OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 17 March 2005 [1]

I — Introduction

1. By the present infringement proceedings the Commission challenges Spanish laws allowing the term 'bio' to be used for products which have not been produced in accordance with 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. [2] The Commission regards these as infringing this regulation and Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs. [3]

II — Legal framework

A — *Community law*

2. The relevant provisions of Regulation No 2092/91 have been amended many times, most recently by Council Regulation (EC) No 392/2004 of 24 February 2004 amending Regulation (EEC) No 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs. [4] The present dispute depends on Regulation No 2092/91 as amended by Council Regulation (EC) No 1935/95 of 22 June 1995 amending Regulation (EEC) No 2092/91 [5] and by Council Regulation (EC) No 1804/1999 of 19 July 1999 supplementing Regulation (EEC) No 2092/91 to include livestock production. [6]

1 — Original language: German.

2 — OJ 1991 L 198, p. 1.

3 — OJ 2000 L 109, p. 29.

4 — OJ 2004 L 65, p. 1.

5 — —OJ 1995 L 186, p. 1.

6 — OJ 1999 L 222, p. 1; in so far as relevant to the present proceedings, it has been in force since 24 August 2000. The reference to 24 August 2001 in the French text appears to be a typographical error.

3. Article 2 of Regulation No 2092/91 as amended by Regulation No 1804/1999 provides:

'For the purpose of this Regulation, a product shall be regarded as bearing indications referring to the organic production method, where, in the labelling, advertising material or commercial documents, such a product, its ingredients or feed materials are described by the indication in use in each Member State, suggesting to the consumer that the product, its ingredients or feed materials have been obtained in accordance with the rules of production laid down in Article 6 and in particular the following terms or their usual derivatives (such as bio, eco etc.) or diminutives, alone or combined, unless such terms are not applied to agricultural products in foodstuffs or feedingstuffs or clearly have no connection with the method of production:

— in Spanish: ecológico,

— in Danish: økologisk,

— in German: ökologisch, biologisch,

— in Greek: βιολογικό,

— in English: organic,

— in French: biologique,

— in Italian: biologico,

— in Dutch: biologisch,

— in Portuguese: biológico,

— in Finnish: luonnonmukainen,

— in Swedish: ekologisk.'

4. Article 5(1) and (3) of Regulation No 2092/91 lays down the conditions a product must satisfy before its labelling or advertising may refer to organic production methods.

5. Article 10a(2) of Regulation No 2092/91 provides:

'Member States shall take whatever measures and action are required to prevent fraudulent use of the indications referred to in Article 2 and/or Annex V.'

6. Article 2(1)(a)(i) of Directive 2000/13 states:

'The labelling and methods used must not:

(a) be such as could mislead the consumer 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; ...'

B — *National law*

7. In the Kingdom of Spain, organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs was first regulated by Real Decreto No 1852/1993 of 22 October 1993 [7] (hereinafter 'Royal Decree No 1852/1993'). Article 3(1) of the Royal Decree used to provide that a product was in any event to be regarded as bearing indications referring to the organic production method where the product or its ingredients were described, in the labelling, advertising material or commercial documents, by the term 'ecológico'. Article 3(1) used also to provide that the following terms could be used: 'obtenido sin el empleo de productos químicos de síntesis' (produced without the use of synthetic chemicals), 'biológico' (biological), 'orgánico' (organic) and 'biodinámico' (bio-dynamic), as well as the terms 'eco' (eco) and 'bio' (bio).

8. Royal Decree 1852/1993 was amended by Real Decreto No 506/2001 of 11 May 2001 [8] (hereinafter 'Royal Decree No 506/2001'). Article 3(1) now provides:

'In accordance with the provisions of Article 2 of Regulation (EEC) No 2092/1991, as

7 — BOE of 26 November 1993.

8 — BOE of 26 May 2001.

amended by Regulation (EC) No 1804/1999, a product shall in any event be regarded as bearing indications referring to the organic production method where the product, its ingredients or feed materials are described, in the labelling, advertising material or commercial documents, by the term "ecológico" or its derivative "eco", alone or combined with the name of the product, its ingredients or the commercial brand.'

9. In the Comunidad Foral de Navarra (Autonomous Region of Navarre) Decreto Foral No 617/1999 of 20 December 1999 [9] (hereinafter 'Regional Decree No 617/1999') makes provision for organic production. Article 2 provides that a product shall be regarded as bearing an indication that it has been obtained by the organic production method where it bears the term 'ecológico', 'obtenido sin el empleo de productos químicos de síntesis', 'biológico', 'orgánico' or 'biodinámico', or the abbreviation 'eco' or 'bio'. Decreto Foral No 212/2000 of 12 June 2000 [10] (hereinafter 'Regional Decree No 212/2000') provides for an exception from Article 1 of Regional Decree No 617/1999, by which the latter provision does not apply to dairy products in respect of which the term 'bio' has been customarily and continuously used when they have not been obtained in accordance with organic production methods.

9 — BO Navarra (*Boletín Oficial de Navarra*) of 10 January 2000.
10 — BO Navarra (*Boletín Oficial de Navarra*) of 10 July 2000.

III — Pre-litigation procedure and forms of order sought

10. By letter dated 18 July 2001 the Commission requested the Kingdom of Spain to submit observations in accordance with Article 226 EC. It stated that the amendments to Spanish legislation effected by Royal Decree No 506/2001 and by Regional Decree No 212/2000 infringed Article 2 of Regulation No 2092/91 in conjunction with Article 5 of that regulation, Article 2 in conjunction with Article 10a of the regulation and Article 2 of Regulation No 2092/91 in conjunction with Article 2(1)(a)(i) of Directive 2000/13. The Kingdom of Spain disagreed with this view.

11. Thereafter, by letter dated 24 April 2002 the Commission delivered a reasoned opinion to the Spanish Government and set a time-limit of two months for bringing an end to the infringements complained of. The Spanish Government maintained its view that there was no infringement.

12. By document dated 17 March 2003, lodged at the Court of Justice on 26 March 2003, the Commission raised proceedings against the Kingdom of Spain pursuant to Article 226 EC.

13. The Commission requests that the Court:

— declare that

— by maintaining in its domestic legal system and in current usage the term 'bio', on its own or in combination with other terms, for products which have not been obtained in accordance with organic production methods, thereby infringing Article 2 in conjunction with Article 5 of 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, as amended by Regulations (EC) No 1935/95 and (EC) No 1804/1999; by failing to adopt the necessary measures to prevent misleading use of that word, thereby infringing Article 2 in conjunction with Article 10a of the abovementioned amended regulation; and by failing to adopt measures to prevent consumers from being misled as to the method of manufacture or production of foodstuffs, thereby infringing Article 2 of the abovementioned amended regulation in conjunction with Article 2(1)(a)(i) of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs; and,

— by maintaining in the Comunidad Foral de Navarre, contrary to the same provisions, use of the term 'bio', on its own or in combination with other terms, for dairy products in respect of which that term has been customarily and continuously used when they have not been obtained in accordance with organic production methods,

the Kingdom of Spain has failed to fulfil its obligations under the abovementioned regulation and directive, in particular the provisions thereof as indicated above;

— order the Kingdom of Spain to pay the costs.

14. The Kingdom of Spain contends that the Court should:

— dismiss the application;

— order the Commission to bear the costs of the proceedings.

IV — Legal assessment

15. The present infringement proceedings are unusual in so far as the Commission alleges that Spanish national provisions are incompatible with a Community regulation. Whereas whether national provisions are compatible with directives is frequently the question in infringement proceedings, it is not obvious that such proceedings are necessary in the case of regulations. Given

that regulations are directly applicable and are to be applied in preference to national law, one might simply regard incompatible national law as irrelevant. However, that would misunderstand the point that contradictions between a regulation and national law can disrupt the practical effectiveness of Community law. In particular, such contradictions can raise doubts as to which law is applicable. Accordingly, Member States may adopt rules for the application of a regulation only if they do not obstruct its direct applicability, do not conceal its Community nature and adhere to the parameters laid down under it. [11] On account of the obligations laid down by Article 10 EC, in general national measures must facilitate the application of Community law and must not obstruct its implementation. [12] An infringement of these obligations can also be the subject of infringement proceedings.

16. The Commission's complaint is that the new Spanish law permits the use of the term 'bio' for products which have not been obtained by organic production methods in accordance with Regulation No 2092/91. Spain is thus infringing Article 2 in conjunction with Article 5 and Article 10a of Regulation No 2092/91, as well as Article 2 (1)(a)(i) of Directive 2000/13.

17. Article 2 of Regulation No 2092/91 provides for when a product's designation constitutes a reference to its having been obtained by organic production methods. Article 5 of Regulation No 2092/91 provides for which products may carry such a designation. Article 10a of Regulation No 2092/91 obliges the Member States to prevent fraudulent use of a description under Article 2 of the regulation. Article 2(1)(a)(i) of Directive 2000/13 requires the Member States to prohibit misleading labelling.

18. If in Spain the description 'bio' refers to organic production methods within the meaning of Article 2 of Regulation No 2092/91, then those provisions are infringed. In that case, Spain is prohibited from enacting provisions such as those in dispute in the present case which allow this designation to be used for products which have not been obtained by organic production methods as defined by the regulation. Spain also has to prevent fraudulent use of the term.

11 — See Case 94/77 *Zerbone* [1978] ECR 99, paragraphs 22 and 27, and Case C-113/02 *Commission* v *Netherlands* [2004] ECR I-9707, paragraph 16.

12 — Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 25.

19. Thus, the interpretation of Article 2 of Regulation No 2092/91 alone determines whether the Commission's complaint is well founded as regards all the infringements alleged. The question is whether a product which bears the term 'bio' in Spain is thereby to be regarded as bearing an indication referring to the organic production method within the meaning of Article 2 of Regulation No 2092/91.

20. Article 2 of Regulation No 2092/91 determines whether a product is to be regarded as bearing an indication referring to the organic production method by means of a general definition supplemented by a number of specific terms listed by language. The provision commences with the general rule as to when a product is to be regarded as bearing an indication referring to the organic production method, namely,

'where ... a product ... [is] described by the indication in use in each Member State, suggesting to the consumer that the product ... [has] been obtained in accordance with the rules of production laid down in Article 6 ...'.

21. Thus, this general definition refers to usage of the term and the meaning the consumer connects with it.

22. The examples which follow are individual terms, listed by language, whose use — like the use of words and diminutives derived from them — indicates that a product has been obtained by organic production methods:

'... and in particular the following terms or their usual derivatives (such as bio, eco etc.) or diminutives, alone or combined, unless such terms are not applied to agricultural products in foodstuffs or feedingstuffs or clearly have no connection with the method of production'.

23. There follows a list of terms in the various official languages. For Spanish, Danish, German and Swedish the word for 'ecological' is listed; for German, Greek, French, Italian, Dutch and Portuguese, the word for 'biological'; for English the word is 'organic'; and for Finnish, the term 'natural'.

24. According to this list, the terms listed for the official language of a Member State are in that Member State in any event a reference to the organic production method. To that extent, Article 2 of Regulation No 2092/91 deems consumers to have that understanding.

25. The Spanish entry lists only the term "ecológico', whereas the term 'biológico', which would include its diminutive 'bio', is not listed for Spanish.

26. By contrast, the German and Dutch entries have the term 'biologisch', the French has 'biologique', the Greek has 'βιολογικό', the Italian 'biologico', and indeed the Portuguese has 'biológico' itself, so that at least in these languages these terms' diminutive, 'bio', constitutes an indication that a product has been obtained by the organic production method.

27. Protection of these descriptions does not depend on the language of the individual consumer, but on the language of the marketing. For that reason, it is unlawful for example to use the adjective 'biologique' for a product marketed in French not only in France, Belgium and Luxembourg, but in all the Member States, if it has not been obtained in accordance with the regulation. It would be likewise unlawful to use the diminutive 'bio' for such a product.

28. On the other hand, it is not possible to extend this protection of the diminutive 'bio' as a diminutive of the equivalents of 'biologisch' listed expressly to the marketing of products in a language for which no translation of the word 'biologisch' is listed. In assessing marketing measures, the Court takes into account the presumed expectations of an average consumer of the products in question who is reasonably well informed and reasonably observant and circumspect. [13] As regards a product marketed in Spanish, this average consumer will not understand 'bio' to be a diminutive of one of the translations of the term 'biological' listed in Article 2, but only as a diminutive for the Spanish 'biológico'. [14]

29. Accordingly, the Commission's complaint is well founded only if 'bio', as a diminutive of the Spanish 'biológico', is to be understood as a reference indicating production in accordance with the regulation. This could be so either directly under the regulation or on account of the actual understanding of an average consumer of products marketed in Spanish.

A — *The reference function of the term 'biológico' under Regulation No 2092/91*

30. On a superficial reading, the list in Article 2 of Regulation No 2092/91 gives

13 — Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31.

14 — However, as regards products marketed in a number of languages, it may be that the use of 'bio' for example in a Spanish description also influences a consumer who is focussing on a different language, for example French

the impression that in each of the languages the only terms to be understood as a reference to organic production methods are those listed. However, this impression is wrong. Although Article 2 of Regulation No 2092/91 lists one or two terms for each language which are to be understood as a reference to production in accordance with the regulation, the list is not exhaustive. Specifically, a reference that falls within Article 2 may be constituted *in particular* by one of the terms specified. It follows that other terms too may be references to the organic production method. At the same time, it is to be inferred from the express list that extending protection to terms not listed for the language in question requires justification. Prima facie, listing different terms for different languages gainsays the view that these terms are to be understood in *all* those languages as references to organic production methods.

31. The legislative history of Regulation No 2092/91 also contradicts the view that the terms listed refer in all the Community languages to the organic production method. Initially, the Commission proposed that the use of any of the translations of a single Community term, namely 'biological' or 'biodynamic', [15] should be mandatorily reserved for products obtained by organic production methods. Instead, the list reflects the suggestion in the Parliament's opinion of including linguistically different terms deriving from 'ecological', 'biological' and 'organic'. [16] If the idea of a unified concept in all languages had been maintained, then all three terms, namely 'ecological', 'biological' and 'organic', would have been reserved in all the languages for production in accordance with Regulation No 2092/91, instead of there being a list of nine terms in different languages.

32. On the other hand, the purposes of Regulation No 2092/91 and the idea of the single market, which has to be taken into account in interpreting secondary legislation so as to conform with the Treaty, indicate that these terms constitute references in all the official languages.

33. The purpose of Regulation No 2092/91 is to promote organic production methods. To achieve this purpose, the regulation seeks first to protect consumers from misleading descriptions. Consumers should be able easily to identify products obtained using organic production methods. In the second place, the regulation seeks to protect producers of organic products from unfair competition. The rules are intended to protect products obtained using organic production

15 — Proposal for a Council Regulation (EEC) on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs, OJ 1990 C 4, p. 4, at p. 5.

16 — COM(91) 112 final, p. 4 f.

methods from competition from cheaper products obtained by conventional agricultural methods. [17]

34. It would be inconsistent with these purposes if one and the same term, such as 'bio', were reserved in one Member State for products obtained by organic production methods but were left unprotected in other Member States.

35. If 'bio' were protected in only some of the Community languages as a reference to the organic production method, then when shopping in other Member States, or when buying products marketed in other languages, consumers might wrongly think that the products were obtained by organic production methods. Moreover, in cross-border trade products obtained by organic production methods would be subject to direct competition from cheaper products obtained by conventional agriculture. This would obstruct not only the regulation's purpose of preventing unfair competition. Such differences in the protection of descriptions could hinder intra-Community trade in products obtained by organic production methods. By contrast, uniform, Community-wide protection would not only prevent potential obstacles to free movement of goods, but would also help develop a uniform understanding throughout the Community, and this would promote trade in these products.

36. In this context there must also be taken into account the fact that in the single market multilingual labelling is both possible and normal, for the purpose of enabling products to be marketed in different Member States. Such labelling could even mislead consumers where the term used in his language to indicate production in accordance with the regulation appears in another language on a product which has not been obtained in accordance with the regulation. For example, it would be misleading if a Spanish yoghurt were sold in Portugal bearing the Spanish description 'biológico'. [18] There is indeed much to be said for the view that the risk of confusion renders such multilingual labelling incompatible with the regulation. [19] However, in practice it would be difficult to stop, given that most Member States permit the free use of descriptions which in other Member States are reserved for production in accordance with the regulation.

37. The results of a comparative legal survey undertaken by the Research and Documentation Service of the Court underline the

17 — See the second and fifth recitals in the preamble to Regulation No 2092/91.

18 — Article 2 of the regulation lists 'biológico' as the reference in Portuguese to production in accordance with the regulation.

19 — See above, point 27 f.

potential for distorting the single market so far as products obtained by the organic production method are concerned. They indicate that apart from Spain the only Member States [20] which permit the use of 'bio' for products which have not been obtained in accordance with the regulation are Denmark and the United Kingdom. However, in Denmark and the United Kingdom there must be at least a clear indication that the product has not been obtained by the organic production method. It is therefore to be assumed that in the single market, except Spain, 'bio' is understood as a reference to the organic production method and may be used by producers for that purpose.

38. Regulation No 392/2004, which is not yet applicable in the present case, supports the interpretation based on the purposes of Regulation No 2092/91. By this regulation, the Community legislature expressly took the view that the equivalents in other Community languages of the words listed in Article 2 of Regulation No 2092/91 are also to be understood as references to the organic production method.

39. By Regulation No 392/2004, the Council amended inter alia Article 2 of Regulation No 2092/91. The terms now listed are to be regarded as 'indications referring to the organic production method throughout the Community and *in any Community language*'. [21] The second recital in the preamble to Regulation No 392/2004 states that that protection also applies to the usual derivatives or diminutives of those terms, irrespective of the language used. The European Parliament rapporteur also clearly stated that the new version of Article 2 would prevent the use of 'bio' for products which had not been obtained by organic production methods. [22] It is clear the Spanish Government knew this to be the effect of the provision, since it voted against the amending regulation. Under reference to the present infringement proceedings, it emphasised that in Spanish 'bio' did not refer to organic production methods and that the amendment was accordingly unnecessary. [23] It has thus been made clear that now the diminutive 'bio' in all Community languages may be used in any event only for products obtained by organic production methods. [24]

40. The second recital in the preamble to Regulation No 392/2004 emphasises that the

20 — The survey did not include the Baltic States, Malta and Hungary.

21 — Emphasis added.

22 — Report of Danielle Auroi on the proposal for a Council regulation amending Regulation (EEC) No 2092/91 on organic production of agricultural products and indications referring thereto in agricultural products and foodstuffs of 6 November 2003, A5-392/2003, p. 11.

23 — Declaration No 16/04, in the monthly list of legal transactions of the Council for February 2004, Council document 7712/04 of 24 March 2004, Annex II, p. 6.

24 — See my Opinion in Case C-107/04 *Comité Andaluz de Agricultura Ecológica* [2005] ECR I-7139, point 20 ff.

purpose of the amendment was to eliminate any possibility of the scope of the protection being *misunderstood*. It follows that the legislature proceeded on the footing that to refuse protection for usual derivatives or diminutives in other languages would be to misinterpret the unamended version of Article 2 of Regulation No 2092/91.

41. Thus, the result of this interpretation of Article 2 of Regulation No 2092/91 is that under the regulation in principle all of the terms listed for the individual languages, as well as their diminutives, are to be regarded throughout the Community as indications that products have been obtained by the organic production method.

42. However, Article 2 of the regulation contains an exception for words which 'clearly have no connection with this method of production'. [25] On the other hand, the provisions which formerly applied throughout Spain (discussed in more detail below) and the regional provisions still in force, which, respectively, used to reserve and still reserve inter alia the term 'bio' for organic production methods, [26] demonstrate that in Spain this term is certainly connected with organic production methods.

43. Accordingly, permitting the term 'bio' to be used for products which do not satisfy the requirements of Regulation No 2092/91 is incompatible with Article 2.

B — *In the alternative: the understanding of consumers on the Spanish market*

44. If the Court were not to accept this interpretation of Article 2 of Regulation No 2092/91 as amended by Regulation No 1804/1999, the case would depend on whether a consumer of products marketed in Spanish would regard the description 'bio', as a diminutive of 'biológico', as a reference to the organic production method. This is because Article 2 reserves not only the terms specifically listed to products obtained by organic production methods but every 'indication in use in each Member State, suggesting to the consumer that the product, its ingredients or feed materials have been obtained in accordance with the rules of production' laid down in the regulation. The

25 — As regards the new wording of this exception, see my Opinion in *Comtè Andaluz de Agricultura Ecologica* (cited above, footnote 24), point 31 ff.

26 — See below, point 43 ff.

provision refers to the individual Member States, and therefore contrary to the Commission's submissions the question depends not on the typical consumer on the European single market but on the consumer on the Spanish market.

45. The Spanish Government denies that Spanish consumers would connect the term 'bio' with production in accordance with the regulation. The Commission counters that position by pointing out that the previous version of Royal Decree No 1852/1993, which applied only to vegetable products, permitted the use of this term for products obtained in accordance with the regulation. It relies also on Decree No 212/2000 of the Region of Navarre, which still provides that except for dairy products a product is to be regarded as bearing an indication referring to the organic production method if it bears inter alia the term 'biológico' or 'bio'. In response to an enquiry by the Court, the Spanish Government confirmed the differences between the national provision and the provision in the Region of Navarre. The response can be understood only so as to mean that the national provision does not preclude the applicability of the regional provision. According to the Spanish Government, similar provisions which are not incompatible with the regulation — and which do not include the restriction to dairy products — are in force in the regions of Valencia, the Canary Islands, Galicia, Madrid, Catalonia, Aragon and the Balearic Islands. Indeed, at the hearing the Commission stated that of the 17 Spanish regions only Navarre — for dairy products — and the Basque region permitted the use of 'bio' for products which had not been obtained in accordance with the regulation. Thus, in Spain there are various different provisions regarding the use of the description 'bio'.

46. If even the Spanish legislature at both national and regional level equates the terms 'biológico' and 'bio' with the terms 'ecológico' and 'eco', it is to be assumed that Spanish consumers do the same. This is because it is to be assumed that the legislature based the provision on consumers' existing understanding, or that the provisions at least fostered such an understanding.

47. Neither the fact that the previous version of the Royal Decree applied only to vegetable products, nor the fact that the Regional Decree provides for an exception for dairy products, gainsays this conclusion. If 'bio' and 'biológico' indicate production in accordance with the regulation for some products, it is to be assumed that consumers will assume such production in respect of other

products too, and that the use of these descriptions can therefore be misleading. [27]

48. Nor does the disputed amendment of the Royal Decree contradict the conclusion drawn from the text of the Spanish laws as regards Spanish consumers' understanding. On the one hand, there still exist regional provisions which continue to instil in consumers such a belief as regards the terms 'bio' and 'biológico'. On the other, it is not possible to draw the opposite conclusion of a change in consumers' understanding solely from the repeal of a provision relating to the use of these descriptions. Consumers' expectations deriving from the previous provisions will persist at least for a transitional period. For that reason, withdrawing protection abruptly from certain terms necessarily creates a risk that consumers will be misled. It would be justified only if it were actually established that consumers did not connect any reference to production in accordance with the regulation with descriptions which are no longer protected.

49. It was for the Spanish Government to prove the latter point, since Spanish law contains sufficient indications that Spanish consumers connect the term 'bio' with the organic production method. However, the Spanish Government has not proved this point. It supports its submissions essentially by an opinion poll it lodged. In principle, it is not impossible to evidence consumers' expectations by reference to such a poll. However, the poll was merely a pilot project based on around 100 telephone interviews in Madrid, Barcelona and Bilbao. It appears from the survey itself that the public opinion institute which conducted it considers that to obtain representative results it is necessary to undertake a second stage polling about 2 000 people. Moreover, as the Commission pointed out the study was commissioned by the Spanish dairy industry, which has an interest in continuing to be permitted to use the term 'bio'. Although it is not necessary to assess the substantive quality of the study any more at present, it should also be observed that it contains at least indications that 'bio' is understood not only as indicating something that promotes health but also as a reference to the method of production. [28]

50. The Spanish Government relied on the risk of misleading Spanish consumers who connected not a means of production but particular health advantages, such as bifid cultures in dairy products, with bio-products. However, if such a risk really exists, it cannot be used to justify allowing consumers

27 — Until it was supplemented by Regulation No 1804/1999, Regulation No 2092/91 suffered a similar mistake in its wording, in that the protection given to words did not apply in relation to animal products. To that extent, it caused consumers to be misled.

28 — Defences, Annex IV, p. 8, second and sixth characteristics.

who connect these descriptions with production in accordance with the regulation to be misled. Instead, one would have to prohibit the use of this description completely. [29]

53. Accordingly, at least in Spain the use of 'bio' for products not obtained by organic production methods is incompatible with Article 2 of Regulation No 2092/91.

C — Conclusions on the infringement proceedings

51. Thus, even if Regulation No 2092/91 did not require the term 'bio' to be regarded in all languages as a reference to organic production methods, it is such a reference at least in Spain.

54. It has already been shown that an infringement of Article 2 of Regulation No 2092/91 is also an infringement of Articles 5 and 10a of this regulation and of Article 2(1)(a)(i) of Directive 2000/13. [30] It follows that the Commission's action succeeds in its entirety.

52. For the sake of completeness, it should be observed that the Spanish provisions are not justified as exceptions falling within Article 5(3a) of Regulation No 2092/91. It provides that an indication reserved generally for organic products may be used for products which are not organic only if it is a registered trademark. Regulation No 2092/91 does not recognise any general exceptions for whole product groups: it permits this restricted derogation only in relation to individual trade marks.

V — Costs

55. Article 69(2) of the Rules of Procedure provides that the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has made such an application in the present case, and on the basis of the foregoing considerations has been completely successful, the Kingdom of Spain is to be ordered to pay the costs of the proceedings.

29 — However, following the amendment of the regulation by Regulation No 392/2004 this is no longer possible, since it now provides that the Spanish word 'biológico' is a permitted reference to production in accordance with the regulation as a translation of 'biologisch'.

30 — See above, points 16 ff.

VI — Conclusion

56. On the basis of the foregoing considerations, I suggest that the Court:

(1) declare that, by maintaining in its domestic legal system and in current usage under Royal Decree No 506/2001 and Regional Decree No 212/2000 the term 'bio', on its own or in combination with other terms, for products which have not been obtained in accordance with the requirements of 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, as amended by Regulation (EC) No 1804/1999, the Kingdom of Spain:

— has infringed Article 2 in conjunction with Article 5 and Article 10a of Regulation No 2092/91, and

— has infringed Article 2 of Regulation No 2092/91 in conjunction with Article 2(1)(a)(i) of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs;

(2) order the Kingdom of Spain to pay the costs of the proceedings.