OPINION OF MR ADVOCATE GENERAL LENZ DELIVERED ON 7 JUNE 1984 [1]

Table of contents

Mr President,
Members of the Court,

The present reference for a preliminary ruling on the interpretation of Articles 30 and 36 of the EEC Treaty arises out of criminal proceedings brought in the Netherlands against Albert Heijn BV.

A — The defendant undertaking, which operates a chain of supermarkets in the Netherlands, is charged with having in stock for sale, in January 1981, at its premises in Zaanstad, a quantity of apples of the Granny Smith variety on which was found a higher level of residues of a pesticide called "vinchlozoline" than was permitted by law. The apples, on which a residue of 1 milligram of vinchlozoline per kilogram of apples was found, were first of all seized and then, 14 days later, released for sale.

The defendant in the main proceedings does not deny the offence with which it is charged. However, it contends that the Netherlands provisions under which it is prohibited to have in stock the apples in question, which originated in Italy, constitute measures equivalent in effect to a quantitative restriction on imports contrary to the provisions of Article 30 *et seq.* of the EEC Treaty.

The Netherlands rules, the details of which are to be found in the Report for the Hearing, can be broadly described as follows: the Bestrijdingsmiddelenwet [Law on Pesticides] 1962 prohibits the

1 — Translated from the German.

sale, keeping in stock, storage or use of any pesticide unless authorized by the competent minister. With regard to pesticide residues, Article 16 of that Law, read together with the Residubesluit [Residues Decree] 1964, provides that these may not exceed a level fixed by the competent minister. The Residubeschikking [Residues Order] 1965, implementing the aforementioned legislation, prohibits any residues of the pesticide vinchlozoline in or on apples. However, with regard to other agricultural products, a certain level of vinchlozoline residue is permitted. Moreover, the permissible levels of pesticide residues laid down in the Residues Order can be varied by the competent minister on the application, *inter alia*, of importers of foodstuffs or beverages.

The Economische Politierechter [magistrate dealing with commerical offences] at the Arrondissementsrechtbank [District Court], Haarlem, who has to decide whether those rules are in conformity with Community law, stayed proceedings, and by an order dated 25 April 1983 referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"1. Does a prohibition on the marketing in one Member State of apples imported from another Member State on the ground that those apples contain, contrary to the applicable national legislative provisions under which it is prohibited to market food and drink containing residues of pesticides unless the quantity of those residues is below a maximum limit fixed per product and per pesticide, residues of a pesticide not mentioned in Annex II to Council Directive No 76/895/EEC of 23 November 1976 constitute a measure having an effect equivalent to a quantitative restriction on imports which is prohibited under Article 30 of the EEC Treaty?

2. To what extent does the answer to the first question depend on the answer to the question whether the apples referred to therein were produced and marketed in the Member State from which they originated in accordance with the legislation applying there?

3. (a) If the first question must be answered in the affirmative can the national legislative provisions referred to therein be regarded as a necessary means of protecting public health as contemplated by Article 36 of the EEC Treaty?

(b) In order to answer Question 3 (a) must it be established that the prohibition specifically applying to the use of a particular pesticide on apples is justified as a necessary means of protecting public health or may that prohibition also be regarded as justified if it is adopted pursuant to a general policy which is designed to reduce as far as possible the presence of residues of pesticides in food and drink and under which tolerance limits are fixed for residues only where a particular pesticide is required for a particular product and from the point of view of public health — taking into account

national dietary habits — there are no serious objections to adopting such limits?

4. (a) Is it relevant to Question 3 (a) and (b) that the national legislation of the importing country does not permit residues of a particular pesticide on or in particular kinds of food and drink but fixes a maximum permissible residual quantity of the same pesticide for other kinds of food and drink?

(b) Or, more specifically, is it relevant that in the Netherlands a residue of vinchlozoline is not permitted on apples but is permitted on other agricultural and market-garden produce and that the maximum residual quantity of vinchlozoline permitted in the case of some of those products is even higher than the quantity found on the lot of apples in question?"

B — My opinion on those questions is as follows:

1. First and second questions (Interpretation of Article 30 of the EEC Treaty)

(a) The first question seeks to ascertain whether a prohibition of the marketing of apples which originate in another Member State and on which are found residues of a pesticide not covered by Community law is to be regarded as a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty.

As all the parties to the main proceedings agree, that question must in principle be answered in the affirmative. It is not in dispute that the substance in question, vinchlozoline, does not fall within the scope of Council Directive No 76/895/EEC of 23 November 1976 relating to the fixing of maximum levels for pesticide residues in and on fruit and vegetables (Official Journal 1976, L 340, p. 26). Legislation which imposes an absolute prohibition on residues of this pesticide on apples can constitute, as long as the maximum permitted levels have not been harmonized, a restriction on the importation of such goods from other Member States where different levels are tolerated. It is therefore to be regarded in principle as a measure which is, according to the *Dassonville*[1] formula, "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".

(b) The second question, which is more difficult to answer, follows from that basic proposition and seeks to ascertain whether it is possible to speak of a measure having equivalent effect to quantitative restrictions within the meaning of Article 30 of the EEC Treaty when goods have not been produced and marketed in accordance with the law of the Member State from which they are imported. That question, as the Commission points out, is obviously inspired by the *Cassis de Dijon* decision (Case 120/78, *Rewe*[2]), in which the Court of Justice held that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption, even though it applied without distinction to both home-produced and imported products, fell within the prohibition laid down in Article 30 "where the importation of alcoholic beverages lawfully produced and marketed in another Member

1 — Judgment of 11. 7. 1974 in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837.

2 — Judgment of 20. 2. 1979 in Case 120/78 *Rewe-Zentral-AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

State is concerned". At first sight, it might be inferred from the latter condition that a measure having equivalent effect within the meaning of Article 30 only exists when the goods from another Member State whose importation or marketing is being restricted have been produced and marketed in accordance with the law of that State. It can be argued in favour of that view that only measures capable of restricting *intra-Community* trade are prohibited by Article 30 of the EEC Treaty. It can be further argued that a product which is not produced and marketed in accordance with the law of its country of origin cannot, by definition, benefit from the free movement of goods guaranteed by the EEC Treaty.

A closer analysis of the *Cassis de Dijon* judgment [1] and of the ensuing cases shows however that the Court of Justice did not intend that the question whether a product was produced and marketed in accordance with the law of its country of origin should be an additional criterion to be applied in deciding whether or not a measure having equivalent effect exists. It has been made clear since the abovementioned judgment that even national marketing rules which apply without distinction to both home-produced and imported products may constitute restrictions on intra-Community trade if such measures are not necessary to satisfy certain imperative requirements relating, for example to effective tax control, fair trading and consumer protection. The purpose of the condition in question is to make clear, as is obvious from the later judgments (see Case 53/80, *Officier van Justitie* v *Eyssen*, and Case 272/80, *Frans-Nederlands Mattschappij voor Biologische Producten* [2]), that, *if* a product has been produced and marketed in accordance with the law of the Member State of origin, additional requirements in the importing State will only be legitimate when they are necessary in order to satisfy the aforementioned imperative requirements. That conclusion, which takes into account the facts of the case, does not however justify as such the converse proposition that a restriction on the importation of a product which has not been produced in accordance with the law of its country of origin is not to be regarded as a measure having equivalent effect within the meaning of Article 30.

It would, in my opinion, be wrong in principle if consideration of the question whether or not a product was produced and marketed in its country of origin in accordance with the legislation there applying were divorced from the facts of the case. The question whether a restriction on trade is to be regarded as a measure having equivalent effect in Community law can only be answered on the basis of Community law and not on the basis of the various national legal systems.

Moreover to take account of the internal law of the Member States in order to determine whether national trade rules are to be regarded as measures having equivalent effect within the meaning of Article 30 of the EEC Treaty would also generally lead to practical difficulties.

The legislation in question often goes into great detail, is complicated and is difficult to understand. If the customs

1 — Judgment of 20. 2. 1979 in Case 120/78 *Rewe-Zentral-AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

2 — Judgment of 5. 2. 1981 in Case 53/80 *Officier van Justitie* v *Koninklijke Kaasfabriek Eyssen BV* [1981] ECR 409.

Judgment of 17. 12. 1981 in Case 272/80 *Frans-Nederlands Maatschappij voor Biologische Producten BV* [1981] ECR 3277.

authorities of a Member State had to decide whether or not particular goods had been marketed in accordance with the law of another Member State, they would encounter difficulties, including, for example, those of a linguistic nature, which would be difficult to overcome. National authorities and courts cannot be required to know and to be able to apply the legislation in force in the ten, perhaps soon to be twelve, Member States. Moreover, account would also have to be taken, in verifying that a product had been lawfully produced and marketed, of the question whether the legislation of the other Member State was in conformity with Community law. That result cannot be right. All that can be required of national authorities is that they apply both their own national law and Community law correctly.

On those grounds, I agree with the view of the defendant in the main proceedings, and with the German, French and Netherlands Governments, that the question whether the apples in question were produced and marketed in the country of origin in accordance with legislation applying there is not decisive in determining whether or not the Netherlands legislation at issue is to be regarded as a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty. That aspect can at most be taken into account in considering the question of whether or not the national legislation at issue is justified as being necessary to meet the imperative requirements referred to in the *Cassis de Dijon* judgment [1] or is justified on one of the grounds set out in Article 36 of the EEC Treaty.

1 — Judgment of 20. 2. 1979 in Case 120/78 *Rewe-Zentral-AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

2. Third and fourth questions (Interpretation of Article 36 of the EEC Treaty)

(a) In its third question, the national court asks whether the Netherlands system, under which any residue of the pesticide vinchlozoline on apples is prohibited in the absence of an express ministerial authorization, is justified under Article 36 of the EEC Treaty on the grounds of the protection of human health. In particular, it wishes to clarify whether or not the prohibition of residues in or on apples must be justified in each particular case, as being necessary for the protection of public health or whether such a prohibition may also be justified when it is laid down in the context of a general policy which is intended to prevent, as far as possible, the presence of pesticide residues in foodstuffs and beverages. The fourth question, which is also related to that problem asks whether or not it is significant that in the Netherlands vinchlozoline residues are prohibited on apples while being allowed on certain other agricultural products and that the maximum quantity permitted in the case of some of those products is higher than the quantity found on the apples in question.

(b) In answering that question we must start from the proposition that pesticides are intended to destroy a form of life, namely pests, and that vinchlozoline, if absorbed in large quantities, is, like any other pesticide, capable in principle of endangering human health. The fixing of a maximum residual quantity of

vinchlozoline permitted on and in apples thus comes, in principle, within the scope of the proviso contained in Article 36 of the EEC Treaty, whereby the provisions of Article 30 *et seq.* do not preclude prohibitions or restrictions on imports which are justified on grounds of "the protection of health and life of humans, animals or plants".

(c) It must also be borne in mind that the maximum quantity of vinchlozoline residues permitted on and in apples is not regulated by the Council's pesticide directive (No 76/895/EEC of 23 November 1976). That directive, in which the risk to human and animal life presented by chemical pesticides is expressly recognized, was an attempt to harmonize to a limited extent the maximum permitted content of the residues of certain pesticides, mentioned by name in an annex to the directive. In so far as pesticides do not come within the scope of that directive, it is, according to previous judgments of the Court (see Case 104/75, Case 272/80 and Case 174/82 [1]), for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they intend to afford to public health and in particular how strict the necessary controls are to be.

National measures of that kind must in particular, in accordance with the first sentence of Article 36, be justified on the grounds of the protection of health and life of humans. According to the second sentence of the same article, they must also not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

(d) In the *Frans-Nederlands Maatschappij* case (Case 272/80 [2]), this Court decided, on the basis of those criteria, that the Netherlands legislation relating to the approval of disinfectants, according to which the sale, storage or use of such products without prior approval was prohibited, was legitimate. It also confirmed in that case that Member States are, in principle, free to require on the grounds of the protection of health, a pesticide which has already received approval in another Member State to undergo a fresh procedure of examination and approval.

In the *Sandoz* judgment (Case 174/82 [3]), the Court decided that Community law permitted national rules prohibiting without prior authorization the marketing of foodstuffs lawfully marketed in another Member State to which vitamins had been added.

(e) The position cannot be different as regards the Netherlands legislation fixing maximum quantities of pesticide residues on or in foodstuffs or beverages, which may also be described as a prohibition with the possibility of use subject to prior approval. That legislation, like the Council's pesticide directive (No 76/895/EEC), seeks to ensure that foodstuffs are kept free, as far as

1 — Judgment of 20. 5. 1976 in Case 104/75 *de Peijper* [1976] ECR 613.

Judgment of 17. 12. 1981 in Case 272/80 *Frans-Nederlands Maatschappij voor Biologische Producten BV* [1981] ECR 3277.

Judgment of 14. 7. 1983 in Case 174/82 *Sandoz BV* [1983] ECR 2445.

2 — Judgment of 17. 12. 1981 in Case 272/80 *Frans-Nederlands Maatschappij voor Biologische Producten BV* [1981] ECR 3277.

3 — Judgment of 14. 7. 1983 in Case 174/82 *Sandoz BV* [1983] ECR 2445.

possible, from the residues of chemical substances that could damage the health of the consumer if they were absorbed in sufficient quantities with food. As the Community legislature accepted in the aforementioned directive, the requirements of fruit and vegetable growing must be reconciled with the need to protect human and animal health when fixing the maximum permissible levels for pesticide residues. In that regard it is important, on toxicological grounds, to limit the consumption of such substances to the lowest possible level, even when the substance in question is perhaps a less dangerous pesticide than those named in the pesticide directive in question.

In this connection, it is obvious that the maximum permissible level for a pesticide in individual food items is to be determined so that the total daily intake of that pesticide with food does not exceed the quantity that can be absorbed without danger to health. With regard to pesticide residues on or in individual foodstuffs, it must be borne in mind that the differing levels of consumption of each foodstuff in the various Member States can lead to different quantities of residues being permitted in different foodstuffs. It is clear moreover that the habits of consumers and the actual conditions in the individual Member States may be different. Consequently, assessment of the danger to health of residues of a particular pesticide cannot be made, as the defendant in the main proceedings contends, solely on the basis of the quantity of residues contained in a single foodstuff. The decisive element can only be the total quantity of residues absorbed by the consumer with all the food he takes. The result of thus looking at the general picture is necessarily that a higher level of residue permitted in the case of one foodstuff requires that lower levels be permitted in the case of other foodstuffs.

(f) On the basis of those considerations, not only the Council's pesticide directive but also the judgments of this Court have accepted the possibility of differing maximum permissible levels for substances which are potentially dangerous to health when found in foodstuffs.

Thus the Court held in the *Eyssen* case (Case 53/80 [1]) that the difficulties and uncertainties inherent in an assessment of the danger to health represented by nisin, a preservative, may explain the lack of uniformity in the national laws of the Member States regarding the use of that preservative and justify the scope of a prohibition of its use in individual Member States. The Court stressed that the absence of absolutely certain conclusions regarding the maximum quantity of that product which might be consumed daily without serious risk to health was essentially due to the fact that the assessment of the risk connected with its consumption depended upon several factors of a variable nature, including, in particular, the dietary habits of each country. It also recognized that the fixing of the maximum permissible level for each product must not only take account of the quantity that is added to

1 — Judgment of 5. 2. 1981 in Case 53/80 *Officier van Justitie* v *Koninklijke Kaasfabriek Eyssen BV* [1981] ECR 409.

a particular product. Account must also be taken of the quantities added to each of the other products which are intended to satisfy the dietary habits and in which the content of the substance in question may vary depending on the origin, the method of manufacture or the particular need in the market in question for a longer or shorter period of preservation.

Finally, the *Sandoz* judgment [1] provides further clear authority for the proposition that the assessment of the danger to health of a particular pesticide cannot be based solely on the level of residue to be found in an individual foodstuff. That case concerned the legality of a prohibition on the marketing of foodstuffs to which vitamins had been added and it was established that the taking of vitamins which were not in themselves harmful could have harmful effects if excessive quantities were consumed over a prolonged period. However, scientific research was not sufficiently advanced to be able to determine with certainty the critical quantities and the precise effects. It was not disputed by the parties that the concentration of vitamins contained in the foodstuffs of the kind in issue was far from attaining the critical threshhold of harmfulness so that even excessive consumption thereof could not in itself involve a risk to public health. Nevertheless the Court was not prepared to exclude such a risk, in so far as the consumer absorbs with other foods further quantities of vitamins which it is impossible to monitor or foresee. In view of the uncertainties inherent in the scientific assessment of such matters, the Court therefore held that national rules prohibiting, without prior authorization, the marketing of foodstuffs to which vitamins had been added were in principle justified under Article 36 of the Treaty.

As all parties, with the exception of the defendant in the main proceedings, contend, those considerations must also be applied to the system of authorizations for pesticide residues which is at issue here. In order to ensure an appropriate level of protection of public health, it is important, as the present case shows, that the competent authorities should, after making studies, be in a position to draw up a list of harmful substances and to determine the maximum permissible levels of those substances on foodstuffs. Such a system permits the authorities, on the application of a producer or importer, to carry out an examination and thereby take account both of the need to protect human health and of the requirements of fruit and vegetable growing.

(g) Finally, there is nothing to suggest that the system in question might constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. The principle of proportionality, which underlies Article 36, requires, as the Court emphasized in the *Sandoz* judgment [1], that the power of the Member States to prohibit imports of the products in question from other Member States should be restricted to what is necessary to attain the legitimate aim of protecting health. Accordingly, national rules providing for such a prohibition are justified, as the Commission in particular has argued, only if authorization to market a product is

1 — Judgment of 14. 7. 1983 in Case 174/82 *Sandoz BV* [1983] ECR 2445.

granted when it is compatible with the need to protect health.

The fact that in the Netherlands vinchlozoline residues are not permitted in the case of apples, even though higher levels of that substance are permitted in the case of other agricultural products than were found on the apples in question, is due to the fact, as the Netherlands Government has told the Court, that no producer or importer has yet made the appropriate application. The Netherlands Government has assured the Court that if the defendant in the main proceedings had made use of that possibility it would have had a decision on the pesticide in question within a week. Such an obstacle can in no way be regarded as disproportionate when it comes to striking a balance between the free movement of goods guaranteed by the Treaty and the protection of public health.

C — On the basis of the foregoing considerations, I propose that the questions raised should be answered as follows:

Questions 1 and 2

Articles 30 and 36 of the EEC Treaty permit national rules prohibiting the presence in or on foodstuffs of residues of a pesticide not covered by Council Directive No 76/895/EEC in a quantity which exceeds that laid down by a general administrative measure. That is so irrespective of whether the goods in question were produced and marketed in their country of origin in accordance with the legislation applying there.

Questions 3 and 4

(a) In deciding whether or not the prohibition of residues of a particular pesticide in or on foodstuffs is justified in the interests of protecting public health, the level of residues to be found in or on individual foodstuffs is not to be considered in isolation. The decisive factor is the total quantity of residues of that pesticide absorbed by the consumer with all the food he eats. It is thus of no significance that the national legislative provisions of the importing country prohibit residues of particular pesticides in the case of certain foodstuffs but fix a maximum permissible level of residues of the same pesticide in the case of other foodstuffs.

(b) A prohibition of that kind contained in national law is however only justified when the administrative procedures are so arranged that authorization to market the goods in question can be obtained within a reasonable time, if that is consistent with the requirements of the protection of health.