Judgments of the European Court of Justice in cases C-24/00 and C-95/01

Note to the Attention of the « Syndicat de la Diététique et des Compléments Alimentaires »

Re: Judgments of the European Court of Justice in cases C-24/00 and C-95/01

The European Court of Justice (ECJ) has on February 5, 2004 issued its long awaited judgments in Cases C-24/00 Commission v French Republic (infringement procedure) and C-95/01 Public Ministry v John Greenham and Leonard Abel (preliminary ruling).

These cases concerned obstacles to the free movement of foodstuffs and food supplements with added nutrients that have been marketed in France without prior authorisation or in a quantity exceeding recommended daily allowances set down in France.

Within the infringement procedure (Case C-24/00), the Commission specifically alleged that French legislation failed to oblige competent authorities to establish in each case and for each product that the adopted prohibiting measures are necessary to protect public health.

In the other case (C-95/01), the question referred to the ECJ for a preliminary ruling concerned the interpretation under EU Law of such a legislation which does not in particular set a clear authorization procedure easily accessible to operators and does not allow for the processing of applications in a reasonable period of time.

These two judgements are in line with the landmark judgment of September 23, 2003, Commission v Kingdom of Denmark (case C-192/01) in which the Court clearly affirmed the principles and obligations with which Member States must comply and which have been recalled and applied to these specific cases. France has therefore no other choice but to comply with them, as stressed by the European Commission in its detailed opinions on the incompatibility with EU law of the two French draft regulations on food supplements.

In this recent case-law, the Court has once again recalled that although the Member States enjoy, in absence of harmonization and in case of persisting uncertainty in the current state of scientific research, broad discretion to establish the level of public health protection they wish to ensure and may, in this context, establish a prior authorization procedure, they must however comply with certain conditions.

The Authorization Procedure

First, the authorization procedure established must be easily accessible for the operators and completed in a reasonable period of time (90 days); unfavourable decisions must be open to challenge before courts. Such a procedure must be laid down in a measure of general application, which is binding on the authorities. In this regard, the Court held in cases C-24/00 and C-95/01 that the French procedure does not comply with these criteria and must be therefore declared as being in breach of the EC Treaty.
The Principle of Proportionality

Second, Member States must comply with the principle of proportionality, which requires that the adopted national measures are limited to what is strictly necessary to achieve the protection of public health. In other words, if there are less restrictive measures allowing achieving this goal, recourse to such measures must be made. In order to adopt measures complying with this principle, Member States must demonstrate in each specific case that their national rules are necessary for public health protection, and specifically that the marketing of the products at stake represents a real health risk. Such a demonstration requires a thorough assessment of the health risk alleged by the Member State so as to appraise the likelihood of harmful effects on human health and the seriousness of those potential effects. In this respect, the ECJ ruled in case C-24/00 that France failed to establish that the marketing of certain disputed foodstuffs entailed a real risk health for public health.

Precautionary Principle

Third, the Court has again underscored that it is only where such a risk assessment reveals that scientific uncertainty persists as regards the existence or extent of real risk to human health that Member States may, in accordance with the precautionary principle, adopt protective measures without having to wait until the existence and gravity of those risks are fully demonstrated.

Absence of Nutritional Need

Further, while recognising that the nutritional need may play role in such a detailed risk assessment, the Court has reaffirmed that the absence of nutritional need cannot, by itself, justify a total prohibition of marketing.

Mutual Recognition Clause

The Court has rejected a plea submitted by the Commission concerning the absence of a mutual recognition clause in the French legislation, considering that France has opted for a pre-market approval system, which conclusion may not however be interpreted as exempting it from complying with its obligations deriving from the EC Treaty, as interpreted by the EC courts, and in particular, with the mutual recognition principle.