

OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 12 December 1996 *

1. By order of 18 October 1995, the Pretore di Pordenone requested a preliminary ruling from the Court under Article 177 of the EC Treaty on four questions relating to the compatibility with Articles 30 and 36 of the Treaty of certain Italian provisions applicable to the production and marketing of bread.

2. Those questions were raised in proceedings brought by Tommaso Morellato, the person vested with legal representation of the company Soveda Srl ('Soveda'), whose registered office is in Sarmeda di Rubano, against Unità Sanitaria Locale No 11 di Pordenone (hereinafter 'the USL').

3. Soveda is a company which markets various kinds of wholemeal bread in Italy. It is the sole distributor for Italy of frozen bread produced by BCS, a French company whose registered office is in Tarascon. During 1993 Soveda supplied a supermarket in Porcia (Pordenone) with various quantities of special wholemeal bread containing dextrose, produced by BCS. The bread was lawfully produced and marketed in France and a certificate of 7 July 1992 from the Joint Regional Laboratory, Marseilles, attested that it was 'a quality product, wholesome and

suitable for human consumption'. Furthermore, the sales description for the Italian market and the labelling of the containers complied with Directive 79/112/EEC¹ and were a correct translation of the French version.

4. Nevertheless, on 26 July 1993 the Health Inspectorate of the USL found that the imports by Soveda of special wholemeal bread infringed several provisions of Law No 580 of 4 July 1967 laying down rules for the processing and marketing of cereals, flour, bread and pasta ('Law No 580').² In particular, the USL made the following findings:

— contravention of Article 16 of Law No 580, by reason of marketing special wholemeal bread, deep-frozen, containing dextrose, in units of 300 grammes, with a moisture content in excess of the statutory limit of 34%. On the basis of its specific weight the bread was found to

1 — 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).

2 — Legge No 580, 4 luglio 1967, 'Disciplina per la lavorazione e commercio dei cereali, degli sfarinati, del pane e delle paste alimentari' (GURI No 189, p. 4182).

* Original language: Spanish.

have a moisture content of 38.40% on the first analysis and 37.50% on the second;

in the case, the Pretore di Pordenone considered it necessary to refer the following questions to the Court:

— contravention of Articles 7(4) and 16 of Law No 580, because the ash content of the bread imported from France was less than the minimum laid down for the wholemeal flour used for making wholemeal bread. The ash content of the bread in question was equivalent to 1.05% of the dry matter on the first analysis and 1.13% on the second, whereas the Italian provisions required wholemeal flour and wholemeal bread made from it to have a minimum ash content of 1.40% and a maximum of 1.60%;

'1. Are Articles 30 and 36 of the Treaty establishing the EEC to be interpreted as precluding the Italian legislation on the processing and marketing of cereals, flour, bread and pasta (Law No 580 of 4 July 1967), in so far as such legislation prohibits the sale of deep-frozen special wholemeal bread having:

— contravention of Article 18 of Law No 580, by reason of the use of bran in the imported bread, an ingredient which is not authorized in Italy.

— a moisture content in excess of the percentage referred to in Article 16,

— an ash content lower than that prescribed by Article 16 in conjunction with Article 7(3),

5. On 13 and 18 January 1994 the USL issued three orders for the payment of certain sums by way of administrative penalties against Mr Tommaso Morellato, the person vested with legal representation of the company Soveda. Mr Morellato challenged them by three separate applications lodged on 16 February 1994. In order to give judgment

— an admixture of bran, which is not a permitted ingredient;

accordingly, are those legislative provisions to be regarded as a quantitative restriction or a measure having equivalent effect thereto within the meaning of Article 30?

2. In the event of an affirmative answer to that question, is the Italian State, in circumstances such as those of this case, entitled to rely on the derogation provided for in Article 36 of the EEC Treaty, for the purpose of protecting public health?

3. Is the Italian legislation to be disapplied by the Italian courts?

4. Is the free movement on Italian territory of bread produced in France and described as aforesaid to be permitted?

6. The first two questions from the national court raise the problem of the compatibility with Articles 30 and 36 of the Treaty of national provisions which, like the Italian law at issue here, lay down certain requirements for the marketing of bread and prevent the import of bread legally produced and marketed in other Member States in accordance with different requirements. The fourth question, referring to the free move-

ment in Italy of bread produced in France, is closely bound up with the first two.

Finally, the third question relates to the attitude of the Italian courts if the Italian provisions in question are incompatible with Community law and, in particular, asks whether they should refuse to apply those provisions.

First question

7. By its first question, the national court seeks to ascertain whether legislation of a Member State which prohibits the marketing of deep-frozen special wholemeal bread with a moisture content in excess of the statutory limit, an ash content below the statutory limit and an admixture of bran, constitutes a measure having an effect equivalent to a quantitative restriction pursuant to Article 30 of the Treaty. It must be observed that the provisions concerned apply without distinction to bread produced in Italy and that imported from other Member States.

8. All the parties which have submitted observations in this case — the Commission, the French Republic and the Federal Republic of Germany — consider that the Italian provisions amount to a measure having an

effect equivalent to a quantitative restriction, which is prohibited by Article 30 of the Treaty. Personally, I entirely agree with that view for the reasons which I am about to give.

9. In principle the Member States retain their power to regulate the conditions for the production and marketing of bread and other bakery products since there are no Community measures for harmonization in this sector. However, the Member States cannot use that power in order to improve the competitive position of their domestic producers and create obstacles to access to their national markets for bread made in other Member States. The Court has consistently so held in many decisions to the effect that, in the absence of common or harmonized rules on the making and marketing of bread and other bakery products, it is for the Member States to regulate all matters relating to the composition, making and marketing of those foodstuffs, provided that they do not thereby discriminate against imported products or hinder the import of products from other Member States.³

10. The provision of Community law designed to restrict the use of that State power for protectionist purposes is Article 30 of the Treaty, which prohibits measures

having an effect equivalent to quantitative restrictions. According to the well-known formulation in the *Dassonville* judgment, which has been applied in many subsequent decisions, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.⁴ According to that definition, a measure having equivalent effect exists where there are two elements, namely a measure attributable to a Member State, and the restrictive effect of that measure on intra-Community trade.

11. In the present case there is no problem with regard to the first element since it is clear that Law No 580 is a measure attributable to the Italian State.

12. To determine whether the Italian provisions fulfil the second condition, it must be shown that they have a restrictive effect on trade in the Community in wholemeal bread.

13. The Court has developed copious, although not always consistent, case-law

3 — See the judgments in Case 130/80 *Fabriek voor Hoogwaardige Voedselprodukten Kelderman* [1981] ECR 527, and Case C-17/93 *Openbaar Ministerie v Van der Veldt* [1994] ECR I-3537, paragraph 10.

4 — Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5.

concerning the second element of the definition of measures having equivalent effect. That case-law has now been delimited by the *Keck and Mithouard* judgment,⁵ particularly with regard to measures applying without distinction to both national and imported products — the kind with which this case is concerned since the Italian legislation is of that type.

14. The *Keck and Mithouard* judgment relies on the distinction between provisions relating to the characteristics of products and provisions concerning selling arrangements in order to determine which measures applying without distinction have a restrictive effect such that they may be regarded as measures having equivalent effect, in accordance with the definition in *Dassonville*.

15. Departing from its previous case-law, the Court held that 'contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of *Dassonville* [...], so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member

States'.⁶ The exclusion of measures relating to selling arrangements from the ambit of Article 30 has been confirmed by numerous later judgments.⁷

16. On the other hand, in *Keck and Mithouard* the Court adhered to the rule first laid down in the *Cassis de Dijon* judgment⁸ relating to measures concerning the characteristics of products. The Court observed that 'in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect ... 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'.⁹

6 — *Keck and Mithouard*, cited above, paragraph 16.

7 — See, among others, the judgments in Case C-292/92 *Hünermund and Others v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787; joined Cases C-401/92 and C-402/92 *Tankstation 't Heuvske v JBE Boermans* [1994] ECR I-2199; joined Cases C-69/93 and C-258/93 *Punto Casa v Sindaco del Comune di Capena and Comune di Capena* [1994] ECR I-2355; Case C-412/93 *Leclerc-Siplec v Société TF1 Publicité and Société M6 Publicité* [1995] ECR I-179; Case C-391/92 *Commission v Greece* [1995] ECR I-1621; Case C-63/94 *Belgapom* [1995] ECR I-2467; Case C-387/93 *Banchero* [1995] ECR I-4663; joined Cases C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro Casa Uno and Others v Sindaco del Comune di Erbusco and Others* [1996] ECR I-2975.

8 — Case 120/78 *Revue-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

9 — *Keck and Mithouard*, cited above, paragraph 15.

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

In short, the Court observed that measures applying without distinction to product characteristics always fall within the definition of a measure having equivalent effect given by the *Dassonville* judgment and are contrary to Article 30 unless they are justified in order to safeguard one of the general interests referred to in Article 36 of the Treaty or are regarded as an imperative requirement by Community case-law. That approach has been followed in judgments subsequent to *Keck and Mithouard* relating to measures concerning product characteristics.¹⁰

17. The provisions of the Italian legislation at issue in this case lay down requirements for making wholemeal bread and relate to its composition, such as the moisture level, ash content and the use of bran. Consequently there is no doubt that the provisions relate to product characteristics. Although they apply without distinction to bread made in Italy and bread imported from other Member States, they create a barrier to imports of the product into Italy by preventing the marketing there of bread made in another Member State which does not comply with the Italian requirements. This restrictive effect on trade in the Community means that the provisions in question amount to a measure having an effect equivalent to a quantitative restriction since they fulfil the second requirement of the definition in *Dassonville*, as clarified by *Keck and Mithouard*.

18. This conclusion seems to me to be logical and consistent with the object of Article 30, which was included in the Treaty to prevent the Member States from using for protectionist purposes their residual power in relation to the production and marketing of goods, in other words in order to improve the competitive position of national products in relation to products imported from other Member States. The Italian legislation in question clearly has certain protectionist consequences because it compels bread producers in other Member States, where there are different production requirements, to change their production system according to the destination of the bread. This results in increased production costs for producers in other Member States and gives Italian producers an unjustified advantage, with the result that the Italian provisions unquestionably have a protectionist effect.¹¹

19. Consequently the answer to the first question must be that the application of legislation of a Member State which prohibits the marketing of deep-frozen special wholemeal bread with a moisture content in excess of the statutory limit, an ash content below the statutory limit and an admixture of bran, constitutes a measure having an effect equivalent to a quantitative restriction, contrary to Article 30 of the Treaty.

10 — See, among others, the judgments in Case C-315/92 *Verband Sozialer Wettbewerb v Clinique Laboratoires and Others* [1994] ECR I-317; Case C-317/92 *Commission v Germany* [1994] ECR I-2039; *Van der Veldt*, cited above, and Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars* [1995] ECR I-1923.

11 — The same reasoning was adopted by the Court in *Kelderman*, cited above, paragraph 7, in relation to certain Dutch requirements concerning the production of bread, and was repeated in *Van der Veldt*, cited above, paragraph 11, in relation to certain other Belgian provisions on the marketing of bread.

Second question

national rules which are contrary to Article 30 are necessary to give effective protection to one of the interests referred to by Article 36.¹³

20. By its second question, the national court seeks clarification as to whether the Italian State may plead the protection of public health under Article 36 of the Treaty in order to apply provisions such as those to which this case relates.

21. Article 36 provides, in the absence of Community harmonization, for a residual power of the Member States which enables them to adopt and maintain in force provisions contrary to Article 30 with the object of protecting the health and life of humans, among other fundamental social interests. The Court's case-law has clarified the conditions under which the exception provided for by Article 36 is available.

22. Firstly, the Court has repeatedly observed that Article 36 falls to be construed strictly, as it is an exception 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.¹²

23. Secondly, Member States seeking to rely on Article 36 must demonstrate that the

24. Thirdly, the national provisions must pass the test of proportionality which Community case-law has deduced from the last sentence of Article 36, which states that prohibitions or restrictions 'shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. The requirement of proportionality means that it is necessary to show that the objective pursued by the national provisions cannot be attained by means which are less restrictive of trade within the Community and therefore it must be limited to what is strictly necessary in order to safeguard the protected interest.¹⁴

25. In the present case, it seems clear to me that the Italian rules on the production and marketing of wholemeal bread are not necessary for the protection of public health. The order of the national court does not say for what reason bread imported from France might present a risk to health. Furthermore,

¹³ — See the judgments in Case 227/82 *Officier van Justitie v Van Bennekom* [1983] ECR 3883; Case 304/84 *Ministère Public v Müller* [1986] ECR 1511; Case C-42/90 *Bellon* [1990] ECR I-4863, and Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617.

¹⁴ — See, among others, the judgments in Case 174/82 *Officier van Justitie v Sandoz* [1983] ECR 2445; Case 247/84 *Motte* [1985] ECR 3887; Case C-369/88 *Delattre* [1991] ECR I-1487; and Case C-373/92 *Commission v Belgium* [1993] ECR I-3107.

¹² — See Case C-205/89 *Commission v Greece* [1991] ECR I-1361, paragraph 9.

it has not been shown that the Italian State, which has not submitted observations in this case, at any time pleaded the protection of this interest in order to justify application of the contested provisions of Law No 580.

reasoned opinion was sent to the Italian authorities requiring them to remedy that failure and, after the abovementioned circular was issued, the Commission decided not to proceed to the litigation stage but to allow Italy the necessary time to make the requisite amendments to its legislation.

26. The Italian State has implicitly recognized that the application of Law No 580 is not necessary to ensure the protection of public health. Indeed, in a Ministerial Circular of 2 November 1992¹⁵ Italy allows the importation of bread and similar products made according to standards differing from those of Law No 580, provided that they have been lawfully produced and marketed in other Member States and that they comply with the labelling requirements laid down by the Italian legislation implementing Directive 79/112.

27. Irrespective of Italy's attitude, it likewise does not appear that there are any authoritative scientific grounds¹⁶ to justify the requirements laid down by Law No 580 concerning the degree of moisture, the ash content and the prohibition of bran in wholemeal bread. In its observations the German Government sets out the results of a scientific analysis which support this conclusion.

That circular, which takes due account of the Court's case-law relating to Articles 30 and 36, was adopted by the Italian State in order to remove *de facto* the obstacles to the free movement of goods resulting from Law No 580, which had led the Commission to initiate against Italy an action for failure to fulfil its obligations. As the Commission points out in its observations, on 18 March 1991 a

28. Finally, I should like to point out that, even if the Italian legislation were necessary for protecting public health, it would not pass the proportionality test. Instead of prohibiting and penalizing the marketing of wholemeal bread with a composition different from that laid down in Law No 580, the Italian 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

15 — Circolare No 131150/R del Ministero dell'Industria, del Commercio e dell'Artigianato, 2 novembre 1992, 'Bread-making. Bread and similar products not conforming with Law No 580/67 may be imported from Member States of the EEC provided that they are labelled in accordance with Legislative Decree No 109 of 27 January 1992'.

16 — See Case 178/84 *Commission v Germany* [1987] ECR 1227, paragraph 44, and *Debus*, cited above, paragraph 17.

far-reaching restrictions on the free movement of goods.¹⁷

Fourth question

29. By this question the national court asks whether the marketing of the wholemeal bread imported from France must be authorized in Italy.

30. The answer to this question may be inferred directly from those to the two previous questions. As the Italian provisions constitute a measure having an effect equivalent to a quantitative restriction, which is prohibited by Article 30 and is not justified under Article 36, the wholemeal bread lawfully produced and marketed in France must be given the benefit of free movement for goods and may therefore be marketed in Italy.

Third question

31. By this question the national court asks whether the Italian courts are under an obligation not to apply internal rules such as Law No 580 which may be contrary to Community law.

32. Firstly, it must be observed that the Court has recognized the direct effect of Article 30 since its judgment in *Iannelli*,¹⁸ in which it stated that the prohibition of measures having equivalent effect is mandatory and explicit and its implementation does not require any subsequent intervention of the Member States or Community institutions. Therefore it has direct effect and creates individual rights which national courts must protect.

33. Secondly, mention must be made of the consistent case-law in which the Court has resolved the conflict between national law and Community law. The best example is still the *Simmenthal* judgment,¹⁹ in which the Court stated that, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures by their entry into force render automatically inapplicable any conflicting provision of current national law.²⁰ The Court added that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are

18 — Case 74/76 *Iannelli & Volpi v Ditta Paolo Meroni* [1977] ECR 557, paragraph 13.

19 — Case 106/77 *Amministrazione delle Finanze v Simmenthal* [1978] ECR 629.

20 — Paragraph 17.

17 — See *Van der Veldt*, cited above, paragraph 19.

incompatible with those requirements which are the very essence of Community law.²¹ Finally, the Court concluded that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provisions of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.²²

34. In accordance with *Simmenthal*, national courts are therefore under an obligation to refuse to apply national provisions contrary to Article 30 of the Treaty, which has direct effect. The national court must resolve the dispute before it in accordance with the Community rule which prohibits measures having equivalent effect, disregarding the conflicting national provision, even if it was adopted subsequently, and it is not necessary for any request to be made for such national provision to be repealed.

35. The duty not to apply national provisions which are incompatible with Community law obviously extends to all authorities of the Member States and not merely to the judicial authorities.²³ Consequently USL

No 11, Pordenone, was also under an obligation to refuse to apply Law No 580 to the special wholemeal bread imported from France because it is a national measure incompatible Article 30, as construed by the Court. Furthermore, the action of the USL is all the more difficult to understand if it is remembered that the Ministerial Circular adopted by the Italian State in 1992 expressly provides that Law No 580 is not to apply to bread imported into Italy from other Member States where it is lawfully produced and marketed in conformity with national standards differing from those of Italy.

This anomalous situation would no doubt have been avoided if the Italian State had enacted clear amendments to remedy the incompatibility of its national legislation with Community law. The Court has consistently held that the incompatibility of provisions of national law with provisions of the Treaty, even those not directly applicable, can be definitively eliminated only by means of binding domestic provisions having the same legal force as those which require to be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty, since they maintain, for the persons concerned, a state of uncertainty as regards the extent of their rights as guaranteed by the Treaty.²⁴

21 — Ibid., paragraphs 22 and 23. That approach was confirmed in the judgment in Case C-213/89 *Regina v Secretary of State for Transport ex parte Factortame and Others* [1990] ECR I-2433, paragraphs 18 and 20.

22 — Ibid., paragraph 24. See also the judgments in Case 170/88 *Ford España* [1989] ECR 2305, in particular 2308; *Debus*, cited above, paragraph 32; and Joined Cases C-228/90 to C-234/90, C-339/90 and C-353/90 *Simba and Others* [1992] ECR I-3713, paragraph 27.

23 — See Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839, paragraph 30.

24 — See Case C-151/94 *Commission v Luxembourg* [1995] ECR I-3685, paragraph 18, and Case C-80/92 *Commission v Belgium* [1994] I-1019, paragraph 20.

36. Moreover the obligation of the national courts to disapply domestic provisions which are incompatible with Community law has been clearly acknowledged by the Italian Constitutional Court in case-law beginning with the *Granital* judgment²⁵ and upheld in a line of judgments starting on 11 July 1989.²⁶

Conclusion

37. In the light of the foregoing, I propose that the Court give the following answers to the questions referred to it by the Pretura di Pordenone:

- (1) The application of national legislation of a Member State which prohibits the marketing of deep-frozen special wholemeal bread with a moisture content in excess of the statutory limit, an ash content below the statutory limit and an admixture of bran, constitutes a measure having an effect equivalent to a quantitative restriction, contrary to Article 30 of the Treaty.
- (2) A Member State may not plead the protection of public health, provided for by Article 36 of the Treaty, in order to justify the application of a provision such as that in issue in the present case.
- (3) The judicial authorities of the Member States are under an obligation to refuse to apply domestic provisions which are inconsistent with Community law, in particular Article 30 of the Treaty.
- (4) In accordance with Articles 30 and 36 of the Treaty, special wholemeal bread lawfully produced and marketed in the French Republic may be marketed and move freely in Italy.

25 — Judgment 170, 8 June 1984, *Giurisprudenza Costituzionale*, 1989, I, 1098.

26 — See judgment 389, 11 July 1989, *Giurisprudenza Costituzionale*, 1989, I, 1757. See also judgments 1698, 18 April 1991, *Giurisprudenza Costituzionale*, 1991, I, 1409, and 285, 16 June 1993, *Giurisprudenza Costituzionale*, 1993, I, 2026.