Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

19 December 2018 *

(Reference for a preliminary ruling — Agriculture — Regulation (EC) No 510/2006 — Article 4(2)(e) — Regulation (EU) No 1151/2012 — Article 7(1)(e) — Protection of geographical indications and designations of origin — Application to amend the product specification — Ham originating from the Black Forest, Germany ('Schwarzwälder Schinken') — Requirements to package in the area of production — Applicability of Regulation (EC) No 510/2006 or of Regulation (EU) No 1151/2012)

In Case C-367/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundespatentgericht (Federal Patent Court, Germany), made by decision of 18 May 2017, received at the Court on 13 June 2017, in the proceedings

S

v

EA,

EB,

EC,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, Vice-President, acting as President of the First Chamber, J.-C. Bonichot, A. Arabadjiev, C.G. Fernlund and S. Rodin (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 17 May 2018,

after considering the observations submitted on behalf of:

– S, by J. Schwarze and U. Gruler, Rechtsanwalt,

– EC, by K. Sandberg and V. Schoene, Rechtsanwälte,

– the Austrian Government, by G. Eberhard, acting as Agent,

* Language of the case: German.

– the European Commission, by B. Eggers, B. Hofstötter, I. Naglis and D. Bianchi, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 2006 L 93, p. 12), and of Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ 2012 L 343, p. 1).

2 The request has been made in proceedings between S, an association, and EA, EB and EC concerning a decision by which the Deutsches Patent- und Markenamt (German Patent and Trade Mark Office, 'DPMA') refused the application made by S seeking to amend the specification of the protected geographical indication ('PGI') 'Schwarzwälder Schinken' (Black Forest ham), in so far as that amendment related to slicing and packaging instructions.

Legal context

3 Article 4(2)(e) of Regulation No 510/2006 provides:

'The product specification shall include at least:

…

(e) a description of the method of obtaining the agricultural product or foodstuff and, if appropriate, the authentic and unvarying local methods as well as information concerning packaging, if the applicant group within the meaning of Article 5(1) so determines and gives reasons why the packaging must take place in the defined geographical area to safeguard quality or ensure the origin or ensure control.'

4 The first and second paragraphs of Article 5(1) of that regulation provide:

'Only a group shall be entitled to apply for registration.

For the purposes of this Regulation, "group" means any association, irrespective of its legal form or composition, of producers or processors working with the same agricultural product or foodstuff. Other interested parties may participate in the group. A natural or legal person may be treated as a group in accordance with the detailed rules referred to in Article 16(c).'

5 Article 8 of Commission Regulation (EC) No 1898/2006 of 14 December 2006 setting out detailed rules for applying Regulation No 510/2006 (OJ 2006 L 369, p. 1), states:

'If the applicant group determines in the product specification that the packaging of the agricultural product or the foodstuff referred to in point (e) of Article 4(2) of Regulation (EC) No 510/2006 must take place in the defined geographical area, justifications, specific to the product, for such restrictions on free movement of goods and freedom to provide services must be given.'

6 Regulation No 510/2006 was repealed and replaced, with effect from 3 January 2013, by Regulation No 1151/2012.

7 Article 7(1)(e) of Regulation No 1151/2012 is worded as follows:

‘A protected designation of origin or a [PGI] shall comply with a specification which shall include at least:

…

(e) a description of the method of obtaining the product and, where appropriate, the authentic and unvarying local methods as well as information concerning packaging, if the applicant group so determines and gives sufficient product-specific justification as to why the packaging must take place in the defined geographical area to safeguard quality, to ensure the origin or to ensure control, taking into account Union law, in particular that on the free movement of goods and the free provision of services.’

The facts in the main proceedings and the questions referred for a preliminary ruling

8 Following an application by S, the name ‘Schwarzwälder Schinken’ has been registered since 25 January 1997 as a PGI.

9 By application of 23 March 2005 to the DPMA, S sought a number of amendments to the specification of the PGI ‘Schwarzwälder Schinken’ in accordance with Article 9 of Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1).

10 In order to assess that amendment application, the DPMA Trade Mark department 3.2 collected the opinions of expert bodies concerned in the matter.

11 Following the reception of those opinions, by a statement dated 13 February 2007, received at the DPMA on 15 February 2007, S, taking those opinions into account, submitted a new application to amend the specification.

12 Three objections were lodged against that application, one of which by EC, which submitted observations in the present proceedings. EC is a large distributor of meat-based products, which currently slices and packages ‘Schwarzwälder Schinken’ outside of the production area.

13 By decision of 5 December 2008, the DPMA refused the application to amend the specification inasmuch as it concerned instructions relating to the slicing and packaging, on the ground that that application did not comply with Regulation No 510/2006.

14 S lodged an appeal seeking to alter the part of the DPMA’s decision where that amendment application was refused.

15 By decision of 13 October 2011, the Bundespatentgericht (Federal Patent Court, Germany) annulled the decision of the DPMA and held that the application for the amendment of the specification complied with the requirements of Regulation No 510/2006.

16 EC lodged an appeal against that decision before the Bundesgerichtshof (Federal Court of Justice, Germany).

17 By order of 3 April 2014, the Bundesgerichtshof (Federal Court of Justice) set aside the decision of the referring court, of 13 October 2011, and referred the matter back to that court.

18 In those circumstances, the Bundespatentgericht (Federal Patent Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is the decision on an application lodged with the competent national authority (in this case, the [DPMA]) on 15 February 2007 for an amendment to the specification of a PGI to the effect that the slicing and packaging of the product (in this case, Schwarzwälder Schinken) may take place only in the production area to be taken on the basis of Regulation No 510/2006, which was in force at the time of the application, or on the basis of Regulation No 1151/2012, which is the legislation currently in force at the time of the decision?

(2) If the decision is to be taken on the basis of Regulation No 1151/2012 which is currently in force:
(1.a) Does the fact that incorrect transportation of the product to other areas for the purposes of further processing (slicing and packaging) may have a harmful effect on its authentic flavour, authentic quality and durability represent, from the point of view of quality assurance of the product, a sufficient product-specific justification within the meaning of Article 7(1)(e) of Regulation No 1151/2012 such that slicing and packaging may take place only in the production area?
(1.b) Do requirements for slicing and packaging set out in the specification which do not go beyond the applicable food hygiene standards represent, from the point of view of quality assurance of the product, a sufficient product-specific justification within the meaning of Article 7(1)(e) of Regulation No 1151/2012 such that slicing and packaging may take place only in the production area?
(2.a) Can a sufficient product-specific justification within the meaning of Article 7(1)(e) of Regulation No 1151/2012 be seen in principle, for the rule laid down in the specification for a PGI that slicing and packaging may take place only in the production area, in the fact that the (producer) controls that are then possible in that regard in the production area (Article 7(1)(g), in conjunction with Article 36(3)(a) and Article 37, of Regulation No 1151/2012) offer a greater frequency of controls and generally a better guarantee than (abuse) controls for the purposes of Article 36(3)(b), in conjunction with Article 38, of Regulation No 1151/2012?
(2.b) If question [2(2.a)] is answered in the negative:

Is a different assessment justified if the product in question is also a product with strong supra-regional demand which is sliced and packaged to a large extent outside the production area, even if specific instances of improper use of the PGI for the purposes of Article 13 of Regulation No 1151/2012 have not been established to date?
(3) Can a sufficient product-specific justification within the meaning of Article 7(1)(e) of Regulation No 1151/2012 be seen, for the rule laid down in a specification for a PGI that slicing and packaging may take place only in the production area, in the fact that otherwise the traceability of the further processed product cannot be guaranteed with certainty?In this context, is it relevant that:
(a) the traceability of food, in particular that of animal origin, must be guaranteed, in accordance with Article 18(1) of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [(OJ 2002 L 31, p. 1),] in conjunction with Commission Implementing Regulation (EU) No 931/2011 of 19 September 2011 on the traceability requirements set by Regulation No 178/2002 of the European Parliament and of the Council for food of animal origin [(OJ 2011 L 242, p. 2)];

(b) the traceability of the product must be guaranteed through the participation of the processors of the product in legally voluntary but de facto compulsory private safeguard systems?

(4) If Question (2)(1) to (3) is answered in the affirmative:

Can or must it be laid down in a specification for a PGI — as a less onerous measure compared to the compulsory shifting back of slicing and packaging to the production area — that the processors of the product established outside the production area must be subject in that regard to a control carried out by the authorities and bodies competent under the specification for the controls in the production area (Article 7(1)(g) of Regulation No 1151/2012)?

(3) If the decision is to be taken on the basis of Regulation No 510/2006 (see Question 1), the referring court asks that the questions set out in (2) above be answered on the basis of Regulation No 510/2006, in particular Article 4(2)(e) of that regulation in conjunction with Article 8 and recital 8 of Regulation No [1898/2006].'

Consideration of the questions referred

The first question

19 By its first question, the referring court asks, in essence, whether the decision relating to an application to amend the specification of a PGI, such as that at issue in the main proceedings, must be governed by Article 4(2)(e) of Regulation No 510/2006 in conjunction with Article 8 of Regulation No 1898/2006, in force at the time of the submission of the application, or by Article 7(1)(e) of Regulation No 1151/2012, in force at the time that decision is made. Since these provisions are in essence identical, there is no need to reply to the first question.

The second and third questions

20 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 4(2)(e) of Regulation No 510/2006 in conjunction with Article 8 of Regulation No 1898/2006 and Article 7(1)(e) of Regulation No 1151/2012 must be interpreted as meaning that the requirement to package a PGI-certified product such as the 'Schwarzwälder Schinken' in its geographical area of production is justified, under Article 4(2)(e), if its objective is to avoid the risk incurred by transportation, slicing or packaging outside of that area as regards the quality of the product, to guarantee a greater efficiency of controls in that area and ensure that product traceability, required by European legislation, is better ensured.

21 Article 4(2)(e) of Regulation No 510/2006 envisages that the specification may contain 'information concerning packaging, if the applicant group … so determines and gives reasons why the packaging must take place in the defined geographical area to safeguard quality or ensure the origin or ensure control' and Article 8 of Regulation No 1898/2006 states that 'if the applicant group determines in the product specification that the packaging of the agricultural product or the foodstuff referred to in point (e) of Article 4(2) of [Regulation No 510/2006] must take place in the defined geographical area, justifications, specific to the product, for such restrictions on free movement of goods and freedom to provide services must be given'.

22 Furthermore, pursuant to Article 7(1)(e) of Regulation No 1151/2012, the specification of the PGI must contain 'information concerning packaging, if the applicant group so determines and gives sufficient product-specific justification as to why the packaging must take place in the defined geographical area to safeguard quality, to ensure the origin or to ensure control, taking into account Union law, in particular that on the free movement of goods and the free provision of services'.

23 According to those provisions, the requirement to package a product covered by a PGI in a defined geographical area must aim to safeguard the quality, or to guarantee the origin or ensure the control of that product.

24 It must also be recalled that EU legislation displays a general tendency to enhance the quality of products within the framework of the common agricultural policy, in order to promote the reputation of those products through, inter alia, the use of designations of origin which enjoy special protection. It also aims to satisfy the consumers' expectation regarding product quality and identifiable geographical origin, and to enable producers, in conditions of fair competition, to secure higher incomes in return for a genuine effort to improve quality (see, to that effect, judgment of 3 March 2011, *Kakavetsos-Fragkopoulos*, C-161/09, EU:C:2011:110, paragraph 34).

25 In fact, the specification which subjects the attribution of PGI in particular to the slicing and packaging of ham in the area of production is intended to allow the persons entitled to use the PGI to keep under their control one of the ways in which the product appears on the market. That condition which it lays down aims better to safeguard the quality and authenticity of the product, and consequently the reputation of the PGI, for which those who are entitled to use it assume full and collective responsibility (see, to that effect, judgment of 20 May 2003, *Consorzio del Prosciutto di Parma and Salumificio S. Rita*, C-108/01, EU:C:2003:296, paragraph 65).

26 Against that background, a condition such as at issue in the main proceedings must be regarded as compatible with EU law, despite its restrictive effects on trade, if it is shown that it is necessary and proportionate and capable of safeguarding the quality of the product at issue, guaranteeing its origin or ensuring the control of the specification of that PGI (see, to that effect, judgment of 20 May 2003, *Consorzio del Prosciutto di Parma and Salumificio S. Rita*, C-108/01, EU:C:2003:296, paragraph 66).

27 In this case, the referring court points out, as regards the risk of impairing the quality of the product because of incorrect transportation, that that risk concerns every product put on the market, whether under a PGI or not, and that no specification relating to transportation tending to prevent potential impairments of that product was put forward by S.

28 In that regard, to the extent that the aim of the requirement to package a PGI product in a defined geographical area is, in particular, to safeguard the quality of that product, it must be observed that that requirement is relevant solely if the packaging of that product outside of its geographical area of production entails increased risks regarding the quality of that product and not if other similar products are exposed to the same risks.

29 Furthermore, the fact that the instructions put forward by S regarding the slicing and packaging are either customary in the ham trade, or do not go beyond the criteria currently in force regarding food hygiene does not confirm or preclude, as such, the emergence of increased risks in case of packaging outside of the area of production of a PGI-certified product.

30 In contrast, as regards the fact that the European Commission has previously accepted, in its decisions to register, comparable arguments regarding similar products, it must be noted that the referring court is not required to assess whether the arguments put forward justify the packaging of the product at issue in the main proceedings in a defined geographical area in the light of a supposed previous decision-making practice of the Commission.

31 As regards the objective to guarantee product traceability, it follows from the request for a preliminary ruling that that argument was mentioned by S in a general manner, without any detailed justification, and that it is not subsequently demonstrated that the packaging in the geographical area of production is necessary to guarantee the origin of the product.

32 Lastly, as regards the objective to ensure an efficient control of the respect of the specification, S argues that the efficiency of controls is in general higher in the geographical area of production when a product, such as that at issue in the main proceedings, is, to a large extent, marketed outside of that geographical area.

33 In this regard, it must be recalled that, in the judgment of 20 May 2003, *Consorzio del Prosciutto di Parma and Salumificio S. Rita* (C-108/01, EU:C:2003:296, paragraphs 69, 74 and 75), the Court found that in the context where the protected designation of origin (PDO) specification of the product at issue in that case establishes the different steps of the slicing and packaging giving rise to very precise technical and control interventions, on the authenticity, quality, hygiene and labelling, some of which require specialised assessments, controls performed outside of the area of production provide less guarantees of the quality and authenticity of that product than those performed in the area of production according to the procedure provided in the specification.

34 That is in particular the case when the procedure laid down in the specification attributes the performance of systematic and thorough controls to experts who have specialist knowledge of the features of the products at issue and it is, therefore, hardly conceivable that such checks could be effectively introduced in other Member States (see, to that effect, judgment of 20 May 2003, *Consorzio del Prosciutto di Parma and Salumificio S. Rita*, C-108/01, EU:C:2003:296, paragraph 75).

35 In this case, even though the specification of the product designated under the PGI 'Schwarzwälder Schinken' contains instructions which must be taken into account during the slicing and packaging of that product and the product is, to a large extent, marketed outside of the geographical area of production, those instructions are considered by the referring court to be customary in the ham trade or not going beyond the currently enforceable criteria concerning food hygiene.

36 It follows from all of the foregoing considerations that Article 4(2)(e) of Regulation No 510/2006, in conjunction with Article 8 of Regulation No 1898/2006 and Article 7(1)(e) of Regulation No 1151/2012, must be interpreted as meaning that the requirement to package a product covered by a PGI in its geographical area of production is justified, under Article 4(2)(e), if it constitutes a necessary and proportionate means to safeguard the quality of the product, to guarantee its origin or to ensure the verification of the specification of the PGI. It is for the national court to assess whether that requirement is duly justified by one of the objectives mentioned above, regarding the PGI 'Schwarzwälder Schinken'.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 4(2)(e) of Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, in conjunction with Article 8 of Commission Regulation (EC) No 1898/2006 of 14 December 2006 laying down detailed rules of implementation of Regulation No 510/2006, and Article 7(1)(e) of Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November

2012 on quality schemes for agricultural products and foodstuffs, must be interpreted as meaning that the requirement to package a product covered by a protected geographical indication in its geographical area of production is justified, under Article 4(2)(e), if it constitutes a necessary and proportionate means to safeguard the quality of the product, to guarantee its origin or to ensure the verification of the specification of the protected geographical indication. It is for the national court to assess whether that requirement is duly justified by one of the objectives mentioned above, regarding the protected geographical indication 'Schwarzwälder Schinken'.

[Signatures]