JUDGMENT OF THE COURT (First Chamber)

4 April 2000 *

In Case C-465/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Oberlandesgericht Köln (Germany) for a preliminary ruling in the proceedings pending before that court between

Verein gegen Unwesen in Handel und Gewerbe Köln eV

and

Adolf Darbo AG

on the interpretation of 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 (OJ 1979 L 33, p. 1),

* Language of the case: German.

THE COURT (First Chamber),

composed of: L. Sevón, President of the Chamber, P. Jann and M. Wathelet (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Verein gegen Unwesen in Handel und Gewerbe Köln eV, by W. Berg, Rechtsanwalt, Cologne,

— Adolf Darbo AG, by K. Bauer, Rechtsanwalt, Cologne,

— the Austrian Government, by C. Stix-Hackl, Gesandte in the Federal Ministry of Foreign Affairs, acting as Agent,

— the Finnish Government, by H. Rotkirch, Ambassador, Head of the Legal Service in the Ministry of Foreign Affairs, and T. Pynnä, Legal Adviser in that Ministry, acting as Agents,

— the Commission of the European Communities, by C. Schmidt, of its Legal Service, and M. Shotter, a national civil servant on secondment to that service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Verein gegen Unwesen in Handel und Gewerbe Köln eV, represented by W. Berg and J. Ristelhuber, Rechstanwalt, Cologne, of Adolf Darbo AG, represented by K. Bauer and D. Gorny, Rechtsanwalt, Cologne, of the French Government, represented by R. Loosli-Surrans, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as agent, of the Finnish Government, represented by T. Pynnä, and of the Commission, represented by C. Schmidt, at the hearing on 24 November 1999,

after hearing the Opinion of the Advocate General at the sitting on 20 January 2000,

gives the following

Judgment

1 By order of 2 December 1998, received at the Court Registry on 18 December 1998, the Oberlandesgericht Köln (Higher Regional Court, Cologne) referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of 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 (OJ 1979 L 33, p. 1, hereinafter 'the Directive').

2 That question was raised in proceedings between Verein gegen Unwesen in Handel und Gewerbe Köln eV (Association opposing anti-competitive practices in trade and industry, hereinafter 'the Verein') and Adolf Darbo AG (hereinafter 'Darbo') concerning the labelling and presentation of strawberry jam marketed by that company in Germany.

The Community legislation

3 Article 2(1) of the Directive provides:

'The 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 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 Under Article 3(1) of the Directive:

'In 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 Article 6(4)(a) of the Directive defines 'ingredient' as meaning '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'. Article 6(5)(a) gives further details:

'The 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 the Directive provides:

'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:

— protection of public health,

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

...'

The national legislation

7 Article 17 of the Lebensmittel- und Bedarfsgegenständegesetz (Law on foodstuffs and consumer products — 'the LMBG') contains provisions intended to protect consumers against risks of fraud. Under Article 17(1);

'It shall be prohibited,

...

4. in marketing any foodstuffs whatsoever which either contain additives or residues of authorised substances within the meaning of Article 14 [plant-health products, fertilisers and pesticides] and Article 15 [animal feeding-stuffs containing substances producing any pharmacological effect]... to use wording or other indications suggesting that they are natural, naturally pure ("naturrein") or free of residues or pollutants;

5. to sell foodstuffs under names, descriptions or presentations liable to mislead and, in general or in individual cases, to engage in misleading advertising or make statements of that kind. More particularly, fraud shall be constituted by

(a) indicating that foodstuffs have effects which they do not have, according to scientific knowledge, or which have not been adequately proven scientifically,

(b) the use of names, indications, presentations, advertising or other statements liable to mislead concerning the origin of the foodstuffs, their quantity, their weight, the date of their manufacture or packaging, their shelf-life or other matters which are decisive in evaluating the foodstuff in question,

...'

8 Article 47(a)(1) of the LMBG provides:

'... products within the meaning of this Law, which are properly manufactured and marketed 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 to 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*.'

9 In Austria, the third edition of the *Österreichisches Lebensmittelbuch* (Austrian Food Code) lays down, in Chapter B 5, entitled 'Jam and other fruit-based products', the conditions governing the marketing of 'special quality jams' bearing the description 'naturrein'; it provides:

'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.'

The main proceedings

10 Darbo manufactures in Austria, where it is established, strawberry jam, which it markets in that Member State and in Germany under the name 'd'arbo naturrein' and under the description 'Garten Erdbeer' (garden strawberry).

11 The labelling on the packaging of the jam bears the following wording:

'In 1879 the Darbo family commenced jam production. Today, d'arbo 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.

Garden strawberry

Special quality jam

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

12 According to the order for reference, the pectin gelling agent in the jam is made up of 'dilute acids obtained principally from the inside of citrus fruit peel, fruit pomace or shredded sugar beet'.

13 The order for reference also states that, according to analyses carried out in Germany, the jam also contains, as traces or residues, the following levels of various substances: less than 0.01 mg/kg lead, 0.008 mg/kg cadmium and 0.016 mg/kg procymidone (pesticide) and 0.005 mg/kg vinclozolin (pesticide).

14 The Verein asked the Landgericht (Regional Court) Köln, which dismissed its application, and then, on appeal, the court from which the request for a preliminary ruling emanates, for an order that the word 'naturrein' should no longer be used for d'arbo jam on the ground that such use was contrary to Article 17(1)(4) and (5) of the LMBG, for three reasons. First, the pectin gelling agent is an additive, within the meaning of subparagraph 4, which consumers do not expect to find in the jam in question because of the description 'naturrein'; second, the latter term is likely to mislead consumers in that the air or the land from which the fruit used in the jam originates are contaminated by pollution, and third, in view of the residues of lead, cadmium and pesticide in the jam, it cannot be described as 'naturally pure'.

15 Before the national court, Darbo contended that the use of the term 'naturrein' was not misleading since, in view of land and air pollution, consumers expected there to be toxic substances in food and knew that it is impossible to make jam without a gelling agent, pectin being a well-known gelling agent. Darbo also contended that it should be able to market its jam in Germany pursuant to

Article 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'.

16 Entertaining doubts as to the scope of Article 2(1)(a)(i) of the Directive, 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 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)?'

The question referred to the Court

17 By that question, the national court seeks essentially to ascertain whether Article 2(1)(a)(i) of the Directive precludes use of the description 'naturally pure' to describe a strawberry jam which contains the gelling agent pectin and traces or residues of lead, cadmium and pesticides of the following levels: 0.01 mg/kg of

lead, 0.008 mg/kg of cadmium, 0.016 mg/kg of procymidone and 0.005 mg/kg of vinclozolin.

Darbo's request that the question be reformulated

18 Darbo maintains that the question submitted by the national court is imprecise and that the latter should have asked the Court of Justice whether Article 17(1)(4) of the LMBG constitutes a measure having equivalent effect within the meaning of Article 30 of the Treaty, on the ground that that national provision allows prohibition of the marketing in Germany of a foodstuff duly marketed in Austria under the description 'naturally pure'.

19 On that point, it should be observed that, according to settled case-law, it is solely for the national courts before which proceedings are pending, and which must assume responsibility for the judgment to be given, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they submit to the Court (see, *inter alia*, Case C-264/96 *ICI* v *Colmer (HMIT)* [1998] ECR I-4695, paragraph 15, and Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 20). Consequently, Darbo's request that the question be reformulated in the terms which it indicates cannot be granted.

Substance

20 As the Court has held on several occasions in relation to provisions similar to Article 2(1)(a) of the Directive, designed to prevent any deception of consumers

and contained in a number of secondary legislative measures that are either of general application or are sectoral in scope, it is for the national court to assess whether an appellation, brand name or advertising statement may be misleading, taking into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect (see, in particular, Case C-303/97 *Sektkellerei Kessler* [1999] ECR I-513, paragraph 36).

21 Whilst, therefore, it is for the national court to decide, in the light of that criterion, whether, in view of the presence of toxic substances in d'arbo jam, use of the term 'naturally pure' is liable to mislead consumers as regards the characteristics of that foodstuff, the Court has before it the information it needs in order to expound the following considerations concerning each of the substances mentioned in the question referred to it.

22 As regards, first, pectin, it need merely be pointed out that its presence in d'arbo jam is indicated on the label on the packaging in accordance with Article 3(1), point (2), and Article 6(4)(a) and Article 6(5)(a) of the Directive. As the Court has already acknowledged (Case C-51/94 *Commission* v *Germany* [1995] ECR I-3599, paragraph 34), 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 Article 6 of the Directive. In those circumstances, an average consumer who is reasonably well informed and reasonably observant and circumspect could not be misled by the term 'naturally pure' used on the label simply because the jam contains pectin gelling agent whose presence is duly indicated on the list of its ingredients (see, to the same effect, Case C-383/97 *Van der Laan* [1999] ECR I-731, paragraph 37).

23 It must be added that, as observed by the Advocate General in point 29 of his Opinion, pectin is specifically named as one of the substances which may be

added to special quality jams in accordance with the combined provisions of Article 5 and Annex I, A, point 1, and Annex III, B, of Council Directive 79/693/EEC of 24 July 1979 on the approximation of the laws of the Member States relating to fruit jams, jellies and marmalades and chestnut purée (OJ 1979 L 205, p. 5), as amended by Council Directive 88/593/EEC of 18 November 1988 (OJ 1988 L 318, p. 44), and with the combined provisions of Article 2(2) of and Annexes I and II to European Parliament and Council Directive No 95/2/EC of 20 February 1995 on food additives other than colours and sweeteners (OJ 1995 L 61, p. 1), as amended by European Parliament and Council Directive No 98/72/EC of 15 October 1998 (OJ 1998 L 295, p. 18).

24 As regards, second, the presence of residues of lead, cadmium and pesticide in d'arbo jam, it must be stated, as observed by the Commission, that such residues are not ingredients of the foodstuff within the meaning of Article 6(4)(a) of the Directive and do not appear on the list of compulsory particulars set out in Article 3(1) thereof.

25 Although the Directive does not require those substances to be mentioned on the packaging of the jam, it is nevertheless necessary to consider whether, in view of the presence thereof in the amounts indicated by the national court, the description 'naturally pure' used on the label is liable to mislead an average consumer who is reasonably well informed and reasonably observant and circumspect as to the characteristics of the foodstuff within the meaning of Article 2(1)(a)(i) of the Directive.

26 According to the Verein and the Finnish Government, use of the term 'naturally pure' is likely to create in the consumer's mind the impression that d'arbo jam is a pure and natural product, free of any impurity or extraneous substance. However, the mere presence of residues of lead, cadmium and pesticides,

whatever their respective amounts in the foodstuff, detracts from that description, which is therefore liable to mislead consumers as to the characteristics of the jam.

27 That argument cannot be upheld. It is common ground that lead and cadmium are present in the natural environment as a result, in particular, of air pollution and pollution of the aquatic environment, as evidenced by several Community legislative instruments mentioned by the Advocate General in point 65 of his Opinion. Since garden fruit is grown in an environment of that kind, it is inevitably exposed to the pollutants present in it.

28 In those circumstances, even if it is assumed that, in certain cases, consumers might be unaware of that fact and thereby be misled, that risk remains minimal and cannot therefore justify a barrier to the free movement of goods (see, to that effect, Case C-238/89 *Pall* [1990] ECR I-4827, paragraph 19, Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln* v *Mars* [1995] ECR I-1923, paragraph 19, and *Commission* v *Germany*, cited above, paragraph 34).

29 The same conclusion is called for, thirdly, in relation to the presence of traces or residues of pesticides in d'arbo jam. As observed by the Advocate General in point 70 of his Opinion, the use of pesticides, even by private individuals, is one of the most usual means of combating the presence of harmful organisms on vegetables and agricultural products. Thus, that fact that garden strawberries are grown 'naturally' does not in any event mean that they are free of pesticide residues.

30 Lastly, it is necessary to verify whether the amounts of residues of lead, cadmium and pesticide measured in d'arbo jam render the presence of those substances

incompatible with the description 'naturally pure' appearing on the label. Such a description might indeed be liable to mislead consumers if the foodstuff contained a high level of residues of toxic or polluting substances, even if they presented no risk to consumers' health.

31 In that regard, it is clear from studies conducted at both international and Community level, produced to the Court by the Commission and not contested by the parties to the main proceedings or by the Member States which submitted observations, that the lead and cadmium residues which were measured in d'arbo jam are present in it at levels well below the maximum values authorised by the legislation of the Member States as a whole. Thus, it appears from a comparative study of that legislation made by the Commission Directorate-General for Industry that the German legislation tolerates in most fruit a level of 0.5 mg/kg of lead and a level of 0.2 mg/kg of cadmium. However, according to the national court, d'arbo jam contains residues of 0.01 mg/kg of lead and 0.008 mg/kg of cadmium, which are, respectively, 50 times and 25 times lower than the maximum values authorised by the German legislation.

32 As regards pesticides, it must be pointed out, as observed by the Commission, that the levels mentioned by the national court are particularly low as compared with the levels allowed by the Community legislation. Thus, under Annex II to Council Directive 90/642/EEC of 27 November 1990 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 amended by Council Directive 93/58/EEC of 29 June 1993 amending Annex II to Directive 76/895/EEC relating to the fixing of maximum levels for pesticide residues in and on fruit and vegetables and the Annex to Directive 90/642/EEC (OJ 1993 L 211, p. 6), and by 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 1998 L 290, p. 25), the maximum level for residues present in strawberries (other than wild strawberries) is 5 mg/kg both for procymidone and for vinclozolin. However, according to the national court, the jam contains residues of 0.016 mg/kg of

procymidone and 0.005 mg/kg of vinclozolin, which are, respectively, 312 and 1 000 times lower than the maximum values authorised by the abovementioned legislation.

33 In those circumstances, it must be considered that, notwithstanding the presence of traces or residues of lead, cadmium and pesticides in d'arbo jam, the term 'naturally pure' used on the label of the packaging of that foodstuff is not liable to mislead consumers as to its characteristics.

34 In view of the foregoing, the answer to the question submitted must be that Article 2(1)(a)(i) of the Directive dos not preclude use of the description 'naturally pure' for a strawberry jam which contains the gelling agent pectin and traces or residues of lead, cadmium and pesticides of the following levels: 0.01 mg/kg of lead, 0.008 mg/kg of cadmium, 0.016 mg/kg of procymidone and 0.005 mg/kg of vinclozolin.

Costs

35 The costs incurred by the French, Austrian and Finnish Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the question referred to it by the Oberlandesgericht Köln by order of 2 December 1998, hereby rules:

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 does not preclude use of the description 'naturally pure' for a strawberry jam which contains the gelling agent pectin and traces or residues of lead, cadmium and pesticides of the following levels: 0.01 mg/kg of lead, 0.008 mg/kg of cadmium, 0.016 mg/kg of procymidone and 0.005 mg/kg of vinclozolin.

Sevón Jann Wathelet

Delivered in open court in Luxembourg on 4 April 2000.

R. Grass

Registrar

L. Sevón

President of the First Chamber