REPORT FOR THE HEARING
delivered in Case 91/87 *

I — Facts, legal framework and procedure

The Erzeugergemeinschaft Gutshof-Ei (hereinafter referred to as 'the plaintiff') is an egg producer. For the Grade A eggs which it markets it uses small packs stamped: Güteklasse A 'frisch' (Grade A 'fresh eggs').

In 1985, the competent officers of Land Rheinland-Pfalz (hereinafter referred to as 'the defendant') took away a sample of eggs from a supermarket for a marking check. Subsequently, the defendant informed the plaintiff that the marking used was contrary to Article 6 (1) of Regulation No 2772/75, according to which:

'Eggs shall be graded by quality as follows:

Grade A or "fresh eggs",

Grade B or "second-quality or preserved eggs",

Grade C or "non-graded eggs intended for the food industry".'

That provision merely authorized, according to the defendant, the use of one of the two markings, either 'Grade A' or in 'fresh eggs'.

The plaintiff on the other hand considers that the use of both terms is also permitted. In that regard, it relies on Article 21 of the same regulation, as amended by Council Regulation No 1831/84 of 19 June 1984 amending Regulation No 2772/75 (Official Journal 1984, L 172, p. 2), which is worded as follows:

'Packs shall not bear any indications other than those laid down in this regulation.

However, small packs may carry the following additional information:

(a) ...

(b) ...

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

Furthermore, the 13th and 14th recitals in the preamble to Regulation No 2772/75 state that:

'The marking of "fresh eggs" can be optional, since the obligatory marking of other eggs enables them to be easily distinguished' and 'anyone marketing "fresh

* Language of the Case: German.

eggs" should be permitted to stamp such eggs with other particulars serving publicity ends'.

Since the defendant did not change its view of the legal situation, notwithstanding the plaintiff's arguments, the latter, in January 1986, brought an action before the Verwaltungsgericht Neustadt and der Weinstraße in which it sought a declaration that the practice it follows with regard to designating the eggs on small packs was in accordance with the Community rules applying to the marketing of eggs. The national court wonders in particular whether Regulation 2772/75 is not ambiguous inasmuch as Article 21 thereof prohibits indications other than those expressly laid down whereas the preamble thereto refers to the possibility of using other indications serving publicity ends.

By order of 20 March 1987, therefore, the Verwaltungsgericht requested the Court of Justice to give a preliminary ruling on the question whether:

'Regulation (EEC) No 2772/75 of the Council of 29 October 1975 on marketing standards for eggs (Official Journal 1975, L 182, p. 56), as amended by Council Regulation (EEC) No 1831/84 of 19 June 1984 (Official Journal 1984, L 172, p. 2, corrected in Official Journal 1984, L 197, p. 66), and by Council Regulation (EEC) No 3341/84 of 28 November 1984 (Official Journal 1984, L 312, p. 7) and as adapted by Council Regulation (EEC) No 3791/85 of 20 December 1985 (Official Journal 1985, L 367, p. 6) must be interpreted as meaning that, according to Article 6 (1) and Article 21 of that regulation, read together with the preamble thereto, small packs of Grade A eggs may be marked only Grade A or "fresh eggs", or whether both markings may be used together'.

The order for reference was received at the Court Registry on 24 March 1987.

In accordance with Article 20 of the Protocol of the Statute of the Court of Justice of the European Economic Community, written observations were submitted by the plaintiff, represented by Mr Volkmann-Schluck, Rechtsanwalt, of Modest, Gündisch and Landry, Hamburg, and by the Commission of the European Communities, represented by its Legal Adviser, Mr Karpenstein, acting as agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. By decision of 30 December 1987 under Article 95 (1) and (2) of the Rules of Procedure, the Court assigned the case to the second chamber.

II — Written observations submitted to the Court

The plaintiff claims that it has been current practice since the end of the 1960s to use the expression 'fresh eggs' in addition to other indications when putting up Grade A fresh eggs. The purpose of that practice is, in the interests of better consumer understanding, to make more specific the abstract designation of the quality grading by adding to it an indication of the nature of the eggs, namely the expression 'fresh eggs'. The designations are synonymous and are designed to describe one and the same factual situation, namely that the eggs in question fulfil the minimum conditions laid down in Article 7 of Regulation No 2772/75.

According to Article 18 (1) of that regulation, certain indications are compulsory such as, for example, in subparagraph (c), the quality grading. However, Article 6 (1) provides for two possibilities in regard to the way in which the quality grading may be expressed, namely by the terms 'Grade A' or 'fresh eggs'. The result of all those provisions taken together is that small packs must bear at least one of the designations of quality grading. On the other hand, it is nowhere provided that the cumulative use of the two authorized designations is prohibited. On the contrary, Article 21 of Regulation No 2727/75, as amended by Regulation No 1831/84, permits additional information designed to promote sales which does not mislead the consumer. The first recital in the preamble to Council Regulation No 3341/84 of 28 November 1984 amending Regulation No 2772/75 and laying down special provisions for the application of Regulation No 1831/84 (Official Journal 1984, L 312, p. 7) states, in regard to the amendments made by Regulation No 1831/84, that Regulation No 2772/75 was amended

'to take account of the experience gained since the introduction of common marketing standards for eggs and in view of trade practices as well as in the interests of better consumer information'.

Finally, the plaintiff does not see how the consumer could be misled by the marking at issue. The expression 'Grade A' designates the characteristic 'fresh eggs' just as 'fresh eggs' must correspond to 'Grade A'. Consumers have been accustomed for many years to 'Grade A eggs' also being called 'fresh eggs'. Buyers are also aware that, in accordance with Article 19 of Regulation No 2772/75, eggs which are particularly fresh have the word 'extra' printed on a band. The possibility of confusion between the designation 'extra' and the designation 'fresh eggs' is thus automatically excluded. Since the expression 'fresh eggs' is merely a precise explanation of the expression 'Grade A', which is used as a designation, there is no danger of consumers being misled since the expression 'fresh eggs' describes precisely the same characteristic as the expression 'Grade A', namely that the minimum conditions of freshness required by the marketing rules have been fulfilled.

The Commission, on the other hand, considers that the two designations at issue may only be used separately since one excludes the other. Not only the letter of the Community rules, but the principles underlying them and the purpose which those rules seek to achieve, argue in favour of that interpretation.

In regard to the first quality grade for eggs, Article 6 (1) of Regulation No 2772/75 permits the use of the expressions 'Grade A' or 'fresh eggs'. The use of 'or' is of itself sufficient to show that although producers and distributors may choose between the two expressions, they may not join them to each other. If the legislature had intended to permit such a cumulative use, it would have been employed 'and/or' in place of 'or' or would have clearly explained that the two expressions could be used together.

In accordance with the judgment of the Court of 25 June 1986 in Case 130/85 [1986] ECR 2035, the basic principle must be that markings which are not expressly authorized by the Community marketing rules applicable to eggs may not be used and that principle is based on the definitive character of the rules laid down by the Council and confirmed in the first paragraph of Article 21 of Regulation No 2772/75. The only question which arises is therefore whether other provisions of the regulation at issue contain factors justifying a broad interpretation of Article 6 (1). That is not however the case.

For example, the fact that Article 19 of the regulation at issue authorizes, in addition to the designation 'Grade A' the use of the word 'extra' on a separate band argues against the plaintiff's view. The very fact that the Community legislature expressly provided for an exception in regard to particularly fresh eggs shows that it wished to remain extremely prudent in regard to authorizing additional markings or markings which could be used in conjunction with others.

With regard to the provisions of Article 21 of Regulation No 2772/75, as amended by Regulation No 1831/84, authorizing the use of 'statements designed to promote sales' on small packs, the new version of that provision does not justify any more than the earlier version the joint use of the expressions at issue because such use could mislead the consumer and is consequently contrary to the purpose of the Community rules.

As can be seen from the seventh and 12th recital in the preamble thereto, Regulation No 2772/75 seeks to determine the quality grades in a way which is simple and easy to understand. It is obvious that by providing for only three quality grades and by laying down designations therefor which are both clear and strictly defined, the Community legislature wished to take account primarily of the interests of consumers. In order to prevent the latter from being misled, it was necessary in the legislature's view for the system which was to be established to be as simple and easy to understand as possible.

An interpretation which would permit undertakings to use the contested expressions either jointly or alternatively seems difficult to reconcile with the objective set out above. A consumer who was unaware of the true situation would, when confronted with eggs of the same grade and price certain of which were marked in 'Grade A' and certain of which were marked in 'Grade A — fresh eggs' choose in most cases the pack which emphasized the freshness of the goods. In other words, in regard to eggs of exactly the same quality, the addition of the words 'fresh eggs' would lead consumers to believe that they were being offered something to addition to merely Grade A eggs.

Finally, the Commission points out that, unlike the national court, it does not see any contradiction between Article 21 of Regulation No 2772/75 and the 15th recital in the preamble thereto. The latter is irrelevant in this case because it concerns only markings placed on the eggs themselves and not markings which may be

placed on the packs. Furthermore, the origin of that recital shows that the Community legislature clearly never had any intention of authorizing statements serving publicity ends on the eggs or on packs which went beyond what was provided for in the provisions laid down by it.

The Commission concludes by proposing that the Court reply as follows to the national court:

'Article 6 (1) and 21 of Regulation No 2772/75, as amended by Regulation No 1831/84, must be interpreted as meaning that they permit only the alternative use of the indications of "Grade A" or "fresh eggs" on small packs containing eggs and exclude the use of those two indications together.'

K. Bahlmann
Judge-Rapporteur