

OPINION OF ADVOCATE GENERAL
ALBER

delivered on 22 May 2003 ¹

I — Introduction

II — Legal framework

A — *Community law*

1. These infringement proceedings concern the free movement of cleaning products containing bleach. The Kingdom of Spain prohibits the marketing of products under the name ‘limpiador con lejía’ (‘cleaning product containing bleach’) or similar (hereinafter referred to only as ‘cleaning product containing bleach’), which are lawfully manufactured and marketed in other Member States, if they do not contain at least 35 g active chlorine per litre, as prescribed in Spain. Spain regards this as the minimum concentration necessary to be effective as a disinfectant.

2. Article 28 EC provides that quantitative restrictions on imports and all measures having equivalent effect are to be prohibited between Member States. Article 30 EC provides that exceptions to Article 28 may be justified, among other, on grounds of the protection of health and life of humans. Such prohibition or restrictions are not, however, to constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

3. Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 ² (hereinafter: ‘Decision 3052/95’) established a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community. Article 1 of Decision 3052/95 provides: ‘Where a Member State takes

1 — Original language: German.

2 — OJ 1995 L 321, p. 1.

steps to prevent the free movement or placing on the market of a particular... type of product lawfully produced or marketed in another Member State, it shall notify the Commission accordingly where the direct or indirect effect of the measure is:

- a general ban on the goods,
- a refusal to allow the goods to be placed on the market,
-'

4. Council Directive 88/379/EEC of 7 June 1988 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations³ (hereinafter: 'Directive 88/379') is also relevant to the present case. Article 1(2) provides that this Directive is to apply to preparations which are placed on the market in Member States and which contain at least one dangerous substance, within the meaning of Article 2.

3 — OJ 1988 L 187, p. 14.

Dangerous substances, as defined in Article 2, undoubtedly include chlorine.⁴ Article 7 of the Directive stipulates the information which must be affixed legibly and indelibly to the packaging. This includes, among other, the chemical formulae of the substance, or substances included in the preparation.

5. Article 2 of the Commission's Recommendation of 13 September 1989 for the labelling of detergents and cleaning products⁵ (hereinafter: 'Recommendation') provides that the packaging of detergents and cleaning products should indicate certain constituents, in so far as they are added in a concentration above 0.2%. These constituents include chlorine-based bleaching agents.

6. Article 2(2) of Council Directive 84/450/EEC of 10 September 1984 on the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising⁶ (hereinafter: 'Directive 84/450') defines misleading advertising as 'any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it

4 — Article 2 of Directive 88/379 also refers to the definitions in Article 2 of Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ, English Special Edition 1967, p. 234). Article 4 of that Directive refers to Annex I, which contains a list of dangerous substances classified in accordance with the provisions of Article 3.

5 — OJ 1989 L 291, p. 55.

6 — OJ 1984 L 250, p. 17.

reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor'. Article 3 provides:

'In determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning:

- (a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;

- (b) ...'.

B — *Spanish law*

7. Royal Decree 349/1993⁷ (hereinafter: 'the Decree') applies in this case. Article 2(2) of the Decree defines 'lejía'

(bleach) as a solution of alkaline hypochlorite containing a proportion of active chlorine that must be not less than 35 g per litre and not more than 100 g per litre. Article 5 stipulates the conditions subject to which it is permissible for bleach to be described as 'suitable for disinfecting drinking water'. That is, the chlorine content must be between 35 g and 60 g per litre.

Article 17 of the Decree governs intra-Community trade in products. It provides that regulations as to composition do not apply to products coming from intra-Community trade and which are lawfully manufactured and marketed in the Member State of origin. Provided they pose no risk to human health, these products may be marketed in Spain under the same designation as in the State of origin, including a description that enables the purchaser of the product to determine its contents.

The first supplementary regulation of Decree 349/1993 lays down rules for cases where bleach is a constituent element of a product. The labels of such products may only include the term 'bleach' or 'containing bleach' if the concentration of active chlorine corresponds to that prescribed by law, and it is stated that the product is not suitable for disinfecting drinking water.

⁷ — B.O.E of 20 April 1993, p. 1251.

Article 2 of the Decree provides that the active chlorine content must be in a concentration of at least 35 g per litre.

III — Facts and proceedings

8. A report issued by the Instituto nacional del consumo on 7 April 1998 confirms that the person responsible for marketing the product must provide the authorities with the following documents in order to be able to take advantage of the mutual recognition clause (Article 17 of Decree 349/1993):

- a label which clearly states the true concentration of active chlorine;
- sufficient evidence to show that the products concerned have the same disinfecting power as conventional (that is to say, Spanish) bleach products;
- certified evidence that these products are marketed in the country of origin.

9. Procter & Gamble España, S.A. and Colgate-Palmolive España, S.A. had marketed cleaning products labelled 'bleach' in Spain, although the products contained less than 35 g bleach per litre. After the Consejería de Economía y Empleo de la Comunidad de Madrid (hereinafter: 'the autonomous community of Madrid') had become aware of this, it started penalty proceedings against both undertakings for infringement of the labelling regulations in force in Spain.

10. This event came to the Commission's attention because of a complaint. The Commission then instituted proceedings under Article 226 EC and issued a letter of formal notice to the Spanish Government on 4 November 1999, in which the Commission alleged that the Kingdom of Spain had failed to fulfil its obligations under Article 28 EC et seq., by refusing access to the Spanish market to products lawfully produced and marketed in other Member States under the name 'limpiador con lejía' (cleaning products containing bleach) or similar.

11. With its reply of 28 December 1999, the Spanish Government sent the Commission a report of the Ministerio de Sanidad y

Consumo (hereinafter: 'Ministry of Health and Consumer Affairs'). This made it clear that the marketing of bleach products, or other products containing bleach but contravening Spanish law as to the minimum hypochlorite content, was only permissible if the products were lawfully produced, consumers were informed of the products' actual hypochlorite content, and the products had the same disinfecting power as conventional bleach products.

30 November 2000. It maintained its position and emphasised that the regulations in issue were justified on grounds of health and consumer protection, and that they were proportionate. The Commission then brought an action against the Kingdom of Spain on 19 September 2001.

IV — Forms of order sought

12. On 17 February 2000, the Commission sent a further letter of formal notice to the Spanish Government, in which it stated that the decisions by the city authority of Madrid to refuse access to the market to these products, were measures which contravened the principle of free movement of goods within the Community. The Kingdom of Spain, it claimed, had failed to fulfil its obligations under Decision 3052/95 (cited in point 3), as it had failed to notify the Commission of these measures. The Spanish Government rectified this by e-mail of 1 August 2000.

14. The Commission claims that the Court should

1. declare that, by refusing access to the Spanish market under the name of 'limpiador con lejía' (cleaning product containing bleach) or similar to products lawfully manufactured and marketed in other Member States, with an active chlorine content of less than 35 g per litre, the Kingdom of Spain has failed to fulfil its obligations under Article 28 EC; and
2. order the Kingdom of Spain to pay the costs of the proceedings.

13. However, the Spanish Government did not respond to the further letter of formal notice, and so the Commission submitted its reasoned opinion to the Government on 24 July 2000. The Spanish Government responded to this in writing on

15. The Kingdom of Spain claims that the Court should

V — On the admissibility of the application

1. declare that the information about the undertakings Procter & Gamble España S.A. and Colgate-Palmolive España S.A., as well as about the products in issue in the penalty proceedings, which is contained in the Defence and in its annexes, is confidential,

A — Submissions of the parties

1. Kingdom of Spain

2. declare the application inadmissible, or, in the alternative, restrict it to the procedures initiated by the autonomous community of Madrid with a view to imposing penalties and dismiss it,

17. The Spanish Government argues that the application is inadmissible because the substance of the application in the pre-litigation procedure is not the same as that of the application in the main proceedings. It is the settled case-law of the Court that the application in the infringement proceedings must be substantively the same as in the reasoned opinion. The substance of the application cannot be extended in the action; at most, the Commission may restrict or rephrase it. In this case, however, the Commission had, it was argued, extended the subject-matter of the proceedings.

3. in the alternative, dismiss the application,

4. order the Commission to pay the costs of the proceedings.

18. In its letter of formal notice, the Commission had taken the view that the Kingdom of Spain had failed to fulfil its obligations under Article 28 EC et seq. by refusing access to the Spanish market to products lawfully produced and marketed in other Member States under the name 'cleaning product containing bleach'. In its further letter of formal notice, on the other hand, the Commission had focused on the penalty proceedings instituted by the city

16. It is not necessary to consider the first application of the Spanish Government, as the procedure to which it relates is irrelevant to the present dispute.

authority of Madrid. The Commission had noted that the decisions taken in those proceedings constituted measures which conflicted with the free movement of goods within the Community.

19. In its reasoned opinion, the Commission alleged that the Kingdom of Spain had infringed Article 28 EC by making administrative decisions, such as that referred to above. On the other hand, the complaints made in the Commission's application were not limited to these administrative decisions, but were vague and phrased in very general terms. The Commission applied for a declaration that the Kingdom of Spain had failed to fulfil its obligations under Article 28 EC et seq., by refusing access to the Spanish market to products lawfully produced and marketed in other Member States under the description 'cleaning product containing bleach' where these contain less than 35 grams active chlorine per litre. This reference to the minimum content appears for the first time in the application. This, therefore, amounts to an inadmissible extension of the substance of the application, and that is why the application should be struck out as inadmissible.

2. The Commission

20. The Commission is of the view that the Spanish Government's approach is based on a misunderstanding of the reasoned opinion. Essentially, this concerned the

problem of refusing access to the market to products lawfully produced and marketed in other Member States under the name 'cleaning product containing bleach' where these have an active chlorine content of less than 35 grams per litre. The administrative sanctions and the report of the Spanish national consumer institute of 7 April 1998 were raised as examples, which, the Commission maintains, is apparent from the terms of the application. The reference to the report was particularly important, as it is argued in both the reasoned opinion and the application, that this interprets the mutual recognition clause in Article 17 of Decree 349/1993. The report applies in the whole of the territory of Spain, and its significance can be seen also in the fact that it is expressly referred to in the judgment of the Administrative Court of Madrid of 11 December 2000.

21. It follows from all of this that the reasoned opinion deals with the problem of refusing access to the market generally, and that the pre-litigation procedure was not limited to the question of sanctions in the penalty proceedings either. Ultimately, the Commission had merely repeated in its application the conclusions in the reasoned opinion, without altering the substance of the dispute. Rephrasing the issue in dispute is permitted, according to the settled case-law of the Court, as the Spanish Government had also stated in its written submission. Therefore, the Commission asks the Court to dismiss the plea of inadmissibility.

B — *Assessment*

22. It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under Community law and to defend itself effectively against the charges laid by the Commission.⁸ That is why the matter in issue is limited by the pre-litigation procedure and may not be extended in the application. The definition of the subject-matter of the dispute arises from the letter of formal notice and the reasoned opinion. Extending the subject-matter of the dispute in the application would prejudice the Member State's right of defence, which is why the claim may not be based on pleas other than those raised in the pre-litigation procedure.⁹

23. As the Court explained in paragraph 56 of its judgment in Case C-191/95:¹⁰ '[h]owever, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter

of the proceedings has not been extended or altered but simply limited'.

24. In this case the Commission cannot be accused of having extended the subject-matter of the proceedings in the application beyond that raised in the pre-litigation procedure. It is quite clear from the letter of formal notice, that the subject-matter of the proceedings is generally the refusal of access to the market to foreign products, which results from the Spanish authorities' interpretation of Decree 349/1993. The Commission concludes in its letter of formal notice that the Kingdom of Spain has failed to comply with Article 28 EC et seq. by refusing access to the Spanish market to products lawfully produced and marketed in other Member States under the name 'cleaning product containing bleach'. The decisions of the autonomous community of Madrid are not referred to in this letter of formal notice; the Commission only refers to them in its further letter of formal notice.

25. As described in point 22 of this Opinion, the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to state its case in response to the charges formulated by the Commission. The Court has declared, for example in Case 51/83,¹¹ that 'the opportunity for the Member State concerned to submit its observations constitutes an essential guarantee required by the Treaty and, even if the Member State does

⁸ — See Cases C-152/98 *Commission v Netherlands* [2001] ECR I-3463, paragraph 23, and C-439/99 *Commission v Italy* [2002] ECR I-305, paragraph 10.

⁹ — Cases 51/83 *Commission v Italy* [1984] ECR 2793, paragraph 4, C-206/96 *Commission v Luxembourg* [1998] ECR I-3401, paragraph 13, C-392/96 *Commission v Ireland* [1999] ECR I-5901, paragraph 51 and C-340/96 *Commission v United Kingdom* [1999] ECR I-2023, paragraph 36.

¹⁰ — Case C-191/95 *Commission v Germany* [1998] ECR I-5449.

¹¹ — Case C-51/83 (cited in footnote 9, paragraph 5).

not consider it necessary to avail itself thereof, observance of that guarantee is an essential formal requirement of the procedure [for a declaration of the failure by a Member State to fulfil its obligations]'. The Kingdom of Spain had the opportunity to respond to the general charge of denying access to the market. The Commission's letter of formal notice is broadly drafted; the Spanish authorities could, therefore, have taken note of the charges raised, and availed themselves accordingly of their right to defend themselves.

26. It is true that the Commission refers to the said administrative decisions as the subject of its reasoned opinion, but further on in the text it is clear that the charge is laid in broader terms. Thus, in the crucial paragraph of the application, the Commission repeats the charge that the Kingdom of Spain has failed to fulfil its obligations under Article 28 EC, by taking measures *such as* the said administrative decisions or the report from the Spanish national consumer institute by which access to the Spanish market was refused to foreign products. The fact that the Spanish authorities were aware of this can be seen from the response to the reasoned opinion. This refers literally 'to the reasoned opinion of the Commission with regard to the obstacles to intra-Community trade, caused by Spanish legislation relating to bleach'.

27. According to the settled case law of the Court,¹² the reasoned opinion should represent a detailed and logical exposition of the grounds on which the Commission has come to the view that the Member State has failed to fulfil its obligations under the Treaty. These requirements have been fully met in the present case.

28. It follows from all this that it is not extension of the subject-matter of the proceedings for the Commission to allege in its application against the Kingdom of Spain that it has failed to fulfil its obligations under Article 28, by refusing access to the Spanish market to products lawfully produced and marketed in other Member States under the name 'cleaning product containing bleach'. The pre-litigation procedure and the application are based on identical complaints. Whilst the Commission has presented the issue in different terms in the letters of formal notice, it is nevertheless clear in each that the subject-matter of the proceedings is not limited to the administrative decisions. The pre-litigation procedure provided the Spanish authorities with all the information necessary to enable it to defend itself in the subsequent infringement proceedings. The claim is, therefore, to be regarded as admissible and cannot be limited to the decisions of the autonomous community of Madrid. The application by the Kingdom of Spain should, to that extent, therefore, be dismissed.

12 — Compare, for example, Cases 274/83 *Commission v Italy* [1985] ECR 1077, paragraph 21, C-247/89 *Commission v Portugal* [1991] ECR I-3659, paragraph 22 and C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 30.

VI — The merits of the application

A — *Submissions of the parties*

1. The Commission

29. The Commission's complaint against the Kingdom of Spain is that the provisions of Decree 349/1993, as interpreted by the Spanish authorities, constitute restrictions. The argument put forward by the Spanish Government, that these measures are justified on grounds of consumer protection, should be rejected, according to the Commission. It is simply not possible, and thus disproportionate, to require that a product composed of several ingredients should present the same characteristics as a single one of those ingredients, namely pure bleach. In truth, the Spanish authorities' interpretation of Decree 349/1993 completely negates the principle of mutual recognition laid down in Article 17 of the Decree. Indeed, the purpose of the mutual recognition clause is precisely to facilitate the marketing of bleach and, moreover, of products containing bleach, in Spain.

30. The Commission refers further to the substantial case-law of the Court on labelling. Affixing a label bearing a description of the nature and contents of the product being marketed, would have a far less

restrictive effect on trade than a ban. Various Community regulations exist in respect of washing and cleaning products in relation to labelling. These include, for example, Directive 88/379 or the Recommendation of the Commission of 13 September 1989. The application of these regulations allows the consumer to find out about the product ingredients. This could remove the risk of confusing 'bleach' with a 'product containing bleach'.

31. In its response, the Commission emphasises that marketing products with a low bleach content in Spain would pose no risk to human health. Pure bleach products, to which consumers can resort if they require its particular disinfecting qualities, remain on the market. It appears unlikely that consumers would stop purchasing pure bleach products.

32. As regards active chlorine content, the Commission refers to various documents. These show that the disinfecting power of cleaning products takes effect even at concentrations of far less than 35 g/litre. In the Commission's view, the ban on marketing is, therefore, disproportionate.

2. Kingdom of Spain

fied on the grounds of health protection, as the consumer must have a product at his disposal that ensures total disinfection.

33. Before responding to the complaints made by the Commission, the Kingdom of Spain explains the characteristics of bleach and its use by Spanish consumers. The main ingredient of bleach is hypochlorite. In Spain, bleach products are primarily used for domestic cleaning and disinfection, as they are the most effective disinfectants.

36. There would be a risk to the health and protection of the consumer if imported products did not have the same active chlorine content as those to which the Spanish consumer is accustomed and which he expects. Marketing products described as 'bleach', which have only a weak disinfecting power, is, furthermore, misleading advertising within the meaning of Directive 84/459.

34. There is no Community standard for harmonisation of bleach, therefore it is for Member States to issue regulations concerning the manufacture and marketing of a product in their respective territories. Obstacles to internal trade which arise from differences in national laws on marketing must be accepted, in so far as they are necessary to meet overriding requirements such as, for example, protection of human health.

37. Should the Court take the view that this is not the case, then the measures may be justified on grounds of consumer protection. The Spanish consumer knows bleach because of its bleaching and disinfecting characteristics, and chooses this product in reliance on the information available on the label. So far as these imported products are concerned, the label does not describe the real nature of the product. Affixing an appropriate label would not solve the problem, as even the average informed and alert consumer would not be in a position to understand the information on the label of a cleaning product. Bleach cannot be compared to foodstuffs in this respect. If a Spanish consumer purchased a product labelled 'bleach', he would associate it with optimum disinfecting qualities.

35. The Kingdom of Spain recognises that the ban at issue is a measure having equivalent effect to a quantitative import restriction. This could, however, be justi-

38. In its rejoinder, the Spanish Government emphasises that access to the Spanish market is entirely possible for products lawfully produced and marketed in other Member States. Those who wish to bring such products onto the market must, however, prove that they have the same disinfecting characteristics as conventional bleach products. This is not disproportionate or contrary to the provisions of the EC Treaty.

to be met by such goods, such as those relating to presentation, labelling and packaging, even if those rules apply without distinction to domestic products and imported products.¹⁴

40. Consequently it must be considered to what extent the Spanish ban on bringing products onto the market, which contain less than 35 grams active chlorine per litre, but which are lawfully marketed and marketed in other Member States under the name of ‘cleaning product containing bleach’, represents an obstacle to the free movement of goods.

B — *Assessment*

39. According to Article 28 EC quantitative restrictions on imports and all measures having equivalent effect are to be prohibited between Member States. It is settled case-law that any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade, constitutes a measure having equivalent effect to a quantitative restriction.¹³ In the absence of harmonisation of laws, Article 28 EC prohibits, generally, obstacles to intra-Community trade which are the consequence of applying, to goods coming from other Member States, where they have been lawfully manufactured and marketed, rules that lay down requirements

1. Is there an obstacle to the free movement of goods

41. The parties are unanimous in their view that the Spanish ban represents a measure which has equivalent effect to a quantitative import restriction. This view should prevail.

42. Decree 349/1993 prohibits the marketing of products lawfully manufactured in other Member States under the name ‘cleaning product containing bleach’ where

¹³ — Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5, and Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 11.

¹⁴ — Case C-217/99 *Commission v Belgium* [2000] ECR I-10251, paragraph 16.

these contain less than 35 grams active chlorine per litre. As I argued in my Opinion in Case C-14/00,¹⁵ manufacturers based in other Member States are forced, through such a ban, to alter the composition of their products if they wish to market them in Spain under the name 'cleaning product containing bleach'. To that extent, the law restricts access to the Spanish market for products lawfully manufactured in other Member States, and, consequently, restricts the free movement of such goods within the Community.¹⁶

manufactured in other Member States under the trade description 'cleaning product containing bleach'. According to the case-law cited above, such conduct amounts to a measure having equivalent effect to a quantitative restriction.¹⁷

43. In the present case, it is true that the trade description, 'cleaning product containing bleach', is not reserved to Spanish products. Rather, it may be applied to any product containing at least 35 grams active chlorine per litre. According to information given by the Commission, comparable products are also marketed in other Member States, albeit with a lower chlorine content; only in Belgium is the concentration as high as in Spain. The Spanish authorities point out that the products which were at issue in the penalty proceedings contained significantly less active chlorine, namely 9 grams per litre and 10.4 grams per litre. The Spanish regulations thus favour a typical domestic product and, at the same time, operate to the disadvantage of products lawfully

44. The Spanish Government argues that these products may be marketed under the name 'cleaning product containing bleach' if the three conditions set out in the report of the Instituto nacional del consumo have been met. To that extent, access to the Spanish market is not, in principle, prohibited. The interpretation by that institute of the mutual recognition clause does not conflict with the text of Article 17 of Decree 349/1993 or, consequently, with the Community's rules on the free movement of goods.

45. This argument cannot stand. Fulfilment of the prescribed conditions, or rather, submission of the requisite evidence, amounts to an additional requirement for foreign products, which hinders the free movement of bleach products. If the Spanish authorities interpret the mutual recognition clause in this manner, they are undermining its purpose altogether.

15 — Opinion of 6 December 2001 in Case C-14/00 *Commission v Italy* [2003] ECR I-513, points 33 and 36.

16 — See also Cases 193/80 *Commission v Italy* [1981] ECR 3019, paragraph 26 and Case 286/86 *Ministère public v Deserbais* [1988] ECR 4907, paragraph 12.

17 — See Case 193/80, cited in footnote 16, paragraph 20.

46. The Spanish Government explains, furthermore, that the products could be marketed in Spain under the trade description ‘contiene blanqueantes a base de cloro’ (containing chlorine-based bleach). As far as this option is concerned, it should be noted that the use of this description brings with it the possibility of a negative consumer response. If the consumer sees a product labelled in this way, he could easily believe that he is not buying a conventional disinfectant, since this would normally be labelled ‘bleach’. There is, therefore, a possibility that the consumer would not consider this product to be up to standard, or that he would regard it as inferior to bleach products. Therefore, the option of describing the product differently does not prevent the ban at issue from resulting in a restriction of the free movement of goods.

47. We can, therefore, conclude at this stage that the Spanish regulations at issue do constitute an obstacle to the free movement of goods.

2. Justification for the restriction of free movement of goods

48. The Spanish Government’s first line of argument to justify the regulations at issue

is on the grounds of the protection of health or, if the Court should not accept this, the requirements of consumer protection.

3. Justification on the grounds of health protection

49. The protection of health is recognised both under Article 30 EC, and as an overriding requirement for the possible justification of a measure having equivalent effect. In order to be able to justify a measure having equivalent effect on the grounds of health protection, it must comply with the principle of proportionality; that is, it must be suitable, necessary and reasonable.

50. The Spanish provision is undoubtedly suited to protecting the health of the Spanish population. Because of the ban, Spanish consumers can only buy products with a relatively high active chlorine content, which have very strong disinfecting qualities. The likelihood is thus higher that use of these products will result in as many germs being killed as possible.

51. In order for the provision at issue to be compatible with Community law, however,

it must not exceed that which is required to achieve its purpose. The Commission's submissions reveal that comparable bans do not apply in other Member States, where products with a significantly lower active chlorine content are marketed. The case for necessity could be supported by the Spanish Government's argument that relatively high temperatures prevail in Spain. The probability of micro-organisms multiplying is, therefore, high, and, in order to keep in check the associated risks, disinfection is a necessary measure for the preservation of public health.

The consumer would remain free, as now, to opt for a Spanish product, if he wished to have a particularly strong disinfectant. This argument is valid. The settled case-law of the Court¹⁸ presumes the consumer to be an informed adult, who may easily be trusted to make a conscious purchasing decision.

52. In this connection, it must be emphasised that the bleach cleaning products described are used for household cleaning, and not to disinfect medical instruments, hospitals or other public places. Nor are they used to disinfect drinking water or fruit or vegetables. The parties are agreed on this. This is relevant, as the disinfecting qualities a product should have are determined by its use. In the present case, the disinfectant power of the products does not, therefore, need to be as high as if they were used, for example, to disinfect drinking water.

54. Both parties have put forward different studies of the effect of active chlorine and the point at which, in terms of content, the disinfecting qualities start to take effect. These show that the requisite concentration is affected by various factors, such as, for example, the type of micro-organism which is to be destroyed. The studies reveal that effective disinfection takes place even at levels significantly below an active chlorine content of 35 grams per litre. In this connection, mention should also be made of the decision of the Administrative Court of Madrid on 11 December 2000,¹⁹ in which it is stated that an active chlorine content of at least 10 grams per litre in a cleaning product with bleach, has the same disinfecting qualities as pure bleach. Even the Spanish technical-sanitary regulations provided, until they were amended by Decree 349/1993, that products with an active chlorine content of at least 20 grams per litre could be described as 'bleach'. The

53. The Commission points out that the consumption of Spanish bleach products would not cease if products from other Member States were marketed in Spain.

18 — See, for example, Case C-220/98 *Estée Lauder* [2000] ECR I-117, paragraph 30.

19 — Defence, Annex 6.

concentration required by the Spanish regulation now in force is thus significantly higher than is necessary.

the justification on grounds of consumer protection, as the issues are similar. It must be concluded, therefore, that the complete ban on marketing on grounds of health protection cannot be justified.

55. National measures which have, or could have, a restrictive effect on the import of goods, are only compatible with the Treaty if they are necessary for the effective protection of health and human life. A national law or practice conflicts with Article 30 EC, therefore, if health or human life could be equally effectively protected by measures which are less restrictive of intra-Community trade.²⁰

4. Justification on grounds of consumer protection

56. As the cleaning products with bleach are lawfully manufactured and marketed in other Member States, it cannot be assumed that they endanger the health of the Spanish population. The special circumstances which exist in Spain and which may make the use of particularly strong disinfectants necessary, may be addressed by measures which are less restrictive of intra-Community trade than a complete marketing ban. One option, for example, would be to label the products appropriately. This possibility will be examined more closely in relation to

57. As I argued in my Opinion in Case C-14/00, it is settled case-law²¹ that obstacles to intra-Community trade resulting from disparities between provisions of national law, in those areas not covered by Community legislation, must be accepted in so far as such provisions are applicable to domestic and imported products without distinction and may be justified as being necessary in order to satisfy overriding requirements, particularly consumer protection. The relevant provisions are, however, only permissible if they are proportionate to the objective pursued and that objective must not be capable of being achieved by measures which are less restrictive of intra-Community trade.²²

20 — See, in this respect, Cases 215/87 *Schumacher* [1989] ECR 617, paragraph 18 and C-320/93 *Ortscheit* [1994] ECR I-5343, paragraphs 16 and 17.

21 — See, for example, Case C-313/94 *Graffione* [1996] ECR I-6039, paragraph 17.

22 — See my Opinion in Case C-14/00, cited in footnote 15, point 39.

58. The Spanish regulations apply without distinction to domestic and foreign products. Thus the first condition is met.

59. The Spanish Government maintains the view that the ban at issue is justified on consumer protection grounds. Spain is the member of the European Community with the highest consumption of bleach per member of the population. The Spanish consumer has traditionally only known bleach products with a high active chlorine content, and expects the same from imported products. If these are marketed in Spain, the consumer would be at risk of confusing the products, and not achieving the disinfectant effect he expects and requires. This could have negative consequences for the consumer.

60. The Court has acknowledged consumer protection to be an overriding requirement,²³ which is generally capable of justifying measures which restrict the free movement of goods. Thus the second condition is also met.

61. It must, therefore, be considered whether the measure is proportionate to the objective pursued. The Commission takes the view that it is impossible to insist that a product, which consists of several ingredients, should have the same qualities as one of its ingredients. Further, consumer protection may be achieved by measures which have a less restrictive effect on intra-Community trade. According to the settled case-law of the Court, in the absence of harmonisation at Community level, such national measures are compatible with Article 28 et seq. of the Treaty as are necessary in order to ensure the correct description of products and thereby prevent any mistake by the consumer, and guarantee the integrity of trade.²⁴

62. The ban on marketing 'cleaning products with bleach' under this description is suitable for protecting the Spanish consumer from mistakes. The ban also ensures that only bleach products containing at least 35 grams active chlorine per litre are offered for sale, and that the customs and expectations of Spanish consumers are thereby met.

63. Thus, the question is whether the ban is also necessary for the achievement of the objective. The Commission takes the view

23 — See, for example, Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 15.

24 — Case C-51/94 *Commission v Germany* [1995] ECR I-3599, paragraph 31, Case 216/84 *Commission v France* [1988] ECR 793, paragraph 11 and Case 76/86 *Commission v Germany* [1989] ECR 1021, paragraph 17.

that the ban is not necessary, and proposes, for example, the affixing of appropriate labelling, containing information about the manufacture and relevant characteristics of the product. The Court has, in its case-law, acknowledged that labelling which describes the nature and characteristics of the product being sold, is, as a rule, a less drastic measure.²⁵ The Spanish Government takes the view that this solution cannot guarantee consumer protection to the same extent, as the consumer would not really be able to understand and assess the information on the label. Furthermore, scientific analysis would be necessary to identify the disinfectant strength of the product, which the consumer himself would be unable to carry out.

in another Member State. The importing Member State may not prohibit the import and trade of such products under this generic description if consumers are not provided with information.²⁷

64. The Court has, in earlier cases, repeatedly held that the fact that consumers in a Member State may have a particular expectation of the composition of a product, is not sufficient to justify the restriction of the free movement of goods.²⁶ Further, it has found that it is incompatible with Article 28 EC and the aims of the Common Market, for a Member State to prohibit the use of a particular description for the same type of imported products, which have been lawfully manufactured and marketed

65. As I argued in my Opinion in Case C-14/00,²⁸ the Court has, in what is now a fairly comprehensive body of case-law on the use of trade descriptions for foodstuffs, consistently presumed the existence of an intelligent consumer, who can be expected and trusted to inform himself.²⁹ Thus, according to the case-law, it must be assumed that consumers who are guided in their purchasing decisions by the composition of the products in question will first read the list of ingredients. The Court has recognised the risk that the consumer could be misled in isolated cases.³⁰ To that extent, the reservations which the Spanish Government has put forward are basically justified. However, according to the case-law, the risk is minimal, and cannot justify obstacles to the free movement of goods.³¹ There appears to be no basis in the present proceedings for departing from settled case-law.

25 — See, for example, Case C-184/96 *Commission v France* [1998] ECR I-6197, paragraph 22.

26 — See, in this regard, Case 193/80, cited in footnote 16, paragraph 23, Case 178/84 *Commission v Germany* [1987] ECR 1227, paragraph 26 and Case C-51/94 (cited in footnote 24, paragraph 32).

27 — Case C-210/89 *Commission v Italy* [1990] ECR I-3697, paragraph 13.

28 — See my Opinion in C-14/00 (cited in footnote 15, point 50).

29 — Case C-3/99 *Ruwet* [2000] ECR I-8749, paragraph 53.

30 — Case C-51/94 (cited in footnote 24, paragraph 34).

31 — Case C-51/94 (cited in footnote 24, paragraph 34).

66. The Spanish Government argues that the case-law which has been developed by the Court in relation to labelling does not apply to the present case. Case-law has developed in relation to foodstuffs and cosmetics, and cannot be applied to cleaning products such as bleach, as consumers cannot assess the disinfectant qualities of the product by reading the label. This point cannot be accepted.

products with bleach to Spain must comply with. Article 7 of the Directive stipulates the information which must be quite legibly and indelibly affixed to the packaging. Article 7(c) provides that the chemical composition of the substance or substances must be stated according to the regulations set out therein. It must be assumed that the level of safety set by the Directive is adequate to satisfy the consumer protection argument put forward by the Spanish Government.

67. As the Commission has correctly argued, it cannot generally be said that the labels of cleaning products are any less intelligible than those of foodstuffs or cosmetics. The Court presumes, in its judgments, that the average consumer is reasonably well informed, observant and circumspect.³² There is no reason to assume that the consumer is only able to decipher the label of a food or cosmetic product, and not that of a cleaning product. The case-law with regard to labelling is, accordingly, applicable to the present case.

68. This is supported by the fact that Directive 88/379 provides rules for labelling dangerous substances, which manufacturers who wish to export cleaning

69. Also to be rejected is the Spanish Government's argument that products which are lawfully manufactured and marketed in other Member States under the name 'cleaning product with bleach' fall foul of Directive 84/450 on misleading advertising. The labels affixed to these products do not mislead the consumer as to the true characteristics of the product, for the products are described as 'gel with bleach' or 'spray with bleach'. The word 'with' clearly shows the consumer that he is purchasing a product which also includes bleach, but is not only bleach. Furthermore, the products which were the subject of administrative decisions, also contained details of their composition. The true nature of the products is not withheld from the consumer. It follows that this is not a case of misleading advertising in the sense of Directive 84/450.

32 — Cases C-470/93 (cited in footnote 23, paragraph 24) and Case C-220/98 (cited in footnote 18, paragraph 30).

70. As a result it must be concluded that the ban on marketing products which are lawfully manufactured and marketed in other Member States under the name ‘cleaning product with bleach’ is disproportionate, because it is not the simplest means of ensuring that the Spanish consumer is protected from mistaking these for Spanish bleach products. The requirement of appropriate labelling is less invasive in terms of the free movement of goods. To that extent, the Spanish provision is not suited to justifying the established restriction of the free movement of goods. It follows that the Commission’s application must be upheld.

VII — Costs

71. According to Article 69(2) of the Rules of Procedure, the unsuccessful party must bear the costs, where an application to that effect has been made. As the Kingdom of Spain has failed in its submissions, and the Commission has applied for the Kingdom of Spain to bear the costs, the Kingdom of Spain should be ordered to pay the costs.

VIII — Conclusion

72. On the basis of the foregoing, it is proposed that the Court should rule as follows:

- (1) By refusing access to the Spanish market to products lawfully manufactured and marketed in other Member States under the name of ‘limpiador con lejía’ (cleaning product containing bleach), or similar, with an active chlorine content of less than 35 grams per litre, the Kingdom of Spain has failed to fulfil its obligations under Article 28 EC.
- (2) The Kingdom of Spain shall pay the costs of the proceedings.