JUDGMENT OF THE COURT (Fifth Chamber)
28 January 1999 *

In Case C-303/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Verbraucherschutzverein eV

and

Sektkellerei G. C. Kessler GmbH und Co.

on the interpretation of Article 13(2)(b) of Council Regulation (EEC) No 2333/92 of 13 July 1992 laying down general rules for the description and presentation of sparkling wines and aerated sparkling wines (OJ 1992 L 231, p. 9),

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J. C. Moitinho de Almeida, C. Gulmann, D. A. O. Edward and M. Wathelet (Rapporteur), Judges,

* Language of the case: German.

Advocate General: N. Fennelly,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Verbraucherschutzverein eV, by N. Reich, Professor at the University of Bremen,

— Sektkellerei G. C. Kessler GmbH und Co., by K. Bauer, Rechtsanwalt, Cologne,

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent,

— the French Government, by F. Pascal, Administrative Attaché in the Legal Directorate of the Ministry of Foreign Affairs, and K. Rispal-Bellanger, Deputy Head of the same directorate, acting as Agents, and

— the Commission of the European Communities, by K.-D. Borchardt, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Verbraucherschutzverein eV, represented by N. Reich; Sektkellerei G. C. Kessler GmbH und Co., represented by K. Bauer; the French Government, represented by C. Vasak, Assistant Secretary in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agent; and the Commission, represented by K.-D. Borchardt, at the hearing on 9 July 1998,

after hearing the Opinion of the Advocate General at the sitting on 29 September 1998,

gives the following

Judgment

1 By order of 26 June 1997, received at the Court on 25 August 1997, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 13(2)(b) of Council Regulation (EEC) No 2333/92 of 13 July 1992 laying down general rules for the description and presentation of sparkling wines and aerated sparkling wines (OJ 1992 L 231, p. 9).

2 Those questions were raised in proceedings between Verbraucherschutzverein eV ('the Verbraucherschutzverein'), a consumer protection association, and Sektkellerei G. C. Kessler GmbH&Co. ('Kessler') concerning the description 'Hochgewächs' on the label of bottles of *Sekt* (sparkling wine) marketed by that company.

Community law

3 Council Regulation (EEC) No 2392/89 of 24 July 1989 lays down general rules for the description and presentation of wines and grape musts (OJ 1989 L 232, p. 13).

4 Article 11(1) sets out the descriptive information which must appear on the labelling of quality wines produced in specified regions (hereinafter 'psr'). Article 11(2) provides that, in the case of such wines, that description

'may be supplemented by ...:

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

...

(k) details as to:

— the method of production,

— the type of product,

— the particular colour of the quality wine psr,

in so far as this information is prescribed in Community legislation or by the producer Member State. However, the use of such information may be prohibited in the description of quality wines psr originating in a specified region where it is not traditional and customary;

...'

5 Article 40(2) of Regulation No 2392/89 provides that such brand names must not be likely to cause confusion or mislead consumers.

6 Pursuant to Article 11(2)(k) of Regulation No 2392/89, Article 14(3)(a) of Commission Regulation (EEC) No 3201/90 of 16 October 1990 laying down detailed rules for the description and presentation of wines and grape musts (OJ 1990 L 309, p. 1) provides that the description 'Riesling Hochgewächs' is among the terms which may be used to describe a German quality wine psr.

7 The description and presentation of sparkling wines and aerated sparkling wines is the subject of specific provisions in Regulation No 2333/92.

8 Article 3 of that regulation sets out the mandatory information which must appear on the labels of bottles of sparkling wine or aerated sparkling wine.

9 In accordance with the first indent of Article 4(1) of Regulation No 2333/92, such information may be supplemented by other particulars provided that 'they are not liable to mislead the persons for whom the information is intended'.

10 In that respect, the eighth recital in the preamble to that regulation states that

'... in order to facilitate the marketing of the said products, it should be left to the parties concerned to choose which optional information they wish to include, without provision of an exhaustive list; whereas the choice of optional information should nevertheless be restricted to details which are not inaccurate or liable to create confusion in the minds of final consumers or others for whom the information is intended'.

11 Article 6 of Regulation No 2333/92 permits various types of optional information to appear on the label. In particular, Article 6(8) provides:

'Reference to superior quality shall be allowed only in the case of:

— a quality sparkling wine psr,

— a quality sparkling wine

...'

12 Under Article 13 of Regulation No 2333/92,

'1. The description and presentation of the products referred to in Article 1(1) 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 ...

2. Where the description, presentation and advertising of the products referred to in Article 1(1) are supplemented by brand names, such brand names may not contain any words, syllables, 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 with all or part of the description of a table wine, a quality wine produced in a specified region, including a quality sparkling wine psr or an imported wine whose description is governed by Community provisions or with the description of any other product referred to in Article 1(1), or are identical to the description of any such product, unless the products used for constituting the cuvée of the sparkling wine in question are entitled to such description or presentation.

3. Notwithstanding paragraph 2(b), the holder of a well-known registered brand name for a product referred to in Article 1(1) which contains wording that is identical to the name of a specified region or the name of a geographical unit smaller than a specified region may, even if he is not entitled to use such a name pursuant

to paragraph 2, continue to use that brand name where it corresponds to the identity of its original holder or of the original provider of the name, provided that the brand name was registered at least 25 years before the official recognition of the geographical name in question by the producer Member State in accordance with Article 1(3) of Regulation (EEC) No 823/87 as regards quality wines psr and that the brand name has actually been used without interruption.

Brand names complying with the conditions of the first subparagraph may not be invoked against the use of the name of geographical units used to describe a quality wine psr.'

13 The 18th recital in the preamble to the regulation states in that context that, in order to establish conditions for fair competition between the various aerated sparkling wines,

'anything in the description or presentation of such wines likely to confuse or mislead those for whom the information is intended should be prohibited; whereas similar prohibitions should be laid down for brand names used to describe sparkling wines or aerated sparkling wines'.

The dispute in the main proceedings

14 Kessler produces *Sekt* from French wine of the 'Chardonnay' grape variety and has been marketing it for about 60 years under the name 'Kessler Hochgewächs', a description protected in Germany as a trade mark since 7 June 1950.

15 Since 1986, the description 'Riesling Hochgewächs' has been protected in Germany, and, pursuant to Paragraph 8a of the German Weinverordnung (Wine Regulations; hereinafter 'the WeinVO') — which in 1995 became Paragraph 34 of the WeinVO (BGBl. I, p. 630) —, may be applied only to a white wine meeting certain quality criteria and made exclusively from grapes of the 'Riesling' variety. Under that provision,

'A white wine may be described by the term "Riesling-Hochgewächs" only if it is produced exclusively from grapes of the Riesling variety, the must obtained from those grapes having a natural alcoholic strength at least 1.5% by volume higher than the minimum natural alcoholic strength laid down for the given production region or the part thereof where the grapes were harvested, and if it has obtained a quality rating of at least 3.0 at the official quality control.'

16 The Verbraucherschutzverein applied to the Landgericht (Regional Court) for an injunction restraining Kessler from continuing to market its sparkling wines under the description 'Hochgewächs' on the ground that it was likely to lead consumers to believe, wrongly, that the wine was made from 'Riesling' and was therefore contrary to Article 13(2)(b) of Regulation No 2333/92 and certain provisions of the Gesetz gegen den unlauteren Wettbewerb (German Law against Unfair Competition).

17 In the proceedings before the Landgericht, Kessler countered that consumers could not be misled since, first, it did not use the whole of the description 'Riesling-Hochgewächs' and, secondly, consumers would not infer the identity of the base wine used from the description of a sparkling wine. Kessler further argues that it has in any event acquired a vested right to the description 'Kessler Hochgewächs' through the use of that description as a trade mark protected in Germany since 1950, and that the interpretation of Regulation No 2333/92 cannot have the effect of prejudicing that trade mark right.

18 The Landgericht dismissed the application by the Verbraucherschutzverein, which appealed to the Oberlandesgericht (Higher Regional Court), Cologne. That court dismissed the appeal, on the ground that, whilst it was quite conceivable that a substantial number of consumers had formed the impression that the wines used for making the cuvée fulfilled the criteria as to grape varieties and quality for a 'Riesling-Hochgewächs' wine within the meaning of the WeinVO, only consumers who knew of the existence of the wine description 'Riesling-Hochgewächs' could be misled, and that, in any event, the Verbraucherschutzverein had not furnished proof that a substantial number of those consumers had been misled. In the appellate court's view, for Article 13(2)(b) of Regulation No 2333/92 to apply, it would be necessary not only to establish that the fact of the term 'Hochgewächs', as it appears on the labels of bottles of sparkling wine, being identical with part of the description of another wine made according to different criteria might in itself entail a risk of confusion ('abstrakte Verwechslungs- bzw. Irreführungsgefahr'), but also to show that the term was in fact likely to mislead consumers ('konkrete Verwechslungs- bzw. Irreführungsgefahr').

19 Faced with an appeal by the Verbraucherschutzverein on a point of law, the Bundesgerichtshof has expressed doubts as to the interpretation of Article 13(2)(b) of Regulation No 2333/92. In its view, the question raised by the main proceedings is whether the prohibition on using certain brand names imposed by that provision presupposes a mere risk of confusion, without there being any need to demonstrate that the information used is in fact likely to mislead consumers and thus affect their economic behaviour.

20 In that respect, the Bundesgerichtshof is asking in particular whether the use of the terms 'cause confusion' and 'mislead' as alternatives in Article 13(1) and Article 13(2)(a), while Article 13(2)(b) is concerned only with the question whether the descriptions in question are 'liable to be confused', might indicate that, in the first two cases, the prohibition presupposes proof of the risk of persons actually being misled, whereas, in the situation covered by Article 13(2)(b), it is sufficient to find that the descriptions in question are in themselves 'liable' to be confused.

21 In the event of the latter interpretation being upheld, the national court also questions the legality of the resulting encroachment on the intellectual property right concerned, regard being had to the protection of fundamental rights.

22 In those circumstances, the Bundesgerichtshof decided to stay proceedings in order to refer the following questions to the Court:

'(1) Does it suffice for the prohibition in Article 13(2)(b) of the said regulation to be applicable that a word in a brand name used to describe the sparkling wine (in this case "Hochgewächs") may be confused with part of the description of a wine (in this case "Riesling-Hochgewächs") not used for constituting the cuvée of the sparkling wine, even if it is not the case that a substantial proportion of consumers form mistaken impressions as to the composition of the cuvée which influence their purchases, and there is no intent to deceive on the part of the owner of the brand?

(2) If so, may the industrial property which the owner of the brand has acquired by reason of the traditional undisturbed use of his description in Germany, as a higher-ranking interest deserving protection, preclude the application of the prohibition of descriptions in Article 13(2)(b) of the said regulation?'

The first question

23 Article 13(2) of Regulation No 2333/92 provides that brand names supplementing the description, presentation and advertising of a sparkling wine may not contain, *inter alia*, words likely to cause confusion or mislead the persons to whom they are addressed [subparagraph (a)] or which are liable to be confused with all or part

of the description of, in particular, a quality wine produced in a specified region whose description is governed by Community provisions or are identical to the description of such a wine 'unless the products used for constituting the cuvée of the sparkling wine in question are entitled to such description or presentation' [subparagraph (b)].

24 In the submission of the French Government, Community law does not require proof of confusion to be adduced in cases where a brand name contains terms which form part of a description reserved for the presentation of certain wines. Community law affords objective protection to the descriptions which it lists, reserving their use exclusively to those who offer the wines for sale. Thus the Community legislature did not impose any conditions as to proof of actual confusion in consumers' minds with an indication reserved for the presentation of certain wines where, as in this case, the product includes a term identical to that appearing in such an indication.

25 Similarly, the Verbraucherschutzverein maintains that the Community rules do not require proof that confusion has actually occurred. The abstract risk that persons might be deceived is, in its view, sufficient, irrespective of the effects of using the brand name on a given group of consumers.

26 In support of its interpretation, the Verbraucherschutzverein argues that, in Case 56/80 *Weigand* v *Schutzverband Deutscher Wein* [1981] ECR 583, which concerned 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), the Court took an abstract view of the prohibition of indications liable to cause confusion, having regard to the specific objectives of the organisation of the market in question. It submits that only that view is capable of ensuring the uniform application of Community law, as it is not dependent on the inevitably divergent perceptions of consumers from the various Member States.

27 The first point to be made is that the brand name 'Kessler Hochgewächs' is not identical with the description 'Riesling-Hochgewächs', with the result that the situation envisaged by the second part of the alternative contained in Article 13(2)(b) of Regulation No 2333/92, which concerns a misappropriation of the description reserved, as such, for certain wines by the Community rules, does not arise here.

28 As this case therefore falls within the first part of the alternative contained in Article 13(2)(b) of Regulation No 2333/92, it is necessary to enquire, as does the national court, whether it is sufficient to find that a brand name which contains a word appearing in the description of one of the products mentioned in that provision is, in itself, capable of being confused with that description, or whether it also needs to be established that use of that brand name may in fact generate in the minds of the consumers concerned misconceptions as to the composition of the cuvée which would be liable to influence their economic behaviour.

29 In that regard, the first point to note is that the use of references to superior quality is expressly authorised by Article 6(8) of Regulation No 2333/92 in respect of certain wines and, in particular, 'quality sparkling wines'.

30 Such references, if they are likely to cause confusion in consumers' minds, fall within the specific prohibition laid down by Article 13(2) of Regulation No 2333/92 where they constitute a protected brand name, otherwise they fall within the general prohibition laid down by Articles 4(1) and 13(1). There is nothing to suggest

that the Community legislature intended to set different criteria for assessing the concept of confusion according to whether or not the reference constitutes a protected brand name, especially since Articles 13(1) and 13(2)(a) both use the same expression 'likely to cause confusion or mislead'.

31 It is true that, in Article 13(2) of Regulation No 2333/92, the Community legislature envisaged two distinct types of risks of confusion arising from the use of brand names intended to supplement the description, presentation and advertising of a sparkling wine. But that distinction, which makes it possible for the specific risks of confusion concerning the characteristics of the base wine used in producing the cuvée and the particular case of a brand name which is identical to a protected description to be highlighted in subparagraph (b), does not support the interpretation to the effect that the Community legislature attributed a different meaning to the expressions 'likely to cause confusion or mislead' and 'liable to be confused' contained in subparagraphs (a) and (b) respectively of Article 13(2).

32 Moreover, as the Commission and the German Government have pointed out, by authorising the use of brand names to supplement the description, presentation and advertising of sparkling wines, the Community legislature necessarily intended to balance the interests involved as between, on the one hand, the protection of consumers, and in particular the right not to be misled as to the intrinsic qualities of a product, and, on the other, the protection of intellectual property rights and, in particular, the legitimate interest of the owners of a brand name to use and exploit it for commercial purposes. That process of balancing the interests involved would be seriously undermined if a mere risk of confusion, found to exist without even taking the opinions and habits of the consumers concerned into consideration, were enough to prevent the use of an appellation protected as a brand name.

33 Finally, in its judgment in Case C-456/93 *Zentrale zur Bekämpfung unlauteren Wettbewerbs* v *Langguth* [1995] ECR I-1737, concerning Article 40 of Regulation No 2392/89, the wording of which is almost identical with that of Article 13 of

Regulation No 2333/92, the Court held in paragraph 28 that the fact that a brand name is presented in a conspicuous manner does not mean that it is likely to cause confusion or mislead the persons to whom it is addressed, even if it contains a word that has been designated by the rules in question as information which may be used in the appellation of a quality wine psr. The Court added in paragraph 29 that the wording of Article 40 of Regulation No 2392/89 shows that it is aimed primarily at prohibiting the untruthful use of brand names. It follows from that judgment 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.

34 Contrary to the view taken by the Verbraucherschutzverein, the *Weigand* judgment cited above does not contradict that interpretation, since *Weigand* does not support the proposition that the risk of confusion, within the meaning of the provisions at issue in that case, might be determined without reference to the opinions or habits of the consumers concerned.

35 Nor, moreover, can the Verbraucherschutzverein object that that interpretation would involve considerable expense in time and money, inasmuch as application of Article 13(2)(b) of Regulation No 2333/92 would entail recourse to a survey of a representative sample of consumers or to an expert's report, which would amount in practice to a denial of legal protection and render the prohibition laid down by that provision without content.

36 As the Court has frequently held in relation to provisions similar to those in Article 13 of Regulation No 2333/92, designed to prevent any deception of consumers and contained in a number of secondary legislative measures either of general application or sectoral in scope, it is for the national court to assess whether an appellation, brand name or advertising statement may be misleading (see, in particular, Case 94/82 *De Kikvorsch* [1983] ECR 947; C-313/94 *Graffione* v *Fransa* [1996] ECR I-6039; Case C-373/90 *X* [1992] ECR I-131, paragraphs 15 and 16, and Case C-210/96 *Gut Springenheide and Tusky* v *Oberkreisdirektor Steinfurt* [1998] ECR p. I-4657). In this case, it is for the national court to assess in the light of the circumstances whether, bearing in mind the consumers to whom it is addressed, a brand name or its component parts are liable to be confused with all or part of the

description of certain wines. In that respect, it is also apparent from the Court's case-law that the national court must take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect (*Gut Springenheide and Tusky*, cited above, paragraphs 31 and 32).

37 It is only where it has particular difficulty in appraising the misleading nature of the brand name that, in the absence of any Community provision on the matter, the national court must assess whether it is necessary, under the conditions laid down by its national law, to decide upon measures of inquiry such as an expert's report or a consumer research poll as guidance for its judgment (see *Gut Springenheide and Tusky*, cited above, paragraphs 35 to 37) and, where appropriate, adopt interim measures.

38 Having regard to all the above considerations, the answer to the first question must be that, on a proper construction of Article 13(2)(b) of Regulation No 2333/92, it is not sufficient for the prohibition laid down by that provision to be applied to find that a brand name which includes a word appearing in the description of one of the products there mentioned is, as such, likely to be confused with that description. It is also necessary to establish that use of the brand name is in fact likely to mislead the consumers concerned and thus affect their economic behaviour. In that respect, it is for the national court to have regard to the presumed expectations, in regard to that information, of an average consumer who is reasonably well informed and reasonably observant and circumspect.

The second question

39 Having regard to the negative answer given to the first question, the second is devoid of purpose.

Costs

40 The costs incurred by the German and French Governments 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Bundesgerichtshof by order of 26 June 1997, hereby rules:

On a proper construction of Article 13(2)(b) of Council Regulation (EEC) No 2333/92 of 13 July 1992 laying down general rules for the description and presentation of sparkling wines and aerated sparkling wines, it is not sufficient for

the prohibition laid down by that provision to be applied to find that a brand name which includes a word appearing in the description of one of the products there mentioned is, as such, likely to be confused with that description. It is also necessary to establish that use of the brand name is in fact likely to mislead the consumers concerned and thus affect their economic behaviour. In that respect, it is for the national court to have regard to the presumed expectations, in regard to that information, of an average consumer who is reasonably well informed and reasonably observant and circumspect.

Puissochet Moitinho de Almeida Gulmann

Edward Wathelet

Delivered in open court in Luxembourg on 28 January 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber