JUDGMENT OF THE COURT (Fourth Chamber)

10 September 2009*

In Case C-366/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberlandesgericht München (Germany), made by decision of 31 July 2008, received at the Court on 11 August 2008, in the proceedings

**Zentrale zur Bekämpfung unlauteren Wettbewerbs eV**

v

**Adolf Darbo AG,**

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of Chamber, T. von Danwitz, E. Juhász, G. Arestis (Rapporteur) and J. Malenovský, Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 20 May 2009,

after considering the observations submitted on behalf of:

— Zentrale zur Bekämpfung unlauteren Wettbewerbs eV, by R. Burkhardt, Rechtsanwalt,

— Adolf Darbo AG, by D. Gorny, Rechtsanwalt,

— the German Government, by M. Lumma and J. Möller, acting as Agents,

— the French Government, by A. Adam and R. Loosli-Surrans, acting as Agents,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Polish Government, by M. Dowgielewicz, acting as Agent,

— the Commission of the European Communities, by F. Erlbacher and L. Pignataro-Nolin, acting as Agents,

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

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Part A of Annex III to European Parliament and Council Directive 95/2/EC of 20 February 1995 on food additives other than colours and sweeteners (OJ 1995 L 61, p. 1), as amended by Directive 98/72/EC of the European Parliament and of the Council of 15 October 1998 (OJ 1998 L 295, p. 18), ('Directive 95/2'), and of the second paragraph of Part II of Annex I to Council Directive 2001/113/EC of 20 December 2001 relating to fruit jams, jellies and marmalades and sweetened chestnut purée intended for human consumption (OJ 2002 L 10, p. 67).

2 The reference has been made in proceedings between Zentrale zur Bekämpfung unlauteren Wettbewerbs eV (Office for the Prevention of Unfair Competition) ('ZBW') and Adolf Darbo AG ('Darbo'), a company incorporated under Austrian law, concerning a prohibitory injunction requiring Darbo to refrain from marketing in Germany an extra jam to which the preservative potassium sorbate (E 202) has been added and order that it reimburse ZBW for its warning costs.

## Legal context

*Community law*

3 According to the second recital in the preamble to Directive 95/2, the prime consideration for any rules on food additives and their conditions of use should be the need to protect the consumer.

4 The fourth recital in the preamble to that directive states that, having regard to the most recent scientific and toxicological information on those substances, some of them are to be permitted only for certain foodstuffs and under certain conditions of use.

5 According to Article 1 thereof, Directive 95/2 is a specific directive forming a part of the comprehensive directive, within the meaning of Article 3 of Council Directive 89/107/EEC of 21 December 1988 on the approximation of the laws of the Member States concerning food additives authorised for use in foodstuffs intended for human consumption (OJ 1989 L 40, p. 27). Directive 95/2 applies to additives other than colours and sweeteners and does not apply to enzymes other than those mentioned in the annexes to that directive.

6 Article 1(3)(a) of Directive 95/2 defines 'preservatives' as substances which prolong the shelf-life of foodstuffs by protecting them against deterioration caused by micro-organisms.

7 According to Article 2(1) and (4) of Directive 95/2:

‘1. Only substances listed in Annexes I, III, IV and V may be used in foodstuffs for the purposes mentioned in Article 1(3) and Article 1(4).

…

4. Additives listed in Annexes III and IV may only be used in the foodstuffs referred to in those Annexes and under the conditions specified therein.

…’

8 Part A of Annex III to that directive relates to conditionally permitted preservatives and antioxidants, such as sorbates, benzoates and p-hydroxybenzoates. Potassium sorbate may be added to the following foodstuffs:

‘…

Low-sugar jams, jellies, marmalades and similar low calorie or sugar-free products and other fruit-based spreads, *Mermeladas*.

…’

9 Part B of Annex III to that directive provides that sulphur dioxide and various sulphites may be added to the following foodstuffs:

‘…

Jam, jelly and marmalade as defined in [Council] Directive 79/693/EEC [of 24 July 1979 on the approximation of the laws of the Member States relating to fruit jams, jellies and marmalades and sweetened chestnut purée (OJ 1979 L 205, p. 5), as amended by Council Directive 88/593/EEC of 18 November 1988 (OJ 1988 L 318, p. 44) (‘Directive 79/693’)] (except extra jam and extra jelly) and other similar fruit spreads including low-calorie products.

…’

10 The fifth recital in the preamble to Directive 79/693 states ‘… a new type of product with a low sugar content has recently appeared on some markets but its industrial development is not yet complete; … as a consequence in the initial stage it is advisable to allow Member States the possibility of including such products under the designation fruit jams, jellies and marmalades and sweetened chestnut purée; …’.

11 According to its Article 1, that directive is to apply, inter alia, to 'jam' and'extra jam'.

12 Article 2 of that directive provides that Member States are to take all the necessary steps to ensure that the products defined in Annex I to that directive may be marketed only if they conform to the definitions and rules laid down in that directive.

13 According to Article 3 of Directive 79/693:

'1. The names listed in Annex I shall be used exclusively to denote the products defined therein and in so far as their soluble dry matter content is not less than 60% as determined by refractometer.

2. Member States may also allow the use in their territory of the names listed in Annex I for products with a soluble dry matter content of less than 60% which comply with the other provisions of this Directive with the exception of those prescribed in Annex III (B).

...'

14 Article 7(3) of that directive provides:

‘The labelling of the products defined in Annex I shall also bear the following obligatory information:

…

(b) the words “total sugar content: … g per 100 g”, the figure shown representing the value determined by refractometer at 20°C for the finished product, subject to a tolerance of ± 3 refractometric degrees; …’.

15 Annex I to that directive defines the finished products and, inter alia, extra jam and jam:

‘…

1. Extra jam:

a mixture, brought to a suitable gelled consistency, of sugars and the pulp of:

— one type of fruit, or

— two or more types of fruit, excluding apples, pears, clingstone plums, melons, water-melons, grapes, pumpkins, cucumbers and tomatoes.

The quantity of fruit pulp used for the manufacture of 1 000 g of finished product shall not be less than:

— 450 g as a general rule,

…

2. Jam:

a mixture, brought to a suitable gelled consistency, of sugars and the pulp and/or purée of:

— one type of fruit, or

— two or more types of fruit.

The quantity of fruit pulp and/or purée used for the manufacture of 1 000 g of finished product shall not be less than:

350 g as a general rule,

…'

16 In accordance with Article 1 of Directive 2001/113, which repealed Directive 79/693 with effect from 12 July 2003, Directive 2001/113 is to apply to the products defined in Annex I thereto, but not to products intended for the manufacture of fine bakery wares, pastries or biscuits.

17 Annex I to Directive 2001/113 does not make any substantial changes to the definitions of 'jams' and 'extra jams' given by Annex I to Directive 79/693. Part II of Annex I to Directive 2001/113 moreover provides:

'Products defined in part I must have a soluble dry matter content of 60% or more as determined by refractometer, except for those products in respect of which sugars have been wholly or partially replaced by sweeteners.

Without prejudice to Article 5(1) of 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)], Member States may, however, in order to take account of certain

particular cases, authorise the reserved names for products defined in part I which have a soluble dry matter content of less than 60%.'

18 Article 1(3) of European Parliament and Council Directive 94/35/EC of 30 June 1994 on sweeteners for use in foodstuffs (OJ 1994 L 237, p. 3) provides:

'3. For the purposes of this Directive, "with no added sugar" and "energy-reduced" in column III of the Annex shall be defined as follows:

— "with no added sugar": without any added mono- or disaccharides or any other foodstuff used for its sweetening properties,

— "energy-reduced": with an energy value reduced by at least 30% compared with the original foodstuff or a similar product.'

*National legislation*

German legislation

19 Paragraph 6 of the Foodstuffs, Consumer Products and Animal Feed Code (Lebensmittel-, Bedarfsgegenstände- und Futtermittelgesetzbuchs) of 1 September 2005, in the version published on 26 April 2006 (BGB1. 2006 I, p. 945), provides:

'Prohibitions on food additives

(1) It shall be prohibited:

1. in the commercial manufacture or processing of foodstuffs intended to be marketed:

(a) to use unauthorised food additives …,

2. to market by way of trade foodstuffs manufactured or processed in contravention of the prohibition laid down in subparagraph 1 or not conforming with a regulation issued pursuant to Paragraph 7(1), Paragraph 7(2)(1) or Paragraph 7(2)(5).'

…

20 In accordance with Lists 1 and 2 in Part A of Annex 5 to the Regulation on the authorisation of additives in foodstuffs for technological purposes (Verordnung über die Zulassung von Zusatzstoffen zu Lebensmitteln zu technologischen Zwecken) of 29 January 1998 (BGBl. 1998 I, p. 230), potassium sorbate is authorised only in respect of 'low-sugar fruit jams, jellies, marmalades and similar low-calorie or sugar-free products and other fruit-based spreads; mermeladas'.

21 According to Paragraph 4 of the Regulation on jams and certain similar products (Verordnung über Konfitüren und einige ähnliche Erzeugnisse) of 23 October 2003 (BGB1. 2003 I, p. 2151), foodstuffs which are given a name listed in Annex 1 to that regulation without satisfying the manufacturing requirements referred to in that annex may not be marketed by way of trade.

22 Section 1 of Annex I to that regulation lays down, in conformity with Directive 2001/113, the manufacturing requirements relating to jams described as 'extra jam'. Section II of that annex provides:

'1. Products defined in Section I must have a soluble dry matter content of 60% or more …, except for those products in respect of which sugars have been wholly or partially replaced by sweeteners pursuant to the Regulation on the authorisation of additives.

…'

Austrian legislation

23 Paragraph 3 of the Regulation on fruit jams, jellies and marmalades and sweetened chestnut purée adopted by the Austrian Minister for Health and Women (Verordnung der Bundesministerin für Gesundheit und Frauen über Konfitüren, Gelees, Marmeladen und Maronenkrem) of 2004 (BGB1. II, 367/2004) provides:

'1. Products defined in Paragraph 1(1) must have a soluble dry matter content of 60% or more …, except for those products in respect of which sugars have been wholly or partially replaced by sweeteners. …

2. Low-sugar fruit jams, jellies and marmalades shall have a soluble dry matter content of less than 60% but at least 45% … and with regard to their fruit content at least satisfy the requirements applicable to products of the extra category.'

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

24 Darbo markets under the description *extra jam*, both in 25g portion packages and — for the manufacture of cakes and pastries — in bulk packs, jams which contain potassium sorbate (E 202) and have a sugar, and thus a soluble dry matter, content of 58%.

25 ZBW, applicant at first instance in the main proceedings, submitted that the jams in question were not low-sugar and claimed before the Landgericht München (Regional Court, Munich) that Darbo should refrain from marketing those jams in Germany and be ordered to reimburse the costs incurred in connection with its warning.

26 Darbo contended that the application should be dismissed, stating that its jams were low-sugar, so that the addition of potassium sorbate was permitted by Directive 95/2. Thus, according to Darbo, since its jams were lawfully marketed in Austria, their marketing in Germany was also lawful.

27 By judgment of 25 September 2007 the Landgericht München granted ZBW's application. Darbo then contested that judgment on appeal before the Oberlandesgericht München (Higher Regional Court, Munich).

28 According to the Oberlandesgericht München, if jams described as 'extra jams' are not covered by the term 'low-sugar', within the meaning of Part A of Annex III to Directive 95/2, potassium sorbate may not be added as a preservative to those jams. If that is the case, Darbo will not be able to market its extra jams either in Germany or in Austria.

29 On the other hand, if extra jams do not fall outside the scope of the term 'low-sugar jams', the outcome of the case in the main proceedings will depend on the conditions under which those jams are to be considered to be low-sugar. In that regard, it would be necessary to determine whether such a term also covered jams with a soluble dry matter content of 58%.

30 In those circumstances, the Oberlandesgericht München decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is the term *low-sugar jams* in Part A of Annex III to Directive 95/2 … to be interpreted as also covering jams described as *extra jam*?

2. If the answer to Question 1 is affirmative:

   (a) How is the term *low-sugar jams* in Part A of Annex III to Directive 95/2 … to be interpreted otherwise?

   (b) In particular is it to be interpreted as also covering jams described as *extra jam* with a soluble dry matter content of 58%?

3. If the answers to Questions 1 and 2(b) are affirmative:

   Is the second paragraph of Part II of Annex I to … Directive 2001/113 … to be interpreted as meaning that the term *extra jam* can be authorised also in respect of jams which have a soluble dry matter content of less than 60% where in the case of such jams no less strict requirements are imposed on the term *jam*?'

**The questions referred for a preliminary ruling**

*The first and second questions*

31 By its first two questions, which it is appropriate to examine together, the referring court seeks essentially to ascertain whether the term 'low-sugar jams', referred to in

Part A of Annex III to Directive 95/2, covers jams described as 'extra jam' with a sugar content of 58%.

32 In order to answer the questions, it is first necessary to determine whether 'jams', within the meaning of that provision, also include products described as 'extra jam'.

33 Directive 95/2, as a specific Directive forming a part of the comprehensive Directive, within the meaning of Article 3 of Directive 89/107, aims at harmonising the laws of the Member States concerning the use of certain food additives authorised for use in certain foodstuffs intended for human consumption.

34 Annex III to Directive 95/2 relates to preservatives and antioxidants which may be conditionally permitted in certain foodstuffs. Part A of that annex provides, inter alia, that potassium sorbate may be added only to 'low-sugar jams, jellies, marmalades and similar low calorie or sugar-free products and other fruit-based spreads, *Mermeladas*'.

35 The wording of that provision refers to 'low-sugar jams' without however specifying whether the term 'jams' is being used generically so as to include not only products described as 'jam' but also those referred to as 'extra jam'.

36 Since Directive 95/2 does not define the term 'jams', it is necessary to refer to Directive 79/693 on the approximation of the laws of the Member States relating inter alia to jams and applicable at the time relevant to the facts of the case in the main proceedings, in order to determine whether, in the light of that directive, products described as 'extra jam' may be low sugar.

37 It should be noted in this respect that Directive 2001/113, which repealed Directive 79/693 with effect from 12 July 2003, did not make any substantial changes to the definitions of 'jam' and 'extra jam' laid down by Directive 79/693.

38 Article 3(1) of Directive 79/693 provides that the names listed in Annex I to that directive are to be used exclusively to denote the products defined therein and in so far as their soluble dry matter content is not less than 60% as determined by refractometer.

39 Moreover, the first subparagraph of Article 3(2) provides that Member States may allow the use in their territory of the names 'jams' and 'extra jams' for products with a soluble dry matter content of less than 60% which comply with the other provisions of that directive.

40 As is apparent from the fifth recital in the preamble to Directive 79/693, the Community legislature wished, by that exception, to allow Member States the possibility of including products with a low sugar content under the designations set out in Annex I thereto.

41 Moreover, as Annex I to that directive provides, jam is a mixture, brought to a suitable gelled consistency, of sugars and the pulp and/or purée of one or more types of fruit. That annex also states that the quantity of fruit pulp and/or purée used for the manufacture of 1 000 g of finished product may not be less than 350 g as a general rule.

42 Extra jam, within the meaning of that annex, is a mixture, brought to a suitable gelled consistency, of sugars and the pulp of one or more types of fruit, excluding certain fruits

which cannot be mixed. That annex states that the quantity of fruit pulp used for the manufacture of 1 000 g of finished product must not be less than 450 g as a general rule.

43 It is apparent from those definitions that the differences between those two names for 'jams' consist fundamentally in the concentration and quantity of fruit pulps used for their manufacture.

44 In that connection, there is nothing in Directive 79/693 to indicate that products described as 'extra jam' must have a sugar content higher than that of products described as 'jam' or that only the latter may be low sugar.

45 Lastly, as regards more specifically Directive 95/2, it must be pointed out that other provisions in its annexes relate separately and expressly to products described as 'jam' or 'extra jam'.

46 Annex II to Directive 95/2, which sets out the foodstuffs in which a limited number of additives listed in Annex I thereto may be used, contains two separate lists of additives according to whether the product is 'jam' or 'extra jam', as defined in Directive 79/693.

47 Part B of Annex III to Directive 95/2 concerning the conditionally permitted addition to certain foodstuffs of sulphur dioxide and sulphites refers to 'jam, jelly and marmalade as defined in Directive 79/693/EEC (except extra jam and extra jelly) and other similar fruit spreads including low-calorie products'. That provision expressly excludes the use of those additives for products described as 'extra jam'.

48 Accordingly, when it drew up the lists set out in Annex II and Part B of Annex III to Directive 95/2, the Community legislature, in order to identify, on the one hand, the foodstuffs in which a limited number of additives listed in Annex I to that directive may be used and, on the other hand, the conditionally permitted preservatives and antioxidants, such as sulphur dioxide and sulphites, drew a clear distinction between 'jam' and 'extra jam', as defined in Directive 79/693.

49 Part A of Annex III to Directive 95/2 permits the addition of preservatives, such as potassium sorbate, only to low-sugar jams, without giving any additional indications as regards the description of such jams.

50 In those circumstances, it is apparent from the foregoing that the term 'jams', within the meaning of Part A of Annex III to Directive 95/2, is used generically and includes both products described as 'jam' and those described as 'extra jam'.

51 Second, it is necessary to examine whether extra jams, such as those marketed by Darbo, which have a sugar content of 58%, may be described as 'low-sugar jams' for the purpose of Part A of Annex III to Directive 95/2.

52 In this respect, it must be pointed out first of all that although that provision does not stipulate any threshold below which a jam may be considered low sugar, a literal interpretation of that term would point towards an appreciable reduction of sugar content in relation to a specific reference content. That provision uses the adjective 'low' to describe the sugar content required for jams for the purposes of such additives.

53 The German Government submits in its written observations that Directive 95/2 uses the terms 'low-sugar' and 'low calorie' in exactly the same way. It refers consequently to the definition of the term 'energy-reduced' within the meaning of Article 1(3) of Directive 94/35, according to which that term requires a reduction of at least 30% compared with the original foodstuff or a similar product.

54 In this respect, it is sufficient to note that, in accordance with the various annexes to Directive 95/2, those terms refer to different products, namely, first, jams, and, second, products similar to jams. It follows that the Community legislature did not consider those terms to mean exactly the same and that the term 'low-sugar' does not necessarily presuppose a reduction of 30% in relation to a specific reference value.

55 In any event, as the Commission rightly observed at the hearing, it is apparent from a literal interpretation of those terms that, for the purposes of adding the preservative potassium sorbate, they require a significant reduction of the sugar content of jams or of the energy value of products similar to jams.

56 According to Article 3(1) of Directive 95/2, preservatives are substances which prolong the shelf-life of foodstuffs by protecting them against deterioration caused by micro-organisms.

57 According to the scientific and technological criteria on the basis of which Directive 95/2 was adopted, the technological need to add a preservative such as potassium sorbate to jams arises only for those which are low-sugar, since their sugar content is insufficient to ensure their preservation.

58 According to the second recital in the preamble to Directive 95/2, the prime consideration for any rules on these food additives and their conditions of use should be the need to protect the consumer.

59 Thus, according to Article 2(1) of Directive 95/2, only substances listed in Annexes I, III, IV and V may be used in foodstuffs for the purposes mentioned in Article 1(3) and Article 1(4) of that directive.

60 In this respect, the Court has held that technological need is closely related to the assessment of what is necessary in order to protect public health. In the absence of a technological need justifying the use of an additive, there is no reason to incur the potential health risk resulting from authorisation of the use of that additive (see Case C-3/00 *Denmark* v *Commission* [2003] ECR I-2643, paragraph 82).

61 Such an objective of public health protection therefore requires that the use of those additives in foodstuffs and, inter alia, of preservatives such as potassium sorbate, be limited to meeting a specific technological need. In this respect, Part A of Annex III to Directive 95/2 requires a significant reduction in the sugar content of jams before a technological need for preservation can be met by the addition of potassium sorbate.

62 In the present case, since the reference value for sugar content in jams was set at 60% by Directive 79/693, products described as 'extra jam', such as those at issue in the case in the main proceedings, whose sugar content is 58%, have a sugar content which is only very slightly below that reference value of 60%.

63 It is lastly necessary to add that, as the French Government observed at the hearing, Article 7(3)(b) of Directive 79/693 provides that the labelling of the products defined in

Annex I to that directive, including those described as 'jams' and 'extra jams', must bear the obligatory information 'total sugar content: … g per 100 g' subject to a tolerance of ± 3 refractometric degrees.

64 The Community legislature thus recognised that a variation of ± 3 points in relation to a reference value of 60% does not alter significantly the sugar content of products described as 'jam' or 'extra jam'. In the present case, an extra jam with a sugar content of 58% remains within the limits of the tolerance laid down by the Community legislature as regards sugar content on the labelling of the products at issue.

65 It follows that, in the light of the wording of Part A of Annex III to Directive 95/2, the technological need required for the addition of preservatives and the objective of the protection of public health laid down by that directive, that provision does not cover such jams.

66 The answer to the first and second questions must therefore be that the term 'low-sugar jams' in Part A of Annex III to Directive 95/2, covers jams described as 'jam' and 'extra jam' which have a sugar content appreciably lower than the reference value of 60%. Products described as 'extra jam' which have a sugar content of 58% cannot be considered to be low-sugar within the meaning of that provision.

67 In the light of the answer given to the first and second questions, there is no need to answer the third question put by the referring court.

## Costs

68 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 (Fourth Chamber) hereby rules:

**The term 'low-sugar jams' in Part A of Annex III to European Parliament and Council Directive 95/2/EC of 20 February 1995 on food additives other than colours and sweeteners, as amended by Directive 98/72/EC of the European Parliament and of the Council of 15 October 1998, covers jams described as 'jam' and 'extra jam' which have a sugar content appreciably lower than the reference value of 60%. Products described as 'extra jam' which have a sugar content of 58% cannot be considered to be low-sugar within the meaning of that provision.**

[Signatures]