CONSEIL DE L'EUROPE

COUNCIL OF EUROPE



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THE FACTS

The applicant, Mr Dirk Ooms, is a Belgian national who was born in 1961 and lives in Geel. He was represented before the Court by Mr Claude-André Chas, a lawyer practising in Nice. The French Government ("the Government") were represented by their Agent, Mrs Edwige Belliard, Director of Legal Affairs at the Ministry of Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

Until November 2001 the applicant was the managing director of Diet, a company incorporated under French law. The company ran a mail-order business selling food supplements designed to aid weight loss. Among these were a liquid product called Forskoline 500 and effervescent tablets called Sveltys-Lyghtyss. The applicant indicated that these had been purchased from "a laboratory with the normal accreditation for such products", based in Monaco.

The applicant added that the products in question had previously been marketed in Belgium and that "for this reason, the Belgian Federal Ministry of Social Affairs, Public Health and the Environment had, in accordance with the procedure in place in the country, authorised [their] release onto the market after verification of [their] conformity as a nutrient[s] within the meaning of Community legislation and in particular Directive No. 95/2/EC of 20 February 1995". In that connection he provided, in particular, a document dated 28 September 2001, issued by the General Inspectorate of Foodstuffs, acknowledging receipt of a "notification file" and assigning a "plant number" to Sveltys-Lyghtyss.

Advertising carried out for the marketing of these products in France attracted the attention of the Department for Competition, Consumer Affairs and Fraud Prevention, which consequently conducted a number of

investigations (in 2001 and 2002). Noting that the Sveltys-Lyghtyss tablets contained sodium benzoate, they contacted the person who had taken over from the applicant as managing director of Diet – who passed them the above-mentioned document dated 28 September 2001 – and then contacted the General Inspectorate of Foodstuffs in Brussels. The latter responded in the following terms in a letter dated 8 July 2002:

> "... Further to your letter dated 11 June 2002 relating to non-compliance of the food supplement L[y]ghtyss with Directive No. 95/2 on food additives other than colours and sweeteners (unauthorised presence of sodium benzoate in a solid food supplement) ..., we have taken the necessary measures to compel the company DMS that markets this product in Belgium to comply with the directive within a period of one month. If the company fails to do so within the period we have allowed, we shall withdraw its notification number .... We thank you for this information ..."

The applicant and the person who had succeeded him as managing director of the company Diet and the company itself were prosecuted in the criminal courts. They were charged with, *inter alia*, false advertising, firstly regarding the composition, essential qualities, content of active ingredients, mode of manufacture, properties and expected effects of food supplements with alleged slimming qualities, and secondly by featuring fictitious studies by researchers on the identity, qualifications or skills of the retailers of these products. They were also prosecuted for having (during 2001 and until 2 November 2002) displayed, marketed or sold foodstuffs to be used for human consumption which they knew to be adulterated, tainted or toxic, by marketing food supplements containing sodium benzoate (Sveltyss-Lyghtyss tablets), namely, an unauthorised product in non-liquid food supplements.

By a decision of 5 March 2004, the Lille Criminal Court found the defendants guilty on those counts. It sentenced the applicant to six months' imprisonment and a fine of 30,000 euros (EUR); the other defendants were sentenced to fines of EUR 10,000 and EUR 50,000 respectively.

The Douai Court of Appeal upheld the Criminal Court's ruling on these points. Its judgment, delivered on 10 March 2005, highlights the following points in particular:

> "... the Order of 2 October 1997 [which transposes into French law several EU directives on food additives, including Directive No. 95/2/EC of 20 February 1995], provides that 'maximum levels indicated in Annexes III, IV and V refer to foodstuffs as marketed, unless otherwise stated; sodium benzoate (preservative E 211) appears in Annex III of this Order, which is permitted in food supplements up to a level of 2,000 mg per litre, but only in liquid food supplements.
>
> The Sveltyss-Lightyss tablets were sold in solid form, so it is immaterial whether they were effervescent or intended to be ingested in liquid form.
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> Once the Belgian Government had acknowledged that the presence of sodium benzoate in solid tablets was such as to cause it to revise its previous position, the defendants could no longer rely on an authorisation they had obtained from the Belgian authorities; in any event, a decision taken by the authorities contrary to

Community law does not create rights and cannot result in an acquittal of the defendants on these charges ...'

By a judgment of 21 March 2006, the Court of Cassation dismissed an appeal lodged by the convicted parties, rejecting the ground of appeal based, *inter alia*, on Article 7 of the Convention as follows:

"It is apparent from the judgment appealed against and the documents in the proceedings that the company Diet and its two successive managing directors ... were prosecuted in the criminal court on a charge of selling and releasing for sale adulterated food products on the grounds that in 2001 and 2002 theysold food supplements in the form of effervescent tablets, called Sveltyss and Lightyss, containing an illegal additive: sodium benzoate;

In finding the defendants guilty of the offence, the Court of Appeal held that the tablets were released for sale in solid form and that, consequently, the use of sodium benzoate was not permitted, since Directive No. 95/2/EC of 25 February 1995, transposed into national law by the ministerial order of 2 October 1997, restricts the use of this preservative to liquid food supplements;

On these grounds alone, and since at the material time sodium benzoate could not be incorporated, either in France or Belgium, into solid food supplements, the Court of Appeal justified its decision with regard to the legal and Convention provisions relied on;

..."

B. Relevant domestic law and Community law

Article L. 213-3 of the Consumer Code is worded as follows:

"Anyone who

1. adulterates foodstuffs for human or animal consumption, medicines, drinks, or agricultural or natural products intended for sale;

2. displays, markets or sells foodstuffs for human or animal consumption, drinks, or agricultural or natural products which they know to be adulterated, tainted or toxic

shall be liable to the penalties provided for in Article L. 213-1

..."

The adulteration of a product may result from the addition of a substance deemed illegal under the applicable law (Cass. Crim., 5 September 2000, No. 99-85437) or, more generally, from "recourse to unlawful processing that fails to comply with the regulations in place, with the effect of altering the substance" (Cass. Crim., 23 January 2001, No. 00-82000).

Directive No. 95/2/EC of the European Parliament and the Council of 20 February 1995 "on food additives other than colours and sweeteners" (Official Journal No. L 61 of 18 March 1995, p.1) stipulates that the additives listed in Annexes III and IV "may only be used in the foodstuffs referred to in [the said] Annexes and under the conditions specified therein" (Article 2, paragraph 4 of the Directive). Sodium benzoate appears in Annex

III (Part A). Unlike "liquid" food supplements, "solid" food supplements are not mentioned in the list of foodstuffs for which they can be used. This Directive was transposed into French law by the Order of 2 October 1997 "on additives usable in the manufacture of foodstuffs intended for human consumption" (Official Journal No. 260 of 8 November 1997, p. 16265).

COMPLAINT

Relying on Article 7 of the Convention, the applicant contended that he had been convicted of an act which, at the time when it was committed, could not constitute the criminal offence with which he was charged.

THE LAW

The applicant complained of having been convicted of selling and releasing for sale adulterated foodstuffs even though, when the product in question was released for sale in France, he had had authorisation issued by the Belgian authorities upon which, under Community law, he could rely in order to market the said product in all the Member States of the European Union. He argued that he had been convicted of an act which, at the material time, could not constitute the criminal offence with which he had been charged and alleged a violation of Article 7 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
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> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission, which, at the time when it was committed, was criminal according to the the general principles of law recognised by civilised nations."

The Government contended, firstly, that the complaint lacked any factual basis in that the applicant could not, on the facts, rely on a licence issued by the Belgian authorities. They pointed out that the letter from the Belgian General Inspectorate of Foodstuffs of 28 September 2001 to which the applicant referred was limited to acknowledging receipt of a notification file and to allocating a number to the product concerned that, under Belgian law, had to appear on business documents relating to certain food products. This had consisted merely of the registration of a unilateral declaration involving no control of the product concerned by the Belgian authorities. The letter of 28 September 2001 had not, moreover, said that the allocation of the number constituted a valid licence or certificate of compliance. In the

alternative, the Government contended that even if the applicant had had a licence to sell duly issued by the Belgian authorities, no provision of Community law permitted the sale of the product in question in France. Although Article 28 of the Treaty establishing the European Community laid down the principle of free movement of goods, Article 30 specified that this did not preclude prohibitions or restrictions on imports, exports or goods in transit justified in particular on grounds of public safety and protection of health. It was precisely for such reasons that Directive No. 95/2/EC prohibited the addition of sodium benzoate in solid foods. Lastly, the Government emphasised the clarity and accessibility of the domestic law: the offence was provided for in Article L. 213-3 of the Consumer Code and the Order of 2 October 1997, which transposed the above-mentioned Directive prohibiting the use of sodium benzoate in solid foods. The applicant's contention that he could not have foreseen his conviction for marketing a solid product containing this substance was unfounded, especially as he had been acting "in a professional capacity".

In his application, referring to the letter of the Belgian General Inspectorate of Foodstuffs of 28 September 2001, the applicant contended that at the material time he had had administrative authorisation from the Belgian authorities allowing him to market his product not only in Belgium but also, under Community law, in all the Member States of the European Union. Since the French authorities had not shown at the material time that the product in question presented a health risk within the meaning of Article 30 of the Treaty establishing the European Community, he could not be criticised for having marketed it in France. In his reply to the Government's observations, he argued that, in any event, the letter of 28 September 2001 showed that he had declared the product in question to the Belgian administrative department which had power to prohibit its sale. It could be inferred from the absence of any objection on their part that "the Belgian authority [had] de facto declared that the product complie[d] with current legislation" and that the said product "did not, in the [Belgian] authorities' view, pose any danger to public health". Moreover, such recognition of compliance of the product under Belgian law involved the application of the principle of free movement of goods enshrined in Article 28 of the Treaty establishing the European Community and the possibility to market it in other Member States. Lastly, the applicant claimed that it was clear that at the time when the product was marketed, he "could not possibly have known that he was committing an offence" because the product in question was already being sold in Belgium, a Member State of the European Community and, even if he could not have been unaware that French law prohibited authorisation of sodium benzoate in foodstuffs in solid form, the product in question, which was in the form of an effervescent tablet, was intended to be diluted in water before being swallowed.

The Belgian Government stated that in Belgian law, under the Royal Orders of 3 March 1992 and 29 August 1997 respectively, on "the marketing of nutrients and foodstuffs to which nutrients have been added' and "the manufacture and marketing of foodstuffs composed of or containing plant or plant preparations", food supplements must, prior to their release onto the market, be the subject of a "notification to the competent authority", which was not the equivalent of a "licence to market". Within one month of receipt of the file, the competent authority sent an acknowledgment of receipt, which included a "notification number". This was merely an administrative number, the allocation of which did not imply recognition that the product complied with current legislation.

The Court reiterates that Article 7 of the Convention establishes, in general, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and prohibits, in particular, the retrospective application of criminal law when it operates to the detriment of the accused. Not only does it specifically prohibit extending the scope of application of existing offences to facts which previously did not constitute offences, it also requires that the criminal law should not be extensively construed to an accused's detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law: the individual must be able to know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see, among others, *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A; *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V; and *Pessino v. France*, no. 40403/02, § 28, 10 October 2006).

The Court observes that these conditions are satisfied in the instant case. It follows from Article 2.4 of Directive No. 95/2/EC of the European Parliament and of the Council of 20 February 1995 "on food additives other than colours and sweeteners" – transposed into French law by an Order of 2 October 1997 – that the additives listed in Annex III, including sodium benzoate, can only be used in the foodstuffs listed in this Annex. With regard to food supplements, only "liquid" food supplements appear in the list in Annex III relating to sodium benzoate: "solid" food supplements are not mentioned there. In these circumstances, the applicant – who does not dispute that, in French law, the adulteration of a product may result from the addition of an unlawful substance – could have foreseen that in marketing a product not appearing on this list but containing the additive, he marketed a product containing a prohibited additive and risked being prosecuted and convicted for the "sale and release for sale of an adulterated food product" on the basis of Article L. 213-3 of the Consumer Code. Moreover, the applicant's argument that the application of this penalty provision was not foreseeable in this case because he had a licence from the Belgian

authorities upon which, under Community law, he could rely in order to market his product in all Member States of the European Union cannot in any event succeed. It has in fact been shown, particularly in the light of information provided by the Belgian Government, that the applicant could neither rely on a proper licence issued by the Belgian authorities nor on any recognition on their part that the product complied with the legislation in force.

It follows that the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention. It must therefore be declared inadmissible.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Peer Lorenzen
President