

1. Within the system established by Article 177 of the Treaty, it is for the national courts to weigh the relevance of the questions which they refer to the Court, in the light of the facts of the cases before them.
2. 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.
3. The provisions of Directive 79/112/EEC relating to the labelling and presentation of foodstuffs, 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.

REPORT FOR THE HEARING

delivered in Case 298/87 *

I — Facts and procedure

1. In France, the name 'yoghurt' is the subject of Decree No 63-695 of 10 July 1963 laying down rules of public administration for the application of the law of 1 August 1905 on the prevention of fraud with regard to fermented milk and yoghurt (*Official Journal of the French Republic* of 16 July 1963, p. 6512). Pursuant to Article 8 thereof, which was repealed in 1982, the name 'yoghurt'

and usual practices, by the growth solely of the lactic bacteria *lactobacillus bulgaricus* and *streptococcus thermophilus*, which must be introduced at the same time and be alive in the product put on sale. The quantity of lactic acid contained in the yoghurt must not be less than 0.8 grams per 100 grams at the time of sale to the consumer'.

'shall be used to designate only "fermented milk", obtained, in accordance with proper

Pursuant to Article 6 of Decree No 63-695 the Ministers for Agriculture and Health adopted on 29 June 1978 a Ministerial

* Language of the Case: French.

Decree, which in Article 1 defines yoghurt as being a 'fresh dairy product'.

On the application of Smanor SA (hereinafter referred to as Smanor), the undertaking against which the main proceedings were brought, the Conseil d'Etat, by a judgment of 25 July 1980, declared this decree void, having found, *inter alia*, that:

'The Ministers for Agriculture and for Health were not empowered to prohibit, as they did by means of the contested provision, the sale under the name of yoghurt of these deep-frozen products since the latter satisfied the definition of yoghurt as provided for in Article 8 of the Decree of 10 July 1963 ...'.

By Decree No 82-184 of 22 February 1982 (*Official Journal of the French Republic* of 25 February 1982, p. 676), Article 8 of Decree No 63-695 was repealed and a new Article 2 was introduced which governs the use of the name yoghurt as follows:

'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 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. The milk used for the manufacture of the yoghurt must not have been reconstituted. However, powdered milk, whether skimmed or not,

may be added up to a maximum dose of 5 grams of powder per 100 grams of milk used. After coagulation of the milk, the yoghurt must not be subjected to any treatment other than refrigeration, and possibly stirring. The amount of free lactic acid contained in the yoghurt must not be less than 0.8 grams per 100 grams at the time of sale to the consumer'.

By a judgment of 19 November 1986, the Conseil d'Etat dismissed an application brought by Smanor and by the National Association of Manufacturers of Deep-frozen and Frozen Products for a declaration that Decree No 82-184 was void.

2. Smanor is a French company specializing in the production and wholesale of deep-frozen products including natural yoghurt and yoghurt containing pieces of fruit, which it subjects to a deep-freezing process 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 aforesaid French provisions from marketing such products under the name 'yoghurt' and thus to require it to sell those products on French territory under the name 'deep-frozen fermented milk'.

Smanor encountered financial difficulties and proceedings were brought against it before the tribunal de commerce, L'Aigle, for compulsory reconstruction. That court considered that Smanor's financial problems stemmed to a large extent from the French rules relating to yoghurt which have the effect of forcing Smanor either to abandon its French outlets or to sell its deep-frozen yoghurt illegally. The tribunal de commerce of L'Aigle therefore stayed the proceedings

by a judgment dated 15 June 1987, and supplemented by a judgment of 21 September 1987, and requested the Court of Justice to give a preliminary ruling 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 foodstuffs for sale to the ultimate consumer (Official Journal 1979, L 33, p. 1) (hereinafter referred to as 'the directive'), in relation to Decree No 82-184 of 22 February 1982.

3. The orders making the reference were received at the Court Registry on 2 and 9 October 1987 respectively.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Smanor, represented by J. Mendel, of the Paris Bar, by the Government of the French Republic, represented by J.-P. Puissochet, acting as agent, by the Netherlands Government, represented by E. F. Jacobs, acting as agent, and by the Commission of the European Communities, represented by C. Durand, a member of its Legal Department.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and, pursuant to Article 95 (1) of the Rules of Procedure, it assigned the case to the Third Chamber.

II — Written observations submitted to the Court

1. *Articles 30 to 36 of the EEC Treaty*

(a) Smanor argues that Decree No 82-184 prohibiting the production and marketing in France of deep-frozen yoghurt is a measure having an equivalent effect to a quantitative restriction within the meaning of Articles 30 and 34 of the Treaty. It has the effect of prohibiting the importation into France of deep-frozen yoghurt originating in other Member States, most of which permit the sale of this product, and also prevents production in France, and consequently, the export of deep-frozen yoghurt to other Member States. The absence of rules at Community level governing the production and sale of yoghurt cannot leave this product outside the scope of Article 30, as Article 36 of the Treaty does not permit the French authorities to prohibit the importation or marketing of products lawfully circulating in another Member State.

Moreover, it has been shown that the deep-freezing of yoghurt is not harmful to the health of the consumer. An expert's report, ordered by the Conseil d'Etat in the context of proceedings brought by Smanor against Decree No 82-184, reveals that the number of viable lactic bacteria in deep-frozen yoghurt diminishes during the period of freezing but may still remain greater than the limit set by the aforementioned decree for several months at -18°C. Furthermore, three hygiene and quality certificates, issued by the French authorities for the export by Smanor of deep-frozen yoghurts to non-member countries, certify that the products 'are hygienic, proper and of merchantable quality' and that 'no substance

dangerous to the health of consumers enters into the production process'.

(b) The French Government argues that the dispute in the main proceedings does not fall within the scope of Article 30 *et seq.* of the Treaty inasmuch as it concerns only the application of national law to a French company manufacturing deep-frozen 'yoghurt' on French territory. In the context of a request for a preliminary ruling, the Court is to rule on provisions of Community law only if an interpretation thereof is necessary in order to resolve the dispute. That is not necessary in this case since there is nothing in the dispute in the main proceedings that goes beyond a purely domestic context. The Court has held on several occasions, and in particular in its judgments of 28 March 1979 in Case 175/78 (*Saunders* [1979] ECR 1129), 27 October 1982 in Joined Cases 35 and 36/82 (*Morson and Jhanjan* [1982] ECR 3723), 12 February 1987 in Case 221/85 (*Commission v Belgium* [1987] ECR 719), and of 8 December 1987 in Case 20/87 (*Gauchard* [1987] ECR 4879), that, in the absence of any such feature, the provisions of Community law relating to the free movement of workers, and in the field of freedom of establishment, did not apply to such situations. The same reply should be given to the question now before the Court, which relates to the free movement of goods, since the French rules in question only affect the marketing in France of a product manufactured there by a French company.

(c) The Netherlands Government considers that the main question raised in this case is what are the properties which yoghurt must possess in order to be able to be marketed under that name. Both international standards (Standard No A-11(a) of the

Codex Alimentarius) and the Netherlands rules on the use of the name 'yoghurt' Article 25 (1) of the Melkbesluit (Warenwet) (Milk decree (Trade Regulation) 1974), (*Staatsblad*, p. 699), show that the presence of living micro-organisms deriving from the yoghurt culture is the characteristic feature of the definition of the product which is marketed under this name. If the composition or the characteristic structure of the product were altered by the deep-freezing of the yoghurt, that should be apparent from the name under which the product is sold. However, intra-Community trade in deep-frozen yoghurt cannot be impeded on the ground of the fairness of commercial transactions provided that the consumer is adequately informed of the particular nature of this product.

(d) The Commission considers that Decree No 82-184, as interpreted by the French authorities, constitutes a measure having equivalent effect within the meaning of Article 30 of the Treaty on account of the fact that it prohibits the marketing in France, under the name 'yoghurt' of deep-frozen yoghurt lawfully manufactured and sold in another Member State, although it has been demonstrated that those products, when defrosted, still satisfy the bacteriological conditions laid down by the law. It is clear from the consistent case-law of the Court relating to Article 30 of the Treaty that national legislation may not reserve a generic expression for the sole use of a national variety to the detriment of other varieties from other Member States. That is the situation in this case where the French authorities are requiring deep-frozen yoghurt to be sold under the name 'fermented milk' which is less well-regarded by the consumer. The measure also has the effect of placing at a disadvantage imported products, in respect of which transport and storage in a deep-frozen form would constitute a real advantage in distribution, to the advantage of national production

which is more readily distributed in a fresh state.

The French rules are justified neither by any of the grounds set out in Article 36 of the Treaty nor by any imperative requirement within the meaning of the Court's case-law. The prohibition of the name 'yoghurt' for deep-frozen yoghurt is a disproportionate and inappropriate means of protecting the consumer since there is a more effective and less obstructive means of ensuring such protection, namely by indicating the deep-frozen state in the sales description, on the labelling or the packaging, in accordance with the requirements of the directive. It runs counter to the setting up of a common market, which is open to the development of new techniques of production, freezing and deep-freezing, to restrict the customary name to the fresh product and thus to place at a disadvantage the sale of imported products. Deep-frozen yoghurts are produced and lawfully marketed under that name in other Member States, particularly in Ireland and in the United Kingdom. The laws of the other Member States contain no specific rules relating to deep-frozen fermented milk or yoghurt. Apart from the French rules, only the Spanish, Portuguese and Netherlands rules lay down the minimum number of live bacteria which must be present. The other national rules do not specify the nature of the bacteria or merely state that they must be present in abundant quantities, which is also the expression used in Standard No A-11(a) of the Codex Alimentarius relating to yoghurt.

Moreover it is not necessary to draw a distinction between fresh yoghurt and deep-frozen yoghurt by the use of a different sales name in order to avoid misrepresentation to the public. A series of studies have shown that deep-frozen yoghurt, after

unfreezing, contains living lactic bacteria in quantities which are at least similar to the requirements of French legislation as regards fresh yoghurt put on sale, provided that the deep-freezing takes place under appropriate conditions and is not of excessive duration. The Commission takes the view that the French rules constitute an infringement of Article 30 of the Treaty and the directive and has decided to institute proceedings under Article 169 of the Treaty.

2. Articles 5, 15 and 16 of Council Directive 79/112/EEC

(a) Smanor claims that the French Government did not observe the provisions of Articles 15 and 16 of the directive before enacting decree No 82-184, so that the Commission was not able to give its opinion thereon. At the material time the only provisions were Decree No 63-695, which was observed by Smanor, and the international definition given by the International Dairy Federation, approved by the Member States including France. The latter definition gave no warrant for restricting the definition of yoghurt in the manner of the French rules in question.

(b) The French Government is of the opinion that the tribunal de commerce's reference to Articles 5, 15 and 16 of the directive is not relevant. It is clear from Article 5 of the directive that the Member States' powers regarding the names under which foodstuffs are sold are expressly reserved. National non-harmonized provisions relating to the labelling and presentation of foodstuffs referred to in Article 15 must not be confused with the rules of Member States relating to the names under which products are sold, that is to say the

definition of products, since otherwise Article 5 will be negated. Moreover, the procedure laid down in Article 16 does not apply, in the case of the name under which a product is sold, as that procedure is not mentioned in Article 5.

Consequently, Member States' freedom in this connection is subject only to the bounds of Article 30 *et seq.* of the Treaty.

The tribunal de commerce's questions should therefore be understood as solely referring to an interpretation of these provisions of the Treaty in relation to the decree in question. However, Article 30 *et seq.* of the Treaty do not apply to situations which are purely internal to a Member State, as is the situation in this case (see above at II. 1. (b)).

(c) The Netherlands Government points out that a specific regime applies in the Netherlands to yoghurt whose period of conservation has been extended by heat treatment. Article 27 *bis* of the aforementioned Melkbesluit provides that the resulting product whose living micro-organisms have been killed by heat treatment must be marketed under the description 'yoghurt whose storage life has been extended by heat treatment' in order to inform the consumer of the condition of the product. Since an essential characteristic of the product was altered by the treatment, an approach derived from Article 5 (1) of the directive was chosen rather than a solution based on Article 5 (3).

(d) The Commission is of the opinion that the refusal by a Member State to allow the name 'deep-frozen yoghurt' to be used for

yoghurts which have undergone deep-freezing, whether they are of domestic origin or imported, constitutes an infringement of Articles 2, 5 and 15 of the directive. It asserts that the directive seeks to enact, for all foodstuffs put on the market, Community rules of a general and horizontal nature, which also apply, in the absence of more specific Community provisions, to the designation of deep-frozen yoghurts. Article 5 (1) of the directive relating to the name under which the product is sold aims to ensure that a foodstuff bears the appropriate name so as to ensure that consumers are given as precise and complete information as possible, thereby eliminating in an objective manner the risk that they may be misled. Member States are required to give to each product the name which is appropriate in accordance with the national provisions in force in such a way as to ensure that the aforementioned conditions are observed. The refusal by a Member State to permit a product such as yoghurt to bear this name on the sole ground that it has undergone deep-freezing constitutes an infringement of Articles 2 and 5 (1) of the directive. Any other name and, in particular, the description 'deep-frozen fermented milk' does not correctly inform the consumer as it is a much wider expression which covers various types of dairy products such as kefir, koumiss and others.

Moreover the directive itself provides in Article 5 (3) that the process of deep-freezing must be mentioned in the description of the product, where the omission of this information would be capable of creating confusion in the mind of the buyer. It therefore establishes a rebuttable presumption that the deep-frozen state is simply a supplementary characteristic of the product and that the fact that a product is fresh, deep-frozen or freeze-dried does not normally affect its inherent characteristics. The position would

be different only if the process of deep-freezing altered the composition or nature of the product, which has been refuted in this case by the abovementioned scientific studies showing that the deep-freezing does not in principle affect the bacteriological properties of yoghurt. In those circumstances, the refusal to authorize the use of the name 'yoghurt' on the sole ground that the product is deep-frozen is capable of misleading the consumer and therefore infringes the provisions of the directive.

Moreover, it follows from the general structure of the directive that Article 5 (1), which permits the name under which a product is sold to be laid down by the national provisions in force, does not allow Member States to introduce into their definitions conditions which go beyond the objective of correctly informing consumers and have the effect of excluding national or imported products which have the same basic characteristics as the products to which the name is applied. In this case, the name 'deep-frozen' is best able to comply

with the objective of the aforementioned provision, which is to guarantee the most apt description of a product in order to inform the buyer of its true nature and to distinguish it from similar products.

Finally, Article 15 of the directive prohibits Member States from enacting stricter national rules with regard to foodstuffs than those laid down by the directive. They may derogate therefrom only in the absence of an approximation of national provisions and on imperative grounds exhaustively set out in Article 15 (2) of the directive. The condition that yoghurt must be a fresh product is not however covered by the exceptions provided for. The protection of public health is not in issue since deep-frozen yoghurt is not harmful to health, as was moreover confirmed by the hygiene certificates issued to Smanor for deep-frozen fruit yoghurt and natural yoghurt intended for export to non-member States.

U. Everling
Judge-Rapporteur