JUDGMENT OF THE COURT (Sixth Chamber)
23 January 2003 *

In Joined Cases C-421/00, C-426/00 and C-16/01,

REFERENCES to the Court under Article 234 EC by the Unabhängiger Verwaltungssenat für Kärnten (Austria), the Unabhängiger Verwaltungssenat Wien (Austria) and the Verwaltungsgerichtshof (Austria) respectively for preliminary rulings in the criminal proceedings pending before those courts against

Renate Sterbenz (C-421/00)

and

Paul Dieter Haug (C-426/00 and C-16/01),

on the interpretation of Articles 28 EC and 30 EC and of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs

* Language of the case: German.

(OJ 1979 L 33, p. 1), as amended by Directive 97/4/EC of the European Parliament and of the Council of 27 January 1997 (OJ 1997 L 43, p. 21),

THE COURT (Sixth Chamber),

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

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Ms Sterbenz, by R. Hütthaler-Brandauer, Rechtsanwältin (C-421/00),

— the Austrian Government, by H. Dossi, acting as Agent (C-421/00, C-426/00 and C-16/01),

— the Commission of the European Communities, by M. Shotter and J.C. Schieferer, acting as Agents (C-421/00, C-426/00 and C-16/01),

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 4 July 2002,

gives the following

Judgment

1 By orders of 8 November 2000, 15 November 2000 and 18 December 2000, received at the Court on 14 November 2000, 20 November 2000 and 15 January 2001, the Unabhängiger Verwaltungssenat für Kärnten (Independent Administrative Chamber for Carinthia), the Unabhängiger Verwaltungssenat Wien (Independent Administrative Chamber for Vienna) and the Verwaltungsgerichtshof (Administrative Court) respectively referred to the Court for preliminary rulings under Article 234 EC various questions on the interpretation of Articles 28 EC and 30 EC and of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ 1979 L 33, p. 1), as amended by Directive 97/4/EC of the European Parliament and of the Council of 27 January 1997 (OJ 1997 L 43, p. 21) ('Directive 79/112').

2 Those questions were raised in three criminal prosecutions brought against Ms Sterbenz and Mr Haug, who are accused of placing on the market foodstuffs labelled in a way which does not comply with Austrian legislation.

Legal background

Community legislation

3 Article 28 EC provides:

'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'

4 Article 30 EC provides:

'The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial

property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

5 Article 2(1) of Directive 79/112 provides:

'The labelling and methods used must not:

(a) be such as could mislead the purchaser to a material degree, particularly:

(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production;

(ii) by attributing to the foodstuff effects or properties which it does not possess;

(iii) by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics;

(b) subject to Community provisions applicable to natural mineral waters and foodstuffs for particular nutritional uses, attribute to any foodstuff the property of preventing, treating or curing a human disease, or refer to such properties.'

6 Article 15 of Directive 79/112 provides:

'1. Member States may not forbid trade in foodstuffs which comply with the rules laid down in this Directive by the application of non-harmonised national provisions governing the labelling and presentation of certain foodstuffs or of foodstuffs in general.

2. Paragraph 1 shall not apply to non-harmonised national provisions justified on grounds of:

— protection of public health,

— prevention of fraud, unless such provisions are liable to impede the application of the definitions and rules laid down by this Directive,

— protection of industrial and commercial property rights, indications of provenance, registered designations of origin and prevention of unfair competition.'

National legislation

7 Under Paragraph 8(f) of the Bundesgesetz über den Verkehr mit Lebensmitteln, Verzehrprodukten, Zusatzstoffen, kosmetischen Mitteln und Gebrauchsgegenständen (Lebensmittelgesetz 1975) (Federal Law on trade in foodstuffs, products intended for human consumption, additives, cosmetic products and consumer goods, 'the LMG') of 23 January 1975:

'Foodstuffs, consumer products and additives are:

...

(f) incorrectly described when they are placed on the market accompanied by information which is likely to be misleading as regards matters which are important in the light of trade practices and, in particular, in the light of consumer expectations, such as nature, origin, use, shelf life, date of manufacture, properties, percentage of effective ingredients, quantity, size, number or weight, or in such a form or presentation or bearing prohibited statements relating to health.'

8 Paragraph 9(1) and (3) of the LMG provides:

'1. In marketing foodstuffs, products intended for human consumption or additives, it is prohibited:

(a) to refer to the prevention, relief or cure of illnesses or symptoms of illness, or to physiological or pharmacological effects, in particular effects which prolong youthfulness, slow down the symptoms of ageing, lead to weight loss or preserve health or to create the impression of any such effect;

(b) to refer to case histories, recommendations by doctors or expert medical opinions;

(c) to use health-related, pictorial or stylised representations of organs of the human body, depictions of members of the health-care professions or of sanatoria or other pictures or illustrations referring to health-care activities.

...

3. The Federal Minister for Health and the Environment shall authorise, by decree and upon request, health-related information for certain foodstuffs or

consumer products where that is consistent with the protection of consumers against fraud. The decree shall be revoked where the conditions of the authorisation are no longer met.'

9 Paragraph 74(3) of the LMG reads as follows:

'A person who places on the market foodstuffs, products intended for human consumption or additives... which are incorrectly described, or consumer goods which are incorrectly described, is guilty of an administrative offence and is to be fined by the district administrative authority...'.

The main proceedings and the questions referred for preliminary rulings

Case C-421/00

10 The Bürgermeister der Landeshauptstadt Klagenfurt (Mayor of Klagenfurt) accuses Ms Sterbenz, in her capacity as representative of Biodiät Erzeugung und Vertrieb GmbH, a company incorporated under Austrian law established in Klagenfurt (Austria), of placing on the market packages of a foodstuff called 'Tartex veget. Pastete Champignon' which were incorrectly described, in that they carried the health-related information 'ein guter Name für gesunden Genuß' ('a good name for healthy enjoyment'), although it is prohibited to refer, in connection with the marketing of foodstuffs, products intended for human consumption or additives, to the prevention, relief or cure of illnesses or symptoms of illness, or to physiological or pharmacological effects, in particular

effects which prolong youthfulness, slow down the symptoms of ageing, lead to weight loss or preserve health or to create the impression of any such effect.

11 Ms Sterbenz appealed against her conviction for breach of Paragraph 9(1)(a) of the LMG to the Unabhängiger Verwaltungssenat für Kärnten, and requested it to stay proceedings until the Court of Justice gave judgment in Case C-221/00 *Commission* v *Austria*. In the latter case the Commission claims that the Republic of Austria has failed to fulfil its obligations under Articles 2(1)(b) and 15(1) and (2) of Directive 79/112, by interpreting and applying Paragraph 9(1) and (3) of the LMG as meaning that health-related information on the labelling of foodstuffs for general consumption is prohibited in a general and absolute manner, and by subjecting the affixing of such information to a prior authorisation procedure.

12 However, having regard to the provisions of the Verwaltungsstrafgesetz 1991 (Law on administrative criminal proceedings, BGBl. 1991/52), which require the appellate tribunal to give judgment within a certain period, the decision at first instance otherwise ceasing to be applicable, the Unabhängiger Verwaltungssenat für Kärnten decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Are Article 28... of the EC Treaty as amended by the Treaty of Amsterdam and Articles 2(1)(b) and 15(1) and (2) of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer... in the applicable version to be interpreted as precluding national legislation prohibiting any health-related information from appearing on

the labelling and presentation of foodstuffs, products intended for human consumption and additives for general consumption, save if expressly authorised (Paragraph 9(1)(a) to (c) and (3) of the [LMG] in the applicable version)?'

Case C-426/00

13 By decision of the Magistrat der Stadt Wien (Council of the City of Vienna), Mr Haug was found guilty of an administrative offence in relation to the application of Paragraphs 74(1), 9(1), 8(f) and 7(1)(c) of the LMG, on the ground that he had placed on the market an incorrectly described foodstuff.

14 Mr Haug appealed against that decision to the Unabhängiger Verwaltungssenat Wien, which decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Does Paragraph 9 of the LMG constitute an appropriate transposition of Article 2(1)(b) of Council Directive 79/112/EEC of 18 December 1978?

2. Does Article 2(1)(b) of Directive 79/112/EEC make exhaustive provision concerning unlawful labelling, or does that provision provide for a minimum level of regulation which may be supplemented by national provisions?

3. Is Article 2(1)(b) of Directive 79/112/EEC to be construed to mean that a restriction on labelling (such as that in Paragraph 9(1) of the LMG in regard to health-related information) is only permissible where a prohibition appears to be an unavoidable necessity in order to prevent consumers from being misled?

4. Can Paragraph 9(1) of the LMG be interpreted so as to comply with the directive and the restriction on labelling mentioned therein be deemed to be in conformity with Article 2(1)(b) of Directive 79/112/EEC? This would be possible inasmuch as an intention to mislead is not required by Article 2(1)[(b)] as a whole but is a second criterion of the unlawfulness of a label.'

Case C-16/01

15 By decision of the Unabhängiger Verwaltungssenat Wien of 12 October 1999, Mr Haug was convicted, as representative of Renatura Naturheilmittel GmbH, a company incorporated under Austrian law established in Vienna (Austria), on the ground that that company had placed on the market 240 packages of a product called 'Renatura Kürbiskernkapseln mit Vitamin E, Blase und Prostata' ('Renatura pumpkin seed capsules with Vitamin E, bladder and prostate') although that foodstuff was incorrectly described, as a result of the presence on the labelling of the following health-related statements: 'for protection of the cell membrane from free radicals', 'important for the functioning of many enzymes', 'important as a building block for bones and teeth' and 'regulation of the fluid balance (bladder functioning)', those statements being contrary to Paragraph 9(1) of the LMG.

16 Since it had always interpreted Paragraph 9(1) of the LMG as prohibiting both statements relating to health and those relating to illness, the Verwaltungsgerichtshof considered that Mr Haug's appeal to it against the decision of 12 October 1999 raised questions of the interpretation of Community law, and it decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Does Article 2(1)(b) of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (now consolidated in European Parliament and Council Directive 2000/13/EC of 20 March 2000...), under which — subject to Community provisions applicable to natural mineral waters and to foodstuffs for particular nutritional uses — the labelling and methods used may not attribute to any foodstuff the property of preventing, treating or curing a human disease, or suggest that it possesses such properties, preclude national legislation which makes it an offence when marketing foodstuffs:

(a) to refer to physiological or pharmacological effects, in particular those which preserve youthfulness, inhibit signs of ageing, promote slimming or maintain health, or to create the impression of any such effect;

(b) to refer to case-histories, recommendations made by doctors or medical experts' reports;

(c) to use health-related pictorial or stylised representations of organs of the human body, pictures of members of the health-care professions or of sanatoria or other pictures or illustrations referring to health-care activities?

2. Do Directive 79/112/EEC or Articles 28 EC and 30 EC preclude a national provision which, on the placing into circulation of foodstuffs, permits health-related information such as that described in Question (1) to be affixed thereto only after prior authorisation by the competent federal minister, whereby a condition of authorisation is that the health-related information is consistent with protecting the consumer from being misled?'

17 By orders of the President of the Court of 16 January and 20 March 2001, Cases C-421/00, C-426/00 and C-16/01 were joined for the purposes of the written procedure and judgment.

Preliminary observations

18 Directive 79/112 was repealed by Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ 2000 L 109, p. 29). However, in accordance with Article 27 of

the latter directive, it did not enter into force until 26 May 2000, and cannot therefore be applied to the main proceedings. Consequently, to rule on the references for preliminary rulings now before it, the Court must refer to Directive 79/112.

19 It must also be observed, with reference more particularly to Case C-426/00, that there is no account in the order for reference of the factual context of the main proceedings.

20 The Court has consistently held that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary for the referring court to define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (see, *inter alia*, Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6, and Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363, paragraph 21).

21 Nevertheless, since, as is apparent from the case-file sent to the Court, the facts of the main proceedings in Case C-426/00 are the same as those of Cases C-421/00 and C-16/01, and since the questions referred by the Unabhängiger Verwaltungssenat Wien also concern the interpretation of Article 2(1)(b) of Directive 79/112 and the possible conflict between that provision and the system established by Paragraph 9 of the LMG, it must be concluded that in the present case the similarity of the questions referred to the Court in the three cases enables it to

give answers which will be of use to the referring courts. Indeed, it is precisely that similarity which justified the President of the Court in ordering the cases to be joined.

22 Accordingly, the reference for a preliminary ruling from the Unabhängiger Verwaltungssenat Wien is admissible.

The questions referred for preliminary rulings

23 In the three cases referred to above, the national courts essentially ask whether Articles 28 EC and 30 EC and Articles 2(1)(b) and 15(1) and (2) of Directive 79/112 preclude a system such as that established by Paragraph 9(1) and (3) of the LMG which prohibits generally, subject to prior authorisation, all health-related information on the labelling and presentation of foodstuffs.

24 It should be observed that, since Article 15(2) of Directive 79/112 carried out an exhaustive harmonisation of the grounds on which the application of national rules raising obstacles to trade in foodstuffs complying with the provisions of that directive may be justified, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not of Articles 28 EC and 30 EC (see, *inter alia*, Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32; Case C-99/01 *Linhart and Biffl* [2002] ECR I-9375, paragraph 18; and today's judgment in Case C-221/00 *Commission* v *Austria* [2002] ECR I-1007, paragraph 42).

25 Moreover, as regards the Austrian Government's argument concerning the applicability of Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 290, p. 18), it must be noted that Articles 2 and 15 of Directive 79/112 prohibit statements liable to mislead the purchaser. This is a specific provision intended to prevent fraud which must consequently be interpreted as a special rule in relation to the general provisions on protection against misleading advertising laid down in Directive 84/450 as amended (see, to that effect, *Linhart and Biffl*, paragraphs 19 and 20, and *Commission* v *Austria*, paragraph 43).

26 It follows that, in answering the questions referred, the Court must confine itself to the interpretation of Directive 79/112.

27 In this respect, it should be noted at the outset, first, that Article 2(1)(a) of Directive 79/112 prohibits the labelling of foodstuffs and the methods used being such as could mislead the purchaser. Second, Article 2(1)(b) of that directive prohibits, subject to the provisions applicable to foodstuffs for particular nutritional uses, the labelling attributing to a foodstuff the property of preventing, treating or curing a disease.

28 It follows that Directive 79/112 prohibits all statements relating to human diseases, regardless of whether or not they are liable to mislead the consumer, as well as statements which, although not containing any reference to diseases but referring rather to health, for example, prove to be misleading.

29 It must also be noted that Article 15(1) of Directive 79/112 prevents Member States from enacting measures prohibiting trade in foodstuffs which comply with the rules laid down in that directive.

30 Consequently, foodstuffs whose labelling contains non-misleading health-related information must be regarded as complying with the rules of Directive 79/112, since Member States may not prohibit their marketing on grounds of a possible irregularity of that labelling.

31 However, as is apparent from the ninth recital in its preamble, because Directive 79/112 is general and applicable horizontally, it allows the Member States to lay down rules in addition to those of the directive. The limits of the power retained by the Member States are fixed by the directive itself inasmuch as it lists exhaustively, in Article 15(2), the grounds on which the application of non-harmonised national provisions prohibiting trade in foodstuffs which comply with the directive may be justified (see, to that effect, Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 15, and *Commission* v *Austria*, paragraph 38). Those grounds include *inter alia* the protection of health and consumers.

32 Paragraph 9(1) of the LMG prohibits, in connection with the marketing of foodstuffs, not only statements referring to diseases but also those relating to health.

33 Under Paragraph 9(3) of the LMG, all statements relating to health are subject to a prior authorisation procedure which is intended to differentiate accurate information from information which is liable to mislead the consumer. Authorisation or prohibition of marketing the foodstuffs concerned depends on the differentiation operated by the competent national authorities.

34 The system thus laid down in Paragraph 9(1) and (3) of the LMG, which is characterised by a general prohibition subject to prior authorisation for health-related information, is more restrictive than that under Article 2(1) of Directive 79/112. The compatibility with Community law of such a system therefore depends on an assessment of the grounds on which it is based.

35 It is common ground that the system established by the LMG is based on the consideration that the protection of consumers against fraud necessarily requires that whether or not health-related information on the labelling of foodstuffs is misleading should be the subject of prior examination by the competent national authorities.

36 It must therefore be ascertained whether Article 15(2) of Directive 79/112, in so far as it authorises non-harmonised national provisions which are justified on grounds of the protection of public health and the prevention of fraud, permits of a system of prior authorisation such as that laid down in Paragraph 9(3) of the LMG.

37 While Article 2(1) of Directive 79/112 prohibits, first, all statements relating to the preventing, treating and curing of a human disease, even if they are not liable to mislead the purchaser, and, second, misleading statements relating to health, it is clear that the protection of public health, assuming that risks relating thereto are nevertheless conceivable in a particular situation, cannot justify a system as restrictive of the free movement of goods as that which results from a procedure of prior authorisation for all health-related information on the labelling of foodstuffs, including those which are manufactured lawfully in other Member States and are in free circulation.

38 Less restrictive measures exist for the prevention of such residual risks to health, such as, for example, an obligation on the manufacturer or distributor of the product in question, in the event of any uncertainty, to furnish evidence of the accuracy of the facts mentioned on the labelling (see, to that effect, *Commission* v *Austria*, paragraph 49).

39 The Austrian Government's argument based on the protection of consumers cannot be accepted either.

40 The system established by Paragraph 9(1) and (3) of the LMG, which is intended to prohibit misleading statements relating to health, has the consequence in practice that foodstuffs bearing health-related information may not be marketed freely in Austria, even if the information is not liable to mislead the consumer.

41 The Austrian Government has not produced any evidence to establish its claim that the system of control *a posteriori* of foodstuffs already on the market, such as that referred to in paragraph 38 above, would be ineffective. It has confined itself to stating, without giving reasons, that such a system had negative results in the United States. The general prohibition established by Paragraph 9(1) and (3) of the LMG cannot therefore be regarded as proportionate to the aim pursued.

42 It should be added that, in similar cases concerning information on the packaging of certain cosmetic products, in which the Austrian authorities likewise relied on the protection of the health of consumers and the prevention of fraud, the Court

held that the need to obtain the authorisation laid down in Paragraph 9(3) of the LMG constituted a wholly unjustified obstacle to the free movement of the products in question (Case C-77/97 *Unilever* [1999] ECR I-431, paragraph 34, and *Linhart and Biffl*, paragraph 45).

43 Finally, as regards the Austrian Government's argument concerning the difficulty of establishing in certain cases that health-related information is misleading, it must be said that it is for the national courts, in all situations where there is doubt, to reach a decision, taking into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect (see, to that effect, Case C-465/98 *Darbo* [2000] ECR I-2297, paragraph 20).

44 The answer to the questions referred must therefore be that Articles 2(1)(b) and 15(1) and (2) of Directive 79/112 preclude a system such as that established by Paragraph 9(1) and (3) of the LMG which lays down a general prohibition, subject to prior authorisation, of all health-related information on the labelling and presentation of foodstuffs.

Costs

45 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decisions on costs are a matter for those courts.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Unabhängiger Verwaltungssenat für Kärnten, the Unabhängiger Verwaltungssenat Wien and the Verwaltungsgerichtshof by orders of 8 November 2000, 15 November 2000 and 18 December 2000 respectively, hereby rules:

Articles 2(1)(b) and 15(1) and (2) of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, as amended by Directive 97/4/EC of the European Parliament and of the Council of 27 January 1997, preclude a system such as that established by Paragraph 9(1) and (3) of the Bundesgesetz über den Verkehr mit Lebensmitteln, Verzehrprodukten, Zusatzstoffen, kosmetischen Mitteln und Gebrauchsgegenständen (Lebensmittelgesetz 1975) (Federal Law on trade in foodstuffs, products intended for human consumption, additives, cosmetic products and consumer goods) which lays down a general prohibition, subject to prior authorisation, of all health-related information on the labelling and presentation of foodstuffs.

Schintgen Skouris Macken

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 23 January 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber