

JUDGMENT OF THE COURT (Third Chamber)

5 April 2001 *

In Case C-123/00,

REFERENCE to the Court under Article 234 EC by the Tribunal de première instance de Bruxelles (Belgium) for a preliminary ruling in the criminal proceedings before that court against

Christina Bellamy

and

English Shop Wholesale SA, party liable at civil law,

on the interpretation of Articles 28 EC and 30 EC,

THE COURT (Third Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

* Language of the case: French.

after considering the written observations submitted on behalf of:

- Mrs Bellamy, by G. Carnoy, avocat,
- the Commission of the European Communities, by M. Shotter and J. Adda, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 January 2001,

gives the following

Judgment

1 By judgment of 28 March 2000, received at the Court on 31 March 1999, the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 28 EC and 30 EC.

2 Those questions were raised in criminal proceedings brought against Mrs Bellamy who is alleged to have contravened national rules relating, first, to the sale of foodstuffs and, second, to the advertising thereof.

National legislation

- 3 Article 1 of the Royal Decree of 2 September 1985 on bread and other bakery products (*Moniteur belge* of 7 November 1985, ‘the 1985 Decree’) defines bread and bakery products falling within its scope. Article 3 of the decree provides:

‘The foodstuffs to which this decree applies must comply with the following requirements as to composition:

...

2. As regards the foodstuffs referred to in Article 1(1) to (3), the cooking salt content expressed in terms of sodium chloride and calculated on the basis of the dry matter may not exceed 2.00 %;

...’

4 Article 8 of the 1985 Decree provides:

‘Any contravention of this decree shall be investigated, prosecuted and punished in accordance with the Law of 24 January 1977 on the protection of consumers’ health in relation to foodstuffs and other products, as regards Articles 2, 3 and 5 ...’

5 Article 4 of the Royal Decree of 17 April 1980 concerning advertising of foodstuffs (*Moniteur belge* of 6 May 1980: ‘the 1980 Decree’) provides:

‘In any advertising of foodstuffs, the following are prohibited:

...

- 2 giving the impression that the branded product possesses particular qualities when in fact all similar foodstuffs display the same qualities;

...’

6 Article 5 of the 1980 Decree provides:

‘All advertising relating to foodstuffs must use in a clearly visible manner such description of a foodstuff as may be provided by law or regulation, where the omission of that description might mislead consumers as to the nature of the foodstuff.’

The dispute in the main proceedings

7 English Shop Wholesale SA (‘ESW’), established in Anderlecht, Belgium, imports foodstuffs from Great Britain for retail sale in Belgium where its clientele consists of European civil servants.

8 A judgment in default was delivered by the Tribunal de première instance de Bruxelles on 9 December 1998 against Mrs Bellamy, the director of ESW, in particular, for having, in contravention of the 1980 and 1985 Decrees:

— sold bread with a salt content of 2.88 %;

— given the impression that the branded product possessed particular qualities when in fact all similar foodstuffs display the same qualities, having in the present case stated that the milk contained no additives or preservatives;

— failed, in the advertising for the product, to use in a clearly visible manner a description of the foodstuff 'thereby misleading consumers as to the nature of the foodstuff, having in the present case described the product as pasteurised whole fresh milk'.

9 Since Mrs Bellamy has applied to have the judgment in default set aside and has contended that the provisions of national law on the basis of which she was charged are contrary to Article 28 EC, the Tribunal de Première Instance de Bruxelles has decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- '1. Are Articles 1(3) and 8 of the Royal Decree of 2 September 1985 on bread and other bakery products and Article 14 of the Law of 24 January 1977 on the protection of consumers' health in relation to foodstuffs and other products, in so far as they prohibit the marketing of bread whose cooking salt content, expressed in terms of sodium chloride and calculated on the basis of the dry matter, exceeds 2.0 %, compatible with the requirements of Article 28 [EC] and are they capable of being justified under Article 30 [EC]?
2. Are Articles 1(3) and 8 of the Royal Decree of 2 September 1985 on bread and other bakery products and Article 14 of the Law of 24 January 1977 on

the protection of consumers' health in relation to foodstuffs and other products compatible with the requirements of Article 28 [EC] and are they capable of being justified under Article 30 [EC]?

3. Are Articles 4(2) and 5 of the Royal Decree of 17 April 1980 concerning advertising of foodstuffs and Article 14 of the Law of 24 January 1977 on the protection of consumers' health in relation to foodstuffs and other products compatible with the requirements of Article 28 [EC] and are they capable of being justified under Article 30 [EC]?

The questions referred for a preliminary ruling

The first question

10. By its first question, the national court is essentially asking whether Article 28 EC precludes the application of a national rule such as that laid down in Article 3(2) of the 1985 Decree and, if so, whether such a rule may be justified under Article 30 EC.
11. It must be observed that, in the context of proceedings concerning the application of the same national rule to bread lawfully manufactured in another Member State, the *Rechtbank van eerste aanleg te Gent* (Court of First Instance, Ghent), Belgium, referred a question to the Court for a preliminary ruling on the interpretation of Articles 30 and 36 of the EC Treaty (now, after amendment,

Articles 28 and 30 EC). In its judgment in Case C-17/93 *Van der Veldt* [1994] ECR I-3537 the Court has, therefore, already considered whether those articles preclude a national rule such as that in point in the main proceedings.

- 12 Since no arguments have been advanced in the present case which are capable of casting doubt on the answer given by the Court in the judgment in *Van der Veldt*, a ruling must be given in the same terms and the first question must be answered as follows:

- a rule of a Member State prohibiting the marketing of bread and other bakery products whose salt content by reference to the dry matter exceeds the maximum permitted level of 2 %, when applied to products which have been lawfully manufactured and marketed in another Member State, constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 28 EC;
- such a rule is likely to hinder trade between Member States and cannot be regarded as justified under Article 30 EC on the ground of protecting public health.

The second question

- 13 In light of the answer to the first question and in view of the fact that the national court has not provided the Court with any explanation as to how this question may be distinguished from the first one, there is no need to give a ruling on the second question.

The third question

- 14 By the first part of its third question, the national court is essentially asking whether Article 28 EC precludes a national rule such as that laid down in Article 4(2) of the 1980 Decree, which prohibits giving the impression that the branded product possesses particular qualities when in fact all similar foodstuffs have such qualities and, if so, whether such a rule may be justified under Article 30 EC.
- 15 It should be observed in that regard that, in the main proceedings, Article 4(2) of the 1980 Decree was applied in a situation in which a branded product, milk, was presented as containing no additives or preservatives.
- 16 Mrs Bellamy maintains that milk is a commonplace foodstuff with whose characteristics and qualities consumers are perfectly familiar, with the result that the risk of a reasonably shrewd consumer being misled is almost non-existent.
- 17 The Commission submits that the national rule at issue in the main proceedings must be regarded as a transposition of Article 2(1)(a)(iii) 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 foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1), and that therefore Article 28 EC does not preclude that national rule.

18 In that regard, it should be borne in mind that, in the absence of harmonisation 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 having equivalent effect which are prohibited by Article 28 EC, 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 (see, in particular, *Cassis de Dijon* — Case 120/78 *Rewe-Zentral* [1979] ECR 649, paragraph 14, and Case C-383/97 *Van der Laan* [1999] ECR I-731, paragraph 19).

19 It should also be observed, as the Commission has pointed out, that as regards the area governed by the national rule at issue in the main proceedings, the Community legislature has enacted a directive harmonising the laws of the Member States. Directive 79/112 seeks to approximate the laws of the Member States on labelling and presentation of foodstuffs for sale to the ultimate consumer with the aim of informing and protecting consumers.

20 Article 2(1)(a) of the directive provides as follows:

‘The labelling and methods used must not:

(a) be such as could mislead the purchaser to a material degree, particularly:

...

- (iii) by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics’.

- 21 As the Commission has pointed out, a national legislative provision which correctly transposes a Community rule harmonising the national rules on consumer protection against misleading practices by means of specifically-defined measures does not constitute an obstacle to free movement contrary to Article 28 EC.
- 22 The answer to the first part of the third question must therefore be that Article 28 EC does not preclude a national rule which prohibits giving the impression that the branded product possesses particular qualities when in fact all similar foodstuffs display the same qualities.
- 23 By the second part of its third question the national court is essentially asking whether Article 28 EC precludes a national rule, such as Article 5 of the 1980 Decree, which imposes an obligation to use in all advertising material such a description of a foodstuff as may be provided by law or regulation, where the omission of that description might mislead the consumer and, should that be the case, whether such a rule may be justified under Article 30 EC.

- 24 In that regard, it must be borne in mind that in order for the Court, where it has been asked for a preliminary ruling, to provide an interpretation of Community law which will be of use to the national court, the order for reference must contain information on the factual context in which the disputed national rule has been or is to be applied (see, to that effect, Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR I-393, paragraph 6).
- 25 In the present case, the national court confines itself to stating that the national rule at issue in the main proceedings applies in criminal proceedings in which Mrs Bellamy is being prosecuted for ‘having failed in the advertising for the product to use in a clearly visible manner a description of the foodstuff, thereby misleading consumers as to the nature of the foodstuff, in this case by describing the product as pasteurised whole fresh milk’.
- 26 That description of the offence with which Mrs Bellamy is charged fails to clarify the situation sufficiently for the Court to be able to give the national court an answer which will be of use to it. It is not made clear whether or not the advertising in question is found on the product’s packaging, nor is it explained what is the specific omission alleged against Mrs Bellamy. In that connection, it is significant that before the Court the two participants in the proceedings differed on the latter point, Mrs Bellamy explaining that she is being prosecuted for having used the description ‘pasteurised whole fresh milk’, thus giving the impression that the milk was fresh although it had been pasteurised, and the Commission suggesting that she is accused of using the description ‘Breakfast Milk’ and omitting the statutory description ‘pasteurised whole fresh milk’.
- 27 In those circumstances, the Court considers that it is not in a position to give a useful answer to the second part of the third question.

Costs

- 28 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Tribunal de première instance de Bruxelles by judgment of 28 March 2000, hereby rules:

1. A rule of a Member State prohibiting the marketing of bread and other bakery products whose salt content by reference to the dry matter exceeds the maximum permitted level of 2 %, when applied to products which have been lawfully manufactured and marketed in another Member State, constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 28 EC.

Such a rule is likely to hinder trade between Member States and cannot be regarded as justified under Article 30 EC on the ground of protecting public health.

2. Article 28 EC does not preclude a national rule which prohibits giving the impression that the branded product possesses particular qualities when in fact all similar foodstuffs display the same qualities.

Gulmann

Macken

Cunha Rodrigues

Delivered in open court in Luxembourg on 5 April 2001.

R. Grass

C. Gulmann

Registrar

President of the Third Chamber