OPINION OF ADVOCATE GENERAL LEGER

delivered on 23 March 1995 *

1. By order of 16 September 1993, the Oberlandesgericht (Higher Regional Court) Frankfurt am Main referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Article 3(2) and (3) of Commission Regulation (EEC) No 3201/90 of 16 October 1990 laying down detailed rules for the description and presentation of wines and grape musts [1] (hereinafter 'Regulation No 3201/90' or 'the implementing regulation') and of Article 40(3) of Council Regulation (EEC) No 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wines and grape musts, [2] in order to resolve a dispute concerning the use of the terms 'Kabinett', 'Spätlese' and 'Weissherbst' as parts of a brand name.

2. The questions have arisen in a dispute between the Zentrale zur Bekämpfung unlauteren Wettbewerbs e. V. Frankfurt ('the plaintiff') and Privatkellerei Franz Wilhelm Langguth Erben GmbH&Co. KG ('the defendant').

3. The defendant markets German wines bearing the quality indications 'Kabinett', 'Spätlese', 'Auslese' and 'Weissherbst' (otherwise referred to as 'quality wines produced in a specified region' or 'German quality wines psr').

4. Those quality indications are set out on the labels, first beside the German quality wine psr designation and then beside the brand name.

5. The plaintiff, which considered that use of those terms as parts of the brand name was contrary to Article 3(2) and (3) of Regulation No 3201/90 and likely to mislead consumers, appealed to the Oberlandesgericht when its action before the Landgericht (Regional Court) Frankfurt am Main was dismissed.

* Original language: French.

1 — OJ 1990 L 309, p. 1.

2 — OJ 1989 L 232, p. 13.

6. Those are the circumstances in which the Oberlandesgericht Frankfurt am Main has referred the following questions to the Court for a preliminary ruling:

'1. Must Article 3(2) of Regulation (EEC) No 3201/90 be interpreted as meaning that, in labelling quality wines (Qualitätsweine mit Prädikat), repetition on the label of the terms "Kabinett", "Spätlese" or "Auslese" — in addition to their prescribed use (in lettering of the same type and height as the name of the specified region or of a geographical unit smaller than the specified region) — in different lettering with higher letters, particularly in a conspicuous manner as part of a brand name, is prohibited?

2. If Question 1 is answered in the affirmative, is it possible to invoke, against a prohibition such as that referred to in Question 1, a property right of proven value acquired in good faith by the conspicuous use of those terms without impediment as a brand name in labelling Qualitätswein mit Prädikat (as regulated for example, with respect to trade marks with a geographical reference, in Article 40(3) of Regulation (EEC) No 2392/89)?

3. Must Article 3(3)(a), first indent, in conjunction with the second subparagraph of Article 3(3) of Regulation (EEC) No 3201/90, be interpreted as meaning that, in the case of quality wines psr from Germany ("Qualitätsweine b. A."), repetition on the label of the term "Weissherbst" — in addition to its use in characters which are the same size as or smaller than those used for indicating the specified region — in higher letters, particularly in a conspicuous manner as part of a brand name, is prohibited?

4. If Question 3 is answered in the affirmative, is it possible to invoke, against a prohibition such as that referred to in Question 3, a property right of proven value acquired in good faith by the conspicuous use of the term Weissherbst without impediment as a brand name in labelling the corresponding wines (as regulated for example, with respect to trade marks with a geographical reference, in Article 40(3) of Regulation (EEC) No 2392/89)?'

The first and third questions

7. In its first and third questions, the national court essentially asks whether, in

labelling German quality wines, Article 3 of the implementing regulation precludes the use of the terms 'Kabinett', 'Spätlese', 'Auslese' and 'Weissherbst' as parts of a brand name in so far as they are set out in larger characters than those used to indicate the region of origin.

Preliminary observation

8. Let me state at the outset that the quality indications 'Kabinett', 'Spätlese' and 'Auslese' are necessary for the description of German quality wines, namely 'German wines accompanied by specific terms traditionally used'. Such wines are regarded by the Community legislature as German quality wines psr. That follows from Article 15(1) and (2)(a) of Regulation (EEC) No 823/87, [3] as amended by Regulation (EEC) No 2043/89. [4]

9. The term 'Weissherbst' is an *optional* supplementary indication traditionally used, complementing the description of German quality wines psr. [5]

10. Let me now consider the relevant Community rules.

11. As regards the labelling of German quality wines psr, Regulations Nos 2392/89 and 3201/90 apply.

12. *Council Regulation No 2392/89*, which lays down general rules for the description and presentation of wines and grape musts, draws distinctions by reference to the origin of the wines (from the Community [6] or from third countries [7]) and to their quality. [8] Article 11 of the regulation sets out the information which must be, [9] and the information which may be, [10] shown on the labelling of quality wines psr. In principle, only the information specified in Article 11 is to be allowed for the description of quality wines psr. [11]

13. *Commission Regulation No 3201/90* lays down the detailed rules necessary for the implementation of Regulation No 2392/89. Article 3 enumerates the terms authorized by

3 — Council Regulation of 16 March 1987 laying down special provisions relating to quality wines produced in specified regions (OJ 1987 L 84, p. 59).

4 — Council Regulation of 19 June 1989 (OJ 1989 L 202, p. 1).

5 — Article 3(3)(a), first indent, of Regulation No 3201/90 in conjunction with Article 11(2)(i) of Regulation No 2392/89.

6 — Chapter I.

7 — Chapter II.

8 — As regards products originating within the Community, a distinction is made between table wines (Section A), quality wines psr (Section B) and products other than table wines and quality wines psr (Section C).

9 — Article 11(1).

10 — Article 11(2).

11 — Article 12.

the various Member States and regarded by the Community legislature as equivalent to the Community term 'quality wine psr'.

14. The aim of the rules [12] is to supply information on the wines marketed in Community territory that is as clear, accurate and complete as possible, so as to:

(a) ensure fair trading in the wine sector, [13]

(b) effectively combat fraud, [14]

(c) protect consumers against any risks of being confused or misled as to the essential characteristics of the products. [15]

However, the Community legislature has not brought about complete harmonization as regards the description and presentation of wines and grape musts. [16]

15. As regards German quality wines psr, *Article 3(2) and Article 3(3)(a), first indent, of Regulation No 3201/90* provide:

'2. The terms "Kabinett", "Spätlese", "Auslese", "Beerenauslese", "Trockenbeerenauslese" and "Eiswein" shall appear in lettering of the same type and height as the name of the specified region or, where appropriate, of the geographical unit smaller than the specified region.

3. The terms referred to in Article 11(2)(i) of Regulation (EEC) No 2392/89 which may supplement those set out in paragraph 1 shall be as follows:

(a) *for German quality wines psr:*

— "Weissherbst",

...

12 — Regulations Nos 2392/89 and 3201/90.

13 — See, in particular, the fifth recital in the preamble to Regulation No 2392/89.

14 — See, in particular, the thirty-first recital in the preamble to Regulation No 3201/90.

15 — See, in particular, the third recital in the preamble to Regulations Nos 2392/89 and 3201/90.

16 — See, in particular, the fourth, fifth, sixth and seventh recitals in the preamble to Regulation No 2392/89 and the third, fourth and fifth recitals in the preamble to Regulation No 3201/90.

These terms shall appear in characters which are the same size as or smaller than those used for indicating the specified region.'

16. Finally, Article 15(2) of Regulation No 823/87 as amended, which also applies, provides as follows:

'2. Without prejudice to any additional terms which may be allowed by Community and national laws, and subject to national provisions on the wines in question being observed, the specific terms traditionally used which are referred to in paragraph 1 shall be the following:

(a) Federal Republic of Germany:

an indication of the origin of the wine, accompanied by the terms "Qualitätswein" or "Qualitätswein mit Prädikat", together with one of the following terms: "Kabinett", "Spätlese", "Auslese", "Beerenauslese", "Trockenbeerenauslese" or "Eiswein";

...'

17. It therefore follows from:

— Article 15(2)(a) of Regulation No 823/87 as amended,

— Article 11(1)(b) of Regulation No 2392/89, and

— Article 3(1) [17] and (2) of Regulation No 3201/90,

viewed in conjunction with one another, that *the terms 'Kabinett', 'Spätlese' and 'Auslese'* are indications of quality which, *together with the terms relating to the origin of the wines and the designation 'Qualitätswein mit Prädikat'*:

(a) form part of the description of German quality wine psr, and

(b) must compulsorily be shown on the labelling of German quality wine psr in

17 — As regards German quality wines psr, the third subparagraph of Article 3(1) provides that the terms 'Qualitätswein' and 'Qualitätswein mit Prädikat' may appear on the label in full or may be indicated by the abbreviations 'Q. b. A.' and 'Q. b. A. m. Pr.'.

lettering of the same type and height as the name of the specified region or, where appropriate, of the geographical unit smaller than the specified region in question.

(b) may optionally be shown on the labelling of German quality wine psr in characters which are the same size as or smaller than those used for indicating the specified region in question. [18]

18. It can also be deduced from:

— the first subparagraph of Article 15(2) of Regulation No 823/87 as amended,

— Article 11(2)(i) of Regulation No 2392/89, and

— Article 3(1) and (3) of Regulation No 3201/90,

viewed in conjunction with one another, that the term *'Weissherbst'* is a supplementary indication of quality which, *together with a specific term traditionally used*,

(a) is employed to describe a German quality wine psr, and

19. *How have those rules been applied in the present case?*

20. The terms 'Kabinett', 'Spätlese', 'Auslese' and 'Weissherbst' are set out at the foot of the labels in characters of the same type and size as the name of the specified region or smaller geographical unit. Thus, for example, on one of the disputed labels, the group of terms 'Qualitätswein mit Prädikat Spätlese Rheinhessen Bereich Wonnegau' appears as follows:

(a) on the first line, the quality indication 'Spätlese' beside the designation 'Qualitätswein mit Prädikat', and

18 — The list of regions producing quality wines is set out in Annex II to Council Decision 94/184/EC of 24 January 1994 concerning the conclusion of an Agreement between the European Community and Australia on trade in wine (OJ 1994 L 86, p. 1).

(b) on the second line, the name of the specified region where the wine is produced — 'Rheinhessen' — before the name of the sub-region 'Bereich Wonnegau'. [19]

21. It follows that the requirements of Articles 3(2) and 3(3)(a) of Regulation No 3201/90 have indeed been complied with.

22. The difficulty lies — *and this is the crux of the matter* — in the fact that the terms 'Kabinett', 'Spätlese', 'Auslese' and 'Weissherbst' reappear next to the brand name of the wines, in the middle of the labels, as follows: 'Erben Kabinett', 'Erben Spätlese', 'Erben Auslese' and 'Erben Weissherbst', and they do so in characters approximately three times larger than those used to indicate the name of the region, or smaller geographical unit, of origin. I should add that those brand names are used to describe the corresponding wines.

23. *Should such a practice be held unlawful? Let me say at once that I think not, for the following reasons.*

24. *First*, the Community legislation which specifically concerns trade marks, particularly the First Council Directive 89/104/EEC of 21 December 1988 [20] ('the first directive on trade marks'), does not contain any provision *concerning the height of the characters used in the terms which constitute the name of a trade mark*. Moreover, that first directive has not yet been implemented in Germany, and Member States are authorized to limit its application to new trade marks. [21]

25. *Secondly*, the wording of the rule in *Article 3 of Regulation No 3201/90* seems to me to be unequivocal. The Community legislature sought to regulate the lettering of these indications *only where they form part of the description of German quality wines psr*. Its intention was that the various terms used in combination to describe quality wines psr should be set out in a uniform manner without one of the components of such descriptions being set apart from the others, so as to avoid any risk of confusion on the part of Community consumers, especially those who are not nationals of the Member State producing the wine in question.

26. An examination of Article 3 of Regulation No 3201/90, especially

19 — See the list of regions producing German quality wines psr, ibid.

20 — Directive to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

21 — Article 3(4).

Article 3(1), [22] in conjunction with the other two numbered paragraphs, shows that each of the elements constituting the description of German quality wine psr is regulated, and not merely the quality indications. *However, that measure does not concern trade marks.* On that point, reference must be made to Regulation No 2392/89.

27. First of all, a brand name is an indication which may, *optionally*, be shown on the labels of quality wines psr. [23]

28. Following the general principle contained in the first directive on trade marks, [24] *Article 40(2)(a) and (b) of Regulation No 2392/89* provide as follows:

'2. Where the description, presentation and advertising of the products referred to in this regulation are supplemented by brand names, such brand names may not contain any words, parts of words, signs or illustrations which:

(a) are likely to cause confusion or mislead the persons to whom they are addressed within the meaning of paragraph 1; or

(b) are:

— liable to be confused by the persons to whom they are addressed with all or part of the description of ... a quality wine psr ...'.

29. In so far as the quality indications 'Kabinett', 'Spätlese' and 'Auslese', *together with the indications concerning the origin of the wines and the designation 'Qualitätswein mit Prädikat'*, as well as the term 'Weissherbst', *together with a specific term traditionally*

22 — Article 3(1) provides:
'The terms "quality wine produced in a specified region" or "quality wine psr" or an equivalent term in another official Community language or, where appropriate:
— "Qualitätswein" and "Qualitätswein mit Prädikat",
...
referred to in Article 15(2) of Regulation (EEC) No 823/87, shall appear on the label in lettering not larger than that indicating the specified region.
...'.

23 — Article 11(2)(c) of Regulation No 2392/89.

24 — Article 3(1)(g) provides: '1. The following shall not be registered or if registered shall be liable to be declared invalid:
...
(g) trade marks which are of such a nature as to deceive the public, for instance as to the nature, quality or geographical origin of the goods or service;'.

used, form part of the description of a quality wine psr, [25] it follows from the first indent of Article 40(2)(b) that they cannot be used as components of a brand name if they are likely to be confused by consumers with all or part of the description of a quality wine psr.

That would undoubtedly be the case if the quality indication used as a part of a brand name did not correspond to the intrinsic qualitative characteristics of the quality wine psr in question. For example, the words 'Erben Kabinett' could not be the brand name of a 'Qualitätswein mit Prädikat Spätlese Rheinhessen Bereich Wonnegau'.

30. Although the quality indications 'Kabinett', 'Spätlese' and 'Auslese' and the term 'Weissherbst' reappear in the middle of the label beside the brand names of German quality wines psr, as in 'Erben Kabinett', 'Erben Spätlese', 'Erben Auslese' and 'Erben Weissherbst', in characters three times larger than those used to describe German quality wines psr, it is undisputed that *those brand names are used to describe the corresponding German quality wines psr.*

31. *Thirdly*, is the use of those terms likely to mislead consumers or cause confusion?

32. *In my view, it is for the national court to determine whether a term is likely to mislead or confuse consumers.* The national court informs us that in their view it does not. This tallies with the view put forward by Advocate General Elmer in his Opinion of 9 March 1995 in Case C-46/94 *Ministère Public et Institut National des Appellations d'Origine* v *Michèle Voisine*, now pending. [26]

33. The answer to that question usually depends on an assessment of the facts in each particular case; save where the brand name contains untruthful indications as to the nature, quality or geographical origin of the product or service, it is particularly difficult to discern general guidelines to assist the national court in identifying *de facto* the indications which are likely to mislead or confuse. *In this case the indications contained in the brand name of the German quality wines psr marketed by the defendant are not untruthful.*

25 — See paragraphs 17 and 18 of this Opinion.

26 — Case C-46/94, paragraph 14.

34. Fourthly, contrary to the view taken by the Commission, the rationale behind Regulations Nos 2392/89 and 3201/90 does not preclude the validity of such a practice.

35. In my view, the Community legislature did not intend to lay down a rule to the effect that the geographical origin of a quality wine psr is to be the quality criterion determining the consumer's choice of product. Therefore, in contrast to the Commission's position, I doubt whether an argument may be derived from the specific provisions of Article 3(2) and (3) of Regulation No 3201/90 in support of the view that the rule whereby the lettering of the terms 'Kabinett', 'Spätlese', 'Auslese' and 'Weissherbst' is regulated constitutes a general principle of strict application to be applied in trade mark matters.

36. As we have seen, the Community legislature has not brought about *complete* harmonization in the description and presentation of wines and grape musts. [27] Thus, despite the existence of widely differing approaches between the Member States, particularly as regards the rules governing the description and presentation of wines produced in the Community, [28] the Community legislature sought to lay down the principle that *traditional regional specificities are to be maintained*, [29] in so far as they are compatible with the principles of a single market and do not carry the risk of misleading Community consumers in relation to the product, particularly if they are nationals of Member States other than that of the wine producer. In order to reconcile these contradictory aims, [30] [31] the Community legislature has given itself certain special legal instruments:

(a) an exhaustive list enumerating the specific terms traditionally used which are considered equivalent to Community terms, [32]

(b) an exhaustive enumeration of mandatory and optional terms, [33]

(c) the rule that the products in question must be capable of moving freely. [34]

27 — See paragraph 14 of this Opinion.

28 — See, in particular, the seventh recital in the preamble to Regulation No 2392/89.

29 — See, in particular, the third recital in the preamble to Regulation No 3201/90: 'Whereas, in applying rules concerning the description and presentation of wines, the traditional and customary practices of the Community wine-growing regions should be taken into account ...'

30 — See, in particular, the seventeenth recital in the preamble to Regulation No 823/87.

31 — Fifth recital in the preamble to Regulation No 2392/89.

32 — See, in particular, Article 15 of Regulation No 823/87; Annex III to Regulation No 3201/90 listing the synonyms of names of vine varieties that may be used to describe table wines and quality wines psr; Annex II to Decision 94/184 listing wines originating in the European Community and containing in particular the list of traditional terms used to describe quality wines psr.

33 — Articles 3, 12 and 21 of Regulation No 2392/89.

34 — Seventh recital in the preamble to Regulation No 2392/89.

37. Contrary to the Commission's argument, the rationale behind Article 12 of Regulation No 2392/89, contained in the preamble to that regulation, is not to lay down a general principle whereby 'everything that is not authorized is prohibited', but rather, it would seem, the reverse.

38. *After explaining the option that was taken in framing the rules on the description and presentation of quality wines psr:*

'Whereas the Community rules on the description and presentation of wines and grape musts are to a large extent based on the national rules formerly applied by the Member States', [35]

and stating the difficulties which would be encountered:

(a) 'Whereas the national rules in question were based on widely differing approaches; whereas some Member States gave priority to accurate consumer information and to the freedom of action of the trade, while others endeavoured to combine these aspects with the need to protect producers on their territory against distortions of competition'; [36]

(b) 'Whereas, in view of the nature of production conditions in the different wine-growing areas and of traditional practices in some Member States, provisions should be made to enable the Member States, in respect of the products obtained on their territory, either to make mandatory some information which is optional under Community provisions, to prohibit it or to limit its use', [37]

the Community legislature explains the purpose of the rules:

(a) '... with the aim of reconciling these different approaches as far as possible and of avoiding too divergent interpretations ...'; [38]

(b) '... to ensure that these rules are effective ...'; [39]

35 — Fifth recital.

36 — Ibid.

37 — Seventh recital.

38 — Fifth recital.

39 — Ibid.

(c) '... to ensure that the information provided is as complete as possible and that it takes account of the customs and traditional practices in the Member States and in third countries ...'; [40]

(d) '... to ensure the free movement of goods ...'; [41]

and sets out its intended solutions for reconciling those conflicting objectives so as not to deprive the system established of its effectiveness:

(a) '... it was deemed appropriate to lay down fairly comprehensive rules on description ...'; [42]

(b) '... it should ... be laid down as a principle that only the details specified in the rules in question or in the relevant implementing rules are permitted for the description of wines and grape musts'; [43]

(c) '... it must ... be specified that ... each Member State must permit the description of products originating in other Member States and put on the market on its territory if it is in accordance with Community provisions and permitted in the producer Member State pursuant to this regulation'. [44]

39. Thus the rationale behind Article 12 is to reconcile the conflicting objectives pursued by the Community legislature *in order not to deprive the system so established of its effectiveness.*

40. In the present case, the terms set out by the defendant on the labelling of German quality wines psr merely contain indications from the list drawn up by the Community legislature.

41. *Fifthly and lastly*, it must be emphasized that the brand name of a wine and its description differ in their definition and purpose.

42. Thus, a *brand name* presupposes the conjoint use of *signs*, words for example,

40 — Sixth recital.
41 — Seventh recital.
42 — Fifth recital.
43 — Ibid.
44 — Seventh recital.

which are *capable of distinguishing products*. Thus, *a priori*, the legitimate aim of the owner of a brand name, an aim moreover which conforms to the very definition of a trade mark, [45] is to 'hook' consumers, or in other words to attract their attention. The general limit on the right to create and register trade marks is set by the Community legislature. [46]

43. By contrast, the aim pursued by the Community legislature in the *description* of a quality wine psr is to enable the public to be *precisely, clearly and correctly* informed as to the intrinsic characteristics of the product or to qualify the latter. [47] Under Article 1 of Regulation No 823/87, 'quality wines psr' are wines which comply with the requirements of that regulation, with those laid down by implementing regulations, and with those laid down by national rules. If follows from that provision viewed in conjunction with Articles 11 and 12 of Regulation No 2392/89 that, in the final analysis, the margin of freedom given to producers of quality wines psr in the various Member States is very restricted.

44. The practice of the defendant, which consists in using as parts of its brand names quality indications which do not conform to dimensions which are, moreover, regulated by way of exception, does not seem to me to involve any risk of misleading the public, *since those indications are consistent with the intrinsic qualities of the product*. For that reason, I suggest that the Court answer the first and third questions referred by the national court in the negative.

The second and fourth questions

45. By these questions, the national court seeks essentially to ascertain the scope of the derogation provided for in Article 40(3) of Regulation No 2392/89.

46. I shall examine these questions in the alternative only, bearing in mind the proposed answer to the first and third questions.

45 — See the First Council Directive on trade marks, cited above, which provides in Article 2: 'A trade mark may consist of any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.' Article 3 provides: '1. The following shall not be registered or if registered shall be liable to be declared invalid: ...(b) trade marks which are devoid of any distinctive character'.

46 — Ibid., Article 3(1)(g).

47 — See, in particular, the fifth and sixth recitals in the preamble to Regulation No 2392/89.

47. The wording of that provision is unequivocal:

'By way of derogation from point (b) of the first subparagraph of paragraph 2, the holder of a registered trade mark for a wine or a grape must which is identical:

— to the name of a geographical unit smaller than a specified region used to describe a quality wine psr

...

may, even if he is not entitled to use such a name pursuant to the first subparagraph of paragraph 2, continue to use that trade mark until 31 December 2002, provided that the trade mark in question:

...'

It does not deal with the case in point, because the case concerns German quality wines psr whose brand names are not identical to the name of a geographical unit smaller than a specified region. As for the scope of the derogation provided for by Article 40(3) of Regulation No 2392/89, in so far as that provision is contrary to the rationale underlying these Community rules, the general principle to be applied is the one consistently endorsed by the case-law of the Court [48] in the most diverse areas of activity, whereby any derogation from fundamental Community rules must be strictly interpreted and applied.

48. In conclusion, for the reasons given above, I suggest that the Court should reply to the questions referred by the Oberlandesgericht Frankfurt am Main as follows:

(1) Article 3(2) of Commission Regulation (EEC) No 3201/90 of 16 October 1990 laying down detailed rules for the description and presentation of wines

48 — For a recent statement of the general principle laid down by the Court of Justice of the European Communities, see the judgment in Case C-328/92 *Commission* v *Spain* [1994] ECR I-1569.

and grape musts must be interpreted as not precluding the labelling of quality wines ('Qualitätsweine mit Prädikat') from repeating the terms 'Kabinett', 'Spätlese' or 'Auslese' — in addition to their prescribed use (in lettering of the same type and height as the name of the specified region) — in different lettering with higher letters, particularly in a conspicuous manner as part of a brand name.

(2) Article 3(3)(a), first indent, in conjunction with the second subparagraph of Article 3(3) of Regulation (EEC) No 3201/90 must be interpreted as not precluding the repetition, in the case of German quality wines produced in specified regions ('Qualitätsweine b. A.'), of the term 'Weissherbst' — in addition to its use in the same lettering as that used for indicating the specified region — in large letters, particularly in a conspicuous manner as part of a brand name.