JUDGMENT OF THE COURT (Second Chamber)
24 October 2002 *

In Case C-81/01,

REFERENCE to the Court under Article 234 EC by the Cour de cassation (France) for a preliminary ruling in the proceedings pending before that court between

Borie Manoux SARL

and

Directeur de l'Institut national de la propriété industrielle (INPI),

on the interpretation of Article 40 of Council Regulation (EEC) No 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wines and grape musts (OJ 1989 L 232, p. 13), as amended by Council Regulation (EEC) No 3897/91 of 16 December 1991 (OJ 1991 L 368, p. 5),

* Language of the case: French.

THE COURT (Second Chamber),

composed of: R. Schintgen, President of the Chamber, V. Skouris and N. Colneric (Rapporteur), Judges,

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

after considering the written observations submitted on behalf of:

— the French Republic, by G. de Bergues and L. Bernheim, acting as Agents,

— the Commission of the European Communities, by A.M. Alves Vieira and G. Berscheid, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2002,

gives the following

Judgment

1 By judgment of 13 February 2001, received at the Court of Justice on 16 February 2001, the Cour de cassation (Court of Cassation) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 40 of Council Regulation (EEC) No 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wines and grape musts (OJ 1989 L 232, p. 13), as amended by Council Regulation (EEC) No 3897/91 of 16 December 1991 (OJ 1991 L 368, p. 5) (hereinafter 'Regulation No 2392/89').

2 That question was raised in the course of proceedings between Borie Manoux SARL (hereinafter 'Borie Manoux'), a company established in Bordeaux (France), and the Director of the Institut national de la propriété industrielle (National Institute for Industrial Property, hereinafter 'the INPI') concerning registration of the brand name 'Les Cadets d'Aquitaine' intended for use in connection with the sale of wines of designated origin from the Bergerac region.

Relevant law

Community law

3 According to the third recital in the preamble to Regulation No 2392/89, the general rules for the description and presentation of wines introduced by the

regulation are intended to ensure the supply to potential buyers and public bodies responsible for organising and supervising the marketing of wine of information which is sufficiently clear and accurate to enable them to form an opinion of the product.

4 Regulation No 2392/89 governs the description and presentation of quality wines produced in specific regions (hereinafter 'quality wines psr') within the meaning of Council Regulation (EEC) No 823/87 of 16 March 1987 laying down special provisions relating to quality wines produced in specified regions (OJ 1987 L 84, p. 59), as amended by Council Regulation (EEC) No 2043/89 of 19 June 1989 (OJ 1989 L 202, p. 1).

5 Article 11 of Regulation No 2392/89 provides that:

'1. In the case of quality wines psr, the description on the labelling shall include the following information:

(a) the name of the specified region of origin;

...

2. In the case of quality wines psr, the description on the labelling may be supplemented by the following information:

...

(c) a brand name, in accordance with the conditions laid down in Article 40;

...

(l) the name of a geographical unit which is smaller than the specified region, in accordance with the conditions laid down in Article 13;

...'

6 Article 12(1) of Regulation No 2392/89 provides that:

'Only the information specified in Article 11 shall be allowed for the description on the label of a quality wine psr.

However:

...

— Member States may allow the statement of the specified region referred to in Article 11(1)(a) to be accompanied by a statement of the name of a larger geographical unit of which the specified region in question is a part, in order to indicate its whereabouts, provided, however, that the conditions governing use of the name of the said specified region and of the name of the said geographical unit are complied with.'

7 The second paragraph of Article 13 of Regulation No 2392/89, to which Article 11(2)(l) refers, provides that the Member States may allocate the name of a geographical unit which is smaller than the specified region in question to quality wines psr provided that the geographical unit is well defined and that all the grapes from which the wines have been produced originate in that unit.

8 According to Article 40(1) and (2) of Regulation No 2392/89:

'1. The description and presentation of the products referred to in this regulation, and any form of advertising for such products, must not be incorrect or likely to cause confusion or to mislead the persons to whom they are addressed, particularly as regards:

— the information provided for in Articles... 11...

— the characteristics of the products, and in particular their... origin or provenance...

...

The geographical name designating a specified region must be sufficiently precise and familiarly linked to the area of production so that, taking account of the existing situations, confusion may be avoided.

2. Where the description, presentation and advertising of the products referred to in this regulation are supplemented by brand names, such brand names may not contain any words, parts of words, signs or illustrations which:

(a) are likely to cause confusion or mislead the persons to whom they are addressed within the meaning of paragraph 1;

or

(b) are:

— liable to be confused by the persons to whom they are addressed with all or part of the description of a table wine, of a quality wine psr, or of an imported wine whose description is governed by Community provisions

or with the description of any other product referred to in the first subparagraph of Article 1(1) and the first subparagraph of Article 36(1),

or

— identical to the description of any such product unless the products used for making the final products referred to above are entitled to such description or presentation.

Moreover, the labelling used for the description of a table wine, a quality wine psr or an imported wine may not bear brand names containing words, parts of words, signs or illustrations which:

...

(b) in the case of table wines described in accordance with Article 72(2) and (3) of Regulation (EEC) No 822/87, quality wines psr or imported wines, contain false information, particularly with regard to geographical origin, vine variety, vintage year or a reference to superior quality;

...'

National law

9 Under Article L. 711-3(c) of the French intellectual property code (*Journal Officiel de la République Française* of 3 July 1992, p. 8801) 'no sign the use of which is... likely to mislead the public, in particular as to the nature, quality or geographical provenance of the product or service, may be adopted as a trade mark or element of a trade mark'. Under Article L. 711-4(h) of the code 'no sign that infringes existing rights, and in particular rights... in the name, image or reputation of a territorial collective, may be adopted as a trade mark'.

The main proceedings

10 On 6 January 1997 Borie Manoux applied to the INPI for registration of the mark 'Les Cadets d'Aquitaine' which it proposed to use in the sale of wines of designated origin from the Bergerac region, which is a specified region within the administrative region of Aquitaine (France).

11 By decision of 8 July 1997, the director of the INPI rejected that application on the basis of Article L. 711-3 of the intellectual property code and Articles 11 and 40 of Regulation No 2392/89.

12 Borie Manoux challenged that decision before the Cour d'appel de Bordeaux (Court of Appeal, Bordeaux) (France). By judgment of 26 October 1998 the Cour d'appel confirmed the INPI's decision.

13 Borie Manoux then appealed against that judgment before the Cour de cassation on the ground that the Cour d'appel had violated Articles 11 and 40 of Regulation No 2392/89 by finding, as a matter of principle, that it was unlawful to include the word 'Aquitaine' in the mark 'Les Cadets d'Aquitaine' because it was not a geographical reference the use of which was provided for by a national law or by Community legislation, without even considering or specifying in what way the inclusion of the word was likely to create a misleading impression as to the origin, quality or nature of the product or a risk of confusion with a Community or national description.

14 In the judgment containing the reference the Cour de cassation noted that, under Article 11(2) of Regulation No 2392/89, the description on the label may be supplemented by certain information, such as a brand name, in accordance with the conditions laid down in Article 40 of the regulation. It also noted that, under Article 40(2), where the description, presentation and advertising of the products referred to in the regulation are supplemented by brand names, such brand names may not contain any words, parts of words, signs or illustrations which are likely to cause confusion or mislead the persons to whom they are addressed, within the meaning of Article 40(1), that is to say as regards the information provided for in Article 11 and the characteristics of the products, such as their nature, origin or provenance.

15 The Cour de cassation added that, under Article 12(1) of Regulation No 2392/89, only the information specified in Article 11 is to be allowed for the description on the label of a quality wine psr and that the Cour d'appel de Bordeaux had held that the mark which Borie Manoux sought to register for wines of the Aquitaine region contained the geographical name 'Aquitaine', the use of which is not provided for by Article 11 of the regulation.

16 It was in those circumstances that the Cour de cassation decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 40 of Regulation No 2392/89 by interpreted as prohibiting the registration as a trade mark, for the products covered by the regulation, of a geographical reference the use of which is not provided for by Article 11, even where the registration of such a trade mark is not likely to mislead the consumer as to the provenance of the wine and does not give rise to any confusion with a registered geographical designation, in so far as such registration might suggest that the geographical reference in question, which relates to the region where that wine is actually produced but which covers other designations of origin, is protected?'

The question referred

17 By its question, the national court is essentially asking whether Article 40 of Regulation No 2392/89 precludes the registration of a trade mark, for use in connection with the sale of wine, which includes a geographical reference the use of which is not provided for by Article 11, where registration, even if unlikely to mislead consumers as to the provenance of the wine or give rise to confusion with a registered geographical designation, might wrongly suggest that the geographical reference in question is protected.

18 It must be remembered at the outset that Articles 11 and 12 of Regulation No 2392/89 reveal an intention on the part of the Community legislature to adopt, in that regulation, a detailed and complete code governing the description and presentation of wines (see Case C-46/94 *Voisine* [1995] ECR I-1859, paragraph 22). The use of a geographical reference on a label is thus lawful only if authorised by Regulation No 2392/89.

19 Leaving aside Article 12 of Regulation No 2392/89, only the information specified in Article 11 of that regulation is to be permitted for the description on the label of a quality wine psr.

20 Under Article 11(2)(l) of the regulation, read together with Article 13(2), adding the name of a smaller geographical unit is permitted; the third indent of the second subparagraph of Article 12(1) permits the addition of the name of a larger geographical unit.

21 However, there is no doubt but that, in both cases, the Member States must make express provision for the use of such names and it appears from the observations of the French Government, which is not contradicted on the point by Borie Manoux, that there is no such provision for the name 'Aquitaine'.

22 Under Article 11(2)(c) of Regulation No 2392/89, the description on the labelling may also be supplemented by a brand name, in accordance with the conditions laid down in Article 40 of the regulation, which include the condition that the brand name must not be likely to mislead consumers as to the provenance of the wine and the further condition that it must not give rise to confusion with a protected description.

23 It seems that the national court, which has the task of establishing the facts of the case, begins from the premiss that the use of the mark in question satisfies both of those conditions. However, registration of a mark containing a geographical reference might imply that the reference is protected as a specific region and the court asks whether that fact is sufficient to give rise to an inference that Article 40 of Regulation No 2392/89 prohibits registration of such a mark.

24 In this connection it should be remembered that Article 40 of Regulation No 2392/89 is aimed primarily at prohibiting the misuse of brand names (Case C-456/93 *Langguth* [1995] ECR I-1737, paragraph 29). As the Court of Justice has held, in connection with Council Regulation (EEC) No 355/79 of 5 February 1979 laying down general rules for the description and presentation of wines and grape musts (OJ 1979 L 54, p. 99), subsequently repealed and replaced by Regulation No 2392/89, it is necessary to prevent in the marketing of wine all practices which are of such a nature as to create false appearances (Case 56/80 *Weigand* [1981] ECR 583, paragraph 18).

25 It is clear from settled case-law that, for the use of a brand name to be capable of being regarded as likely to cause confusion or mislead the persons to whom it is addressed, it must be established, having regard to the opinions or habits of the consumers concerned, that there is a real risk of their economic behaviour being affected (see, *inter alia*, Case C-303/97 *Sektkellerei Kessler* [1999] ECR I-513, paragraph 33).

26 As the Court has frequently held, it is for the national court to assess whether a brand name may be misleading taking into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect (see, *inter alia*, *Sektkellerei Kessler*, cited above, paragraph 36).

27 Thus, the prohibition in Article 40 of Regulation No 2392/89 will not apply on a simple finding that use of a brand name containing a geographical reference is in itself likely to give the impression that the reference is protected whilst in reality it is not. It is necessary also to establish that there is a real risk of the economic behaviour of the consumers concerned being affected by use of the brand name.

28 None the less, it is appropriate to emphasise that Article 40 of Regulation No 2392/89 does not determine what conditions must be satisfied in order to obtain registration of a mark under national law; it is concerned with the description and presentation of the products to which it relates and the manner in which a brand name may be used as an adjunct to such a description. It is not for the Court of Justice to decide whether the prohibition under Community law on the use of a brand name to describe wines means that it may not be registered as a mark in accordance with national law.

29 Consequently, the answer to the question referred must be that Article 40 of Regulation No 2392/89 is to be interpreted as not prohibiting the use of a trade mark which contains a geographical reference and is intended for use in connection with the sale of wine and is likely to give the false impression that the geographical reference is protected, unless there is a real risk that use of such a mark will mislead consumers and, as a result, alter their economic behaviour. It is a matter for the national court to determine whether or not that is the case.

Costs

30 The costs incurred by the French Government and by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the question referred to it by the Cour de cassation by judgment of 13 February 2001, hereby rules:

Article 40 of Council Regulation (EEC) No 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wines and grape musts, as amended by Council Regulation (EEC) No 3897/91 of 16 December 1991, is to be interpreted as not prohibiting the use of a trade mark which contains a geographical reference and is intended for use in connection with the sale of wine and is likely to give the false impression that the geographical reference is protected, unless there is a real risk that use of such a mark will mislead consumers and, as a result, alter their economic behaviour. It is a matter for the national court to determine whether or not that is the case.

Schintgen Skouris Colneric

Delivered in open court in Luxembourg on 24 October 2002.

R. Grass

Registrar

R. Schintgen

President of the Second Chamber