JUDGMENT OF THE COURT (First Chamber)
25 February 1992 *

In Case C-203/90,

REFERENCE to the Court under Article 177 of the EEC Treaty from the Verwaltungsgerichtshof Baden-Württemberg for a preliminary ruling in the proceedings pending before that court between

Erzeugergemeinschaft Gutshof-Ei GmbH

and

Stadt Bühl,

on the interpretation of Article 21 of Council Regulation (EEC) No 2772/75 of 29 October 1975 on marketing standards for eggs (Official Journal 1975 L 282, p. 56), as most recently amended by Council Regulation (EEC) No 3494/86 of 13 November 1986 (Official Journal 1986 L 323, p. 1),

THE COURT (First Chamber),

composed of: Sir Gordon Slynn, President of the Chamber, R. Joliet and G. C. Rodríguez Iglesias, Judges,

Advocate General: G. Tesauro,
Registrar: J. A. Pompe, Deputy Registrar,

* Language of the case: German.

after considering the written observations submitted on behalf of

— Erzeugergemeinschaft Gutshof-Ei GmbH, by Mr Volkmann-Schluck, Rechtsanwalt, Hamburg;

— the Commission of the European Communities, by Ulrich Wölker, a member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Erzeugergemeinschaft Gutshof-Ei GmbH, represented by Jürgen Gündisch, Rechtsanwalt, and the Commission of the European Communities at the hearing on 14 November 1991,

after hearing the Opinion of the Advocate General at the sitting on 13 December 1991,

gives the following

Judgment

1 By order of 20 June 1990, which was received at the Court on 4 July 1990, the Verwaltungsgerichtshof (Higher Administrative Court) Baden-Württemberg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 21 of Council Regulation (EEC) No 2772/75 of 29 October 1975 on marketing standards for eggs (Official Journal 1975 L 282, p. 56), as most recently amended by Council Regulation (EEC) No 3494/86 of 13 November 1986 (Official Journal 1986 L 323, p. 1).

2 Those questions were raised in proceedings between Erzeugergemeinschaft Gutshof-Ei GmbH ('Gutshof-Ei') and the Ordnungs- und Sozialamt (Social

Affairs and Public Safety Office) of the City of Bühl concerning the affixing to packs of eggs marketed by Gutshof-Ei of certain advertising statements.

3 Gutshof-Ei transports eggs from its packing centre to retail shops in cartons containing approximately 24 packs of 10 eggs. Those cartons bear various markings on the sides: 'Legefrische ... die Sie schmecken' (new laid ... as you can taste) and, on the ends, 'Legefrische' (new laid).

4 Relying on a ministerial order of 25 October 1982 issued by the Land Baden-Württemberg (EM No 84-1230 SM No VI/6 — 8755.1), the defendant in the main proceedings threatened Gutshof-Ei with a restraining injunction if it continued to affix the indication 'legefrisch' to its packs. Gutshof-Ei then brought an action before the Verwaltungsgericht (Administrative Court) Karlsruhe for a declaration upholding its right to use the said indications on its packs. In support of its application, it claimed that the order infringed Council Regulation No 2772/75.

5 The Verwaltungsgericht Karlsruhe dismissed that action and Gutshof-Ei appealed to the Verwaltungsgerichtshof Baden-Württemberg, which decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 21 Council Regulation (EEC) No 2772/75 of 29 October 1975 on marketing standards for eggs to be interpreted as meaning that statements designed to promote sales may also appear on large packs of eggs?

(2) If Question 1 is answered in the affirmative:

May statements which are objectively true nevertheless be misleading within the meaning of subparagraph (c) of the second paragraph of Article 21 of Regulation No 2772/75 if consumers associate false assumptions with them?

(3) If Question 2 is also answered in the affirmative:

Does subparagraph (c) of the second paragraph of Article 21 of Regulation No 2772/75 prohibit on large packs of eggs statements designed to promote sales which concern the freshness of eggs?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

7 It must be noted at the outset that according to Article 16 of Regulation No 2772/75 any pack which contains more than 30 eggs is a large pack for the purposes of that regulation whilst any pack containing 30 eggs or less is a small pack.

8 Article 21 of Regulation No 2772/75 provides that 'packs shall not bear any indications other than those laid down in this regulation'. Article 17 of the regulation, which lists the obligatory and optional indications on large packs, makes no reference to advertising. It follows that, according to the wording of Regulation No 2772/75, statements designed to promote sales are prohibited on large packs.

9 However, the second paragraph of Regulation No 2772/75, added by Council Regulation (EEC) No 1831/84 of 19 June 1984 (Official Journal 1984 L 172, p. 2), provides that small packs may bear 'statements designed to promote sales, provided that such statements and the manner in which they are made are not likely to mislead the purchaser'. According to Gutshof-Ei, there is no substantive reason for limiting advertising to small packs and the prohibition of indications on large packs is thus the result of an error in the drafting of Regulation No 2772/75,

as amended. It considers that conclusion to be confirmed by the change made to the rules in question by Council Regulation (EEC) No 1907/90 of 26 June 1990 on certain marketing standards for eggs (Official Journal 1990 L 173, p. 5). According to Article 10(2)(e) of the latter regulation, which replaced Regulation No 2772/75 with effect from 1 October 1990, both large and small packs may carry statements designed to promote sales.

10 That argument cannot be upheld. The second paragraph of Article 21 was inserted in Regulation No 2772/75 in order to ensure better information for consumers (see the fourth recital in the preamble to Regulation No 1831/84). It provides for the possibility of affixing to small packs, in addition to promotional statements, various additional items of information, in particular the retail management code or the stock control code. On 28 November 1984, that is to say six months after the adoption of Regulation No 1831/84, the Council again amended Regulation No 2772/75 by adopting Regulation (EEC) No 3341/84 (Official Journal 1984 L 312, p. 7). Article 1 of that regulation makes an addition to Article 17 of Regulation No 2772/75 whereby large packs may bear the retail management code or the stock control code. However, Regulation No 3341/84 contains no provision authorizing the affixing of advertising statements to large packs. Accordingly, the theory of a drafting error must be rejected.

11 It must therefore be stated in reply to the first question that Article 21 of Council Regulation (EEC) No 2772/75 of 29 October 1975 on marketing standards for eggs prohibits the display of statements designed to promote sales on large packs.

The second and third questions

12 The national court seeks a reply to the second and third questions only if the answer to the first question is affirmative. It should be borne in mind however that, according to Article 10(2)(e) of Regulation No 1907/90, large packs of eggs may also carry statements designed to promote sales provided that such statements and

the manner in which they are made are not likely to mislead the purchaser. That regulation did not enter into force until 1 October 1990, that is to say after the date of the order for reference. However, it was maintained at the hearing that the national court is required by German procedural law to give its decision in the light of the provisions in force at the time of the last public sitting in the case. Accordingly, it is appropriate to give an answer to the second and third questions on the basis of the new egg marketing standards laid down in Regulation No 1907/90.

13 In its second and third questions the national court seeks to determine whether the Community legislation prohibits statements designed to promote sales which refer to the freshness of eggs and which, although objectively accurate, may nevertheless mislead the purchaser.

14 It must first be pointed out that a promotional statement concerning the freshness of eggs may give rise to misconceptions in the mind of the consumer where the latter has no reliable criterion to enable him to check the accuracy of such information. On the other hand, if the consumer is provided with a point of reference, such as the date of laying, which will enable him to assess the freshness of the eggs for himself the statement in question is not likely to mislead him.

15 It should be borne in mind in that regard that, under Regulation No 2772/75, direct or indirect indications relating to the date of laying were prohibited (see the judgment in Case C-372/89 *Gold-Ei* [1991] ECR I-43). Article 10(2)(c) of Regulation No 1907/90 provides, on the other hand, that both large and small packs may carry one or more dates, other than the date of packing, intended to provide the consumer with additional information. However, pursuant to Article 10(3) of the same regulation, those additional dates may be used only in accordance with the implementing rules to be adopted by the Commission.

16 The implementing rules for affixing the date of laying are contained in Articles 15 and 16 of Commission Regulation (EEC) No 1274/91 of 15 May 1991 introducing detailed rules for implementing Regulation (EEC) No 1907/90 on certain marketing standards for eggs (Official Journal 1990 L 121, p. 11). In order to prevent fraud, those rules lay down for eggs on which provision is made for the laying date to be stamped a system of daily collection and classification and immediate marking, and also especially rigorous registration, record-keeping and monitoring procedures (see the fourteenth recital in the preamble to Regulation No 1274/91).

17 In those circumstances, it must be concluded that promotional statements which refer to the freshness of eggs may, even if objectively correct, mislead the purchaser, unless the eggs bear the date of laying, affixed in accordance with the Community provisions.

18 It is necessary to consider next the question whether advertising slogans which refer to the freshness of eggs are liable to be confused with certain similar expressions which are restricted by the Community rules to a quality grading. In that regard, the Commission states that, pursuant to Article 10(1) of Regulation No 1907/90, Grade A eggs may be identified by the word 'fresh' together with the indication of the quality grading and that pursuant to Article 12 of the same regulation the word 'extra' may be used on small packs containing Grade A eggs up to the seventh day following packing. According to the Commission, there is therefore a serious risk that the consumer may be led to conclude that the use of expressions concerning the freshness of eggs, such as 'new laid', is subject to conditions similar to those imposed by Community law for use of the expression 'extra'.

19 It must be observed that it is for the national court to decide whether a statement designed to promote sales is presented in such a manner that, by virtue of the very characteristics of such presentation, that it is unreasonable to think that confusion with a legally defined grade could arise in the mind of the consumer.

20 It must therefore be stated in reply to the second and third questions submitted by the Verwaltungsgerichtshof Baden-Württemberg that Community law as it stands prohibits the display on packs of statements designed to promote sales which refer to the freshness of the eggs if the eggs in question bear no date of laying indicated in a manner which complies with Community legislation. It is for the national courts to determine whether the statements are displayed in a manner likely to lead to confusion with information restricted by Community legislation to a quality grading.

Costs

21 The costs incurred by the Commission of the European Communities, which has 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 reply to the questions referred to it by the Verwaltungsgerichtshof Baden-Württemberg by order of 20 June 1990, hereby rules:

1. **Article 21 of Council Regulation (EEC) No 2772/75 of 29 October 1975 on marketing standards for eggs prohibits the display of statements designed to promote sales on large packs;**

2. **Community law as it stands prohibits the display on packs of statements designed to promote sales which refer to the freshness of the eggs if the eggs in question bear no date of laying indicated in a manner which complies with Community**

legislation. It is for the national courts to determine whether the statements are displayed in a manner likely to lead to confusion with information restricted by Community legislation to a quality grading.

Slynn Joliet Rodríguez Iglesias

Delivered in open court in Luxembourg on 25 February 1992.

J.-G. Giraud
Registrar

Gordon Slynn
President of the First Chamber