

JUDGMENT OF THE COURT (Third Chamber)
14 July 1988 *

In Case 298/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal de commerce (Commercial Court), L'Aigle, for a preliminary ruling in the proceedings for reconstruction under judicial supervision pending before that court against

Smanor SA, Saint Martin d'Ecublei,

on the interpretation of Articles 30 to 36 of the EEC Treaty and Articles 5, 15 and 16 of Council Directive 79/112/EEC of 18 December 1978 (Official Journal 1979, L 33, p. 1),

THE COURT (Third Chamber)

composed of: J. C. Moitinho de Almeida, President of Chamber, U. Everling and Y. Galmot, Judges,

Advocate General: J. Mischo

Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of:

Smanor SA, by Messrs Langlais and Mendel,

the French Government, by J. P. Puissochet and G. de Bergues,

the Netherlands Government, by E. F. Jacobs,

the Commission of the European Communities, by C. Durand,

* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 4 May 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 2 June 1988,

gives the following

Judgment



- 1 By a judgment of 15 June 1987, supplemented by a judgment of 21 September 1987, the tribunal de commerce, L'Aigle, referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 30 to 36 of the Treaty and Articles 5, 15 and 16 of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of food-stuffs for sale to the ultimate consumer (Official Journal 1979, L 33, p. 1) (hereinafter referred to as 'the directive'), in order to be in a position to assess whether French Decree No 82-184 of 22 February 1982 is compatible with those provisions.
- 2 This question arose in proceedings for compulsory reconstruction brought against Smanor SA (hereinafter referred to as 'Smanor') before the tribunal de commerce, L'Aigle. Smanor is a French company which specializes in the production and wholesale of deep-frozen products, in particular yoghurt which it deep-freezes on the basis of an invention for which it holds the patent. Since 1977, Smanor has been the subject of several attempts by the French authorities to ban it, on the basis of the applicable French provisions, from marketing such products under the name 'yoghurt' and to require it instead to sell them on French territory under the name 'deep-frozen fermented milk'.
- 3 Article 2 of French Decree No 63-695 on the prevention of fraud with regard to fermented milk products and yoghurt (*Official Journal of the French Republic* of 16 July 1963, p. 6512), as amended by Decree No 82-184 of 22 February 1982 (*Official Journal of the French Republic* of 25 February 1982, p. 676) provides that:

"The name "yoghurt" shall be used to designate only fresh fermented milk obtained, in accordance with proper and usual practices, from the growth solely of the specific lactic, thermophile bacteria known as *lactobacillus bulgaricus* and *streptococcus thermophilus*, which must be introduced at the same time and must be alive in the product put on sale at the rate of at least 100 million bacteria per gram . . . After coagulation of the milk, the yoghurt must not be subjected to any treatment other than refrigeration, and possibly stirring . . . '.

- 4 The tribunal de commerce, L'Aigle, considered that Smanor's financial difficulties, which underly the main reconstruction proceedings, stemmed from the French regulations relating to yoghurt inasmuch as they have the effect of forcing Smanor either to abandon its French outlets or to sell its deep-frozen yoghurt illegally. The tribunal de commerce, L'Aigle, therefore stayed the proceedings and requested the Court to give a preliminary ruling 'on the interpretation of Articles 30 to 36 of the Treaty and Articles 5, 15 and 16 of the directive in relation to Decree No 82-184 of 22 February 1982'.
- 5 Reference is made to the Report for the Hearing for a fuller account of the facts of the main dispute, the provisions of national law at issue and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The interpretation of Articles 30 and 36 of the Treaty

- 6 In the first part of its question, the national court wishes essentially to know whether Articles 30 and 34 of the Treaty preclude the application by a Member State to deep-frozen yoghurts of national legislation banning such products from being marketed under the name 'deep-frozen yoghurt'.
- 7 The French Government argues that the situation from which the main proceedings originated does not fall within Article 30 *et seq.* of the Treaty, as it involves the application of French law to a French company manufacturing and marketing deep-frozen 'yoghurt' on French territory, and that, consequently, there is no need to reply to this part of the question.

- 8 It is true that the French regulations do in fact only apply to products sold on the French market, without in any way affecting exports to other Member States, and that there is accordingly no need to examine them in the light of Article 34 of the Treaty relating to measures having equivalent effect to quantitative restrictions on exports. Nevertheless, it is clear from the Commission's uncontested observations that deep-frozen yoghurts are lawfully manufactured and marketed under that name in other Member States. It cannot therefore be ruled out that such products may be imported into France and that the French legislation will apply to them.
- 9 As to whether Smanor may validly plead before the national court a barrier to imports of deep-frozen yoghurt created by the French regulations, it should be pointed out that the Court has consistently held that it is for the national courts, within the system established by Article 177 of the Treaty, to weigh the relevance of the questions which they refer to the Court, in the light of the facts of the cases before them.
- 10 It must therefore be examined whether and to what extent Article 30 of the Treaty precludes regulations such as the French rules prohibiting the marketing, on national territory, under the name 'deep-frozen yoghurt' of yoghurts that have been deep frozen.
- 11 It should first be recalled that the Court has consistently held (first, in its judgment of 11 July 1974 in Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837) that the prohibition of measures having an equivalent effect to quantitative restrictions, laid down in Article 30 of the Treaty, covers any trading rules of the Member States capable of impeding, whether directly or indirectly, actually or potentially, intra-Community trade.
- 12 Although the abovementioned prohibition, which imposes the obligation to sell the product under a different name, does not absolutely preclude the importation into the Member State concerned of products originating in other Member States or in free circulation there, it may none the less make their marketing more difficult and thus impede, at least indirectly, trade between Member States (see in particular the judgment of 16 December 1980 in Case 27/80 *Fietje* [1980] ECR 3839).

- 13 In this connection, it should be stated that the name proposed by the French Government, namely 'deep-frozen fermented milk', is less familiar to consumers than 'deep-frozen yoghurt' and that the decisive criterion for prohibiting the name 'yoghurt', namely deep-freezing, relates to a method of preservation which is particularly important in the case of this type of product when it is imported.
- 14 National rules prohibiting the marketing, on national territory, under the name 'deep-frozen yoghurt' of yoghurts which have undergone deep-freezing therefore constitute a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty.
- 15 It should be pointed out that as the Court has consistently held (see in particular the judgments of 20 February 1979 in Case 120/76 *REWE* [1979] ECR 649; of 10 November 1982 in Case 261/81 *Rau* [1982] ECR 3961; and of 12 March 1987 in Case 178/84 *Commission v Germany* (the Beer case) [1987] ECR 1227), in the absence of common rules relating to the marketing of the products concerned, obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable without distinction to domestic and imported products, can be justified as being necessary in accordance with one of the grounds of public interest set out in Article 36 of the Treaty, such as the protection of the health of persons, or imperative requirements relating *inter alia* to consumer protection. Nevertheless, such regulations must be proportionate to the aim in view. If a Member State has a choice between various measures to attain the same objective, it should choose the means which least restrict free trade.
- 16 In the light of these considerations, it should be noted that there are no common or harmonized rules relating to the manufacture or the marketing of yoghurt, with the exception of the directive which relates only to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, and which forms the subject-matter of the second part of the preliminary question to be examined below. Council Regulation No 1898/87 of 2 July 1987 on the protection of designations used in marketing of milk and dairy products (Official Journal 1987, L 182, p. 36), whilst reserving, in Article 2 (2), the description 'yoghurt' to dairy products alone, essentially does no more than refer to the applicable national rules.

- 17 The justification pleaded on the basis of the protection of the health of persons cannot be accepted in the case of rules such as those described above which do not prohibit the marketing of deep-frozen yoghurt but merely the use of the name 'yoghurt'.
- 18 As regards consumer protection, the Court has acknowledged it to be legitimate for a Member State to ensure that consumers are properly informed about the products which are offered to them, thus giving them the possibility of making their choice on the basis of that information (see the judgments of 12 March 1987, mentioned above and of 23 February 1988, in Case 216/84 *Commission v France* [1988] ECR 793 (Milk substitutes)).
- 19 Such information may however be given effectively, without forbidding the use of the name 'yoghurt', by requiring adequate labelling with the compulsory inclusion of the description 'deep-frozen', to show clearly the particular treatment which the products in question have undergone.
- 20 That solution is all the more appropriate as Article 5 (3) of the directive provides that the name under which a foodstuff is sold is to be accompanied by particulars as to its physical condition or the specific treatment which it has undergone, and expressly mentions in this context the 'deep-frozen' state.
- 21 The position would be different only if the yoghurt, having undergone deep-freezing, no longer had the characteristics which the consumer expects when buying a product bearing the name 'yoghurt'.
- 22 In this connection, it must be stated that it is clear from both the Codex Alimentarius drawn up by the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) and the regulations of several Member States, referred to by the Commission, that the characteristic feature of the product marketed as 'yoghurt' is the presence in abundant quantities of live lactic bacteria.

- 23 In those circumstances, the prohibition by national rules of the use of the name 'yoghurt' for the sale of deep-frozen products appears to be disproportionate in relation to the objective of consumer protection, when the characteristics of the deep-frozen products are not substantially different, particularly as regards the quantity of bacteria, from fresh products, and when appropriate labelling together with an indication of the date by which the product should be sold or consumed would suffice to give consumers proper information.
- 24 It is for the national court which has to decide on the merits of the case to determine, in the light of the information available to it, whether the extent to which deep-frozen yoghurt differs from the requirements of national rules relating to fresh yoghurt is such as to justify a different name.
- 25 The reply to the first part of the tribunal de commerce's question should therefore be that Article 30 of the Treaty precludes a Member State from applying to products imported from another Member State, where they are lawfully manufactured and marketed, national rules reserving the right to use the name 'yoghurt' solely to fresh yoghurt, to the exclusion of deep-frozen yoghurt, when the characteristics of the latter product are not substantially different from those of the fresh product, and when appropriate labelling, together with an indication of the date by which the product should be sold or consumed, is sufficient to ensure that consumers are properly informed.

The interpretation of Council Directive 79/112/EEC

- 26 In the second part of its question, the national court seeks in substance to establish whether Articles 5, 15 and 16 of the directive are to be interpreted as precluding national rules regarding the names under which products are sold from refusing to allow yoghurt which has undergone deep-freezing to bear the name 'yoghurt'.
- 27 The French Government argues that the national court's reference to the aforementioned articles of the directive is without relevance. The French Government relies, in this connection, in particular on Article 5 of the directive which reserves to Member States the power to lay down the names under which foodstuffs are to be sold.

- 28 It should be stated that, under Article 5 (1) of the directive, the name under which a foodstuff is sold is the name laid down by whatever laws, regulations or administrative provisions apply to it or, in the absence of any such name, the name customary in the Member State where the product is sold to the ultimate consumer, or a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused.
- 29 Whilst it is true that this provision refers to names laid down by the national rules of Member States, its meaning and exact scope must nevertheless be determined regard being had to its context and, in particular, to the directive's general purpose and its structure.
- 30 It should be pointed out that it is clear from both the statement of the reasons on which the directive is based and the terms of Article 2 thereof, that its object was to inform and protect the ultimate consumer of foodstuffs, in particular as regards the nature, identity, properties, composition, quantity, durability, origin or provenance, and the method of manufacture or production thereof.
- 31 As regards, more specifically, the deep-freezing of foodstuffs, Article 5 (3) provides that the name under which a product is sold shall include or be accompanied by particulars as to the physical condition of the foodstuff or the specific treatment which it has undergone, where the omission of such information could create confusion in the mind of the purchaser. The examples given in this connection are 'powdered, freeze-dried, deep-frozen, concentrated, smoked'.
- 32 As the deep-freezing of a product is expressly mentioned in that provision, it must be concluded that a Member State cannot refuse to permit a certain name to be used for a given product on the sole ground that that product has undergone deep-freezing treatment, so long as it continues to satisfy, after undergoing such treatment, the other conditions laid down by the national rules for the use of the name in question.

- 33 Whether yoghurt, once it has been deep-frozen, still complies with the other conditions laid down by the French rules for authorization to use the name 'yoghurt' is a question of fact which is for the national court to decide.
- 34 As regards Article 15 of the directive permitting the prohibition of trade in foodstuffs which comply with the rules laid down by the directive, by the application of non-harmonized national provisions governing the labelling and presentation of certain foodstuffs, it is sufficient to note that the grounds on which such prohibitions might be justified under Article 15 (2), in this instance, the protection of public health and the prevention of fraud, are not, as has been demonstrated above, at issue in this case.
- 35 Finally, it should be stated that Article 16 of the directive only applies, by its very terms, where reference is made to it in the provisions of the directive, which is not so in the case of Articles 5 and 15.
- 36 The reply to the second part of the question should therefore be that the provisions of Directive 79/112/EEC, and in particular Article 5 thereof, must be interpreted as precluding the application of national rules which refuse to allow imported or domestic products which have been deep-frozen to bear the name 'yoghurt' where those products, for the rest, comply with the requirements laid down by the national rules for fresh products to bear that name.

Costs

- 37 The costs incurred by the French Government, the Netherlands Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in reply to the question referred to it for a preliminary ruling by the tribunal de commerce, L'Aigle, by judgment of 15 June 1987, as supplemented by a judgment of 21 September 1987, hereby rules:

- (1) Article 30 of the Treaty precludes a Member State from applying to products imported from another Member State, where they are lawfully manufactured and marketed, national rules which reserve the right to use the name 'yoghurt' solely to fresh yoghurt, to the exclusion of deep-frozen yoghurt, when the characteristics of the latter product are not substantially different from those of the fresh product, and when appropriate labelling, together with an indication of the date by which the product should be sold or consumed, is sufficient to ensure that consumers are properly informed.
- (2) The provisions of Directive 79/112/EEC, in particular Article 5, must be interpreted as precluding the application of national rules which refuse to allow imported or domestic products which have been deep-frozen to bear the name 'yoghurt', where those products, for the rest, comply with the requirements laid down by the national rules for fresh products to bear that name.

Moitinho de Almeida

Everling

Galmot

Delivered in open court in Luxembourg on 14 July 1988.

J.-G. Giraud

Registrar

J. C. Moitinho de Almeida

President of the Third Chamber