

OPINION OF ADVOCATE GENERAL

GEELHOED

delivered on 28 June 2005¹

I — Introduction

1. In this case the Court is requested to give a preliminary ruling on a question referred by the Unabhängiger Verwaltungssenat Salzburg (Independent Administrative Chamber Salzburg) concerning the interpretation of Articles 28 EC and 30 EC and Council Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs (hereinafter the 'Directive').² The main proceedings in the national court concern the treatment in Austria of various types of chewing gum without wrapping (non-packaged) which are freely marketed in Germany and Italy.

2. The question referred by the national court reads as follows:

'Do Articles 28 to 30 EC in conjunction with Article 7 of Council Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs preclude a national provision, adopted before the entry into force of that directive, under

which it is prohibited to offer for sale sugar confectionery or products made using sugar substitutes, without wrapping, from vending machines?'

II — Legal framework

A — Community law

3. Under Article 28 EC, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States.

4. However, according to Article 30 EC, restrictions on imports justified on grounds of, among other things, the protection of health and life of humans, animals or plants are permitted insofar as they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

¹ — Original language: Dutch.

² — OJ 1993 L 175, p. 1.

5. The first recital of the preamble to the Directive states that:

tion, handling and offering for sale or supply of foodstuffs shall be carried out in a hygienic way.'

'Whereas the free movement of foodstuffs is an essential pre-condition for the completion of the internal market; whereas this principle implies confidence in the standard of safety of foodstuffs for human consumption in free circulation, and in particular their standard of hygiene, throughout all stages of preparation, processing, manufacturing, packaging, storing, transportation, distribution, handling and offering for sale or supply to the consumer.'

8. Under 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 following principles, used to develop the system of HACCP (Hazard Analysis and Critical Control Points).

6. According to the fourth recital, the general rules of hygiene for foodstuffs to be observed at the time of preparation, processing, manufacturing, packaging, storing, transportation, distribution, handling and offering for sale or supply to the consumer must be harmonised in order to protect human health.

9. According to Article 7(1) of the Directive:

7. Article 3(1) of the Directive reads as follows:

'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:

'The preparation, processing, manufacturing, packaging, storing, transportation, distribu-

— 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.'

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;

10. Chapter III of the Annex to the Directive lays down requirements for movable and/or temporary premises (such as marquees, market stalls, mobile sales vehicles), premises used primarily as a private dwelling house, premises used occasionally for catering purposes, and vending machines.

...

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

'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.

...

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

2. In particular and where necessary:

...

11. Paragraph 3 of Chapter IX stipulates that:

(b) surfaces in contact with food must be in a sound condition and be easy to clean

'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.'

1988 (hereinafter the 'Confectionery Hygiene Regulation') read 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 a security device (delivery tray).

B — *National law*

12. The provisions of Directive 93/43 were transposed into Austrian law by the Regulation on the Hygiene of Foodstuffs of 3 February 1998,³ in which the requirements of the Food Hygiene Directive are reproduced in (substantially) identical terms.

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

14. According to Paragraph 2 of the Confectionery Hygiene Regulation:

13. Paragraphs 1(1) and (2) of the Regulation on Hygiene in relation to Confectionery from Vending Machines of 10 February

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

3 — BGBl. II No 31/1998, as amended by BGBl. II No 33/1999.

III — Facts of the case and procedure

15. By administrative penalty order issued by the Mayor of Salzburg, G. Schwarz (hereinafter the 'appellant') was charged with having committed various infringements under Paragraph 2 of the Confectionery Hygiene Regulation in that he sold, and thus marketed, several kinds of chewing gum without wrapping from vending machines with a delivery tray. The appellant has lodged an appeal against the abovementioned administrative penalty order with the Unabhängiger Verwaltungssenat Salzburg. In his appeal he argues that the Confectionery Hygiene Regulation, and in particular its Paragraph 2, is contrary to the Treaty provisions on the free movement of goods and to Directive 93/43.

16. The goods at issue are goods from Canada which the appellant imports into Austria through Germany. These goods were manufactured specifically for sale from vending machines. According to the appellant, who also does business in Germany and Italy, it is only in Austria that confectionery sold from vending machines has to be wrapped. This means, so says the appellant, that in the present case, goods produced abroad, which, at least in the Federal Republic of Germany and the Italian Republic, may be sold freely from vending machines without any additional packaging would have to be specially foil-wrapped for Austria. The appellant also points out that

the product and the form of distribution have been tested according to HACCP standards and found to be safe.

17. The appeal court is of the opinion that, in principle, such an import restriction on trade is indeed prohibited. However, in the order for reference, the referring court, although it considers a preliminary ruling necessary, indicates that it is inclined to regard the national rule in question as compatible with Community law. In its opinion, the national provision is justified under Article 30 EC on the grounds of protection of human health, inasmuch as it increases food safety. According to the referring court, the intended protection could not have been achieved by less far-reaching means. Paragraph 2 of the Confectionery Hygiene Regulation is suited to achieving the legitimate national objective of a high level of food hygiene, not only up to the time of sale but also up to the time of consumption, by making it compulsory to package sugar confectionery sold from vending machines. There is, according to the referring court, no clear alternative way of attaining that level of protection.

IV — Appraisal

18. The aim of the question referred for a preliminary ruling is to discover whether a

national provision prohibiting the offering for sale of sugar confectionery, or products made using sugar substitutes, without wrapping from vending machines is incompatible with Article 7 of Directive 93/43 and Articles 28 EC and 30 EC. The referring court takes the view that the Food Hygiene Directive applies only to a limited extent to a national rule concerning a packaging requirement and that such a rule must be tested against the primary Community law laid down in Articles 28 EC and 30 EC.

19. If the national court is correct in its conclusions, then recourse to Article 30 EC or one of the overriding requirements is still possible. However, justification under Article 30 EC or on the grounds of one of the overriding requirements is precluded where Community directives provide for harmonisation of the measures necessary to achieve the specific objective.⁴ In that case protective measures must be adopted within the framework outlined by the harmonising directive. In the present case, therefore, it must be established whether the provisions of secondary legislation invoked apply and provide for harmonisation of the measures with respect to the form in which products are offered for sale.

20. As is also clear from the preamble, the aim of the Directive is to ensure the free movement of foodstuffs and the protection of human health. To achieve this objective, the Directive provides for the harmonisation of food hygiene throughout all stages of preparation, processing, manufacturing, packaging, storing, transportation, distribution, handling and offering for sale or supply to the consumer. To be allowed into free circulation in the Community, the goods concerned must satisfy the prescribed requirements of food hygiene, the purpose of which is to protect human health. By these means the Directive seeks to ensure that products manufactured in conformity with Community standards which satisfy the essential requirements of the Directive may circulate freely within the common market.

21. The Directive places responsibility for internal hygiene on the food business itself. Food business operators must ensure that only foodstuffs not harmful to health are placed on the market. To this end, food businesses must comply with the rules of hygiene as listed in the Annex to the Directive. Moreover, food businesses must introduce safety procedures based on HACCP principles. Finally, food businesses may use guides to good hygiene practice in order to satisfy the hygiene requirements of the Directive. The competent national

⁴ — Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 18.
See also Case C-1/96 *Compassion in World Farming* [1998] ECR I-1251, paragraph 47.

authorities are responsible for verifying compliance with these provisions.

less stringent than those given in the Annex and (ii) may not constitute a restriction, hindrance or barrier to trade in foodstuffs produced in accordance with the Directive. What then is the scope of the discretion that the Community legislature leaves to the national authorities?

22. The Annex to the Directive contains a list of general food hygiene requirements. Chapter III of the Annex specifies the requirements for, among other things, vending machines. Vending machines must 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. Moreover, Chapter IX(3) stipulates that food must be protected against any contamination likely to render it unfit for human consumption or injurious to health. These general provisions may be further supplemented and supported by more specific Community food hygiene rules.⁵ Moreover, the hygiene rules may be developed by food business sectors and representatives of other interested parties.⁶

23. Article 7(1) of the Directive allows Member States to maintain, amend or introduce more specific hygiene provisions, provided that they take into account the limits for which the Directive expressly provides. These limits take the form of two cumulative requirements: more specific national hygiene provisions (i) may not be

24. From the wording of the second requirement two possibilities emerge. Either Member States maintain more specific provisions concerning the production of a foodstuff or Member States maintain more specific provisions concerning other stages, namely, the preparation, processing, packaging, storing, transportation, distribution, handling and offering for sale or supply to the consumer. In the first case, a Member State can only apply and maintain such a provision if it does not constitute a restriction, hindrance or barrier to trade in foodstuffs produced in accordance with the Directive. Since the Directive expressly stipulates the limits of this provision, Articles 28 EC and 30 EC have no further function within the scope of the Directive and, accordingly, recourse to Article 30 EC is no longer open to Member States.

5 — Article 1(2) of the Directive

6 — Article 5(2) of the Directive.

25. In the second case, a Member State may maintain a more specific provision if that provision is not less stringent than those in the Annex and is not contrary to the Treaty. In these circumstances, the Directive leaves the door open for justification under Article 30 or on the grounds of one of the overriding requirements of public importance recognised in the case-law of the Court.

26. The referring court assumes that the product concerned — chewing gum balls and, in particular, the sale of such balls from vending machines — falls within the material scope of the Directive. The order for reference gives no further details but concentrates mainly on justification on the treaty-law grounds of Article 30 EC. In my opinion, the national provision does indeed fall within the scope of the Directive and, in particular, is covered by the requirements of Chapter IX(3). However, it governs aspects that the Directive has not yet exhaustively harmonised, including packaging requirements for the sale of sugar confectionery from vending machines. In the abovementioned provision, the Directive confines itself to the general rule that displayed food must be protected against contamination. On the other hand, the Directive does not contain any specific requirements, such as for packaging, for preventing such contamination.

27. The national provision prohibiting the offering for sale of sugar confectionery, or products made using sugar substitutes, without wrapping from vending machines is a more specific and more stringent requirement than that laid down in the Annex to the Directive. Moreover, the national provision concerns the packaging, not the production, of a food. It must therefore be tested against Articles 28 EC and 30 EC.

28. Accordingly, the first thing that needs to be done is to investigate whether a ‘selling arrangement’ within the meaning of the judgment in *Keck and Mithouard*⁷ is involved. The national measure that forms the subject of the main action includes a requirement to package sugar confectionery distributed to the consumer from vending machines. This means that sugar goods brought into circulation elsewhere, before being offered for sale to the end consumer in Austria, must first be packaged, that is to say, must be altered.

29. According to settled case-law, the need to alter the packaging or the labelling of imported products prevents such requirements from being selling arrangements.⁸ The description ‘selling arrangement’ should be reserved for regulations that concern the

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

8 — See Case C-33/97 *Colin* [1999] ECR I-3175, paragraph 37, and Case C-12/00 *Commission v Spain* [2003] ECR I-459, paragraph 76.

general circumstances in which products are marketed and limit the commercial freedom of traders.⁹ It does not apply to regulations that concern the characteristics of products or restrict the marketing of products with specified characteristics.¹⁰

ited by Article 28 EC, even if the requirements apply to all products without discrimination, where their application cannot be justified by a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods.¹²

30. This leads me to conclude that a prohibition on the offering for sale of sugar confectionery, or products made using sugar substitutes, without wrapping from vending machines cannot be treated as a selling arrangement within the meaning of the *Keck and Mithouard* judgment and therefore must be tested entirely against Articles 28 EC and 30 EC.¹¹

32. The special packaging requirement creates an obstacle to trade, inasmuch as in Austria sugar confectionery, or products made using sugar substitutes, placed on the market elsewhere in the Community cannot legally be delivered to the end consumer from vending machines without being packaged. This requirement leads to additional costs for the importer, which makes importation more difficult and more expensive. Such a provision is therefore incompatible with Article 28 EC.

31. According to the case-law of the Court, obstacles to the free movement of goods stemming from the application of requirements concerning the conditions which the goods must satisfy (such as requirements relating to their description, shape, dimensions, weight, composition, presentation, labelling or packaging) are to be regarded as measures having equivalent effect prohib-

33. An obstacle of this kind can only be justified on one of the grounds of general interest mentioned in Article 30 EC, such as the protection of the health and life of

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

10 – See also my opinion of 11 December 2003 in Case C-239/02 *Dauve Egberts* [2004] ECR I-7007, paragraph 72.

11 – In the judgment in Case C-416/00 *Morellato* [2003] ECR I-9343 the Court did, it is true, leave open the possibility of a prepackaging requirement for bread being treated, in certain circumstances, as a selling arrangement. However, the special circumstances of the case and the very strict requirements laid down by the Court preclude the possibility of the ruling being applied in the present context.

12 – Case C-120/78 *Rewe-Zentral* [1979] ECR 649.

humans, or by one of the overriding requirements relating, for example, to the protection of the consumer. It must also be suited to pursuing its intended objective and must not be disproportionate.¹³

34. The national measure at issue applies to sugar confectionery sold from vending machines regardless of the origin of the goods. This means that apart from the importance of protecting human health the importance of protecting the consumer can be used to justify the measure. However, from the documents in the case it appears that the prohibition on offering sugar confectionery for sale unwrapped is expressly dictated by health protection considerations.¹⁴ Therefore I shall confine my analysis to Article 30 EC. Determining whether the national provision passes the proportionality test is an essential part of this analysis.

35. With regard to the justification for the provision at issue, the referring court has pointed to the statement by the Austrian Health and Food Safety Agency, the authority responsible for analysing foodstuffs, to the effect that there have been individual instances of non-packaged products being impaired by moisture or insects (ants), even

while still in the vending machine, and of the sugar coating being completely dissolved and sticky. Packaging the product could prevent this deterioration. The referring court has also drawn attention to the possibility of products being affected as a result of the delivery tray being contaminated with pathogenic germs and those germs being transmitted onto the next purchaser's goods. There might also, it says, be a risk of a bacterial infection on the hands of the consumer being transmitted onto the product. This could be reduced by wrapping the goods, so that the consumer does not need to touch the product with bare hands.

36. It is possible that certain packaging requirements for sugar confectionery dispensed from vending machines could serve to protect health, where they are intended to prevent deterioration and contamination. The question is, however, whether such a requirement, coming on top of the requirements of Directive 93/43 which sugar confectionery must already satisfy, is effective.

37. The Directive lays down a number of rules that concern the entire production and distribution chain and also provides for a

13 — In this connection, see Joined Cases C-34/95 to C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 45.

14 — At least that is what I conclude from the order for reference. In fact, in this case the Austrian Government has not submitted any observations and consequently has offered no explanation of the reasons behind the provision at issue.

methodology for verifying compliance with those rules and identifying activities. Under Article 3(2) of the Directive, food businesses 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. In this respect, the Directive aims to provide full protection for human health.

foodstuffs in question are being responsibly marketed and sold, this is an untenable position.

38. It is true that, under Article 7(1) of the Directive the Member State is authorised to impose more specific packaging requirements for the sake of health and hygiene but, in view of the fact that the Directive is intended to provide full protection for health, this authority is very limited. Accordingly, only a weighty reason can justify such a specific national measure. A Member State must then show that the regulation is actually necessary.

40. The referring court having provided no factual evidence that sugar confectionery sold unwrapped from vending machines poses a threat to human health, the risks of contamination appear to be hypothetical.

39. The question is whether offering unwrapped sugar confectionery for sale from vending machines constitutes a real risk to health. It seems clear to me that since, given proper compliance with the requirements of the Directive, it may be assumed that the

41. Similar considerations apply to the risk of deterioration of the goods. In this connection, the appellant has pointed out that there have only been complaints in cases where the vending machine has been vandalised. If this is the cause of deterioration, it would seem more appropriate to deal with the phenomenon itself. Banning products which elsewhere in the Community can be lawfully marketed and dispensed from vending machines unwrapped is not a suitable means of prevention and, moreover, it restricts trade in these products more than is necessary. If moisture and ants can penetrate into vending machines that have not been damaged by exceptional circumstances such as vandalism, it would seem more reasonable to adapt the regulations on the technical design of the vending machines than to impose specific packaging requirements on the products.

42. I therefore conclude that a national provision under which it is prohibited to offer for sale sugar confectionery or products made using sugar substitutes, without wrapping, from vending machines is incompatible with Articles 28 EC and 30 EC.

V — Conclusion

43. In the light of the above, I suggest that the Court's reply to the question referred for a preliminary ruling by the Unabhängiger Verwaltungssenat Salzburg should be as follows:

A national provision that goes beyond the requirements of Council Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs and under which it is prohibited to offer for sale sugar confectionery or products made using sugar substitutes, without wrapping, from vending machines constitutes a measure having an effect equivalent to that of a quantitative restriction on imports within the meaning of Article 28 EC and cannot be justified on grounds of the importance of protecting human health under Article 30 EC.