OPINION OF ADVOCATE GENERAL LÉGER

delivered on 20 January 2000 *

1. This reference for a preliminary ruling is concerned with Directive 79/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer [1] (hereinafter 'Directive 79/112').

The Oberlandesgericht Köln (Higher Regional Court, Cologne) seeks a ruling on whether the use of the term 'naturrein' ('naturally pure') to describe jam which contains in addition to the gelling agent pectin traces of lead, cadmium and pesticide is liable to mislead consumers as to the characteristics of the foodstuff.

I — Relevant provisions

Directive 79/112 [2]

2. Directive 79/112 lays down the general rules on the labelling and presentation of foodstuffs for sale to the ultimate consumer.

3. Article 2(1) of the directive reads:

'[T]he labelling and methods used must not:

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

(i) as to the characteristics of the foodstuff and, in particular, as to

* Original language: French.

1 — Council Directive of 18 December 1978 (OJ 1979 L 33, p.1), as last amended by Commission Directive 1999/10/EC of 8 March 1999, providing for derogations from the provisions of Article 7 of Directive 79/112 (OJ 1999 L 69, p. 22).

2 — The documents before the Court do not give any indication as to the period during which the facts of the case in the main proceedings took place. In order to establish which version of Directive 79/112 is applicable in this case I have referred to the date on which the order for reference was made, which was 2 December 1998. On that date Directive 79/112/EC was applicable in the version last amended by Directive 97/4/EC of the European Parliament and of the Council of 27 January 1997 (OJ 1997 L 43, p. 21).

its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production,

(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 all similar foodstuffs possess such characteristics;

...'.

4. Article 3(1) of Directive 79/112 provides:

'[I]n accordance with Articles 4 to 14 and subject to the exceptions contained therein, indication of the following particulars alone shall be compulsory on the labelling of foodstuffs:

(1) the name under which the product is sold,

(2) the list of ingredients;

...'.

5. According to Article 6(5)(a) of Directive 79/112:

'[T]he list of ingredients shall include all the ingredients of the foodstuff, in descending order of weight, as recorded at the time of their use in the manufacture of the foodstuff. It shall appear preceded by a suitable heading which includes the word "ingredients"'.

6. Article 15 of Directive 79/112 states:

'1. Member States may not forbid trade in foodstuffs which comply with the rules laid down in this directive by the application of non-harmonised national provisions governing the labelling and presentation of certain foodstuffs or of foodstuffs in general.

2. Paragraph 1 shall not apply to non-harmonised national provisions justified on grounds of:

...

— prevention of fraud, unless such provisions are liable to impede the application of the definitions and rules laid down by this directive,

...'.

German law

7. Paragraph 17 of the *Lebensmittel- und Bedarfsgegenständegesetz* (Law on foodstuffs and consumer products) ('the LMBG') contains provisions intended to protect consumers against risks of fraud.

8. Article 17(1)(4) of the LMBG states that it is prohibited:

'in marketing any foodstuffs... which either contain additives or residues of authorised substances within the meaning of Article 14 and Article 15... to use wording or other indications suggesting that they are natural, naturally pure ("naturrein") or free of residues or pollutants'. [3]

9. Paragraph 17(1)(5) of the LMBG states that it is prohibited 'to sell foodstuffs under names, descriptions or presentations liable to mislead...'.

10. Furthermore, Paragraph 47a(1) of the LMBG provides:

'products within the meaning of this Law, which are properly manufactured and mar-

3 — Paragraph 14 of the LMBG prohibits the marketing of plant health products, fertilizers and unauthorised pesticides. Paragraph 15 of the LMBG prohibits the marketing of animal feedingstuffs containing substances producing any pharmacological effect (paragraph 11 of the observations of the defendant in the main proceedings).

keted in another Member State of the Community... may be released and marketed in this country even if they do not meet the legal provisions on foodstuffs of the Federal Republic of Germany. The first sentence shall not apply to products which

1. do not comply with the prohibitions contained in Articles 8, 24 or 30 or

2. do not comply with other legal provisions adopted for the protection of health, to the extent which the marketability of the products in the Federal Republic of Germany has not been recognised... by the publication of a decision of general application of the Federal Minister in the Bundesanzeiger'.

II — The facts and the main proceedings

11. Adolf Darbo AG (hereinafter 'Darbo') is a company established in Austria. It markets strawberry jam in Austria and in Germany under the trade mark 'd'arbo naturrein' and the more specific description 'Garten Erdbeer' ('Garden strawberry').

12. The labelling on the packaging of the jam bears the following wording:

'In 1879 the Darbo family commenced jam production. Today Darbo jams are still made according to a Tyrolean recipe which has been handed down. They are heated and stirred carefully. Thus valuable vitamins and the natural aroma of the fruit are preserved.

Darbo AG, 6135 Stans,
Tyrol — Austria

GARDEN STRAWBERRY

Special quality jam

Made from at least 50g of fruit per 100g. Total sugar content 60g per 100g. Keep cool after opening. Ingredients: strawberries, sugar, lemon juice concentrate, pectin gelling agent.

450g'

13. The strawberry jam made by Darbo contains pectin gelling agent. According to the order for reference [4] this gelling agent is made up of 'diluted acids obtained principally from the inside of citrus fruit peel, fruit pomace or shredded sugar beet'.

14. The jam also contains traces of the following residues: less than 0.01 mg/kg lead, 0.008 mg/kg cadmium, 0.016 mg/kg procymidone (pesticide) and 0.005 mg/kg vinclozolin (pesticide).

15. In Austria it is permissible to use the term 'naturrein' on the packaging of d'arbo jam under the Österreichisches Lebensmittelbuch (Austrian Food Code). That legislation provides as follows: [5]

'Where they are produced without glucose syrup and, instead of food acids and salts thereof, only fresh or naturally conserved lemon juice (lemon-juice concentrate) is used, special quality jams and "light" jams may bear the description "naturrein" prominently displayed. Whatever the size of their packaging, such products shall not be preserved chemically'.

16. In Germany the *Verein gegen Unwesen in Handel und Gewerbe Köln eV* (Association opposing anti-competitive practices in trade and industry, hereinafter 'the Verein') brought an action against Darbo seeking an order that the word 'naturrein' should no longer be used. The Verein considers that the word is contrary to Paragraph 17(1)(4) and (5) of the LMBG for three reasons.

First, the pectin gelling agent is an additive which consumers do not expect to find in the jam in question because of the description 'naturrein'. Second, the latter term is liable to mislead consumers in that the air or the land from which the fruit used in the jam originates are contaminated by pollution. Last, in view of the residues of lead, cadmium and pesticide in the jam, it cannot be described as 'naturally pure'.

17. Before the national court, Darbo contended that the use of the term 'naturrein' was not misleading.

It maintained that in view of land and air pollution, consumers expected there to be toxic substances in food. Moreover, consumers knew that it was impossible to make jam without a gelling agent, pectin being a well-known gelling agent. Darbo

4 — Page 3 of the English translation.

5 — The Österreichisches Lebensmittelbuch (hereinafter 'the ÖMLB'), 3rd edition, Chapter B 5, 'Jam and other fruit-based products', lays down the conditions governing the marketing of 'special quality' jams bearing the description 'naturrein'. The provision quoted is Paragraph 24 of the ÖMLB (paragraph 2 of the Austrian Government's observations and paragraph 13 of Darbo's observations).

also contended that it should be able to market its jam in Germany pursuant to Paragraph 47(a)(1) of the LMBG and Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC), since that foodstuff is legally produced and marketed in Austria under the brand-name 'd'arbo naturrein'.

III — The question referred to the Court

18. Entertaining doubts as to the scope of Article 2(1)(a)(i) of Directive 79/112, the Oberlandesgericht Köln stayed proceedings pending a preliminary ruling from the Court of Justice on the following question:

'Is it contrary to Article 2(1)(a)(i) of Directive 79/112/EEC ("the directive on labelling") for jam manufactured in a Member State (Austria) and sold there and in another Member State (the Federal Republic of Germany) under the description "naturrein" ("naturally pure") to contain the gelling agent pectin and less than 0.01 mg/kg lead (atomic absorption spectrometry analysis — AAS), 0.008 mg/kg cadmium (AAS), and pesticides (0.016 mg/kg procymidone and 0.005 mg/kg vinclozolin)?'

IV — Preliminary observations

19. In its written observations,[6] Darbo claims that the question submitted by the Oberlandesgericht Köln is imprecise. It maintains that this case should be considered in the light of Article 30 of the Treaty. Consequently, Darbo proposes to the Court that the question be reformulated in order to establish whether the prohibition on marketing the jam in question in Germany under the trade mark 'd'arbo naturrein' — a prohibition under Paragraph 17(1)(4) and (5) of the LMBG — constitutes a measure having equivalent effect, which is capable of being justified by overriding requirements relating to consumer protection.

20. I should like to make three observations on this point.

21. *First*, I find it difficult to reconcile Darbo's proposal with the findings of the national court.

In its order for reference[7] the Oberlandesgericht Köln held that the use of the term

6 — Paragraph 9.

7 — Page 6 of the English translation.

'naturrein' was in effect prohibited under Paragraph 17(1)(4) of the LMBG. However, it stated that notwithstanding the prohibition the jam in question is marketable in Germany under Paragraph 47a(1) of the LMBG since the product is lawfully manufactured and placed on the market in Austria. By the present reference the Oberlandesgericht Köln wishes to verify whether that condition is met: it seeks to ascertain whether Article 2(1)(a)(i) of Directive 79/112 precludes the jam in question being lawfully manufactured and placed on the market in Austria under the description 'naturrein'. The national court is therefore not questioning whether the German law is compatible with Article 30 of the Treaty.

22. *Second*, I would point out that the Court has held on several occasions that it is solely for the national court to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the Court. [8] Article 177 of the EC Treaty (now Article 234 EC) does not therefore allow the Court of Justice to review the reasons for which a reference is made. [9]

23. *Third*, I think that at all events the reformulation proposed by Darbo would have little incidence on the answer to be given to the question referred to the Court.

The Court has consistently considered in the context of Articles 30 and 36 of the Treaty whether the objective of protecting consumers, being pursued by the national regulations in issue, could not be attained by a measure less restrictive on freedom of trade than a ban on the marketing of the foodstuff concerned. [10] In this connection the Court has ruled that: '[I]t is contrary to Article 30 of the EC Treaty for national rules to prohibit, for reasons of consumer protection, the marketing of foodstuffs lawfully manufactured and marketed in another Member State, where consumers are protected by means of *labelling in accordance with the provisions of Council Directive 79/112/EEC...*'. [11]

8 — See in particular judgments in Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 10; in Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraph 17; in Case C-146/93 *McLachlan* [1994] ECR I-3229, paragraph 20; and in Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 15.

9 — See in particular judgments in Case 13/68 *Salgoil* [1968] ECR 661, 672 and in Case C-7/97 *Bronner* [1998] I-7791, paragraph 17.

10 — See for example judgments in Case 261/81 *Rau* [1982] ECR 3961, especially paragraph 17, and in Case 176/84 *Commission* v *Greece* [1987] ECR 1193, especially paragraph 29.

11 — Judgment in Case C-383/97 *Van der Laan* [1999] ECR I-731, paragraph 1 of the operative part (emphasis added).

The purpose of the question submitted by the Oberlandesgericht Köln is similar in the present case: it also concerns whether the labelling on the jam in question complies with the provisions of Directive 79/112.

24. Consequently, I think that there is no need to reformulate the question in the terms proposed by Darbo.

V — The answer to the question referred to the Court

25. The national court asks in substance whether the use of the term 'naturally pure' to describe strawberry jam which contains pectin gelling agent and traces of residues of lead, cadmium and pesticides in the amounts indicated in the question for reference is liable to mislead consumers as to the characteristics of the foodstuff within the meaning of Article 2(1)(a)(i) of Directive 79/112.

26. In this connection it should be pointed out that the Court has been called upon on several occasions to consider in relation to provisions of the Treaty or of secondary legislation whether an appellation, brand name or advertising statement is misleading. [12] It may be seen from the case-law of the Court that the Court has taken into account, in order to determine whether the appellation, brand name or advertising statement in question might mislead consumers, 'the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect...'. [13]

27. This is therefore the criterion to be used when considering whether, in view of the presence of the contested substances in d'arbo jam, the use of the term 'naturally pure' is liable to mislead consumers as regards the characteristics of the foodstuff.

The presence of pectin

28. Pectin is a 'gelling agent' within the meaning of Directive 95/2/EC on food

12 — See for example judgments in Case C-362/88 *GB-Inno-BM* [1990] ECR I-667; in Case C-238/89 *Pall* [1990] ECR I-4827; in Case C-126/91 *Yves Rocher* [1993] ECR I-2361; in Case C-315/92 *Verband Sozialer Wettbewerb ('Clinique')* [1994] ECR I-317; in Case C-456/93 *Langguth* [1995] ECR I-1737; and in Case C-470/93 *Mars* [1995] ECR I-1923.

13 — Judgment in Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31. See also the *Mars* judgment, cited above, paragraph 24 and the judgment in Case C-303/97 *Sektkellerei Kessler* [1999] ECR I-513, paragraph 36.

additives other than colours and sweeteners. [14] It is a substance which gives a foodstuff texture through formation of a gel. [15]

29. The use of pectin in special quality jams is mainly governed by two instruments of Community law: the abovementioned Directive 95/2 and Directive 79/693/EEC on the approximation of the laws of the Member States relating to fruit jams, jellies and marmalades and chestnut purée. [16]

In Directive 95/2, pectin is specifically named as one of the substances which may be added to special quality jams [17] according to the '*quantum satis*' principle. [18] The term '*quantum satis*' means that no maximum level is specified, but additives must be used in accordance with good manufacturing practice. [19]

Directive 79/693 also authorises the use of pectin in the manufacture of special quality jams. [20]

30. Pectin may be liquid or solid. According to the provisions of Directives 95/2 and 79/693, solid pectin is an *additive* (E 440), [21] but liquid pectin is an *ingredient* of a foodstuff. [22]

31. In this particular case, the order for reference does not specify whether the pectin used by Darbo is liquid or solid. However, as the Commission has rightly stated, this question is not decisive as regards assessing the conformity of the labelling in question with the provisions of Directive 79/112.

32. Article 6(4)(a) of that directive reads: '"*Ingredient*" shall mean any substance, *including additives*, used in the manufacture or preparation of a foodstuff and still present in the finished product, even if in altered form'. [23]

14 — Directive of the European Parliament and of the Council of 20 February 1995 (OJ 1995 L 61, p.1), as amended by Directive 96/85/EC of the European Parliament and of the Council of 19 December 1996 (OJ 1997 L 86, p. 4), and by Directive 98/72/EC of the European Parliament and of the Council of 15 October 1998 (OJ 1998 L 295, p. 18) (hereinafter 'Directive 95/2').

15 — Article 1(3)(n) of Directive 95/2.

16 — Council Directive of 24 July 1979 (OJ 1979 L 205, p. 5), as amended by Council Directive 80/1276/EEC of 22 December 1980 amending, by virtue of the accession of Greece, Directives 76/893/EEC, 79/693/EEC and 80/777/EEC with regard to the majority quorum of votes within the Standing Committee of Foodstuffs procedure (OJ 1980 L 375, p. 77) and by Council Directive 88/593/EEC of 18 November 1988 (OJ 1988 L 318, p. 44, hereinafter 'Directive 79/693').

17 — Directive 79/693 defines 'special quality jam' as 'a mixture, brought to a suitable gelled consistency, of sugars and [fruit] pulp...' (Annex I(A), point 1).

18 — Annexes I and II to Directive 95/2.

19 — Article 2(8) of Directive 95/2.

20 — Article 5, in conjunction with Annex I A, point 1; Annex III A, point 1, last indent, and Annex III B of Directive 79/693.

21 — Annex III B of Directive 79/693 and Annexes I and II to Directive 95/2.

22 — Annex III A, point 1, last indent to Directive 79/693 and Article 1(5)(b) of Directive 95/2.

23 — Emphasis added.

33. This means that the pectin used by Darbo, whether liquid (ingredient) or solid (additive) must appear on the list of the product's ingredients.

34. The labelling on the jam in question meets this requirement. After the word '*Ingredients*' it clearly indicates the presence of '*strawberries*, *sugar*, *lemon juice concentrate*' and '*pectin gelling agent*'.

35. The labelling therefore complies with Article 3(1)(2) and Article 6(4)(a) and Article 6(5)(a) of Directive 79/112.

36. It should also be pointed out that in addition to the compulsory details provided for under Directive 79/112, Directive 79/693 laid down specific rules on the labelling of jam.[24] According to those rules, the packaging of special quality jams must include:

'the words "prepared with... g of fruit per 100 g", the figure shown representing the quantities per 100 g of finished product for which [was] used... pulp...'[25]

and

'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...'.[26]

37. The labelling on the product in question also meets those two additional requirements. It states that the jam is '*Made from at least 50 g of fruit per 100 g*' and has a '*Total sugar content 60 g per 100 g*'.

38. In those circumstances, I think that the description 'naturally pure' is not liable to mislead consumers as to the composition of the product in question.

39. In the judgment in Case C-51/94 *Commission* v *Germany* the Court recognised

24 — Directive 79/112 states that: 'Community provisions applicable to specified foodstuffs... may provide that other particulars in addition to those listed in article 3 must appear on the labelling' (first indent of Article 4(2)).

25 — Article 7(3)(a) of Directive 79/693.

26 — Article 7(3)(b) of Directive 79/693.

that 'consumers whose purchasing decisions depend on the composition of the products in question *will first read the list of ingredients*, the display of which is required by... Directive [79/112]'. [27]

In this particular case, an average consumer who is reasonably well-informed and reasonably observant, who looks at the list of ingredients is immediately informed of the presence of the pectin gelling agent in d'arbo jam. The labelling in question therefore enables consumers to make their purchasing decision in full knowledge of the facts and, if appropriate, to assess the exact scope of the description 'naturally pure'.

40. Moreover, I should like to point out that the Court has ruled that 'a Member State cannot claim that a list of ingredients which complies with Article 3 of Directive [79/112] none the less constitutes fraud within the meaning of Article 15(2) of Directive [79/112]...'. [28]

41. Since the list of ingredients of the jam in question complies with Article 3 of Directive 79/112 and with the provisions of Directive 79/693 it cannot be regarded as being liable to mislead consumers.

The presence of residues of lead, cadmium and pesticide

42. The other complaints made by the Verein concern the traces of residues of lead, cadmium and pesticide found in d'arbo jam.

43. As the Commission has rightly stated, the abovementioned residues are not ingredients of the foodstuff within the meaning of Article 6(4) of Directive 79/112. They do not appear on the list of compulsory particulars set out in Article 3(1) thereof. Directive 79/112 does not therefore require them to be indicated on the packaging of the jam in question.

44. It is nevertheless necessary to consider whether, in view of the presence of the abovementioned residues, the description 'naturally pure' is liable to mislead consumers as to the characteristics of the foodstuff within the meaning of Article 2(1)(a)(i) of Directive 79/112. [29]

45. In this connection, the labelling of d'arbo jam provides some details regarding the method of manufacturing the product.

27 — Case C-51/94 *Commission* v *Germany* [1995] ECR I-3599, paragraph 34, emphasis added.

28 — *Van der Laan* judgment, cited above, paragraph 37.

29 — See in this connection the *Van der Laan* judgment, paragraphs 39 and 40.

It states that it is made according to a Tyrolean recipe which has been handed down within the Darbo family since 1879. According to that recipe, the jam is 'heated and stirred carefully', so as to preserve valuable vitamins and the natural aroma of the fruit. The packaging also states that the jam is made from 'garden strawberries'.

46. In the light of this information I think that the description 'naturally pure' is not liable to mislead consumers as regards the *method of producing* the fruit contained in the foodstuff. In particular, it does not seem to me that the abovementioned description is liable to create the impression that the jam in question is an 'organic' product.

47. In the trade, organic products are generally indicated to consumers by the term 'organic'. [30] They may also bear indications which in some way refer to organic production methods. [31] As we have seen, the labelling on d'arbo jam contains no indication of that nature.

48. However, the question referred by the national court is whether an 'average consumer who is reasonably well-informed and reasonably observant and circumspect' would expect to find traces of residues of lead, cadmium and pesticide in a 'naturally pure' jam.

49. In its written observations, [32] the Commission suggested that the Court should adopt a precise criterion in answering this question. It states that several instruments of Community law lay down maximum amounts of residues of lead, cadmium and pesticide which foodstuffs may contain. Consequently, it suggests making a comparison between the values stated by the national court and the maximum levels laid down by Community legislation. The Commission considers that the description 'naturally pure' is liable to mislead consumers only if the levels measured in the jam in question greatly exceed maximum Community levels.

50. The Finnish Government, [33] however, challenged the relevance of such a criterion. It states that all foodstuffs which meet purity standards laid down by Community law must necessarily be described as 'pure'. Hence, if it appears that the jam in question meets those standards, the description 'naturally pure' should be regarded as being

30 — See in this connection Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (OJ 1991 L 198, p. 1).

31 — See in this connection the third recital in the preamble to Regulation No 2092/91 and Article 1(1) thereof.

32 — Pages 9 to 11 of the French translation.

33 — See in particular paragraph 13 of its written observations.

contrary to the provisions of Article 2(1)(a)(iii) of Directive 79/112. In that case, the description would suggest 'that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics'.

51. In this particular case, I consider that the term 'naturally pure' might be liable to mislead consumers as to the characteristics of the foodstuff in *two hypotheses*.

Firstly, the term 'naturally pure' would be liable to mislead consumers if that term was incompatible with the presence of traces of residues of lead, cadmium and pesticide in the jam in question. In that case, the foodstuff would contain toxic or polluting substances which would clearly preclude the use of the term 'naturally pure'.

Secondly, even if the jam in question might reasonably contain traces of residues of lead, cadmium and pesticide, the term 'naturally pure' would still be liable to mislead consumers if the level of such residues was particularly high. In that case the foodstuff would contain such an amount of residues of lead, cadmium and pesticide that it could clearly not be described as 'natural'. Moreover, in such a case the fact that the labelling of the jam fails to inform the consumer of the presence of the above mentioned residues would mislead the consumer in the sense contemplated in Directive 79/112.

52. The first hypothesis involves consideration of the presence of lead, cadmium and pesticides in the natural environment.

53. The second hypothesis is linked to the criterion proposed by the Commission in that it involves a comparison between the levels indicated by the national court and the maximum amounts laid down under Community law.

54. Before considering these two hypotheses, I should like to indicate, by giving examples of some judgments, the way in which the Court examines whether a denomination, trade mark or publicity material is misleading.

55. The *Pall* case, cited above, concerned the use of the symbol (R) — derived from the English word 'registered' — next to a trade mark to indicate that it is a registered trade mark. In that particular case the

German legislation made it possible to obtain a ban on the marketing of a product bearing the symbol ® where the trade mark of the product was not registered in that State but was registered in another Member State. It had been argued that the prohibition was justified because the use of the symbol ®, which indicates that a trade mark is registered, misleads consumers if the trade mark is not registered in the country in which the goods are marketed.

The Court of Justice dismissed that argument on the ground that: '... *even assuming that consumers, or some of them, might be misled on that point*, such a risk cannot justify so considerable an obstacle to the free movement of goods...'. [34]

56. Similarly, the *Mars* case, cited above, put in issue German legislation prohibiting the importation of ice-cream bars lawfully marketed in France, whose wrapping was marked '+ 10%', the quantity of which was increased during a publicity campaign. The national court sought to ascertain whether the marking '+ 10%' was misleading, in particular where retailers had imposed a corresponding increase in the price of the ice-cream bars.

On that point the Court held that '... Mars ha[d] not actually profited from the promotional campaign in order to increase its sale prices and that there [wa]s no evidence that retailers ha[d] themselves increased their prices'. [35] It added, however, that: '... in any case, *the mere possibility that importers and retailers might increase the price of the goods and that consequently consumers may be deceived is not sufficient* to justify a general prohibition which may hinder intra-Community trade'. [36]

57. Lastly, the Court's judgment in *Commission* v *Germany*, cited above, concerned, among other products, hollandaise and Béarnaise sauces. In Germany the marketing of sauces prepared from vegetable fats was possible provided that the label contained, in addition to the list of ingredients, a statement specifying that they contained vegetable fats. When charged with failure to comply with its obligations under Article 30 of the Treaty, the German Government explained that the purpose of the requirement at issue was to draw the attention of German consumers to the presence of certain ingredients which they do not expect to find, since the method of preparing the sauces concerned departed from the traditional German recipe.

34 — *Pall* judgment, cited above, paragraph 19 (emphasis added).

35 — *Mars* judgment, cited above, paragraph 19.

36 — *Mars* judgment, cited above, paragraph 19 (emphasis added). The Court added, however, that: 'That fact does not prevent the Member States from taking action, by appropriate measures, against duly proved actions which have the effect of misleading consumers' (paragraph 19).

In that particular case the Court held that sufficient information was available to consumers in the list of products' ingredients. It added that: '*Even though consumers may sometimes be misled, that risk remains minimal* and cannot therefore justify the hindrance to the free movement of goods created by the requirements at issue'. [37]

58. It is clear from those judgments that, in order to determine whether a name, trade mark or advertising statement is or is not liable to mislead consumers, the Court applies a kind of *de minimis* reasoning. [38] It only decides that consumers are being misled where it considers that the risk of this happening is sufficiently serious or obvious.

59. Moreover, in the judgment in Case C-313/94 *Graffione* the Court held:

'... the risk of misleading consumers cannot override the requirements of the free movement of goods and so justify barriers to trade, *unless that risk is sufficiently serious...*'. [39]

37 — *Commission* v *Germany*, cited above, paragraph 34 (emphasis added).

38 — See also in this connection the *Clinique* judgment, cited above, paragraphs 20 to 23 and the *Van der Laan* judgment, cited above, paragraphs 41 and 42.

39 — [1996] ECR I-6039, paragraph 24 (emphasis added).

60. The requirement of a 'sufficiently serious risk' of consumers being misled is therefore a consistent factor in the case-law of the Court.

61. In the light of that requirement, I think that the Court may adopt a *dual criterion* in this particular case in order to assess whether the term 'naturally pure' is likely to mislead consumers. According to that dual criterion:

(a) the term 'naturally pure' is such as to mislead consumers where the use of that term is manifestly incompatible with the presence of traces of residues of lead, cadmium and pesticide in the jam in question;

(b) if not, the term 'naturally pure' would still be such as to mislead consumers where the use of that term is manifestly incompatible with the abovementioned residues in view of the amounts measured in the jam in question.

62. This dual criterion links the two hypotheses of misleading consumers which I identified above. [40]

40 — See point 51 of this Opinion.

Whether the term 'naturally pure' is manifestly incompatible with the presence of traces of residues of lead, cadmium and pesticide in the jam in question

63. *Lead* and *cadmium* may be described as 'contaminants' within the meaning of the provisions of Regulation (EEC) No 315/93 laying down Community procedures for contaminants in food. [41] These are 'substance[s] not intentionally added to food which [are] present in such food as a result of the production.... or as a result of environmental contamination'. [42]

64. Lead and cadmium are heavy metals found in the air and on the earth's surface as a result of environmental pollution. [43]

65. Moreover, several instruments of Community law confirm the presence of these two substances in our natural environment.

As regards lead, Directive 82/884/EEC, [44] for example, states that '[W]hereas the use of lead is currently causing lead contamination of *many areas of the environment*'. [45] In that directive the Council 'fix[ed] a limit value for *lead in the air* specifically in order to help protect human beings *against the effects of lead in the environment*'. [46]

Another example is given in Council Directive 1999/30/EC of 22 April 1999. [47] Like Directive 82/884, those rules are designed 'to establish limit values... for concentrations of... *lead in ambient air...*'. [48]

Moreover, Directive 80/778/EEC [49] states that water is also likely to contain lead. The provisions of that directive reveal that water intended for human consumption, whether supplied for consumption or used

41 — Council Regulation of 8 February 1993 (OJ 1993 L 37, p. 1).

42 — Article 1(1), second subparagraph, of Regulation No 315/93.

43 — Lead and cadmium are also to be found in the ground naturally in the form of 'salts'.

44 — Council Directive of 3 December 1982 on a limit value for lead in the air (OJ 1982 L 378, p. 15).

45 — Second recital in the preamble to Directive 82/884 (emphasis added).

46 — Article 1(1) of Directive 82/884 (emphasis added).

47 — Directive relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (OJ 1999 L 163, p. 41).

48 — Article 1, first indent, of Directive 1999/30 (emphasis added).

49 — Council Directive of 15 July 1980 relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11).

in food production, generally contains a certain amount of lead. [50]

As regards cadmium, I have found several Community instruments which confirm the presence of that substance in water.

The preamble to Directive 83/513/EEC [51] states:

'[W]hereas, since *pollution due to the discharge of cadmium into water is caused by a large number of industries*, it is necessary to lay down specific limit values according to the type of industry concerned and to lay down quality objectives for the aquatic environment into which cadmium is discharged by such industries'. [52]

In that directive the Council laid down 'limit values for emission standards for cadmium in discharges from [certain] industrial plants...' [53] and 'quality objectives *for cadmium in the aquatic environment*'. [54]

Moreover, the provisions of Directive 80/778 confirm that water intended for human consumption, whether supplied for consumption or used in a food production undertaking, are also liable to contain amounts of cadmium. [55]

66. It is apparent from all those directives that a considerable number of industries discharge, or have discharged, lead and cadmium into the environment. However regrettable this may be, the presence of those two substances in our natural environment is thus a reality. [56]

67. Since garden fruit is, by definition, grown in such an environment, it is inevitably exposed to pollutants which affect it.

50 — See in particular Articles 2 and 3 and Annex I, D (51) of Directive 80/778.

51 — Council Directive of 26 September 1983 on limit values and quality objectives for cadmium discharges (OJ 1983 L 291, p. 1).

52 — Fourth paragraph in the preamble to Directive 83/513 (emphasis added).

53 — Article 1(1), first indent, of Directive 83/513.

54 — Article 1(1), second indent, of Directive 83/513 (emphasis added).

55 — See in particular Articles 2 and 3 and Annex I, D, point 46 to Directive 80/778.

56 — In this connection, pollution of the ambient air by lead is not really surprising. It will be remembered that the motor industry discharged lead into the atmosphere over a long period when vehicles were using fuel that was not 'lead-free'.

In such circumstances it is not exceptional to find *traces of residues* of lead and cadmium on garden strawberries grown 'naturally'.

68. I would suggest therefore that the term 'naturally pure' is not a priori incompatible with the presence of the abovementioned residues in the jam in question.

69. As regards *pesticides*, reference should be made to Directive 90/642/EEC of 27 November 1990.[57] The preamble to that directive offers a fairly relevant overview of the reasons which lead to the use of pesticides. It states:

'Whereas crop production plays a very important role in the Community:

Whereas the yield from that production is *continually affected by harmful organisms and weeds*;

Whereas *it is essential to protect plants and plant products against these organisms*, not only to prevent a reduction in yield or damage to the products harvested but also to increase agricultural productivity;

Whereas *one of the most important methods of protecting plants and plant products from the effects of these organisms is the use of chemical pesticides*; whereas, however, mandatory maximum levels should be set as low as is consistent with good agricultural practice'.[58]

70. It is apparent from these passages that the use of pesticides is one of the most usual ways of combating the presence of harmful organisms on vegetables and agricultural products.[59] Moreover, pesticides are not used only for industrial purposes or for large-scale crops. Private individuals who have indoor plants or grow fruit and vegetables in their gardens are also wont to use these substances in order to protect their crops.

57 — Council Directive on the fixing of maximum levels for pesticide residues in and on certain products of plant origin, including fruit and vegetables (OJ 1990 L 350, p. 71), as last amended by Commission Directive 1999/71/EC of 14 July 1999 amending the annexes to Council Directives 86/362/EEC, 86/363/EEC and 90/642/EEC (OJ 1999 L 194, p. 36, hereinafter 'Directive 90/642').

58 — First to fourth recitals in the preamble to Directive 90/642 (emphasis added).

59 — The Court has moreover stated on several occasions that 'pesticides are substances... necessary to agriculture...' (judgments in Case 94/83 *Heijn* [1984] ECR 3263, paragraph 15 and Case 54/85 *Mirepoix* [1986] ECR 1067, paragraph 14).

71. Thus, the fact that garden strawberries are grown 'naturally' does not mean that the fruit is free of pesticides. It is true that in the case of 'organic' products Regulation No 2092/91 laid down provisions which 'entail significant restrictions on the use of fertilizers and pesticides which may... result in the presence of residues in agricultural produce'. [60] However, as I stated above, d'arbo jam is not an organic product within the meaning of that regulation and does not bear any indication that it was produced organically. [61]

72. This being so, the description 'naturally pure' does not appear to me incompatible a priori with the presence of traces of pesticide residues in the jam in question.

The manifestly incompatible nature of the description 'naturally pure' with the levels of residues of lead, cadmium and pesticides measured in the jam in question

73. It is necessary however to consider the *levels* of residues of lead, cadmium and pesticides measured in the jam in question. The description 'naturally pure' might nevertheless be liable to mislead consumers if the foodstuff contained a high level of residues of toxic or polluting substances. [62]

74. In this connection it is appropriate to compare the levels indicated by the national court with the maximum levels laid down by Community law.

75. As regards *lead* and *cadmium*, I have not discovered any particular measure governing the presence of those two substances in fruit. However, the Commission has submitted to the Court documents which reveal that several international and Community studies have been carried out in this field.

Thus, in December 1998, the *Codex Alimentarius* Commission of the FAO [United Nations Food and Agriculture Organisation] and the World Health Organisation [63] adopted documents recommending the

60 — Ninth paragraph in the preamble to Regulation No 2092/91.

61 — See points 45 to 47 of this Opinion.

62 — The description 'naturally pure' might indeed be liable to mislead consumers if, due to a high level of residues of toxic or polluting substances, the foodstuff presented a significant risk to consumers' health.

63 — It should be mentioned that the Court refers frequently to the work of the *Codex Alimentarius* Commission of the FAO and the World Health Organisation: see, for example, the judgments in Case 178/84 *Commission* v *Germany* (known as the '*Beer purity laws*' [1987] ECR 1227, paragraph 44; in Case C-42/90 *Bellon* [1990] ECR I-4863, paragraph 14; and in Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, paragraph 17.

adoption of international limits for lead and cadmium in certain foodstuffs. In the case of fruit, it proposed the establishment of a limit of 0.3 mg/kg for residues of lead and a limit of 0.01 mg/kg for residues of cadmium. [64]

Moreover, the Commission Directorate-General for Industry (DG III) made a study of the laws of the Member States imposing maximum levels for lead and cadmium in foodstuffs. In February 1995 it drew up a document entitled 'Compilation of tolerances for contaminants in foodstuffs in the laws of the Member States'. [65] It is apparent from that document that in the case of fruit and vegetables the Member States permit lead levels of between 0.1 mg/kg and 0.5 mg/kg and cadmium levels of between 0.02 mg/kg and 0.2 mg/kg. It is also apparent that the German law tolerates in most fruit a lead level of 0.5 mg/kg and a cadmium level of 0.2 mg/kg.

76. In its question the Oberlandesgericht Köln states that d'arbo jam contains the following traces: less than 0.01 mg/kg lead and 0.008 mg/kg cadmium.

77. It is clear from this that the residues measured in the jam in question are well below all the national and international levels referred to above. Indeed, the product in question has a lead level which is 30 times lower than the level recommended, for example, by the *Codex Alimentarius* Commission of the FAO and the World Food Organisation. Moreover its cadmium level is 25 times lower than the maximum authorised by the German legislation, to take another example.

78. As regards *pesticides*, reference should be made to the provisions of Directive 90/642 of 27 November 1990. In that directive the Council expressly laid down the 'maximum levels for pesticide residues in and on certain products of plant origin, including fruit and vegetables'. [66]

Under Annex II to Directive 90/642 the maximum content for residues present in strawberries (other than wild strawberries)

64 — Annex 1 to the Commission's observations (pp. 8 and 5).

65 — Annex 2 to the Commission's observations.

66 — As can be seen from the title of Directive 90/642.

is 5 mg/kg both for procymidone and for vinclozolin. [67]

79. In its question the court making the reference states that d'arbo jam contains the following traces: 0.016 mg/kg procymidone and 0.005 mg/kg vinclozolin.

80. This shows that the quantities of pesticides measured in the jam in question are particularly low as compared with the levels allowed by Community legislation. [68] Indeed, the procymidone content is more than *300 times* lower than the maximum value authorised by Directive 90/642. Moreover, the vinclozolin content is *1 000 times* lower than the Community maximum amount.

81. In those circumstances, I consider that the description 'naturally pure' is not liable to mislead consumers as to the characteristics of the jam in question, and especially as to its qualities, composition or method of manufacture. In particular, it has by no means been established that, owing to the traces of residues of lead, cadmium and pesticide found in d'arbo jam, that jam should not be termed 'natural' or bear the description 'naturally pure'.

Moreover, it should be pointed out that, in view of the particularly low level of the abovementioned residues as compared with the values authorised by the competent authorities (national, Community or international), the fact that consumers are not informed of the presence of such residues by the labelling of the product cannot be regarded as misleading within the meaning of the provisions of Directive 79/112.

82. I therefore propose that the Court give the following answer to the Oberlandesgericht Köln: the use of the term 'naturally pure' to describe strawberry jam which contains pectin gelling agent and traces of residues of lead, cadmium and pesticide in the amounts indicated in the question referred for a preliminary ruling is not liable to mislead consumers as to the characteristics of the foodstuff within the meaning of Article 2(1)(a)(i) of Directive 79/112.

67 — In the case of vinclozolin, see Annex II, point 1(v) to Directive 90/642, as amended by Article 2 of Council Directive 93/58/EEC of 29 June 1993, amending Annex II to Directive 76/895/EEC and the annex to Directive 90/642/EEC (OJ 1990 L 211, p. 6). As regards procymidone, see Annex II, point 1(v)(b) to Directive 90/642, as amended by Article 3 of Commission Directive 98/82/EC of 27 October 1998 amending the annexes to Council Directives 86/362/EEC, 86/363/EEC and 90/642/EEC (OJ 1990 L 290, p. 25).

68 — To such a degree that the Commission referred to the quantities as being 'astonishingly low' (p. 11 of the French translation of the Commission's observations).

Conclusion

83. In the light of the foregoing I propose that the Court should rule that:

Article 2(1)(a)(i) of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, as amended by European Parliament and Council Directive 97/4/EC of 27 January 1997, is to be interpreted as meaning that the use of the term 'naturally pure' to describe strawberry jam such as that at issue in the main proceedings is not liable to mislead consumers as to the characteristics of the foodstuff.