OPINION OF ADVOCATE GENERAL MISCHO

delivered on 12 March 1998 *

1. Council Regulation (EEC) No 2771/75 of 29 October 1975 on the common organisation of the market in eggs [1] provides for the adoption of marketing standards relating in particular to grading by quality and weight, packaging, storage, transport, presentation and marketing of products in the market in eggs.

2. On the basis of this regulation, on 26 June 1990 the Council adopted Regulation (EEC) No 1907/90 on certain marketing standards for eggs. [2] Article 10 of this regulation lays down the legal rules governing the particulars which may be placed on the packaging in which eggs are sold. This provision is worded as follows:

'1. Large packs, and small packs even when contained in large packs, shall bear on the outer surface in clearly visible and legible type:

(a) the name or business name, and address of the undertaking which has packed the eggs or had them packed; the name, business name or the trade mark used by that undertaking, which may be a trade mark used collectively by a number of undertakings, may be shown if it contains no wording incompatible with this Regulation relating to the quality or freshness of the eggs, to the type of farming used for their production or to the origin of the eggs;

2. Both large and small packs may, however, carry the following additional information, on either inner or outer surfaces:

(a) ...

* Original language: French.

1 — OJ 1975 L 282, p. 49.

2 — OJ 1990 L 173, p. 5.

(e) statements designed to promote sales, provided that such statements and the manner in which they are made are not likely to mislead the purchaser.

3. Further dates and indications concerning the type of farming and the origin of the eggs may only be used in accordance with rules to be laid down under the procedure set out in Article 17 of Regulation (EEC) No 2771/75. These rules shall cover in particular the terms used in indications of the type of farming and the criteria concerning the origin of the eggs.'

3. Article 14 of Regulation No 1907/90 states that packs may not bear any indications other than those laid down in that regulation.

4. The rules for implementing that regulation were adopted by the Commission in Regulation (EEC) No 1274/91 of 15 May 1991, [3] Article 18 of which lists the indications of the type of farming referred to in Article 10(3) of Regulation No 1907/90.

3 — OJ 1991 L 121, p. 11.

5. The company Gut Springenheide GmbH, the applicant in the main proceedings (hereinafter 'Gut Springenheide'), markets eggs ready-packed under the description '6-Korn — 10 frische Eier' (six-grain — 10 fresh eggs). A slip of paper, inserted in each pack of eggs, contains this promotional statement:

'Six-grain eggs are laid by hens fed on six different natural varieties of cereals. Vegetable protein is also a natural component of this feed — making for a thoroughly healthy, delicious egg. Each of the six varieties of cereals ... contains especially important vitamins, minerals and trace elements. The hens' feed is made up in such a way as to exploit these factors to the full. Six-grain eggs stand out for their outstanding flavour and natural quality.'

6. After having repeatedly objected to the description 'six-grain eggs' and the promotional statement, on 24 July 1989 the Office for Supervision of Foodstuffs formally gave the company notice, through its manager Mr Tusky, to remove the description on the pack and the pack insert. Also, a fine was imposed on Mr Tusky on 5 September 1990.

7. Gut Springenheide and its manager then brought an action before the Verwaltungsgericht (Administrative Court) for a declaration that the description on the packs and the pack insert were not contrary to the law in force. Unsuccessful at first instance and on appeal, they then applied to the Bundesverwaltungsgericht (Federal Administrative Court) for a review of the appeal court's judgment.

8. The Bundesverwaltungsgericht considered that the outcome of the proceedings hinged on the interpretation of Article 10(2)(e) of Regulation No 1907/90. It therefore decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. In order to assess whether, for the purposes of Article 10(2)(e) of Regulation (EEC) No 1907/90, statements designed to promote sales are likely to mislead the purchaser, must the actual expectations of the consumers to whom they are addressed be determined, or is the aforesaid provision based on a criterion of an objectified concept of a purchaser, open only to legal interpretation?

2. If it is consumers' actual expectations which matter, the following questions arise:

(a) Which is the proper test: the view of the informed average consumer or that of the casual consumer?

(b) Can the proportion of consumers needed to prove a crucial consumer expectation be determined in percentage terms?

3. If an objectified concept of a purchaser open only to legal interpretation is the right test, how is that concept to be defined?'

Preliminary considerations

9. The French Government contends that there is no need for the Court to reply to the questions referred to it, for two reasons.

10. First of all, the French Government asks the Court to examine whether it has jurisdiction. It states, rightly, that the facts of the case all occurred prior to 1 October 1990, the date of entry into force of Regulation No 1907/90 under Article 24 thereof.

11. It is apparent, however, from the documents before the Court that the appeal made to the referring court is not directly seeking the annulment of measures adopted by the national authorities, but a declaration that the actions of the applicant in the main proceedings are in conformity with the law in force. It is incontestable that the questions posed by the referring court do concern the law as it stood at the time of the appeal. I therefore consider that, in the present case, there is no problem of admissibility of the question referred for a preliminary ruling.

12. However, it should be noted that Regulation No 1907/90 was amended in 1993 [4] and in 1994. [5] Only the first of these two amendments concerns the present case, as the other did not concern Article 10. As a result of this amendment, Article 10(1)(a) now reads as follows:

'(a) the name or the business name, and address of the undertaking which has packed the eggs or had them packed; the name, business name or the trade mark used by that undertaking, which may be a trade mark used collectively by a number of undertakings, may be shown if it contains no statement or symbol incompatible with this Regulation relating to the quality or freshness of the eggs, to the type of farming used for their production or to the origin of the eggs'.

Article 10(2)(e) now reads as follows:

'(e) statements or symbols designed to promote sales of eggs or other items, provided that such statements or symbols and the manner in which they are made are not likely to mislead the purchaser'.

4 — Council Regulation (EEC) No 2617/93 of 21 September 1993 (OJ 1993 L 240, p. 1).

5 — Council Regulation (EC) No 3117/94 of 12 December 1994 (OJ 1994 L 330, p. 4).

However, these changes do not affect the formulation of the questions referred by the Bundesverwaltungsgericht.

13. The French Government puts forward a second reason in support of its view that there is no need for the Court to reply to the questions.

14. It claims that the description 'six-grain eggs' is, in any event, prohibited under Articles 10(1)(a), 10(3) and 14 of Regulation No 1907/90 and that, therefore, the question of the interpretation of the concept of 'likely to mislead the purchaser', within the meaning of Article 10(2)(e) of the regulation, does not even arise.

15. The French Government's argument is as follows: the description at issue concerns the type of farming used, as the intention is to draw purchasers' attention to the laying hens' feed, this being one feature of the type of farming used. The French Government concedes that Regulation No 1907/90 does not itself define the concept of type of farming, but considers that reference can be made to Commission Regulation (EEC) No 1538/91 of 5 June 1991 introducing detailed rules for implementing Council Regulation (EEC) No 1906/90 on certain marketing standards for poultry, [6] wherein descriptions of feed are included under descriptions of the type of farming for poultry.

16. Article 10(3) of Regulation No 1907/90 states that descriptions of the type of farming can only be used in accordance with rules to be laid down under the procedure set out in Article 17 of Regulation No 2771/75. Against that background, the Commission adopted Regulation (EEC) No 1274/91.

17. Article 18 of Regulation No 1274/91 exhaustively lists the terms related to the type of farming that may appear on the packs in which eggs are sold. Since the term 'six-grain' is not one of the terms listed in the regulation, according to the French Government its use is unlawful. Therefore, in its view, it is no longer even necessary to reply to the questions posed by the Bundesverwaltungsgericht.

18. The French Government argues that, if the wording in question is a business name, then it is subject to the terms of Article 10(1)(a), which states that 'the name or business name used by that undertaking ... may be shown if it contains no wording incompatible with this Regulation relating to the quality or freshness of the eggs, to the type

6 — OJ 1991 L 143, p. 11.

of farming used for their production or to the origin of the eggs' and the considerations set out above are therefore also applicable.

19. In this respect, the documents before the Court suggest that the words in question are also a trade mark. The referring court has not, however, asked the Court about the interpretation of Article 10(1)(a), which is the provision of the regulation that applies to trade marks. This could, however, be due to the fact that, as the French Government has quite rightly stated, the question of knowing whether the term 'six-grain' is or is not used as a trade mark in the case in point is irrelevant to the legal rules that apply to that term: it must, in any event, comply with the regulation and, in particular, with the other requirements of Article 10 thereof.

20. The term 'six-grain' is unquestionably not one of the terms related to the type of farming permitted under the rules. But should this necessarily lead to the conclusion that its use is unlawful?

21. The system introduced by Regulation No 1907/90 is based on a distinction between three categories of statements designed to appear on packs in which eggs are sold.

22. Article 10(1) of the aforementioned regulation lists the information whose use is compulsory. Article 10(3) lays down the rules governing certain information whose use is optional. This information concerns further dates and indications concerning the type of farming and the origin of the eggs. The information referred to in Article 10(3) may only be used in accordance with strict conditions laid down in Commission Regulation No 1274/91. Finally, Article 10(2) of Regulation No 1907/90 lists a number of terms whose use is permitted, including 'statements designed to promote sales, provided that such statements and the manner in which they are made are not likely to mislead the purchaser', which are the subject of the present case.

23. These provisions are completed by Article 14 of Regulation No 1907/90, which states that: 'Packs may not bear any indications other than those laid down in this Regulation'.

24. The question that arises from the French Government's argument is whether indications not meeting the strict conditions in Article 10(3) and its implementing regulation can none the less be considered as being 'laid down in this Regulation', as meant by

Article 14, because they fall within the category of 'statements designed to promote sales' governed by Article 10(2)(e).

25. In my view, the answer to this question must be in the affirmative. One of the aims of rules is in fact to ensure that the consumer is given the fullest information possible so that he can make his choice in the best possible conditions. What is more, by permitting the use of statements designed to promote sales, the rules expressly enable producers to distinguish their products in consumers' eyes from those of their competitors, thereby encouraging them to offer consumers greater diversity.

26. Indeed, this is reinforced by the 13th recital of Regulation No 1907/90, which states that:

'anyone marketing "fresh eggs" should be permitted to stamp such eggs with other particulars serving publicity purposes'.

27. Clearly, this concerns eggs and not packs, but it is hard to see why the same comment could not apply to the packs as well.

28. Therefore, 'statements designed to promote sales' must be of a kind to confer a distinct identity on the eggs of the producer using such statements. Furthermore, such statements must be assumed to be lawful unless expressly prohibited by the rules or likely to mislead the purchaser.

29. However, Regulation No 1274/91, laying down rules governing statements on the type of farming, makes no mention of type of feed. In fact, it makes only one reference to the type of farming, in Article 18, which lists the lawful ways of describing the hens' habitat but says nothing about poultry feeding method.

30. Should it be concluded from this that the Community legislature implicitly wanted to preclude any reference to the latter? Given the principles set out above, my view is that, on the contrary, its intention, in these provisions, was only to regulate statements regarding the environment in which the poultry is farmed. In contrast, the legislature's silence on the type of feed implies that producers are free to inform consumers on

this subject, in compliance with the provisions of Article 10(2)(e).

31. The main argument advanced against this view is the one drawn by the French Government from Regulation No 1538/91. Whilst it is true that Article 10 thereof on types of farming includes indications regarding type of feed, I do not think that this is determinative.

32. The definitions in this regulation reflect the need to define standards applicable to the marketing of poultry, which is an economic activity separate from the marketing of eggs. Furthermore, the terms set out in Regulation No 1538/91, regarding the habitat of poultry, are different from those laid down on the same subject in Article 18 of Regulation No 1274/91. It is therefore clear that is not possible unreservedly to have recourse to the provisions of Regulation No 1538/91 for the purposes of interpreting Regulation No 1274/91.

33. This is particularly the case as far as the type of animal feed is concerned. Feed plays a major role in the purchasers' perception of poultry meat and, as stated by the Commission at the hearing, sufficiently clear and irrefutable information on the impact of animal feed on meat characteristics does exist. In that respect, it was inevitable that the legislature would wish to regulate on the use of statements concerning the type of animal feed in order to provide optimum consumer information and protection in an area of importance to the consumer.

34. This is evidenced by the seventh recital of Regulation No 1538/91, which states that:

'Whereas among the indications which may optionally be used on the labelling are those concerning the method of chilling and particular types of farming; whereas the use of the latter, in the interest of consumer protection, needs to be subordinated to the respect of closely-defined criteria concerning both husbandry conditions and quantity thresholds for stating certain criteria such as age at slaughter or length of fattening period and content of certain foodstuff ingredients'.

35. Egg marketing, on the other hand, was viewed differently by the legislature. The legislature considered that the type of farming aspect which was of greatest concern to consumers, whose protection was its priority, was the method of keeping poultry. So it focused on the need to regulate the provision of particulars in that regard, about which it was entitled to assume that consumers would attach particular importance to them.

36. The 17th recital of Commission Regulation No 1274/91, the only one that relates to types of farming, is particularly clear in this respect:

'Whereas, in view of current commercial practice, it seems unnecessary to provide for specific indications for the eggs of laying hens kept in batteries; whereas, however, provision should be made for a limited number of indications for the eggs of hens not raised in batteries, so as to avoid confusion amongst consumers as regards the principal non-battery production systems'.

37. It therefore seems that the provision of Regulation No 1274/91 devoted to types of farming quite simply did not consider it necessary to regulate indications of type of feeds, unlike in the case of meat.

38. Against this background, it cannot be inferred from the legislature's silence that it sought to prohibit all reference to the type of feed whereas, in the case of meat, where the risk of misleading the consumer was considered to be greater, such a reference was possible, albeit under strictly defined conditions.

39. I therefore conclude that the term 'six-grain', even if it does allude to the type of poultry feed, is not necessarily unlawful under Article 10(3) of Regulation No 1907/90 but that, on the contrary, it is likely to be covered by the provisions of Article 10(2)(e) of that same regulation.

40. As a consequence, it is necessary to examine the questions referred to the Court by the Bundesverwaltungsgericht.

41. The three questions submitted can be summarised as follows. The national court asks whether the concept of a purchaser likely to be misled, within the meaning of Regulation No 1907/90, refers to the actual expectations of purchasers, that is actual purchasers, or to an objectified, abstract concept of purchaser, open only to legal interpretation.

42. In the first case, the national court asks whether, in order to determine what that actual expectation is, reference has to be made to the concept of the informed average consumer or to that of the casual consumer, and whether the proportion of consumers needed in order to prove an expectation on the part of consumers can be established in percentage terms.

43. In the second case, the national court asks for the legal definition of the objectified concept of a purchaser.

The first question

44. The first step is to provide the referring court with guidance on the concept of a 'purchaser likely to be misled' within the meaning of Regulation No 1907/90.

45. While the term used in Article 10(2)(e) of Regulation No 1907/90 is 'purchaser' and not 'consumer', although the latter term is used in the regulation's recitals, I consider that the two words are interchangeable and will therefore refer to the case-law of the Court on the concept of a consumer.

46. The applicant in the main proceedings points out that, under Article 129a of the EC Treaty, the consumer must be given adequate information. The concept of a consumer is therefore not purely legal. It is also predicated on the actual expectations of purchasers, on the basis that they are informed average purchasers.

47. The French Government considers that it is the responsibility of the national court to determine whether the statements are likely to mislead purchasers and, accordingly, to identify the reference consumer using the methods that it thinks fit (for instance, but not necessarily, by conducting a survey). This is how, in France, the national court assesses the misleading nature of a statement by reference to the 'average consumer'.

48. The Austrian Government considers that the provisions of Article 10(2)(e) refer to an objective concept of a purchaser requiring a purely legal interpretation. In the view of this Government, the expression 'likely to mislead the purchaser' that appears in this provision raises a question of law, not of fact.

49. According to the Swedish Government, the statements at issue in this case concern an everyday consumer product and so the group at which it is targeted consists of consumers as a whole. In Sweden, the misleading nature of these statements would therefore be assessed by considering how consumers in general could be assumed to understand it, without any need to conduct a survey to determine their actual expectations. The Swedish Government considers that there is no need to apply any differently the provision at issue in the main proceedings.

50. In the Commission's view, assessments as to whether statements designed to promote the sale of eggs are likely to mislead the purchaser should be based on the criteria contained in the regulation, having regard also to the decisions of the Court on other provisions prohibiting misleading advertising. Under these conditions, it is not absolutely essential to establish the purchaser's actual perception of the promotional description or statement at issue by means of an opinion poll or survey. However, if the national court still has doubts as to whether or not a statement is misleading, it can commission a survey or conduct a poll of consumers.

51. The German Government explained at the hearing that it was necessary to know whether the rule at issue applied only in relation to a clearly defined group of people or whether it was a matter of protecting all Community citizens from the danger of being misled.

52. Only when the legal rule covers all consumers and is intended to protect them from the danger of being misled and the promotional statement in question is also addressed to all consumers does the question of law prevail over the question of fact. Judges will be able to decide whether such a statement is likely to mislead as they belong to the group of people concerned. However, they must distance themselves from the general perception of consumers as a whole and must base their decision on an objective criterion. They must make a legal assessment of the facts and, within this context, look at what the provision at issue aims to achieve and the place it occupies in the scheme of Community law.

53. According to the German Government, measures of inquiry are only necessary if the statement in question is addressed to a clearly defined group of people, such as experts, or to people who may easily be misled, such as children. In a case such as the present one, the rules are for all egg consumers. Even the statement that the court has to assess is addressed to all consumers. Therefore, measures of inquiry are not really necessary.

54. For my part, I propose a solution nearer to the one recommended by the French Government and by the Commission; it has two elements:

— in the case of promotional statements addressed to all consumers (which is the case with those at issue in the main proceedings), the national court may apply an objectified concept of a consumer;

— however, Community law does not prevent the Court from commissioning a survey on the actual expectations of the consumer if it still has doubts as to the extent to which the statement at issue might mislead the consumer.

55. Firstly, it is fairly clear from the case-law of the Court that it has always referred to an abstract, legal concept of a consumer. This is the average, 'reasonably circumspect' consumer, according to the terms used by the Court in paragraph 24 of its judgment in the *Mars* case. [7]

56. I believe that this definition is substantially the same as the one given by the Bundesverwaltungsgericht on page 9 of the original text of the reference for a preliminary ruling, that of 'the informed average consumer who takes in the information about the product on sale and hence the overall characterisation of the products attentively' as opposed to the consumer 'who has regard to the information about the product on sale and the statements promoting sale only casually and uncritically, without checking more closely the message put over by the information'.

57. To the same effect one could cite the judgment in the *Langguth* case, [8] concerning the use in a trade mark of terms whose use was regulated.

58. The fact that in Community law the concept of a consumer is defined in general and abstract terms is clear not only from the case-law on Article 30 of the Treaty, cited above, but also from decisions concerning more specifically provisions previously applicable to the marketing of eggs, [9] identical to those at issue in this case.

59. As the Court has generally considered consumers to mean all 'average, reasonably circumspect consumers', it has necessarily had recourse to an abstract idea of this concept.

60. However, in the decision in the *X* (or *Nissan*) case, [10] the Court combined its abstract concept of a consumer with guidance to the national court that the latter was nevertheless also entitled to decide the case by considering the concrete reaction of a significant number of purchasers to a particular form of advertising.

7 — Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Koeln* v *Mars* [1995] ECR I-1923.

8 — Case C-456/93 *Zentrale zur Bekämpfung unlauteren Wettbewerbs* v *Privatkellerei Franz Wilhelm Langguth Erben GmbH&Co.* [1995] ECR I-1737.

9 — Case C-372/89 *Gold-Ei Erzeugerverbund* v *Überwachungsstelle für Milcherzeugnisse und Handelsklassen* [1991] ECR I-43; Case C-203/90 *Gutshof-Ei* v *Stadt Bühl* [1992] ECR I-1003 and Case C-204/88 *Ministère Public* v *Jean-Jacques Paris* [1989] ECR 4361, paragraph 11.

10 — Case C-373/90 *X* [1992] ECR I-131.

61. In the operative part of that decision, the Court held that Council Directive 84/450/EEC [11] on misleading advertising did not preclude vehicles sold in another Member State from being advertised:

— as new, despite the fact that the vehicles had been registered solely for the purpose of importation and had never been on the road;

— as cheaper, when the advertising failed to mention that the vehicles were equipped with fewer accessories than the vehicles in the importing Member State.

62. By taking this stance, the Court thus considered that, in principle, advertising of this kind was not likely to mislead and affect the behaviour of the consumer considered in abstract terms.

63. But, in the grounds of that same decision, [12] the Court stated that it was for the national court, however, to *ascertain* [13] in the circumstances of the particular case and bearing in mind the consumers to which the advertising is addressed, whether the latter could be misleading in so far as, on the one hand, it sought to conceal the fact that the cars advertised as new were registered before importation and, on the other hand, that fact would have deterred a significant number of consumers from making a purchase, had they known it.

64. On the second point, concerning the advertising of the cars as being cheaper, the Court stated in point 16 that 'such a claim can only be held misleading if it is *established* [14] that the decision to buy on the part of a significant number of consumers to whom the advertising in question is addressed was made in ignorance of the fact that the lower price of the vehicles was matched by a smaller number of accessories on the cars sold by the parallel importer'.

65. The Court did not specify how the national court was to 'ascertain' or 'establish' that the consumers' decisions to buy had been affected or could have been affected by this advertising.

11 — Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17).

12 — Paragraphs 15 and 16.

13 — My italics.

14 — My italics.

66. According to the decision cited, this could be a finding made by the court after simply hearing the parties and, if necessary, an expert, or a conclusion reached by the court following a survey of consumer reactions.

67. The fact remains that this decision implies that Community law does not require a court to elucidate consumers' actual expectations if it concludes that a particular advertisement, given the way it is worded and the foreseeable reaction of the average 'reasonably circumspect' consumer, is or is not likely to mislead the purchaser.

68. Conversely, Community law does not prevent a court from resorting to surveys when it considers that the advertising in question is not patently improper and that its effect on the 'reasonably circumspect' consumer may be open to doubt.

69. Having thus reached the conclusion that there is no requirement under Community law to attempt to discover purchasers' actual expectations, I therefore propose that in reply to the first question, in order to determine whether a statement designed to promote sales is likely to mislead the purchaser, reference should be made to an objective concept of purchaser which is open only to legal interpretation. However, the national court may commission surveys or polls on consumer expectations if it considers this to be necessary.

70. In its third question, the Bundesverwaltungsgericht asks us how the objectified concept of a purchaser is to be defined.

71. Let us therefore pass straight on to that question.

The third question

72. The Bundesverwaltungsgericht considers that if an objectified concept of a purchaser must be applied, this should be based on the literal and teleological interpretation of a condition of application of a Community rule, in the context of which the values that the rule is safeguarding have to be put in balance.

73. In view of what has already been stated above, I think that it is acceptable to reframe the third question in the following terms.

74. If it is assumed that the consumer to be protected is the average 'reasonably circumspect' purchaser, what criteria may a court apply in order to decide whether that consumer is likely to be misled by a particular advertising slogan?

75. The question whether a reasonably circumspect consumer is likely to be misled clearly depends, above all, on the content of the advertising slogan at issue. Like the Commission, I consider that the first action of the court should be to establish the meaning of the advertising statement according to linguistic usage and how, on the basis of that meaning, it accords with the truth.

76. The court should then evaluate the effect that the advertising statement may have on the reasonably circumspect consumer.

77. In the eyes of the applicant in the main proceedings, the term 'six-grain — 10 fresh eggs' and the statement inserted in the egg packs constitute true information which, by definition, cannot mislead the purchaser, whatever conclusions the latter might be likely to draw.

78. However, things are not quite as simple as that. I believe that a distinction needs to be drawn between:

— information that is objectively correct;

— information that is objectively incorrect;

— information that is objectively correct but which could mislead the consumer because it does not reflect the entire truth.

79. As far as information that is objectively correct is concerned, the Court considers, and this has been pointed out by the Commission, that true statements are not in principle likely to mislead the consumer. [15]

80. However, it should be noted that sometimes even promotional statements that are

15 — Case C-362/88 *GB INNO/BM* v *Confédération du Commerce Luxembourgeois* [1990] ECR I-667, paragraph 17; judgment in the *X* (or *Nissan*) case, paragraph 17; see also the Opinion of Advocate General Léger in the *Mars* case, point 51, which refers to the decisions of the Court of Justice in the *X* (or *Nissan*) case and in Case C-126/91 *Schutzverband gegen Unwesen in der Wirtschaft* v *Yves Rocher* [1993] ECR I-2361.

true may be likely to mislead the consumer, for instance when such statements involve a risk liable to be confused with terms covered by Regulation No 1907/90. [16]

81. Another criterion to be used is the verifiable or unverifiable nature of the information at issue. The importance of this consideration stems in particular from the decisions of the Court concerning the stamping on eggs of the date of laying. Thus, in the judgment in the *Paris* case, the Court stressed the importance of the accuracy of information supplied to the consumer. In the present case, it would therefore be necessary to confirm that the authorities would be able to verify, if necessary, statements such as the ones in question regarding the feed of the hens that laid the eggs.

82. Eye-catching but irrelevant information can be considered to fall into the category of correct, incontroversial information. For instance, if a producer were to print on his packs the statement 'hen raised in pure mountain air' or 'hen raised in the sunny South of France', the information would probably be true but would have no bearing on the quality of the eggs. It might influence the casual consumer but would be a source of amusement for the informed consumer.

83. As for objectively incorrect statements, these are in principle misleading and prohibited, where, as stated by the Commission, the misleading effect is not eliminated by specific circumstances.

84. It is for the competent national court to assess the facts to decide whether the description of Gut Springenheide's eggs given on the slip inserted in the pack is objectively incorrect because these eggs are no different from ordinary eggs.

85. In this respect, mention should be made of Article 2(1)(a) of Council Directive 79/112/EEC of 18 December 1978 on the approximation of laws of the Member States related to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer and the related advertising, [17] which is worded as follows:

'1. The labelling and methods used must not:

(a) be such as could mislead the purchaser to a material degree, particularly:

(i) ...

16 — See the judgment in the *Gutshof-Ei* case, paragraphs 17 to 19.

17 — OJ 1979 L 33, p. 1.

(ii) by attributing to the foodstuff effects or properties which it does not possess;

(iii) by suggesting that the foodstuff possesses special characteristics when in fact similar foodstuffs possess such characteristics.'

86. Lastly, there are statements which are objectively correct but which do not reflect the entire truth. This is where the most difficult problems lie.

87. If the information omitted would be likely to shed a completely different light on the information provided, the conclusion must be that the consumer has been misled.

88. The term 'six-grain' could fall into this category, if it were to be firmly established that the six grains accounted for only 60% of the composition of the feed of Gut Springenheide's hens, whilst giving the impression that the hens were fed exclusively on these six grains.

89. The appeal court, cited by the Bundesverwaltungsgericht, considers that this description goes along with the 'fad for cereals' and gives the impression that the eggs have something special, whereas that court is persuaded they have no advantages over other eggs (page 5 of the reference for a preliminary ruling).

90. It therefore remains to be determined whether, in view of the sway exerted by the 'cereals fad' over German consumers, even a reasonably circumspect consumer might be taken in by this impression and so be led to buy the eggs in question.

91. The Bundesverwaltungsgericht could settle this question itself if it is persuaded that this is the case. Otherwise, Community law does not prohibit recourse to a survey of a representative sample of consumers or to an expert opinion.

92. I therefore propose that the reply to be given to the third question should be that the objective concept of purchaser to be used is that of the average, reasonably circumspect consumer. In order to determine whether a statement intended to promote sales, within the meaning of Article 10(2)(e) of Regulation No 1907/90, is likely to mislead such a purchaser, account should be taken of the terms and purpose of the Regulation, the factual

accuracy of the statement, its lack of ambiguity and the verifiable nature, for the authorities, of the information that it contains.

The second question

93. This question is put to the Court in the event that the reply to the first question indicates that consumers' actual expectations must be determined in concrete terms.

94. Since I concluded above that the national court was under no obligation to conduct an investigation of this kind but that Community law did not preclude it from doing so in cases where this seemed to it to be appropriate, I consider that a reply to the second question will be of assistance.

Part (a) of the second question

95. The referring court asks first whether it is the concept of the informed average consumer which counts or that of the casual consumer.

96. I propose that the Court should find that, even where the hypothesis mentioned by the second question is correct, it is the opinion of the informed average consumer which counts.

97. The casual consumer does not pay enough attention to the fine print on a product but is more likely to be influenced by the colour of the pack, by the designs on the pack or by slogans which are so exaggerated that it is not even necessary to prohibit them, such as 'The egg that will get you going for the day'.

98. We have also seen above that in its judgments the Court has always adopted an interpretation of the concept of consumer consisting of a reasonably circumspect individual capable of taking in, with some attention, the information appearing on products which he is invited to buy.

99. Advocate General Tesauro rightly stated, in his Opinion in the *X* (or *Nissan*) case, that 'vigilantibus, non dormientibus iura succurrunt'. [18]

18 — [1992] ECR I-145.

100. Moreover, it is clear that the various regulations mentioned above also presuppose a reasonably attentive consumer, since they presuppose that he is capable of noticing the sometimes subtle distinctions between different terms such as 'semi-intensive eggs' ['élevées en plein air'] and 'free range eggs' ['élevées en libre parcours']. [19]

Part (b) of the second question

101. This sub-question is worded as follows:

'Can the proportion of consumers needed to prove a crucial consumer expectation be determined in percentage terms?'

102. The case-law of the Court provides only one indication in this regard. This was in the judgment in the *X* (or *Nissan*) case, where the Court used the expression 'a significant number of consumers'. However, neither in that judgment nor in others did it specify the point at which the number of misled consumers becomes significant.

19 — Annex 2 to Regulation No 1274/91.

103. Like the Commission, I am therefore of the opinion that it is on the basis of the circumstances of each individual case that a national court has to establish whether a percentage of misled consumers is significant.

104. Given, as we have seen, that the consumer is primarily to be considered capable of discernment, the percentage in question must be fixed at a sufficiently high level.

105. This is especially the case in situations in which a too pessimistic view of consumers' capacity, as a result of which a very low percentage is fixed, could upset the balance which in its case-law the Court seeks to achieve between the requirements relating to the protection of consumers and the free movement of goods. The latter could be affected where imported goods are involved.

106. The Commission also states that 'the German courts, in case-law going back several decades, particularly in the competition law field, have developed the principle whereby a percentage of 10 to 15% of consumers misled — depending on the particular case — could still be considered to be insignificant. Clearly, stricter criteria should be applied to advertising statements concern-

ing food and relating to health and it should be considered that even a percentage of less than 10% of consumers misled is no longer insignificant.'

107. It seems to me that the guideline thus developed by the German courts is quite appropriate. Since the statements at issue in the main proceedings are not such as to encourage the consumer to purchase a product hazardous to health, the figure of 15% could be indicated, provided that the Bundesverwaltungsgericht considered that it was necessary to investigate consumers' actual expectations.

108. As I fully agree with the Commission's views on parts (a) and (b) of the second question, I also propose that the Court should adopt the replies suggested by the Commission.

109. It remains for me to make a final comment on the role of the national court. The Commission dwells at some length on the question whether, in the present case, it is for this Court or for the national court to determine whether or not the description in question is likely to mislead the purchaser. It notes that, in a number of cases, the Court has ruled on this question itself. [20] It should be emphasised, however, that those cases were somewhat different from the situation in the present case.

110. In those cases it was a matter of assessing the lawfulness under Community law of national measures restricting the free movement of goods and allegedly justified by mandatory requirements, within the meaning of the Court's case-law relating to the free movement of goods. However, in this particular case, the problem is a different one: the Court is asked to provide the national court with the criteria for interpretation which it needs in order to be able to apply a piece of secondary legislation to the facts before it.

111. I therefore see no reason to depart from the approach which the Court has always taken in its judgments concerning Regulation No 1907/90, namely in the *Gutshof-Ei* and *Gold-Ei Erzeugerverbund* cases and in the *Paris* case, concerning an earlier, similar regulation. In all those cases, the Court confined itself to stating the criteria enabling the national court to determine whether or not the descriptions at issue were misleading.

20 — See Case C-238/89 *Pall Corp.* v *J. Dahlhausen & Co.* [1990] ECR I-4827; the *Yves Rocher* and *X (Nissan)* cases and Case C-315/92 *Verband Sozialer Wettbewerb* v *Clinique Laboratoires and Estée Lauder Cosmetics* [1994] ECR I-317.

Conclusion

112. In view of the foregoing, I propose that the Court should reply to the Bundesverwaltungsgericht in the following terms:

First question

Council Regulation (EEC) No 1907/90 of 26 June 1990 on certain marketing standards for eggs, in particular Article 10(2)(e) thereof, must be interpreted as meaning that, in order to determine whether a statement designed to promote sales is likely to mislead the purchaser, reference should be made to an objective concept of purchaser which is open only to legal interpretation. However, Community law does not preclude the national court from commissioning surveys or polls on consumers' actual expectations if it considers this to be necessary.

Third question

The objective concept of purchaser to be used is that of the average, reasonably circumspect consumer. In order to determine whether a statement designed to promote sales is likely to mislead such a purchaser, within the meaning of Article 10(2)(e) of Regulation No 1907/90, account should be taken of the terms and purpose of the Regulation, the factual accuracy of the statement, its lack of ambiguity and the verifiable nature, for the authorities, of the information that it contains.

Second question

(a) It is the view of the informed average consumer which counts in determining whether a statement designed to promote sales is likely to mislead.

(b) It is for the national court ruling on the question whether a statement or description is likely to mislead consumers to establish, in the light of the

circumstances of each particular case and the principle that Community law protects the informed average consumer, from which point in percentage terms a group of consumers misled by an advertising statement is no longer insignificant so that it is justified to ban the use of that statement.