JUDGMENT OF THE COURT (Sixth Chamber)

5 February 2004 *

In Case C-24/00,

Commission of the European Communities, represented by R.B. Wainwright and O. Couvert-Castéra, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented initially by R. Abraham and R. Loosli-Surrans and subsequently by J.-F. Dobelle and R. Loosli-Surrans, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

APPLICATION for a declaration that:

— by failing to adopt legislation ensuring the free movement of foodstuffs for daily consumption and foodstuffs intended for particular nutritional uses, which are lawfully manufactured and/or marketed in other Member States but contain additives (such as vitamins, minerals and other ingredients) not provided for under French legislation;

— by failing to provide for a simplified procedure for having a substance included on the national list of authorised additives, which is necessary if the above foodstuffs are to be marketed in France;

— by hindering the marketing in France of the above foodstuffs without establishing that their marketing poses a risk to public health,

the French Republic has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC),

THE COURT (Sixth Chamber),

composed of: V. Skouris, acting for the President of the Sixth Chamber, C. Gulmann, J.N. Cunha Rodrigues, R. Schintgen and F. Macken (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 31 May 2001, at which the Commission was represented by R.B. Wainwright and J. Adda, acting as Agent, and the French Republic by R. Loosli-Surrans,

after hearing the Opinion of the Advocate General at the sitting on 26 June 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 27 January 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that,

— by failing to adopt legislation ensuring the free movement of foodstuffs for daily consumption and foodstuffs intended for particular nutritional uses which are lawfully manufactured and/or marketed in other Member States but contain additives (such as vitamins, minerals and other ingredients) not provided for under French legislation;

— by failing to provide for a simplified procedure for having a substance included on the national list of authorised additives, which is necessary if the above foodstuffs are to be marketed in France;

— by hindering the marketing in France of the above foodstuffs without establishing that their marketing poses a risk to public health,

the French Republic has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

2 'Additives' is to be understood as meaning nutrients such as vitamins, minerals, amino acids and other nitrogenous compounds.

Legal background

Community legislation

3 It is common ground that on the date relevant to this action, that is, at the end of the period prescribed by the Commission's reasoned opinion of 26 October 1998, there were no provisions of Community legislation laying down the conditions under which nutrients such as vitamins and minerals could be added to foodstuffs for daily consumption.

4 As regards foodstuffs intended for particular nutritional uses, some are now covered by directives adopted by the Commission under Council Directive 89/398/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses (OJ 1989 L 186, p. 27).

National legislation

5 The French legislation applicable to the marketing of food supplements and foodstuffs for daily consumption fortified with vitamins, minerals and other nutrients such as amino acids is the Decree of 15 April 1912 laying down administrative regulations for implementing the Law of 1 August 1905 to prevent deception in the sale of goods and adulteration of foodstuffs relating to victuals and particularly meat, prepared meat products, fruit, vegetables, fish and preserved foods.

6 Article 1 of the Decree, as amended by Decree No 73-138 of 12 February 1973 (*JORF* of 15 February 1973, p. 1728), provides:

'It shall be an offence to possess with a view to sale, to put on sale or to sell any goods or foodstuffs intended for human consumption to which chemical products have been added other than those whose use has been declared lawful by orders made jointly by the Minister for Agriculture and Rural Development, the Minister for the Economy and Finance, the Minister for Industrial and Scientific Development and the Minister for Public Health, on the advice of the Conseil supérieur d'hygiène publique de France (French Public Health Authority "the CSHPF") and the Académie nationale de médecine (National Academy of Medicine).'

7 Article 1 of Decree No 91-827 of 29 August 1991 on foodstuffs intended for particular nutritional uses (*JORF* of 31 August 1991, p. 11424) provides:

'Foodstuffs are regarded as being intended for particular nutritional uses if, as a result of their particular composition or of a particular process in their

manufacture, they are clearly different from foodstuffs for daily consumption, are suitable for the stated nutritional purpose and are marketed in such a way as to indicate that they fulfil that purpose.'

8 Article 3 of the same decree reads as follows:

'Joint orders made by the ministers responsible for consumer affairs, agriculture and health after obtaining the opinion of the [CSHPF] shall determine:

(a) The list and the conditions for the use of substances with a nutritional purpose, such as vitamins, minerals, amino acids and other substances, which it is lawful to incorporate in foodstuffs intended for particular nutritional uses, as well as the standards of purity applicable to those substances;

...'

9 The orders referred to in Article 3 of Decree No 91-827 are the Order of 20 July 1977 implementing Decree No 75-85 of 24 July 1975 on dietary and diet products and the Order of 4 August 1986 on the use of additives in the manufacture of food intended for particular nutritional uses, both subsequently amended, which were adopted on the basis of the decrees which preceded Decree No 91-827 and were kept in force by the second subparagraph of Article 9 thereof.

Pre-litigation procedure

10 Following complaints from economic operators established in other Member States relating to difficulties encountered in marketing in France foodstuffs fortified with nutrients, the Commission sent the French authorities several requests for their observations between 1994 and 1996.

11 Since the exchange of letters between the Commission and the French authorities and discussions at a 'package' meeting were fruitless, the Commission sent the French Republic on 23 December 1997 a letter of formal notice to submit its observations within two months.

12 Not satisfied by the French authorities' replies of 9 March and 15 May 1998, the Commission issued a reasoned opinion by letter of 26 October 1998 requesting the French Republic to adopt the measures necessary to comply with it within two months of the date of its notification.

13 In a letter of 31 December 1998 those authorities maintained that the French legislation in question was based on overriding requirements of public health protection, and that in the absence of Community harmonisation they were entitled to apply their national legislation. They stated none the less that they intended to adopt a clarificatory regulation setting out the procedure for authorising the addition of nutrients.

14 Since it considered that the French Republic had not complied with the reasoned opinion within the prescribed period, the Commission brought this action.

The action

15 In the application, the Commission makes three complaints against the French Republic: first, the French legislation's lack of any provision for mutual recognition of foodstuffs lawfully manufactured and/or marketed in the Member States to which nutrients not authorised by that legislation have been added; secondly, the lack of a simplified procedure for inclusion of those nutrients on the national list of authorised nutrients; and thirdly, the absence of justification for refusal to include those nutrients on the said list on grounds of public health protection.

The first complaint

Arguments of the parties

16 The Commission claims, in essence, that the French legislation does not cater for foodstuffs to which additives not permitted in France have been added but which have been lawfully manufactured and/or marketed in another Member State, which entitles them as a matter of course to benefit from the principle of free movement of goods, subject to the exceptions provided for by the Treaty. The legislation contains no provision for mutual recognition in order to ensure the free movement of products lawfully manufactured or marketed in another Member State which present a level of protection of consumers' health equivalent to that ensured in France, even if such products do not wholly satisfy the requirements of the French legislation.

17 Relying on the judgment in Case C-184/96 *Commission* v *France* [1998] ECR I-6197, the Commission argues that the absence in the French legislation of provision for mutual recognition is sufficient to demonstrate the failure to fulfil obligations.

18 The French Government contends that the Court's case-law with regard to provision for mutual recognition covers, in general, quality or safety standards of specific industrial products, but not standards of public health in general. By proposing draft directives to regulate the addition of nutrients, the Commission has impliedly recognised in any event that mutual recognition provisions do not, in view of the diversity of national circumstances, enable the free movement of foodstuffs to be ensured whilst guaranteeing a high level of public health protection.

19 The French Government concedes that its national legislation is capable of hindering trade between the Member States but submits that it is justified by objectives of public health and consumer protection, and that the Commission has not proved in this case that such legislation is disproportionate because of the absence of a provision ensuring the mutual recognition of nutrients added to foodstuffs for daily consumption or to foodstuffs intended for particular nutritional uses which have been put on the market in other Member States.

20 The Commission has also failed to demonstrate that where a Member State's legislation was capable of ensuring the same public health objectives, the French Republic refused to consider an application for inclusion on the national list of a nutrient authorised by such legislation under a mechanism for mutual recognition.

Findings of the Court

21 The free movement of goods between Member States is a fundamental principle of the Treaty which finds its expression in the prohibition, set out in Article 30 of the Treaty, of quantitative restrictions on imports between Member States and all measures having equivalent effect thereto.

22 The prohibition set out in Article 30 of the Treaty on measures having an effect equivalent to restrictions covers all commercial rules enacted by the Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see in particular Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5, and Case C-192/01 *Commission* v *Denmark* [2003] ECR I-9693, paragraph 39).

23 It is not disputed that the French legislation is a measure having equivalent effect to quantitative restrictions within the meaning of Article 30 of the Treaty. That legislation, which requires for the marketing of foodstuffs fortified with vitamins and minerals prior inclusion of those nutrients on an 'authorised list', makes the marketing of such foodstuffs more difficult and more expensive, and consequently hinders trade between the Member States.

24 It does not contain any provision ensuring the free movement of fortified foodstuffs lawfully manufactured and/or marketed in another Member State and for which a level of human health protection equivalent to that ensured in France is guaranteed, even if such products do not wholly satisfy the requirements of that legislation.

25 However, the Court has held that national legislation which makes the addition of a nutrient to a foodstuff lawfully manufactured and/or marketed in other Member States subject to prior authorisation is not, in principle, contrary to Community law, provided that certain conditions are satisfied (see to that effect Case C-344/90 *Commission* v *France* [1992] ECR I-4719, paragraph 8, and *Commission* v *Denmark*, cited above, paragraph 44).

26 First, such legislation must make provision for a procedure enabling economic operators to have that nutrient included on the national list of authorised substances. The procedure must be one which is readily accessible and can be completed within a reasonable time, and, if it leads to a refusal, the decision of refusal must be open to challenge before the courts (see to that effect Case C-344/90 *Commission* v *France*, cited above, paragraph 9).

27 Secondly, an application to obtain the inclusion of a nutrient on the national list of authorised substances may be refused by the competent national authorities only if such substance poses a genuine risk to public health (see *Commission* v *Denmark*, paragraph 46).

28 Since the Member State concerned has opted for legislation which makes the marketing of a foodstuff to which a nutrient has been added subject to prior authorisation, the first complaint must be rejected.

29 As regards the question whether the French legislation satisfies the two conditions mentioned in paragraphs 26 and 27 of this judgment, that is the subject of the Commission's second and third complaints.

The second complaint

Arguments of the parties

30 The Commission submits, first of all, that the process of prior authorisation imposed by the French legislation, which requires the prior amendment of the relevant interministerial order before a nutrient which is not authorised in France can be marketed there, is a particularly onerous one and does not meet the requirements of Community law as set out in paragraph 26 of this judgment.

31 For the procedure for inclusion on the national list of authorised substances to be readily accessible to economic operators, the Court has held that the national authorities must list the information to be included in the application for authorisation and describe the procedure for investigating such application, and do so in a document which is published officially and binding on the national authorities. However, according to the Commission, the procedure laid down by the French legislation, details of which are not set out in any such document, cannot be regarded as being readily accessible to economic operators.

32 The national procedure for authorisation must also be capable of being completed within a reasonable time. The Commission claims that that condition is not satisfied in this case, since the applicable provisions do not fix any time-limit for considering applications for inclusion on the list.

33 Finally, any refusal of authorisation must be made in accordance with formal requirements which effectively ensure that the economic operator concerned can challenge it before the courts. The French legislation does not satisfy that

requirement. According to the Commission, negative decisions notified by the French authorities to economic operators do not clearly state, in particular, why the marketing authorisations in question were not granted.

34 The French Government contends that there is already a simplified procedure, even if it is not expressly provided for by the Decree of 15 April 1912. In the first place, the CSHPF takes account of international scientific data in all cases where applicants rely on it in their application. Secondly, the procedure followed is quick since an order is all that is required. The economic operator is indeed often informed by letter of a favourable result even before the publication of the order. The Commission has not proved the absence of a procedure for inclusion, de facto simplified, for a product which is lawfully marketed in a Member State other than the French Republic.

35 In any event, the condition precedent for the application of a simplified procedure seems to be the similarity of the legislation in force in the exporting State and in the importing State, and that condition is not satisfied, as is proved by the fact that the Commission has decided to propose draft directives to regulate the addition of nutrients.

Findings of the Court

36 As is clear from paragraph 26 of this judgment, a procedure which requires prior authorisation, in the interest of public health, for the addition of a nutrient authorised in another Member State complies with Community law only if it is

readily accessible and can be completed within a reasonable time and if, when it is refused, the refusal can be challenged before the courts.

37 As regards first the accessibility of the procedure in question in this case, a Member State's obligation to provide for such a procedure in the case of any national rule which on grounds of public health makes the addition of nutrients subject to authorisation cannot be fulfilled if that procedure is not expressly provided for in a measure of general application which is binding on the national authorities (see also to that effect Case 176/84 *Commission* v *Greece* [1987] ECR 1193, paragraph 41).

38 By stating in their reply of 31 December 1998 to the reasoned opinion their intention of 'clarifying the French legislation by setting out in a legislative text the procedure for authorising the use of nutrients', the French authorities have recognised that, at least at the end of the period prescribed by the reasoned opinion, the national legislation did not formally provide for that procedure.

39 Whilst the French Government has prepared a notice to economic operators on the detailed rules for incorporating nutrients in foodstuffs for daily consumption which, it submits, fulfils that function, it is not apparent from the documents before the Court that such notice, assuming that it meets the requirements of Community law, was in force at the end of the period prescribed by the reasoned opinion.

40 Secondly, the examples provided by the Commission in its application reveal that applications for authorisation submitted by economic operators were not dealt with either within a reasonable period or according to a procedure which was sufficiently transparent as regards the possibility of challenging refusal to authorise before the courts.

41 Thus, in the case of the application for authorisation relating to the drink 'Red Bull', the applicant waited nearly seven months for acknowledgement of receipt of its application and more than two years to be informed of the decision to refuse it.

42 Consequently, the second complaint must be held to be well founded.

The third complaint

Arguments of the parties

43 The Commission claims that the French authorities have refused in a number of cases to authorise the marketing of foodstuffs to which unauthorised nutrients have been added without justifying the refusals by reference to a real risk to public health. In accordance with the Court's case-law, it is for the Member State, in each case, to state the public health risks incurred.

44 Furthermore, it maintains that the Member States are not entitled to prohibit the marketing of such foodstuffs originating in another Member State on the sole ground that no nutritional benefit accrues from the addition of a nutrient thereto and without reference to any considerations of public health.

45 As regards consumer protection, the Commission submits that the French authorities have not considered, in the particular cases which it has brought to light, the possibility of recourse to alternative less restrictive measures, consisting of the obligation to attach labelling enabling consumers to inform themselves of the risks connected with excessive consumption of the substances concerned.

46 The French Government contends that every refusal to authorise the inclusion of a nutrient on the national list of authorised substances is founded on the advice of the French scientific authorities based on analysis in each case of the risks to public health, which the French authorities do not consider that it is for them to challenge since they are scientific assessments.

47 It takes the view that it is right to take into account the nutritional needs of the French population in assessing the harmlessness of nutrients, since the French legislation does not provide for the subsequent approval of end products containing such substances.

48 It recognises that the efficacy of the nutrient is also taken into account in the procedure for inclusion on the national list, but argues, first, that numerous directives on public health also take into account the efficacy of the product or of the added nutrient and, secondly, that a number of Community and national regulations pursue concurrently the twin purpose of protecting public health and preventing deception.

Findings of the Court

49 It must be borne in mind, first, that it is for the Member States, in the absence of harmonisation and to the extent that there is still uncertainty in the current state of scientific research, to decide on the level of protection of human health and life they wish to ensure and whether to require prior authorisation for the marketing of foodstuffs, taking into account the requirements of the free movement of goods within the Community (see Case 174/82 *Sandoz* [1983] ECR 2445, paragraph 16, and *Commission* v *Denmark*, cited above, paragraph 42).

50 That discretion relating to the protection of public health is particularly wide where it is shown that there is still uncertainty in the current state of scientific research as to certain substances, such as vitamins, which are not as a general rule harmful in themselves but may have special harmful effects solely if taken to excess as part of the general diet, the composition of which cannot be foreseen or monitored (see *Sandoz*, paragraph 17, and *Commission* v *Denmark*, paragraph 43).

51 It follows, as is clear from paragraph 25 of this judgment, that Community law does not, in principle, preclude legislation of a Member State which prohibits, save with prior authorisation, possession with a view to sale or the putting on sale of foodstuffs intended for human consumption where nutrients other than those whose addition is lawful under the said legislation have been added thereto.

52 However, in exercising their discretion relating to the protection of public health, the Member States must comply with the principle of proportionality. The means which they choose must therefore be confined to what is actually necessary to ensure the safeguarding of public health or to satisfy overriding requirements regarding, for example, consumer protection, and they must be proportional to the objective thus pursued, which could not have been attained by measures less restrictive of intra-Community trade (see *Sandoz*, paragraph 18, and *Commission* v *Denmark*, paragraph 45).

53 Furthermore, since Article 36 of the EC Treaty (now, after amendment, Article 30 EC) provides for an exception, to be interpreted strictly, to the rule of free movement of goods within the Community, it is for the national authorities

which invoke it to show in each case, in the light of national nutritional habits and in the light of the results of international scientific research, that their rules are necessary to give effective protection to the interests referred to in that provision and, in particular, that the marketing of the products in question poses a real risk to public health (see *Commission* v *Denmark*, paragraph 46).

54 A prohibition on the marketing of foodstuffs to which nutrients have been added must therefore be based on a detailed assessment of the risk alleged by the Member State invoking Article 36 of the Treaty (see *Commission* v *Denmark*, paragraph 47).

55 A decision to prohibit the marketing of a fortified foodstuff, which is in fact the most restrictive obstacle to trade in products lawfully manufactured and marketed in other Member States, can be adopted only if the alleged real risk for public health appears to be sufficiently established on the basis of the latest scientific data available at the date of the adoption of such decision. In such a context, the object of the risk assessment to be carried out by the Member State is to appraise the degree of probability of harmful effects on human health from the addition of certain nutrients to foodstuffs and the seriousness of those potential effects (*Commission* v *Denmark*, paragraph 48).

56 It is clear that such an assessment of the risk could reveal that scientific uncertainty persists as regards the existence or extent of real risks to human health. In such circumstances, it must be accepted that a Member State may, in accordance with the precautionary principle, take protective measures without having to wait until the existence and gravity of those risks are fully demonstrated (see to that effect Case C-157/96 *National Farmers' Union and Others* [1998]

ECR I-2211, paragraph 63). However, the risk assessment cannot be based on purely hypothetical considerations (see Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105, paragraph 106, and *Commission* v *Denmark*, paragraph 49).

57 In certain cases relied upon by the Commission in this instance the French Government has not adduced evidence establishing that the application of the national legislation is necessary to protect effectively the interests mentioned in Article 36 of the Treaty and, in particular, that the marketing of each of the fortified foodstuffs in question presents a real risk for public health.

58 As regards first confectionery and vitamin-enriched drinks, the Opinion of the CSHPF of 10 September 1996, on which the French authorities rely to justify the prohibition on marketing that type of product, states that authorisation to market those fortified foodstuffs should be refused on the ground that individuals might be encouraged to consume numerous vitamin-enriched foodstuffs, augmenting the normal intake thereof in a varied diet. The CSHPF considers that the French population, for the most part, obtains from its diet a sufficient intake of most vitamins.

59 As regards the French Government's argument based on this absence of a nutritional need necessitating the addition of nutrients to the foodstuffs concerned, it must be noted that where there is scientific uncertainty the criterion of nutritional need of the population of a Member State can play a role in the latter's detailed assessment of the risk which the addition of nutrients to foodstuffs may pose for public health.

60 However, the absence of such a need cannot, by itself, justify a total prohibition, on the basis of Article 36 of the Treaty, on marketing foodstuffs lawfully manufactured and/or marketed in other Member States (see *Commission* v *Denmark*, paragraph 54).

61 Although the Opinion of the CSHPF mentions, in the final paragraph, that the distribution of fortified foodstuffs exposes the population to the risk of exceeding the safety limits on the intake of certain vitamins, it merely refers vaguely to the possibility of a general risk of excessive intake, without specifying the vitamins concerned, the extent to which those limits would be exceeded or the risks incurred thereby, and the French Government has not denied that that opinion alone served as the basis for the refusal to authorise the marketing of certain products.

62 It must therefore be held that, as regards confectionery and drinks to which nutrients have been added, the French authorities have not observed the requirements of Community law as set out in the Court's case-law mentioned in paragraphs 52 and 56 of this judgment and, in particular, the requirement for a detailed assessment in each case of the effects which the addition of vitamins and minerals could have on public health in a case such as this (see, to that effect, *Commission* v *Denmark*, paragraph 56).

63 Next, as regards the CSHPF's Opinion of 12 July 1994 concerning the addition of L-tartrate and of L-carnitine to food supplements and dietary products, whilst it is not in favour of the marketing in France of products to which those nutrients have been added, it is because of their lack of any nutritional benefit and because of the absence of proof of the claims concerning the beneficial or useful nature of such substances.

64 However, as is clear from paragraph 60 of this judgment, the absence of a nutritional need is not sufficient to justify a prohibition, on the basis of Article 36 of the Treaty, on marketing foodstuffs lawfully manufactured and/or marketed in other Member States.

65 Furthermore, that Opinion cites digestive problems which affect 13% of the population, without specifying their nature, and mentions the absence of proof of the claims as to the usefulness or benefits of adding L-tartrate and L-carnitine, which does not amount to a detailed assessment of the effects which the addition to foodstuffs of such substances could have on public health and is not sufficient, therefore, to justify under Article 36 of the Treaty a prohibition on marketing them.

66 In those circumstances, the Commission is entitled to conclude as regards the addition of nutrients to food supplements and dietary products that the French authorities have not met the criteria for the application of Article 36 of the Treaty resulting from the Court's case-law referred to above.

67 Finally, as regards energy drinks such as 'Red Bull' it is clear from the Opinion of the CSHPF of 10 September 1996 that even if 'there is no argument based on mainstream toxicology' for opposing the marketing of that type of drink, the CSHPF considered that the marketing thereof should not be authorised because of their excessive caffeine content, higher than that authorised in France, the risk of excessive caffeine consumption, in particular among pregnant women, the misleading claim concerning the 'energy-enhancing' character of the product and the risk of positive drug tests among sportsmen. The CSHPF considers that the maximum level of caffeine in drinks should not exceed 150 mg/l and notes that caffeine consumption should not exceed 200 mg/day.

68 As is apparent from paragraph 49 of this judgment, the French Republic may decide at what level it wishes to ensure the protection of human life and health.

69 It is of course necessary for it to show why the prohibition on marketing energy drinks containing caffeine in excess of a certain limit is necessary and proportionate for public health (see to that effect Case C-420/01 *Commission* v *Italy* [2003] ECR I-6445, paragraphs 30 and 31).

70 In this case, in response to the aforementioned Opinion of the CSHPF setting out the actual risks for public health connected with excessive caffeine consumption, the Commission has not explained why such an Opinion is insufficient to justify a prohibition, under Article 36 of the Treaty, on marketing energy drinks with a caffeine content higher than that authorised in France. The Commission has not adduced evidence sufficient to call into question the French authorities' analysis as regards the dangers which those drinks pose to public health.

71 It must also be observed as regards energy drinks that the French Government argued, without being contradicted in that regard by the Commission, that on 21 January 1999 the Comité scientifique de l'alimentation humaine (Scientific Committee on Human Nutrition) gave an adverse opinion on the presence in those drinks of certain nutrients such as taurine and glucurunolactone.

72 In those circumstances, it was for the Commission to state explicitly why the French Government's argument based on that Opinion cannot suffice to justify the refusal to authorise the marketing of energy drinks to which taurine and glucurunolactone have been added.

73 Since the Commission has not answered that argument, and having regard to its inadequate reply to the justification put forward concerning the exceeding of the authorised threshold of caffeine content in the energy drinks in question, the Commission's third complaint must be rejected in so far as it concerns energy drinks with a caffeine content higher than a certain limit and to which taurine and glucurunolactone have been added.

74 Secondly, as regards effective consumer protection, to which the French Government also refers, it is naturally legitimate, as follows from paragraphs 63 and 67 of this judgment, to seek to ensure that consumers are properly informed about the products which they consume (see to that effect Case 216/84 *Commission* v *France* [1988] ECR 793, paragraph 10, and Case 274/87 *Commission* v *Germany* [1989] ECR 229).

75 However, appropriate labelling, informing consumers about the nature, the ingredients and the characteristics of fortified foodstuffs, can enable consumers who risk excessive consumption of a nutrient added to those products to decide for themselves whether to use them (see Case 216/84 *Commission* v *France*, cited above, paragraph 16).

76 Having regard to all those considerations, it must be held that:

— by failing to provide for a simplified procedure for having included on the national list of authorised nutrients those added to foodstuffs for daily consumption and foodstuffs intended for particular nutritional uses which are lawfully manufactured and/or marketed in other Member States,

and

— by hindering the marketing in France of certain foodstuffs, such as food supplements and dietary products containing the substances L-tartrate and L-carnitine, and confectionery and drinks to which certain nutrients have been added, without establishing that the marketing of such foodstuffs entails a real risk for public health,

the French Republic has failed to fulfil its obligations under Article 30 of the Treaty.

The remainder of the application must be dismissed.

Costs

77 Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads. Since the Commission's application has been upheld only in part, each party must be ordered to bear its own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by failing to provide for a simplified procedure for having included on the national list of authorised nutrients those added to foodstuffs for daily consumption and foodstuffs intended for particular nutritional uses which are lawfully manufactured and/or marketed in other Member States,**

and

by hindering the marketing in France of certain foodstuffs, such as food supplements and dietary products containing the substances L-tartrate and L-carnitine, and confectionery and drinks to which certain nutrients have been added, without establishing that the marketing of such foodstuffs entails a real risk for public health,

the French Republic has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC);

2. **Dismisses the remainder of the application;**

3. **Orders the Commission of the European Communities and the French Republic to pay their own costs.**

Skouris Gulmann Cunha Rodrigues

Schintgen Macken

Delivered in open court in Luxembourg on 5 February 2004.

R. Grass V. Skouris

Registrar President