

SCHWARZ

JUDGMENT OF THE COURT (First Chamber)

24 November 2005^{*}

In Case C-366/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Unabhängiger Verwaltungssenat Salzburg (Austria), made by decision of 16 August 2004, received at the Court on 23 August 2004, in the proceedings

Georg Schwarz

v

Bürgermeister der Landeshauptstadt Salzburg,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, J.N. Cunha Rodrigues, E. Juhász (Rapporteur), M. Ilešič and E. Levits, Judges,

* Language of the case: German.

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Schwarz, by J. Dengg, M. Vavrousek and T. Hölber, Rechtsanwälte,

— the Commission of the European Communities, by J.-P. Keppenne and B. Schima, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2005,

gives the following

Judgment

- ¹ The reference for a preliminary ruling concerns the interpretation of Articles 28 to 30 EC and Article 7 of Council Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs (OJ 1993 L 175, p. 1), (hereinafter ‘the Directive’).

- 2 This reference has been made in the course of proceedings between Mr Schwarz and the Bürgermeister der Landeshauptstadt Salzburg (Mayor of Salzburg), who brought administrative proceedings of a criminal nature against that individual for having marketed non-packaged confectionery from vending machines.

Legal context

Community legislation

- 3 Article 28 EC prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States.
- 4 Under Article 30 EC, Article 28 EC is not to preclude prohibitions or restrictions on imports justified, inter alia, on grounds of the protection of health and life of humans or animals provided that such prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.
- 5 The first recital in the preamble to the Directive states that the free movement of foodstuffs is an essential pre-condition for the completion of the internal market.
- 6 The second recital in the preamble to the Directive states that the protection of human health is of paramount concern.

7 In accordance with the fourth recital in the preamble to the Directive, the general rules of hygiene for foodstuffs must be harmonised in order to protect human health.

8 Article 1 of the Directive provides:

‘1. This Directive lays down the general rules of hygiene for foodstuffs and the procedures for verification of compliance with these rules.

2. This Directive shall apply without prejudice to the provisions adopted in the context of more specific Community food hygiene rules. ...’

9 Article 3(1) of the Directive provides:

‘The preparation, processing, manufacturing, packaging, storing, transportation, distribution, handling and offering for sale or supply of foodstuffs shall be carried out in a hygienic way.’

10 In accordance with Article 3(2) of the Directive, food business operators must identify any step in their activities which is critical to ensuring food safety and ensure that adequate safety procedures are identified, implemented, maintained and reviewed on the basis of the principles used to develop the system of HACCP (hazard analysis and critical control points), principles which are listed in that same paragraph.

11 Article 3(3) of the Directive provides:

‘Food business operators shall comply with the rules of hygiene as listed in the Annex. ...’

12 Article 7(1) of the Directive provides:

‘Subject to the Treaty, Member States may maintain, amend or introduce national hygiene provisions that are more specific than those laid down by this Directive, provided that such provisions:

- are not less stringent than those given in the Annex,

- do not constitute a restriction, hindrance or barrier to trade in foodstuffs produced in accordance with this Directive.’

13 Chapter III of the Annex to the Directive lists the following requirements for, inter alia, movable and/or temporary premises and for vending machines:

- ‘1. Premises and vending machines shall be so sited, designed, constructed and kept clean and maintained in good repair and condition as to avoid the risk of contaminating foodstuffs and harbouring pests, so far as is reasonably practicable.

2. In particular and where necessary:

...

(b) surfaces in contact with food must be in a sound condition and be easy to clean and, where necessary, disinfect. This will require the use of smooth, washable, non-toxic materials unless food business operators can satisfy the competent authority that other materials used are appropriate;

...

(d) adequate provision must be made for the cleaning of foodstuffs;

...

(h) foodstuffs must be so placed as to avoid, so far as is reasonably practicable, the risk of contamination.'

¹⁴ Chapter IX of the same Annex, entitled 'Provisions applicable to foodstuffs' states in paragraph 3:

'All food which is handled, stored, packaged, displayed and transported shall be protected against any contamination likely to render the food unfit for human

consumption, injurious to health or contaminated in such a way that it would be unreasonable to expect it to be consumed in that state. In particular, food must be so placed and/or protected as to minimise any risk of contamination. Adequate procedures must be in place to ensure pests are controlled.'

National legislation

- 15 The provisions of the Directive have been transposed into Austrian law by the Regulation on the Hygiene of Foodstuffs (Lebensmittelhygieneverordnung) of 3 February 1998 (BGBl. II, 31/1998, in the version published in BGBl. II, 33/1999). In it the provisions of the Directive have been reproduced in virtually identical terms.
- 16 Paragraphs 1(1) and 1(2) of the Regulation on Hygiene in relation to Confectionery from Vending Machines (Verordnung über die Hygiene bei Zuckerwaren aus Automaten) of 10 February 1988 (BGBl. 127/1988) (hereinafter 'the Confectionery Hygiene Regulation'), reads as follows:

'(1) Confectionery vending machines for the purposes of this regulation are vending machines which, in return for money inserted through a slot, dispense sugar confectionery or similar products made using sugar substitutes from a sealed container via a delivery chute and collecting tray (basin).

(2) Confectionery vending machines must be installed or mounted in such a way that they are not exposed to direct sunlight. The collecting tray (basin) must be weatherproof in order to prevent contamination.'

17 Under Paragraph 2 of the Confectionery Hygiene Regulation:

'The marketing of sugar confectionery or similar products made using sugar substitutes without wrapping from vending machines is prohibited.'

The main proceedings and the question referred for a preliminary ruling

18 Administrative penal orders were made against Mr Schwarz by the Mayor of Salzburg who charged him with marketing various types of non-packaged chewing gum from vending machines contrary to the requirements of Paragraph 2 of the Confectionery Hygiene Regulation.

19 Mr Schwarz has lodged an appeal against those orders with the Unabhängiger Verwaltungssenat Salzburg (Independent Administrative Chamber Salzburg) in which he claims that the Confectionery Hygiene Regulation, and in particular Paragraph 2 thereof, is incompatible with Community law and, in particular, with the provisions of the Directive.

- 20 As it considers that the case before it requires the interpretation of Community law, the Unabhängiger Verwaltungssenat Salzburg has decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Articles 28 to 30 EC, read in conjunction with Article 7 of Directive 93/43 ... preclude a national provision, adopted before the entry into force of that directive, under which it is prohibited to offer for sale sugar confectionary or products made using sugar substitutes, without wrapping, from vending machines?'

Concerning the question referred for a preliminary ruling

Submissions made to the Court

- 21 Mr Schwarz maintains that the requirement, under Paragraph 2 of the Confectionery Hygiene Regulation, that each chewing gum be individually wrapped, has the effect of preventing the free movement of foodstuffs and is inconsistent with Article 7 of the Directive. That national provision entails that the goods at issue, which are intended for the Austrian market, are specially packaged and therefore can no longer be marketed in the vending machines currently in use in Austria. The effect of this is that there is, in practice, a prohibition on the marketing of goods which are not Austrian as foreign manufacturers are hardly prepared to manufacture packaged goods solely for that market.
- 22 According to Mr Schwarz, such barrier to importation is not justified on the grounds set out in Article 30 EC, in particular, the protection of human health. He submits that if that protection justified the enactment of measures such as those

referred to in Paragraph 2 of the Confectionery Hygiene Regulation, non-packaged chewing gum could not be sold in vending machines in Germany or Italy where outside conditions, particularly climatic ones, are comparable to those in Austria. Furthermore, the applicant in the main proceedings contends that, even if the goods were packaged, the consumer would still have to remove that packaging, usually with his bare hands, so that the risk of potential contamination by the delivery tray would still exist.

- 23 The Commission of the European Communities considers that a provision such as that in Paragraph 2 of the Confectionery Hygiene Regulation constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 28 EC. Paragraph 2 has the effect of making the importation into Austria of goods which are legally marketed in other Member States more expensive.
- 24 As it is not aware of the specific reasons which led the Austrian legislature to prohibit the sale of non-packaged confectionery from vending machines, the Commission is of the opinion that it is not in a position to take a definitive view on the existence of a potential risk to the health of humans and, consequently, on the justification for that national provision in the light of Article 30 EC. However, it maintains that the risk assessment cannot be based on purely hypothetical considerations and that the real risk to public health alleged must appear sufficiently established on the basis of recent scientific data available at the date of adoption of the restrictive measure.

Answer of the Court

- 25 It must be stated that Article 29 EC, to which the national court refers, is not relevant for the purpose of responding to the request for a preliminary ruling. The Court will therefore confine itself to the interpretation of Articles 28 EC and 30 EC as well as to that of the Directive.

- 26 The Directive does not regulate the requirement for foodstuffs dispensed by vending machines to be packaged. The national measures concerning that matter have not therefore been covered by harmonisation at Community level.
- 27 Such national measures must, therefore, be assessed against the yardstick of the EC Treaty provisions relating to the free movement of goods.
- 28 The prohibition of measures having equivalent effect to quantitative restrictions set out in Article 28 EC covers all measures which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see, in particular, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Case 178/84 *Commission v Germany (Beer purity)* [1987] ECR 1227, paragraph 27; Case C-192/01 *Commission v Denmark* [2003] ECR I-9693, paragraph 39; and Case C-270/02 *Commission v Italy* [2004] ECR I-1559, paragraph 18).
- 29 It is established that Paragraph 2 of the Confectionery Hygiene Regulation requires chewing gum which is put up for sale in vending machines in Austria to be packaged, although it is apparent from the file submitted to the Court by the national court that those same goods can be marketed abroad, in particular in Germany, without packaging. It follows from this that importers wishing to put those goods up for sale in Austria have to package them, which makes their importation into that Member State more expensive. It is also apparent from the file that vending machines designed for non-packaged goods cannot be used for packaged goods. It follows from this that, in principle, the aforementioned national provision constitutes a measure having equivalent effect to quantitative restrictions within the meaning of Article 28 EC.

30 However, the Court has consistently held that a national rule which hinders the free movement of goods is not necessarily contrary to Community law if it may be justified by one of the public-interest grounds set out in Article 30 EC or by one of the overriding requirements laid down by the Court's case-law where the national rules are applicable without distinction (see, to this effect, Case 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] ECR 649, paragraph 8, and *Commission v Italy*, cited above, paragraph 21).

31 Given that, according to the national court, the justification for Paragraph 2 of the Confectionery Hygiene Regulation is to be found primarily in the requirement for the protection of public health, which is expressly provided for in Article 30 EC, it is in the light of that provision of Community law that it is appropriate to examine whether the latter does not preclude a national rule such as Paragraph 2.

32 As regards the placing of foodstuffs on the market, the Court has held that it is for the Member States, in the absence of harmonisation, to decide on their intended level of protection of human health and life, always taking into account the requirements of the free movement of goods within the Community (see, to that effect, Case 174/82 *Sandoz* [1983] ECR 2445, paragraph 16; Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior et Publivia* [1991] ECR I-4151, paragraph 16; Case C-271/92 *LPO* [1993] ECR I-2899, paragraph 10; *Commission v Denmark*, paragraph 42; and Case C-41/02 *Commission v Netherlands* [2004] ECR I-11375, paragraph 42).

33 However, the measures taken must be such as to attain one or more objectives referred to in Article 30 EC, in the present case the protection of public health, and they must be proportionate, namely, not go beyond what is necessary to attain the objective pursued (see, in particular, *LPO*, paragraph 12, and Case C-373/92 *Commission v Belgium* [1993] ECR I-3107, paragraph 8).

- 34 It is apparent from the order for reference that, according to the Österreichische Agentur für Gesundheit und Ernährungssicherheit GmbH (the Austrian Health and Food Safety Agency), the prohibition referred to in Paragraph 2 of the Confectionery Hygiene Regulation is justified on the grounds of the protection of public health, given that, in the past, non-packaged goods were impaired by moisture or insects, in particular ants, within vending machine containers.
- 35 The national court also maintains that that prohibition considerably increases the safety of the foodstuffs at issue. In this respect it states that consumers who buy non-packaged confectionery from vending machines must necessarily touch the goods and the delivery tray with their bare hands without having washed them beforehand. That court considers that contamination of the delivery tray by pathogenic germs and their transmission onto the goods removed by the customer is by no means merely theoretical.
- 36 Thus it must be stated that, for the reasons pertinently set out by the Österreichische Agentur für Gesundheit und Ernährungssicherheit GmbH and also by the national court, the prohibition laid down in Paragraph 2 of the Confectionery Hygiene Regulation constitutes an adequate and proportionate measure for the protection of public health.
- 37 Moreover, it must be noted that nothing in the file leads to the conclusion that the public health grounds relied on to justify Paragraph 2 of the Confectionery Hygiene Regulation have been diverted from their proper purpose and used in such a way as to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products (see, to this effect, Case 34/79 *Henn and Darby* [1979] ECR 3795, paragraph 21, and *Aragonesa de Publicidad Exterior et Publivia*, paragraph 20).

38 In view of all the foregoing considerations, the answer to the question referred for a preliminary ruling must be that it is not contrary to Article 28 EC, Article 30 EC and Article 7 of the Directive for a provision of national law, adopted before the entry into force of that directive, to prohibit the offer for sale from vending machines of sugar confectionery or products made using sugar substitutes, without wrapping.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

It is not contrary to Articles 28 EC, 30 EC and Article 7 of Council Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs for a provision of national law, adopted before the entry into force of that directive, to prohibit the offer for sale from vending machines of sugar confectionery or products made using sugar substitutes, without wrapping.

[Signatures]