JUDGMENT OF THE COURT

5 November 2002 *

In Case C-325/00,

Commission of the European Communities, represented by J.C. Schieferer and C. Schmidt, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing, acting as Agent, assisted by M. Loschelder, Rechtsanwalt,

defendant,

APPLICATION for a declaration that by awarding the quality label 'Markenqualität aus deutschen Landen' (quality label for produce made in Germany) to finished products of a certain quality produced in Germany, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet and M. Wathelet (Presidents of Chambers), C. Gulmann (Rapporteur), A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

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 application lodged at the Court Registry on 4 September 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that by awarding the quality label 'Markenqualität aus deutschen Landen' (quality label for produce made in Germany) to finished products of a certain quality produced in Germany, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

Background to the dispute

2 The Gesetz über die Errichtung eines zentralen Fonds zur Absatzförderung der deutschen Land- und Ernährungswirtschaft (Absatzfondsgesetz) (Law establishing a central fund for the promotion of German agriculture and the German food industry of 26 June 1969 (BGBl. 1969 I, p. 635), in its consolidated version of 21 June 1993 (BGBl. 1993 I, p. 998, the 'AFG') set up a fund called the 'Absatzförderungsfonds der deutschen Land- und Ernärungswirtschaft (Absatzfonds)' (the 'Fund'). Under Paragraph 2(1) of the AFG, the Fund has, *inter alia*, the object of promoting, at central level, the marketing and development of agricultural products and the German food industry by researching and developing markets inside and outside Germany.

3 In accordance with Paragraph 4 of the AFG, the Fund is run by a Management Board of three members, chosen by a Supervisory Board and appointed by the president of the Supervisory Board, that appointment being subject to the approval of the competent federal minister. Under Paragraph 5 of the AFG, the Supervisory Board is composed of 21 members who are appointed by the federal minister, five on the proposal of parties represented in the Bundestag, thirteen on the proposal of the German agriculture and food sectors and three on the proposal of the governing organs of the central body responsible for the implementation of the Fund's objectives, referred to in paragraph 5 of this judgment.

4 Under Paragraph 10 of the AFG, the Fund's tasks are financed by compulsory contributions paid by undertakings in the German agriculture and food sector. The obligation to contribute to the Fund applies to all undertakings in the relevant sectors. The Fund is an economic body based on principles of mutual aid.

Its income, consisting of those compulsory contributions, is used exclusively for purposes in the interest of mutual aid.

5 Paragraph 2(2) of the AFG provides that the Fund is to carry out its task through a central body ('einer zentralen Einrichtung der Wirtschaft'). That central body is the Centrale Marketing-Gesellschaft der deutschen Agrarwirtschaft mbH (the 'CMA'). It is a limited company (GmbH) which, in accordance with Paragraph 2(2) and (4) of the AFG is responsible for promoting the distribution and exploitation of products in the sectors of the German economy in question with resources which are granted to it through the Fund.

6 The CMA's Articles of Association — which were originally approved by the competent Federal minister — provide in Article 9, for the setting up of a Supervisory Board composed of 26 members appointed by the general meeting of the members of the company. The members are professional associations from the German food and agriculture sectors having shares in the company. Three of the members of that Board are appointed, under Paragraph 2(2) of the AFG, on the proposal of the Fund, the 23 others being proposed, in accordance with Article 9 of the CMA's Articles of Association, by the professional associations concerned.

7 Article 2 of the CMA's Articles of Association provides:

'(1) The company is to assist the Fund for the promotion of agriculture and the German food sector and its purpose is the promotion, at central level, of the marketing and exploitation of German agricultural and food products.

(2) To achieve that objective, the company must use all appropriate means to research and develop markets, inside and outside the country, in particular:

...

(d) the promotion of indications of origin and quality labels

...

(3) The company is bound to observe the Fund's rules and additionally to be guided, particularly in relation to the commitment of its financial resources, by the general interest of the German agricultural and food sector.

(4) The company is not authorised to provide, for pecuniary gain, goods or services on its own account. Without prejudice to the obligation to manage its activities according to commercial principles, the company is non-profit-making and confines itself to the promotion of the German agricultural and food sector.'

8 Under Article 2(2)(d) of its Articles of Association, the CMA awards a quality label ('Gütezeichen'), which enables the mark 'Markenqualität aus deutschen Landen' 'CMA label') to be affixed to the products concerned. That label is awarded, on the application of an agricultural or food company, to products satisfying certain quality requirements set by the CMA. The latter constantly verifies, with the help of independent laboratories, that the products authorised

to carry its label satisfy the corresponding quality requirements. The CMA reserves the use of its label for products made in Germany, whether they are made from raw materials produced in Germany or imported.

9 When the CMA has verified that an undertaking's products fulfil the conditions for the grant of its label, it concludes a licence contract with the undertaking.

10 The CMA label has existed since the beginning of the 1970s and is, according to the file before the Court, used by 2 538 undertakings for 11 633 different products across 23 sectors of production.

Pre-litigation procedure

11 Following an investigation carried out in 1992 in order to list the quality labels existing in the Member States for agricultural products and food, the Commission, by letters of 6 July 1994 and 18 October 1995, informed the German Government that the award of the CMA label in the circumstances set out in paragraphs 2 to 9 of this judgment ('the contested scheme') constituted a breach of the principle of the free movement of goods enshrined in Article 30 of the Treaty.

12 On 22 January 1998, the Commission sent a formal notice to the German Government concerning the CMA label, to which it replied on 3 June 1998. As the Commission was not satisfied by that reply, on 11 December 1998 it sent a

reasoned opinion to the Federal Republic of Germany calling on it to comply with its obligations under Article 30 of the Treaty within two months of the notification of that opinion. The German Government replied on 16 March 1999 that the award of the CMA label was compatible with Community law.

13 In those circumstances, the Commission decided to bring the present action.

The action

Whether the contested scheme can be classified as a public measure attributable to the State

14 The German Government argues that the CMA's activities do not fall within the competence of the public authorities and are therefore outside the scope of Article 30 of the Treaty. It argues that unlike the position in Case 249/81 *Commission* v *Ireland* ([1982] ECR 4005), the CMA does not merely have the legal form of a private capital company, but also its organs were set up in accordance with private law rules and its resources are supplied by economic operators.

15 Additionally, the German Government points out that CMA label is not used on the basis of a law or other official act but on the basis of contracts concluded between the CMA and the undertakings. The CMA concludes licence contracts with the undertakings on its own responsibility and no licensee is obliged, by act

of state or for other reasons, to conclude such a contract. In addition, the CMA's financial resources come exclusively from contributions from undertakings and the amounts constituting those contributions are used exclusively for purposes which are in the interest of mutual aid.

16 Finally, the German Government argues that, although the Fund is effectively a public law body, its only influence on the CMA's organs is to the extent that three members of the CMA's Supervisory Board, which number 26, are appointed by the Fund. The activity and influence of the State on the CMA is limited to the collection and supervision of the contributions paid to the CMA which come exclusively from the private sector.

17 In that regard, it must be recalled that the CMA, although set up as a private company is

— established on the basis of a law, the AFG, is characterised by that law as a central economic body and has, among the objects assigned to it by that law, the promotion, at central level, of the marketing and exploitation of German agricultural and food products;

— is bound, according to its Articles of Association, originally approved by the competent federal minister, to observe the rules of the Fund, itself a public body, and additionally to be guided, in particular in relation to the commitment of its financial resources, by the general interest of the German agricultural and food sector;

— is financed, according to the rules laid down by the AFG, by a compulsory contribution by all the undertakings in the sectors concerned.

18 Such a body, which is set up by a national law of a Member State and which is financed by a contribution imposed on producers, cannot, under Community law, enjoy the same freedom as regards the promotion of national production as that enjoyed by producers themselves or producers' associations of a voluntary character (see Case 222/82 *Apple and Pear Development Council* [1983] ECR 4083, paragraph 17). Thus it is obliged to respect the basic rules of the Treaty on the free movement of goods when it sets up a scheme, open to all undertakings of the sectors concerned, which can have effects on intra-Community trade similar to those arising under the scheme adopted by the public authorities.

19 Furthermore, it must be observed that:

— the Fund is a public law body;

— the CMA is required to respect the Fund's guidelines;

— the financing of the CMA's activities, under legislation, comes from resources which are granted to it through the Fund, and

— the Fund supervises the CMA's activities and the proper management of the finances which are granted to it by the Fund.

20 In those circumstances, it must be held that the Commission could rightly take the view that the contested scheme is ascribable to the State.

21 Thus it follows that the contested scheme must be considered to be a public measure for the purpose of Article 30 ascribable to the State.

Restriction on trade

22 The Court has consistently held that Article 30 of the Treaty aims to prohibit all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see, in particular, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).

23 The contested scheme has, at least potentially, restrictive effects on the free movement of goods between Member States. Such a scheme, set up in order to promote the distribution of agricultural and food products made in Germany and for which the advertising message underlines the German origin of the relevant

products, may encourage consumers to buy the products with the CMA label to the exclusion of imported products (see, in that respect, *Commission* v *Ireland*, paragraph 25, and *Apple and Pear Development Council*, paragraph 18, cited above).

24 The fact that the use of that quality label is optional does not mean that it ceases to be an unjustified obstacle to trade if the use of that designation promotes or is likely to promote the marketing of the product concerned as compared with products which do not benefit from its use (see, in that regard, Case 13/78 *Eggers* [1978] ECR 1935, paragraph 26).

25 In the same way, the argument that the fact that the contested scheme pursues a quality policy takes it outside the scope of Article 30 of the Treaty must be dismissed. The existence of a restriction for the purposes of Article 30 of the Treaty must be determined by reference to the effect on trade of the measure concerned.

Justification on the basis of the protection of industrial and commercial property

26 Finally, the argument that the contested scheme is justified by Article 36 of the EC Treaty (now, after amendment, Article 30 EC), as coming within the derogation for the protection of industrial and commercial property in so far as the CMA label constitutes simply a geographical indication of provenance, must be dismissed.

27 While it is true, as the German Government points out, that the Court acknowledges in its judgment in Case C-3/91 *Exportur* [1992] ECR 5529, that the protection of geographical indications may, under certain conditions, fall within the protection of industrial and commercial property for the purposes of Article 36 of the Treaty, a scheme such as that at issue in the present proceedings, defining the area of provenance as the extent of German territory and applying to all agricultural and food products fulfilling certain quality requirements, cannot in any case be considered as a geographic indication capable of justification under Article 36 of the Treaty.

28 In the light of the preceding considerations, it must be held that by awarding the quality label CMA to finished products of a certain quality made in Germany, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the Treaty.

Costs

29 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by awarding the quality label 'Markenqualität aus deutschen Landen' (quality label for produce made in Germany) to finished products of a certain quality made in Germany, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC);

2. Orders the Federal Republic of Germany to pay the costs.

Rodríguez Iglesias Puissochet Wathelet

Gulmann La Pergola Jann

Skouris Macken Colneric

von Bahr Cunha Rodrigues

Delivered in open court in Luxembourg on 5 November 2002.

R. Grass G.C. Rodríguez Iglesias

Registrar President