ORDER OF THE COURT (Seventh Chamber)

19 May 2009 *

In Case C-166/08,

REFERENCE for a preliminary ruling under Article 234 EC, from the Amtsgericht Büdingen (Germany), made by decision of 10 April 2008, received at the Court on 18 April 2008, in the criminal proceedings against

Guido Weber

THE COURT (Seventh Chamber),

composed of A. Ó Caoimh, President of the Chamber, U. Lõhmus (Rapporteur) and A. Arabadjiev, Judges,

* Language of the case: German.

Advocate General: J. Mazák,
Registrar: R. Grass,

the Court proposing to give its decision by reasoned order in accordance with the first subparagraph of Article 104(3) of its Rules of Procedure,

after hearing the Advocate General,

makes the following

Order

1 This reference for a preliminary ruling concerns the interpretation of the second paragraph of Article 7(1) of Council Directive 89/397/EEC of 14 June 1989 on the official control of foodstuffs (OJ 1989 L 186, p. 23).

2 The reference has been made in the context of criminal proceedings between Mr Weber, manager of Routhier Weber GmbH ('Routhier Weber'), charged with the offence of marketing a foodstuff under a under a misleading name.

Legal context

Community legislation

Control of foodstuffs

3 The official control of foodstuffs was regulated, until 31 December 2005, by Directive 89/397.

4 Under Recital 13 in the preamble to that directive:

'Whereas although, on the one hand, undertakings should not have the right to oppose the inspections, on the other hand their legitimate rights must be preserved, in particular the right to manufacturing secrecy and the right of appeal.'

5 Article 4 of that directive provides:

'1. Inspections shall be carried out:

(a) regularly;

(b) where non-compliance is suspected.

2. Inspections shall be carried out using means proportionate to the end to be observed.

3. Inspection shall cover all stages of production, manufacture, import into the Community, processing, storage, transport, distribution and trade.

…'

6 Under Article 5 of Directive 89/397:

'Control shall comprise one or more of the following operations in accordance with the conditions laid down in Articles 6 to 9 and in the light of the examination to be carried out:

(1) inspection;

(2) sampling and analysis;

…’

7 According to Article 6 of that directive:

‘1. The following shall be subject to inspection:

…

(d) finished products;

…

(h) labelling and presentation of foodstuffs;

…’

8 Article 7 of the directive is worded as follows:

‘1. Samples of the products enumerated in Article 6(1)(b) to (f) may be taken for the purposes of analysis.

Member States shall take the necessary steps to ensure that those subject to inspection may apply for a second opinion.

2. The analyses shall be carried out by official laboratories.

Member States may also empower other laboratories to carry out these analyses.’

9 In Article 10 of the same directive, it is laid down that:

'Where inspectors discover or suspect an irregularity, they shall take the requisite measures.'

10 Article 12 of Directive 89/397 states:

'1. Member States shall take the measures necessary to ensure that natural and legal persons concerned by the inspection have a right of appeal against measures taken by the competent authority for the purpose of inspection.

…'

The designation of origin 'feta'

11 In Community law, the term 'feta' is protected as a designation of origin. It was included by Commission Regulation (EC) No 1829/2002 of 14 October 2002 amending the Annex to Regulation (EC) No 1107/96 with regard to the name 'Feta' (OJ 2002 L 277, p. 10) in the register provided for in Article 6(3) of Council Regulation (EEC)

No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1).

12 Under Article 4 of Regulation No 2081/92:

‘1. To be eligible to use a protected designation of origin (PDO) or a protected geographical indication (PGI) an agricultural product or foodstuff must comply with a specification.

2. The product specification shall include at least:

…

(b) a description of the agricultural product or foodstuff including the raw materials, if appropriate, and principal physical, chemical, microbiological and/or organoleptic characteristics of the product or the foodstuff;

…’

National legislation

13 Paragraph 11, headed 'Protection against fraudulent practices', in the German Code on foodstuffs, consumer items and animal feed (Lebensmittel- Bedarfsgegenstände- und Futtermittelgesetzbuch), in the version applicable to the case in the main action ('the LFGB'), provides:

'(1) It shall be prohibited to sell foodstuffs under names, indications or presentations liable to mislead and, in general or in individual cases or to advertise those foodstuffs by means of misleading representations or statements of that kind. More particularly, fraud shall be constituted by

1. in the case of a foodstuff, the use of names, indications, presentations, representations or other statements concerning characteristics, in particular those concerning the type, condition, composition, amount, perishability, place of manufacture, origin, or method of manufacture or derivation, which are liable to deceive,

…'

14 Under the terms of Paragraph 43 of the LFGB, headed 'Taking of samples':

'(1) Persons entrusted with inspection and, in urgent cases, police officers, are empowered to request or take samples of their choosing for examination, subject to acknowledgement of receipt. Save as otherwise provided in regulations adopted pursuant to this Law, a part of the sample or, insofar as the sample cannot (or cannot without jeopardising the purpose of the inspection) be divided into portions of equivalent composition, a second piece of the same type and, so far as possible, from the same batch, originating from the same manufacturer as the sample, shall be left behind; the manufacturer may waive the leaving behind of that sample.

(2) Samples to be left behind must be officially locked away or sealed. They must bear the date on which the sample was taken and the date after which the locking away or sealing is to be regarded as no longer being valid.

(3) The person with whom the sample is left behind and who is not the manufacturer is obliged to store and preserve the sample in an appropriate manner and to hand it over at the request of the manufacturer at his expense and risk for examination by a private expert designated by the manufacturer who is accredited under the provisions of food legislation.

…'

15 Paragraphs 59 and 60 of the LFGB provides for criminal penalties and administrative fines. Paragraph 59 of the LFGB provides:

'(1) A custodial sentence of up to one year or a fine shall be imposed on any person who

…

7. contrary to the first sentence of Paragraph 11(1), places on the market a foodstuff under names, indications or presentations liable to mislead or advertises by means of misleading representations or statements…

…'

The dispute in the main action and the question referred for a preliminary ruling

16 On 2 November 2005, the Amt für Veterinärwesen und Lebensmittelüberwachung (Office for Veterinary Matters and Control of Foodstuffs), Vechta (Germany) took a food sample from a retail outlet within its territorial jurisdiction. The name 'Fresca d'Oro, Feta — original griechischer Schafskäse - aus Schaf- und Ziegenmilch in Salzlake

gereift' (Feta Fesca d'Oro — original Greek goat's cheese — made from sheep or goat's milk matured in brine) appeared on the product packaging.

17 The product concerned in the main action was imported from Greece into Germany by Routhier Weber. It subsequently came into the shop concerned through two intermediaries called 'ZHG Offenburg' and 'Zentrale Gronau'.

18 Under Article 1 of Ministerial Order No 313025/1994 of 11 January 1994 recognising the protected designation of origin (PDO) of feta cheese the name 'feta' is recognised as a protected designation of origin (PDO) for white cheese soaked in brine traditionally produced in Greece, more specifically in the regions mentioned in paragraph 2 of that article, from ewes' milk or a mixture of ewes' milk and goats' milk.

19 The Lebensmittelinstitut Braunschweig (the Brunswick Foodstuffs Agency) which falls under the Niedersächsisches Landesamt für Verbraucherschutz und Lebensmittelsicherheit (Office of Consumer Protection and Food Safety for the Land of Lower Saxony), proceeded to analyse the sample concerned in the main action and found that it had a cow's milk content of 21% (+/- 2%). The detection limit is 3%. Consequently, it found that the name set out above to be 'misleading' within the meaning of the first sentence of Paragraph 11(1) of the LFGB and brought a complaint.

20 When the sample concerned in the main action was taken, a second sample was left in storage in the deep freezer of the shop concerned. Neither the producer of the product at issue nor ZHG Offenburg was informed that a sample had been taken and that a second sample had been put aside.

21 Routhier Weber, the name of which does not appear on the packaging concerned in the main action, was not informed of the taking of the sample or of the existence of the second sample either. It first learned of the analysis of the sample concerned on 21 March 2006, that is, almost three months after the expiration of the conservation limit for the product. A second opinion was therefore no longer possible.

22 On 22 December 2006, the Staatsanwaltschaft Gießen (Public Prosecutor's Office, Gießen) charged the manager of Routhier Weber GmbH, Guido Weber, with the offence of placing on the market a foodstuff displaying a misleading name, contrary to the first sentence of Paragraph 11(1) LFGB and applied for criminal proceedings to be instigated.

23 In those proceedings, the national court raised the question whether the accused, which marketed the product concerned in the main action, may be considered to be a person subject to inspection within the meaning of Article 7 of Directive 89/397, which, if that question is answered in the affirmative, would imply that it had the right to request the analysis of the second sample for the purpose of obtaining a second opinion.

24 In those circumstances, the Amtsgericht Büdingen (Local Court, Büdingen) has decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the second sentence of Article 7(1) of Directive 89/397/EEC on the official control of foodstuffs to be interpreted, with regard to the expression 'those subject to inspection', as applying not only to the manufacturer of the foodstuff but also to the person marketing it, in so far as the latter may be held responsible by the prosecuting authorities for the condition and labelling of the foodstuff in proceedings relating to the imposition of criminal penalties or administrative fines?'

The question referred for a preliminary ruling

25 In accordance with the first subparagraph of Article 104(3) of the Rules of Procedure, when the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from the existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order in which reference is made to the relevant case-law.

26 That provision must be applied in the present case.

27 By its question, the national court asks, essentially, whether the second sentence of Article 7(1) of Directive 89/397 is to be interpreted as meaning that a company which imported and then marketed a foodstuff and whose manager may, on the basis of analysis of samples of that product taken in a retail outlet, be subject to proceedings for the imposition of criminal penalties or administrative as a result of the condition and labelling of the product is a person subject to inspection within the meaning of the provision.

28 In that regard, it is necessary, at the outset, to point out that it is clear from the very wording of the article that each Member State is obliged to grant the undertaking concerned a right to a second opinion (Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 42).

29 In the present case, it follows from paragraphs 21 and 22 of this order, first, that Routhier Weber was not informed that the sample had been taken or that a second

sample existed and, second, that the manager of that undertaking was charged with the offence, following those measures of control, of placing foodstuffs on the market under a misleading name.

30 The Court has previously held that the purpose of a second opinion is to safeguard the legitimate rights of the undertakings, in particular their right of appeal against the measures taken for the purpose of inspection (*Steffensen*, paragraph 48).

31 It follows that, where, as in the main action, criminal proceedings have been initiated against a person in his capacity as manager of an undertaking which imports a foodstuff on the basis of the results of the analyses of samples taken from a retail outlet, that undertaking must be regarded as a person subject to inspection for the purposes of the second paragraph of Article 7(1) of Directive 89/397 (see, by analogy, *Steffensen*, paragraph 49).

32 Admittedly, unlike the facts such as those in the case giving rise the judgment in *Steffensen*, the case in the main action relates to criminal rather than administrative proceedings and, instead of being an 'action' brought before a court, concerns direct access to a court following a charge brought by the public prosecutor. However, even if Article 10 of Directive 89/397 appears prima facie to refer to measures of an administrative nature, it follows from the judgment that Member States are also acting in the context of that directive when enforcing legislation concerning foodstuffs by means of sanctions, as the Commission contends. The rights of the defence, embodied in the second paragraph of Article 7(1) of the directive, are of particular importance in the context of criminal proceedings.

33 In addition, the fact that, in the case in the main action, the importer's name does not appear on the packaging of the product in question should not preclude the exercise of the right to a second opinion. In effect, it follows from the terms of Article 4(3) of Directive 89/397 and from the listing of the different stages when the inspection is

carried out, that the administrative or criminal proceedings may affect a large number of persons, far in excess of those whose names appear on the packaging pursuant to Community legislation on foodstuffs.

34 In the light of the foregoing, the answer to the question is that the second paragraph of Article 7(1) of Directive 89/397 must be interpreted as meaning that an undertaking which imported and then marketed a foodstuff and whose manager may, on the basis of analysis of samples of that product taken in a retail outlet, be subject to proceedings for the imposition of criminal or administrative penalties as a result of the condition and labelling of the product is a person subject to inspection within the meaning of the provision.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

The second paragraph of Article 7(1) of Council Directive 89/397/EEC of 14 June 1989 on the official control of foodstuffs must be interpreted as meaning that an undertaking which imported and then marketed a foodstuff and whose manager

may, on the basis of analysis of samples of that product taken in a retail outlet, be subject to proceedings for the imposition of criminal or administrative penalties as a result of the condition and labelling of the product is a person subject to inspection within the meaning of the provision.

[Signatures]