

OPINION OF ADVOCATE GENERAL
GEELHOED
delivered on 11 December 2003¹

I — Introduction

II — Legislative background

A — Community law

1. This case concerns the interpretation of the Community rules concerning the labelling and advertising of foodstuffs, especially coffee. The first question is whether the applicable Community legislation on the use of prescribed product names for a number of coffee products precludes the use of invented names alongside those product names. A further question is whether national provisions prohibiting references to slimming and references to medical recommendations on the labelling and in the advertising of foodstuffs can be regarded as compatible with primary and secondary Community law.

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

3. Directive 1999/4/EC of the European Parliament and of the Council of 22 February 1999 relating to coffee extracts and chicory extracts² (hereinafter 'Directive 1999/4' or 'the coffee directive') contains rules on the labelling of those products and the names under which they are sold.

¹ — Original language: Dutch.

² — OJ 1999 L 66, p. 26.

4. Article 2 of Directive 1999/4 stipulates:

6. In the Annex to Directive 1999/4 coffee extract, soluble coffee extract, soluble coffee or instant coffee are defined as:

'Directive 79/112/EEC shall apply to the products defined in the Annex subject to the following conditions:

- (a) the product names listed in the Annex shall apply only to the products referred to therein and must be used in trade to designate them. Those names shall be supplemented by the words:

'... the concentrated product obtained by extraction from roasted coffee beans using only water as the medium of extraction and excluding any process of hydrolysis involving the addition of an acid or a base. Apart from those insoluble substances which it is technically impossible to remove, and insoluble oils derived from coffee, coffee extract must contain only the soluble and aromatic constituents of coffee....

— "paste" or "in paste form" or

...

— "liquid" or "in liquid form"

Coffee extract in solid or paste form must contain no substances other than those derived from the extraction of coffee....'

as appropriate.

...'

5. Pursuant to Article 3 of Directive 1999/4, the Member States may not adopt, for the products defined in the Annex, national provisions not provided for by this directive.

7. Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs³ (hereinafter 'Directive 2000/13' or 'the label-

3 — OJ 2000 L 109, p. 29.

ling directive') is the codified version of the frequently amended, identically entitled Directive 79/112/EEC, to which reference is made in Article 2 of Directive 1999/4.

(iii) by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics;

8. Article 2(1) of Directive 2000/13 lays down the following rules on the labelling of foodstuffs:

(b) subject to Community provisions applicable to natural mineral waters and foodstuffs for particular nutritional uses, attribute to any foodstuff the property of preventing, treating or curing a human disease, or refer to such properties.'

'The labelling and methods used must not:

9. Article 3(1) of Directive 2000/13 then stipulates:

(a) be such as could mislead the purchaser to a material degree, particularly:

'In accordance with Articles 4 to 17 and subject to the exceptions contained therein, indication of the following particulars alone shall be compulsory on the labelling of foodstuffs:

(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production;

(1) the name under which the product is sold;

(ii) by attributing to the foodstuff effects or properties which it does not possess;

...'

10. Article 5(1), first sentence, and (2) of Directive 2000/13 read as follows:

down in this Directive by the application of non-harmonised national provisions governing the labelling and presentation of certain foodstuffs or of foodstuffs in general.

'1. The name under which a foodstuff is sold shall be the name provided for in the Community provisions applicable to it.

2. Paragraph 1 shall not apply to non-harmonised national provisions justified on grounds of:

...

2. No trade mark, brand name or fancy name may be substituted for the name under which the product is sold.

— protection of public health,

...'

11. Article 18 of Directive 2000/13 stipulates the following with regard to national provisions governing the labelling and presentation of foodstuffs which have not been harmonised by the directive:

— prevention of fraud, unless such provisions are liable to impede the application of the definitions and rules laid down by this Directive,

'1. Member States may not forbid trade in foodstuffs which comply with the rules laid

— protection of industrial and commercial property rights, indications of provenance, registered designations of origin and prevention of unfair competition.'

B — *National legislation*

‘In the advertising of foodstuffs the use of the following shall be prohibited:

12. The relevant provisions of Belgian law concerning the names under which coffee is sold are laid down in the Royal Decree of 5 March 1987 concerning coffee, coffee extracts and coffee substitutes (hereinafter ‘the coffee decree’).

...

3. references to slimming;

13. In Article 1 of the coffee decree the product ‘coffee’ is defined as:

...

‘... the appropriately cleaned and roasted seed of the coffee bean (varieties of the genus *Coffea*)’.

7. references to medical recommendations, attestations, declarations and opinions or to statements of approval, other than a statement that a foodstuff is not to be consumed against medical advice;’

14. Article 3(1) of the coffee decree stipulates:

III — Facts and proceedings

‘Only names which comply with the definition given in Article 1 shall be used to designate the foodstuffs referred to in that article when they are marketed.’

16. Douwe Egberts NV (hereinafter ‘Douwe Egberts’) produces and markets coffee on the Belgian market under the name ‘Douwe Egberts’.

15. Article 2 of the Royal Decree of 17 April 1980 concerning the advertising of foodstuffs stipulates:

It is contesting in law the marketing of a product under the name ‘DynaSvelte Koffie’. This product is manufactured by Westrom Pharma NV (hereinafter ‘Westrom Pharma’).

Until 31 December 2001 it was distributed by Christophe Souranis, trading as 'Établissements FICS'. The distribution was then taken over by FICS-World BVBA (hereinafter 'FICS-World').

Egberts argues that these statements infringe the various national provisions governing the advertising and labelling of this kind of product. It claims, therefore, that Westrom Pharma and FICS-World have acted in breach of the national provisions on fair trade practices.

17. 'DynaSvelte Koffie' is a product which is composed of soluble coffee, fructose and chromium. It is expressly marketed as a product which contributes to slimming. Thus the statements made on the jar and the packaging and in the instructions for use include the following:

Douwe Egberts consequently calls *inter alia* for the use of the aforementioned statements to be prohibited and for the products on which they occur to be withdrawn.

- 'the absolute breakthrough in weight control',
- 'slimming, better weight control, slowing down of excess fat deposits', and
- 'the formula patented in the US by Dr Ann de Wees Allen, in association with the Glycemia Research Institute'.

19. As it is of the opinion that the settlement of the dispute depends on answers to a number of questions concerning the interpretation and validity of Directive 1999/4 and the interpretation of Directive 2000/13 and of Article 28 EC, the national court has decided to suspend further consideration of the action and to refer the following questions to the Court of Justice:

18. In interlocutory injunction proceedings before the *Rechtbank voor Koophandel* (Commercial Court), Hasselt, Douwe

A.1. Must Article 2 of Directive 1999/4/EC relating to coffee extracts and chicory extracts be interpreted as meaning that exclusively the product names listed in the Annex to that directive may be used for the products referred to in that Annex and that other names may not be used alongside those product names (e.g. an invented or trade name) or must Article 2 be interpreted as meaning that the product names listed in the Annex may be used only for the products

referred to in that Annex but that, alongside those product names, other names may also be used for those products (e.g. an invented or trade name)?

- in so doing, reserves use of the name 'coffee' for one single form of 'coffee', namely the coffee bean;

A.2. If the Court of Justice of the European Communities considers that Article 2 of Directive 1999/4/EC of the European Parliament and of the Council of 22 February 1999 relating to coffee extracts and chicory extracts must be interpreted as meaning that exclusively the product names listed in the Annex to that directive may be used for the products referred to in that Annex and that other names may not be used alongside those product names (e.g. an invented or trade name), does it not then follow that this directive conflicts with Article 28 of the EC Treaty, which prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States of the European Community, because the directive, so interpreted, excludes, as regards products falling within its definition of extracts of coffee:

- the use of names other than 'coffee extract', or 'instant coffee', such as the name 'coffee';

- and thereby artificially protects the coffee market from competing products consisting of forms of coffee other than coffee beans, such as *inter alia* coffee extracts and instant coffee?

B.1. Must Article 18(1) and Article 18(2) of Directive 2000/13/EC be interpreted as meaning that non-harmonised national provisions on the labelling and presentation of foodstuffs and on advertising for them which prohibit certain statements such as 'references to slimming' and 'references to medical recommendations, attestations, declarations or statements of approval' in the labelling and/or presentation of foodstuffs and/or advertising for them, even though such statements are not prohibited by the directive, constitute infringements of the directive in view of the fact that the eighth recital of the directive states that the most appropriate labelling is the one which creates the fewest obstacles to free trade and that therefore these national provisions cannot be applied?

B.2. Must Article 18(2) of Directive 2000/13/EC be interpreted as meaning that 'protection of public health' must be understood to include non-harmonised national provisions on the labelling and presentation of foodstuffs and on advertising for them which prohibit certain statements such as 'references to slimming' and 'references to medical recommendations, attestations, declarations or statements of approval'?

— impose an additional burden upon the import of foodstuffs in the bringing of those products into line with the national legislation and in so doing hinder trade between Member States and

— do not apply to all participants concerned in the market who pursue their activities in the national territory inasmuch as there are products of a wholly similar nature (e.g. cosmetic products) to which those provisions do not apply and to which no other equivalent provision applies, and that consequently those provisions may not be applied by the national court?

C. Must Article 28 of the EC Treaty be interpreted as meaning that national provisions on the labelling and presentation of foodstuffs and on advertising for them which are not harmonised at European level and which deviate from Directive 2000/13/EC inasmuch as they prohibit certain statements in the labelling and/or presentation of foodstuffs and/or advertising for them, such as 'references to slimming' and 'references to medical recommendations, attestations, declarations or statements of approval', must be regarded as measures having equivalent effect and/or quantitative restrictions on imports between Member States of the European Community, inasmuch as those national provisions:

20. Written observations have been submitted by the parties in the main action, the Belgian Government, the European Commission, the European Parliament and the Council of the European Union. These parties and interveners explained their positions further at the hearing of 6 November 2003.

IV — The first question (A.1)

Community rules on particular nutritional uses,⁴ and more specifically the rules on slimming products,⁵ cannot be precluded.

21. The first question submitted by the President of the Rechtbank van Koophandel, Hasselt, concerns the interpretation of Article 2(a) of Directive 1999/4 regarding the names under which coffee extracts and chicory extracts must be sold.

24. The Belgian Government, the Council and, more by way of implication, the European Parliament have referred to the fact that, in view of the composite nature of 'DynaSvelte Koffie', this product (manifestly) does not comply with the definition of 'coffee extract' and therefore (presumably) does not fall within the scope of the coffee directive. The implication of this statement is that none of the names reserved in Directive 1999/4 may be used for this product.

22. As various interveners have remarked, this question is based on the assumption that the product concerned, 'DynaSvelte Koffie', falls within the substantive scope of Directive 1999/4. The national court's order for reference does not include any express statements on this aspect. It is therefore impossible to discern whether the national court in fact found that 'DynaSvelte Koffie' must be regarded as a coffee or chicory extract within the meaning of Article 1 of Directive 1999/4.

25. In this context, it must be pointed out that in the division of roles between the national court and the Court of Justice it is for the former to determine the facts underlying the basic dispute and so to indicate the applicable rules of law and to assess the relevance of the questions which it refers to the Court. As is evident from settled case-law, the Court should in principle always answer the questions referred to it by a national court for a preliminary ruling. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the

23. The Commission in particular points out in its written observations that this product is being marketed as a slimming or weight control product. It therefore maintains that the applicability to the present case of

4 — Council Directive 89/398/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses, OJ 1989 L 186, p. 27.

5 — Commission Directive 96/8/EC of 26 February 1996 on foods intended for use in energy-restricted diets for weight reduction, OJ 1996 L 55, p. 22.

interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary in order to give a useful answer to the questions submitted to it.⁶

26. In the present case there is no reason to declare the first question inadmissible. Despite the doubts expressed by interveners about the nature of the product 'DynaSvelte Koffie', it must be assumed from the national court's submission of a question on Directive 1999/4 that it considers that product to fall within the scope of that directive. It must be accepted in this case that the question enjoys a presumption of relevance.⁷ The first question submitted by the national court should therefore be answered, as indicated by the Commission, on the premise that 'DynaSvelte Koffie' must be regarded as a general foodstuff and not as a foodstuff intended for a particular nutritional use and that, therefore, it does fall within the substantive scope of Directive 1999/4.

27. By its first question the referring court is essentially seeking to determine the sense in

which the word 'only' in Article 2(a) of Directive 1999/4 is to be understood. Does it mean that the product names listed in the Annex may be used only for the products referred to therein, that, in other words, the use of those product names is reserved for products with the characteristics to which reference is made in the Annex to the directive? Or does it mean that those products may be designated only by means of those product names? If the former interpretation is correct, the implication is that, alongside the product name which must be used, other designations, such as trade names and invented names, may be used. If the latter interpretation is correct, the use of such other designations would be excluded.

28. Most of the parties⁸ who have submitted written observations take the view that this question must be answered in accordance with the former interpretation. They agree that Article 2(a) of Directive 1999/4 means that only products with the characteristics referred to in the Annex to the directive may be marketed under the reserved product name and that this does not preclude reference to other names, such as invented names and trade names. Douwe Egberts attaches to this the condition that the other names used cannot be regarded as product names by the public concerned and so cannot be misleading. The Commission

6 — See, in particular, the judgments in Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 59-61, Case C-36/99 *Idéal-Tourisme* [2000] ECR I-6049, paragraph 20, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraphs 38 and 39, and Case C-137/00 *MilkMarque* [2003] ECR I-7975, paragraph 37.

7 — Judgments in Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977, paragraphs 22-24, and C-300/01 *Salzmann* [2003] ECR I-4899, paragraph 31.

8 — The Belgian Government and the Council leave this question unanswered since they take the view that the product concerned does not fall within the scope of the directive.

phrases its answer in line with the substance of the implementation obligation on the Member States: Article 2 of Directive 1999/4 does not require the Member States to prohibit the use of statements other than the compulsory product name when a product governed by the directive is marketed.

29. I too consider this to be the correct interpretation, and for reasons I will explain below. With so much agreement on the answer to this question of interpretation, especially between the parties in the basic dispute, I would point out, however, that what continues to divide them is whether the name 'DynaSvelte Koffie' must be regarded as a product name, with the result that the word 'koffie' may form part of it. As I have remarked above, it is for the national court to rule on factual issues of that kind.

30. That Article 2(a) of Directive 1999/4 must thus be interpreted as meaning that the possibility of other statements being used alongside the product name prescribed by the directive is not precluded can be deduced from the wording of that provision, from its place in the system of Community rules on the labelling of foodstuffs and from the function of those rules on the labelling of foodstuffs.

31. The very position of the word 'only' in Article 2(a) of Directive 1999/4 makes it clear that this provision relates to the exclusive use of the product names concerned for the products defined in the Annex. Had the intention been to provide that no names other than the product names prescribed might be used for those products, a different sentence structure would have had to be employed, with the word 'only' more directly associated with the words 'product names'. In that case the provision would have had to read, for example, as follows: 'only the product names listed in the Annex shall apply to the products referred to therein ...'. This difference in sentence structure makes it absolutely clear, in my view, that Article 2(a) of the directive can be interpreted only in the manner I have just indicated.

32. This is also confirmed by an examination of the other language versions of this provision. Most of those using a different sentence structure from the Dutch version indicate that the product names concerned are 'reserved' for the products defined in the Annex. To illustrate this, I would refer to the French version (also cited by FICS) and the German version, which stipulate, respectively, that 'les dénominations prévues à l'annexe sont réservées aux produits qui y figurent' and that '[d]ie im Anhang vorgesehenen Verkehrsbezeichnungen ... den dort aufgeführten Erzeugnissen vorbehalten [sind]'. The English version is even less unambiguous: 'the product names listed in the Annex shall apply only to the products

referred to therein'. From these language versions it is undeniably evident that it was not the intention that the products defined in the Annex might be marketed only under the product names similarly shown in the Annex.

The Commission and the European Parliament have likewise pointed out that Article 3 of Directive 2000/13 is to be understood in this way. Applied to Directive 1999/4, this also means that Article 2(a) of that directive cannot be interpreted as meaning that it seeks to prevent statements other than the product name prescribed for extracts of coffee and chicory from being used.

33. This is also the inescapable conclusion if Article 2(a) of Directive 1999/4 is considered in the legislative context of the rules governing the labelling of foodstuffs. Directive 1999/4 is a special directive in relation to Directive 2000/13, the labelling directive. It confirms that the labelling directive is applicable to coffee extracts and chicory extracts and then elaborates on a number of its provisions for those products. As the *lex specialis*, the coffee directive should be interpreted in the light of the labelling directive.

35. Further support for this reading of the general and specific provisions relating to the use of product names can be found in Article 5(2) of Directive 2000/13, which prohibits the substitution of a trade mark, brand name or fancy name for the name under which the product is sold. This provision implies, of course, that such statements may be used alongside the prescribed product name.

34. The obligation to state the product name on the labelling of a foodstuff is laid down in Article 3(1) of Directive 2000/13. Under this article, the indication of a number of particulars, including the product name, on the labelling is compulsory. While the wording of this provision in the Dutch version is somewhat unclear ('moeten ... uitsluitend de volgende gegevens worden vermeld'), it is evident from other language versions ('the following particulars alone shall be compulsory'; 'comporte ... les seules mentions obligatoires suivantes'; 'enthält ... nur folgende zwingende Angaben') that it seeks to indicate what statements must be prescribed by the Member States, without ruling out the inclusion of other statements.

36. Finally, it can be deduced from the function of compulsory product names that the use of other names in the presentation of foodstuffs is not incompatible with that function. A compulsory product name is intended to give the consumer a guarantee that a product marketed under that product name will have certain characteristics peculiar to that type of product. The product can thus be distinguished from other products with other generic characteristics. To assume that the compulsory inclusion of the product

name concerned precluded the use of other statements would be to exceed the purpose of the directive and to deny traders the option of distinguishing their products differently in a commercial sense from products of the same kind.

37. The answer to the first question submitted for a preliminary ruling is, therefore, that Article 2 of Directive 1999/4 relating to coffee extracts and chicory extracts must be interpreted as meaning that the product names listed in the Annex to the directive may be used only for the products referred to in that Annex and that, consequently, other names (such as fancy or trade names) may be used for such products alongside those product names on condition that they cannot be confused with the prescribed product name.

V — The second question (A.2)

38. The second question was submitted by the national court in case the answer to the first question had to be that products governed by Directive 1999/4 might be marketed only under the product names prescribed in the directive. As that was not the answer to the first question, there is no need to consider the second question.

VI — Prior comment on the other questions submitted for a preliminary ruling

39. It is evident from the national court's order for reference that in the application of the relevant national provisions governing the advertising of foodstuffs statements on the packaging (labelling) are also regarded as advertising messages. From this it follows that in the questions submitted no distinction is made between the national provisions applicable to the labelling of foodstuffs on the one hand and the national provision applicable to the advertising of foodstuffs on the other hand. In this respect I would point out that Directive 2000/13 does make a distinction between labelling and advertising⁹ and that the rules of law applicable to the two aspects are not completely identical.¹⁰

40. As regards the labelling of foodstuffs, Directive 2000/13 provides for complete harmonisation. This means that national rules on this aspect are assessed solely in the context of the directive, either as harmonised measures, in which case it must be considered whether they implement the appropriate provisions of the directive correctly, or as non-harmonised measures, in which case it must be considered whether

⁹ — Article 1(3)(a) of Directive 2000/13 defines the term 'labelling' as follows: 'any words, particulars, trade marks, brand name, pictorial matter or symbol relating to a foodstuff and placed on any packaging, document, notice, label, ring or collar accompanying or referring to such foodstuff.' The term 'advertising' is not defined in that directive.

¹⁰ — See, in this context, the judgment in Case C-241/89 *SARPP* [1990] ECR I-4695, paragraphs 15 and 16.

they can be justified on one of the grounds referred to in Article 18(2) of the labelling directive. As the Court ruled in the *SARPP* judgment, the limits of the power retained by the Member States to adopt national legislation on the labelling of foodstuffs are set by the directive itself. Consequently, Articles 28 and 30 EC no longer have a function within the scope of the directive.¹¹

rules on the advertising of foodstuffs to only a limited degree and that, in so far as such rules do not implement Article 2 of the directive, they must be examined for compatibility with primary Community law as laid down in Articles 28 and 30 EC.

41. Where advertising is concerned, on the other hand, Directive 2000/13 provides for only a limited degree of harmonisation. This is already evident from the definition of the scope of the directive in Article 1(1), which states that the directive concerns the labelling of foodstuffs and 'certain aspects' relating to the presentation and advertising thereof. What these aspects are emerges from Article 2(3) of the directive, which declares the prohibition of misleading statements laid down in Article 2(1) and (2) to be applicable to the presentation and advertising of foodstuffs. The directive does not otherwise contain any specific rules concerning the harmonisation of national provisions on the presentation and advertising of foodstuffs. More specifically, the Court has expressly stated in the *SARPP* judgment that Article 15(2) of Directive 79/112 (now Article 18(2) of Directive 2000/13) does not apply to advertising.¹² This means that the labelling directive is applicable to national

42. None of the parties who have submitted written observations has referred to this distinction. At the hearing the Commission — on the contrary — argued that, as Directive 2000/13 provides for exhaustive harmonisation, both the labelling aspect and the advertising aspect should be assessed on the basis of the directive and that there is no need to answer the final question submitted for a preliminary ruling, which concerns Article 28 EC. To this end, it referred to the Court's judgment in *Sterbenz and Haug*.¹³ I would point out, however, that that case concerned only national rules on advertising and that the relevant considerations¹⁴ concerned Article 15(2) of Directive 79/112, which, as stated above, does not apply to advertising.

43. In view of the different rules to which the labelling of foodstuffs and the advertising of foodstuffs have been shown by the cited case-law to be subject, the remaining ques-

11 — See, in this context, paragraph 39 of my joined Opinion relating to the judgments in Case C-221/00 *Commission v Austria* [2003] ECR I-1007 and Joined Cases C-421/00, C-426/00 and C-16/01 *Sterbenz and Haug* [2003] ECR I-1065.

12 — Cited in footnote 10, paragraph 15.

13 — Cited in footnote 11.

14 — Paragraphs 24 and 31 of the judgment cited in footnote 11.

tions relating to these aspects should therefore be answered separately, it being understood that the fifth question concerning the interpretation of Articles 28 and 30 EC is not relevant to the first-mentioned aspect.

VII — The third, fourth and fifth questions (questions B.1, B.2 and C)

Labelling

44. The third and fourth questions are closely linked and should therefore be considered together as regards the labelling aspect. These questions seek to establish whether or not national provisions prohibiting the placing of references to slimming and references to medical recommendations on the labelling of a product, being non-harmonised provisions, are compatible with Article 18 of Directive 2000/13.

45. The national court assumes that the national measures concerned must indeed be regarded as non-harmonised measures within the meaning of Article 18. It has thus assumed that a prohibition of a reference to slimming and a prohibition of a reference to medical recommendations and attestations do not form part of the matters governed by Articles 3 to 14 of Directive 2000/13.

46. I consider this conclusion to be correct. It is also confirmed by the Court's judgments in the cases of *Commission v Austria* and of *Sterbenz and Haug*. In those judgements the Court considered that, while the labelling directive prohibits all statements relating to human diseases, regardless of whether or not they are liable to mislead the consumer, statements which, although not containing any reference to diseases, refer rather to health, are prohibited only if they are misleading. Consequently, foodstuffs whose labelling contains non-misleading health-related information are regarded as complying with the rules of Directive 2000/13, and Member States may not prohibit their marketing on grounds of a possible irregularity of that labelling.¹⁵

47. Non-harmonised provisions relating to labelling which none the less prohibit the marketing of foodstuffs that comply with the rules of Directive 2000/13 may, as already pointed out in paragraph 40, be applied only if they are justified on one of the grounds exhaustively listed¹⁶ in Article 18(2) of the directive. As Article 18(2) can be regarded as differentiating the exceptions recognised in Article 30 EC and otherwise in case-law to the free movement of goods in the area of the labelling of foodstuffs, it should be

¹⁵ — Judgments in *Commission v Austria*, paragraphs 35 and 37, and *Sterbenz and Haug*, paragraphs 28 and 30 (cited in footnote 11). For a further discussion of the difference between statements on diseases on the one hand and on health on the other, see my Opinion relating to the judgments (paragraphs 53 and 54).

¹⁶ — Cited in footnote 10, paragraph 14, and the judgment in *Commission v Austria*, cited in footnote 11, paragraph 38.

interpreted in the light of those Treaty rules and of the case-law relating to them.¹⁷ This means that the non-harmonised national provisions concerned must not only be justified on one or more of the grounds listed in Article 18(2), but must also be appropriate for protecting the interests concerned and must not obstruct trade in the products concerned any more than necessary for the attainment of that objective.¹⁸

issue are, on the one hand, more restricted and specific and, on the other hand, more extreme in that they make no provision for the withdrawal of or exemption from the prohibition.

49. It is clear from the national court's fourth question that it regards only the protection of public health as justifying the national provisions at issue.

48. The national legislation at issue, to the extent that it is of interest here, provides for the outright prohibition of references to slimming and of references to medical recommendations, attestations, declarations or opinions in the advertising of foodstuffs (including such statements on the packaging). It thus departs in two respects from the national rules considered in the aforementioned judgments in *Commission v Austria* and *Sterbenz and Haug*. While in those cases there was a general prohibition of health-related statements on foodstuffs, unless the competent national authorities had given prior approval, the rules now at

50. In any assessment of the prohibition of the relevant statements on the labelling or packaging of foodstuffs, it should first be remembered that the principle underlying the labelling directive is that, expressed in positive terms, the consumer should be given accurate information about various characteristics of a foodstuff and, expressed in negative terms, he should not be misled with respect to those characteristics as a result of the statements used. This is intended to protect both his economic and his health interests.

51. In view of this premiss, the question is, therefore, whether a prohibition of references to slimming and to medical recommendations and attestations is necessary, given that, in the national court's view, such references must clearly always be regarded as

17 — See inter alia the judgment in Case C-315/92 *Verband Sozialer Wettbewerb* [1994] ECR I-317, paragraph 12, concerning the interpretation of Directive 76/768/EEC relating to cosmetic products (OJ 1976 L 262, p. 169).

18 — See the judgment in *Commission v Austria*, cited in footnote 11, paragraph 47. See also the judgment in Case C-229/01 *Müller* [2003] ECR I-2587, paragraphs 31-34.

misleading by their nature and that the consumption of articles which are accompanied by such statements may pose a threat to public health.

52. It seems obvious to me that so strict an attitude is unacceptable. After all, if a product can be shown actually and scientifically to contribute to slimming, it is difficult to maintain that a reference to this property on the labelling or packaging is misleading. On the contrary, for the consumer this is highly relevant information, which may persuade him to acquire and consume a product or to refrain from doing so. If this information was not provided, health hazards might arise, as even FICS has argued, where a consumer unwittingly made excessive use of a slimming product.

53. A similar consideration applies with regard to medical recommendations and attestations. What must not be precluded is the possibility that such statements are scientifically responsible and that again, provided they are not misleading, they may represent relevant information for the consumer when he comes to decide whether or not to purchase the product concerned. Such statements seem, moreover, to be no more than alternatives to and endorsements of claims concerning the characteristics of the product itself. It is difficult to see how they might pose threats to public health as statements in their own right.

54. It should be remembered in this context that, when assessing whether or not product information is misleading, the Court takes as its point of reference the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect.¹⁹ This presupposes that, before acquiring a given product (for the first time), a consumer will always take note of the information on the label and that he is also able to assess the value of that information. It seems to me that a consumer is sufficiently protected if he is safeguarded from misleading information on products and that he does not need to be shielded from information whose usefulness with regard to the acquisition and use of a product he can himself appraise.

55. An outright prohibition of the aforementioned statements therefore clearly exceeds its objective in that it also affects statements which are known not to be misleading. In this respect such a measure is unnecessary for the attainment of the stated objective of preventing public health hazards.²⁰

56. Furthermore, such a prohibition is disproportionate to the attainment of that objective, since it is possible to conceive of measures that have a less restrictive effect on

19 — See the judgments in Case C-210/96 *Gut Springenheide and Tuský* [1998] ECR I-4657, paragraph 31, and Case C-220/98 *EstéeLauder* [2000] ECR I-117, paragraph 27.

20 — See the judgment in Case C-77/97 *Unilever* [1999] ECR I-431, paragraph 33.

trade. In particular, a prohibition of misleading statements on the ability of products to contribute to slimming and of misleading references to medical recommendations and attestations must be considered in this context.²¹ This type of measure enables the national authorities to take action against infringements in individual cases where statements used may actually pose threats to public health, without preventing the marketing of products which do not pose such threats. Although this approach does not prevent the (temporary) marketing of products with misleading information on the effects which they may have on slimming, such information will comprise only claims which wrongly refer to this effect and, it can be assumed, there will be no threat to health.

57. Douwe Egberts has also argued that the prohibition of references to slimming was intended to prevent any encouragement to lose an excessive amount of weight. It maintains that the prohibition of references to medical recommendations was prompted by the idea that it might be inferred from them that the product concerned had medical properties even though that was not the case. These assumptions seem to be based on a conception of the consumer as uncritical and unable to take decisions for himself and contrast with the conception of the consumer referred to in paragraph 54, which the Court has used as its point of reference. If there is any need to combat excessive slimming, it seems more appro-

priate for this phenomenon itself to be resisted. Suppressing products which are legitimately presented as slimming products is not a suitable means of attaining this objective and restricts trade in such products more than is necessary for that purpose. In addition, if Douwe Egberts' line of reasoning had to be followed, it might result in its being possible to justify a general prohibition of the advertising of foodstuffs as a whole on the ground that obesity should be combated.

58. In the light of the foregoing the answer to the third and fourth questions should be that a non-harmonised national provision governing the labelling of foodstuffs as referred to in Article 18(1) of Directive 2000/13 which prohibits certain statements, such as 'references to slimming' and 'references to medical recommendations, attestations, declarations and opinions or to statements of approval' cannot be justified under Article 18(2) of Directive 2000/13.

Advertising

59. Before answers are given to the third, fourth and fifth questions regarding the

21 — *Unilever*, cited in footnote 20, paragraph 35.

compatibility of national provisions which prohibit references to slimming and references to medical recommendations and attestations in advertising messages, the applicable rules of the labelling directive should be considered.

gium of all the relevant facts of the main action, lacks the external element required for the application of Articles 28 and 30 EC. The question is, in other words, whether this is a purely internal situation, to which those provisions cannot be applied.

60. In paragraph 41 I have already referred to the limited scale of the harmonisation brought about by Directive 2000/13 with regard to advertising. As is evident from the preamble to Directive 2000/13,²² the provisions concerned are complementary in nature where their objective is the effective application of the prohibition of misleading statements in advertising.

61. The national measures at issue, however, go further than the provisions of the labelling directive which prohibit advertising. They do, after all, prohibit certain advertising messages whether or not they are misleading. Under the system laid down by the directive this means that they must be examined for compatibility with Articles 28 and 30 EC.

62. Before I proceed to that examination, I need to consider Douwe Egberts' position, which, owing to the concentration in Bel-

63. While it is true that in factual terms the basic dispute concerns only Belgium, rules such as those at issue may in certain circumstances be examined for compatibility with the Treaty provisions governing the free movement of goods, although this is done *in abstracto*. The Court has found on several occasions with respect to such situations that Article 28 EC cannot be considered inapplicable simply because all the facts of the specific case before the national court are confined to a single Member State. This has been the Court's ruling not only in 'purely internal' disputes, in which there was clear evidence of a discriminatory measure,²³ but also in cases where the measure concerned applied without distinction to national and imported products.²⁴

64. The national rules at issue in the basic dispute provide for an outright prohibition of the use of references to slimming and to

22 — See paragraph 14 of the preamble.

23 — Judgment in Joined Cases C-321/94, C-322/94, C-323/94 and C-324/94 *Pistre and Others* [1997] ECR I-2343, paragraphs 44 and 45.

24 — Judgments in Case C-184/96 *Commission v France* [1998] ECR I-6197, paragraph 17, and Case C-448/98 *Guimont* [2000] ECR I-10663, paragraphs 19 to 22.

medical recommendations and attestations in the advertising of foodstuffs. Such a prohibition has by its nature very far-reaching consequences for trading in products which are marketed as slimming products. It results, after all, in the withholding of essential information on the supply of the products concerned from consumers, and especially consumers who need to use such products. The opportunities for manufacturers of these products, which are in themselves legitimate, to reach their target group are, in other words, seriously restricted. Furthermore, these are often new products with which consumers are not yet familiar. Where such products have been lawfully manufactured and marketed in other Member States, access to the Belgian market is seriously hampered by a general prohibition of references to their special and distinctive characteristics. In these circumstances it is my view that the national rules concerned represent a direct and real obstacle to intra-Community trade and that they cannot escape an examination for compatibility with the Treaty provisions governing the free movement of goods simply because (as it happens) the question concerning compatibility with those provisions has arisen in a dispute which must be regarded as purely internal.

does not directly affect imports, it affects the marketing prospects for the imported products and so restricts their volume.²⁵ That case concerned national rules which included a prohibition of the advertising of certain alcoholic beverages. In that instance the Court came to the conclusion that the rules were inconsistent with Article 30 of the EEC Treaty because they had consequences primarily for imported beverages and could not be justified under Article 36 of the EEC Treaty. Other national provisions on advertising which were examined in somewhat earlier case-law for compatibility with Article 30 of the EEC Treaty concerned a prohibition of the distribution of advertising leaflets which included certain information²⁶ and a prohibition of the advertising of (again) certain alcoholic beverages at certain locations.²⁷ In these two instances too, the Court found that the rules concerned might have an adverse effect on trade, although they might be justified in certain circumstances.

65. The compatibility of national rules on advertising with the Treaty provisions on the free movement of goods has been the subject of various judgments of the Court. As early as 1980 the Court ruled that, although a restriction of advertising for certain products

66. The case-law concerning the compatibility of national rules on advertising with

25 — Judgment in Case 152/78 *Commission v France* [1980] ECR 2299, paragraph 11. This consideration is reiterated in the judgments in Case 286/81 *Oosthoek* [1982] ECR 4575, paragraph 15, Case C-362/88 *GB-INNO-BM* [1990] ECR I-667, paragraph 7, and Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior* [1991] ECR I-4151, paragraph 10.

26 — *GB-INNO-BM*, cited in footnote 25.

27 — *Aragonesa de Publicidad Exterior*, cited in footnote 25.

Article 28 EC has been developed further since the *Keck and Mithouard* judgment.²⁸ That judgment was a reaction to the fact that traders were increasingly relying on Article 28 EC to challenge all kinds of rules governing certain aspects of their conduct in the marketing sphere. To curb this trend, the Court made an adjustment to the line hitherto taken that all trading rules capable of hindering, directly or indirectly, actually or potentially, intra-Community trade were to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of Article 28 EC.²⁹ Excluded from the scope of this concept was the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements, so long as those provisions applied to all relevant traders operating within the national territory and so long as they affected in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.³⁰ National provisions which comply with the terms of this definition fall by their nature outside the scope of Article 28 EC because they are considered to be neutral with respect to trade among the Member States. As the Court put it: 'provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by

nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.'³¹

67. National provisions on advertising too are regarded as such a selling arrangement within the meaning of the *Keck and Mithouard* judgment. Two examples in this respect are the *Hünermund* case,³² which concerned a prohibition on pharmacists to advertise quasi-pharmaceutical products outside the pharmacy, and the *Leclerc-Siplec* case,³³ the subject of which was a prohibition of televised advertising for the distribution sector. These rules do not therefore need to be examined for compatibility with Article 28 EC.

In two other cases, *De Agostini and TV-Shop*³⁴ and *Gourmet*,³⁵ on the other hand, the Court did not regard national rules entailing, respectively, an outright prohibition of televised advertising aimed at children under 12 years of age and a prohibition of the advertising of alcoholic beverages in magazines simply as a selling arrangement, but it did consider whether the second condition set out in the *Keck and Mithouard* judgment had been fulfilled. In that context the Court ruled in its judgments in these cases that an outright prohibition,

31 — Paragraph 17 of the judgment.

32 — Case C-292/92 *Hünermund* [1993] ECR I-6787, paragraph 19.

33 — Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraph 22.

34 — Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843.

35 — Case C-405/98 *Gourmet* [2001] ECR I-1795.

28 — Judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

29 — Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

30 — Paragraph 16 of the judgment in case *Keck and Mithouard* (cited above in footnote 28).

applying in one Member State, of a type of promotion for a product which was lawfully sold there might have a greater impact on products from other Member States.³⁶

68. In the *Hünernmund* and *Leclerc-Siplec* cases the advertising prohibitions were limited in scale. In the former case the effect of the prohibition was restricted to the advertising of non-pharmaceutical products outside pharmacies. In the latter case the prohibition concerned the use of the medium of television to advertise for a certain phase of trading, the distribution phase. In its assessment of these arrangements the Court attached importance to the fact that they did not affect the opportunities for other traders to advertise the products concerned by other means. In other words, the function which advertising performed in relation to gaining access to the market for the products concerned remained intact.

69. The position was different in the *De Agostini* and *Gourmet* cases. In *De Agostini* the Court emphasised that television advertising was the only effective form of promotion for the manufacturer to penetrate the Swedish market since it had no other advertising methods for reaching the target

group, children and their parents.³⁷ This was clearly an important factor, although it was left to the national court to determine whether this situation actually obtained. In the *Gourmet* case a similar situation emerged. The Court found that a prohibition of the dissemination of information on alcoholic beverages by means of advertising would impede access to the market by products from other Member States more than it impeded access by domestic products, with which consumers are instantly more familiar.

70. With its approach in these last two cases, the Court recognises the function which advertising performs in the economic sphere and, more generally, in the integration of the market. Seen from the angle of the internal market, this function is not simply limited to providing the consumer with information and attracting his custom. It is also a means for manufacturers in the Member States to penetrate other markets, to confront consumers with products with which they may not be familiar or, on the other hand, to offer them an alternative to products with which they are familiar. Advertising is the means which may help to increase the transparency of the market, to stimulate market forces and to counteract market rigidity. A general prohibition of advertising, a prohibition of the advertising of certain products or a

36 — *De Agostini and TV-Shop*, cited in footnote 34, paragraph 42, and *Gourmet*, cited in footnote 35, paragraph 19.

37 — See paragraph 43 of the judgment cited in footnote 34.

prohibition of the advertising of the distinctive characteristics of a product are bound, by their nature, to have implications for trade in the products to which they relate. It cannot be said, therefore, that such arrangements are *a fortiori* neutral with respect to intra-Community trade.³⁸

71. The contrast between the two groups of judgments illustrates how the more precise definition of the term 'measure having an equivalent effect to a quantitative import restriction' by means of the concept of selling arrangement introduced by the *Keck and Mithouard* judgment should be understood. If a certain form of advertising is indeed the only effective means of penetrating a certain market or if there are set patterns of consumption in the national market, prohibiting advertising will always seriously impede access to the market for products from other Member States. To my mind, this is also true of a prohibition of the advertising of new products which have been lawfully manufactured and marketed in other Member States. Publicising such products is essential if a market position is to be gained. This is not altered by the fact that such a prohibition is as much of an obstacle to the introduction into the market of similar new products manufactured and marketed in

the Member State concerned. What is decisive is that the product from another Member State is prevented from gaining access to the market. In this situation compatibility with Articles 28 and 30 EC clearly needs to be comprehensively examined.

72. I would add that designating national rules as a selling arrangement results in those rules being taken outside the scope of Article 28 EC and so beyond the reach of judicial control. For this reason the qualification of selling arrangement should be reserved for rules which govern the general conditions under which products are marketed, i.e. when, where and by whom, and which do not specifically concern commercialisation as such. A case in point in this respect is legislation relating to the times and locations at which products are marketed.³⁹ Rules of this kind have an effect primarily on the volume of sales, but they do not restrict access to the market for the products concerned.

73. In short, a distinction should be made between rules which include outright prohibitions, as referred to in paragraph 70, and rules which govern the terms *stricto sensu* of advertising messages. Examples of the latter are prohibitions of unsightly advertising, of advertising in public buildings and of the advertising of certain products at certain events. It will be clear that such rules, which

38 — See, in this context, the remarks of Advocate General Jacobs in his Opinion attached to the judgment in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraphs 20 and 21.

39 — Case C-391/92 *Commission v Greece* [1995] ECR I-1621, paragraph 15.

do not provide for an outright and general prohibition of advertising in the marketing of products, but merely subject it to conditions for well-defined reasons, do not prevent access to the market or commercialisation by other means. They do not seek to restrict access to the market and are further removed from marketing as such.

76. The national rules at issue apply to the advertising messages concerned regardless of the origin of the products to which those messages relate. This means that the importance of protecting the consumer as well as the importance of protecting public health, to which the national court has referred, may serve as justification.

74. These considerations lead me to conclude that an outright prohibition of references in advertising to slimming and to medical recommendations and attestations cannot be regarded as a selling arrangement within the meaning of the *Keck and Mithouard* judgment and must be comprehensively examined for compatibility with Articles 28 and 30 EC.

77. In view of the misunderstandings which may arise in connection with products presented as slimming products and the health hazards which may occur if such products are not used properly, there is certainly justification in a Member State's adoption of legislation on the manner in which these products are marketed, including advertising for them.

75. As I have already stated in paragraph 64 that such a prohibition may have a real effect on the import of goods which may contribute to slimming, it should be considered whether the prohibition can be justified on the ground of a general interest recognised in Article 30 EC or in case-law. In line with the Court's settled case-law it should also be demonstrated that this measure is necessary for the attainment of the objective concerned, is appropriate to it and does not impede trade any more than necessary.

78. Such legislation should meet the requirements of necessity, appropriateness and reasonableness. As pointed out above in the context of national provisions applicable to labelling, the consumer has an interest, both in the economic sense and as regards his health, in being correctly informed about the properties of the products which he is thinking of acquiring. Statements on a label and in advertising messages perform a similar function when it comes to informing the consumer. They differ in that advertising

may focus the consumer's attention on products with which he would not otherwise have come into contact. While advertising messages are normally to be found in isolation from the product concerned, information in the case of labelling is by definition placed on or accompanies the product.

attestations, declarations or opinions or to statements of approval is inconsistent with Articles 28 and 30 EC.

79. This difference does not, however, lead to a different assessment of national provisions applicable to labelling and advertising. In both cases the consumer has an interest in not being misled. So long as the information concerned is correct, it must be assumed that the average consumer who is reasonably well informed and reasonably observant and circumspect⁴⁰ will be capable of forming an opinion on the products advertised without his economic and health interests being harmed. An outright prohibition on obtaining the information concerned therefore goes further than necessary for the protection of those interests. To put it in stronger terms, those interests might well be harmed if information on the properties of a product that contribute to slimming was not obtained.

80. I therefore conclude that a prohibition in national rules of references to slimming and of references to medical recommendations,

81. Finally, the consequences of this finding for the rules at issue should be considered. As the Court has held on several occasions, rules which are inconsistent with Articles 28 EC and 30 EC should not be applied to imported products.⁴¹ With specific reference to advertising, the Court considered in the *SARPP* judgment that, when national rules on advertising are contrary to Articles 30 and 36 of the Treaty, the application of those rules is prohibited only in respect of imported products and not national products.⁴² I have already referred to the close link between labelling and advertising and to the fact that Directive 2000/13 has declared a number of rules applicable to advertising in order to prevent legislation on labelling from being circumvented by means of advertising messages. As I have now come to the conclusion that a prohibition of the statements concerned on the labelling of food-stuffs is not compatible with the labelling directive, it is for the national court to determine the extent to which the rules at issue can still be applied to advertising messages in which identical statements concerning domestic products are used.

41 — *SARPP*, cited in footnote 10, paragraph 16, and *Guimont*, cited in footnote 24, paragraph 35.

42 — *SARPP*, cited in footnote 10, paragraph 16.

40 — See the case-law cited in footnote 19.

VIII — Conclusion

82. In view of the foregoing I propose that the Court should answer the questions submitted by the President of the Rechtbank voor Koophandel, Hasselt, as follows:

- (1) Article 2 of Directive 1999/4/EC of the European Parliament and of the Council of 22 February 1999 relating to coffee extracts and chicory extracts must be interpreted as meaning that the product names listed in the Annex to the directive may be used only for the products referred to in that Annex and that, consequently, other names (such as fancy or trade names) may be used for such products alongside those product names on condition that they are not liable to be confused with the prescribed product name.
- (2) Article 18 of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs precludes the application of non-harmonised national provisions relating to the labelling of foodstuffs which prohibit certain statements, such as ‘references to slimming’ and ‘references to medical recommendations, attestations, declarations or opinions or to statements of approval’ on the labelling and/or presentation of foodstuffs and/or advertising for them.
- (3) Articles 28 EC and 30 EC preclude the application of non-harmonised national provisions relating to the advertising of foodstuffs which prohibit statements

such as ‘references to slimming’ and ‘references to medical recommendations, attestations, declarations or opinions or to statements of approval’ on the labelling and/or presentation of foodstuffs imported from other Member States and/or advertising for them. In view of the link between the rules on labelling and advertising, it is for the national court to determine the extent to which the rules on advertising can be applied to the relevant statements on domestic products.