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. Only if the consumer has a reliable point of reference — which that date can in fact provide — will the consumer not receive, as a result of such an advertising statement, a false impression as to the actual freshness of the eggs. It is for the national courts to determine whether a promotional statement is displayed in a manner likely to lead to confusion with information restricted by Community legislation to a quality grading; if that is the case, such a statement is likewise prohibited.

# REPORT FOR THE HEARING
## in Case C-203/90 *

### I — Legislative background

Council Regulation (EEC) No 2771 of 29 October 1975 on the common organization of the market in eggs (Official Journal 1975 L 282, p. 49) provides for the adoption of marketing standards relating in particular to grading by quality and weight, packaging, storage, transport, presentation and marking.

On the basis of that regulation, in particular Article 2 thereof, the Council adopted Council Regulation (EEC) No 2772/75 of 29 October 1975 on marketing standards for eggs.

That regulation was amended by Council Regulation (EEC) No 1831/84 of 19 June 1984 (Official Journal 1984 L 172, p. 2), Council Regulation (EEC) No 3341/84 of 28 November 1984 (Official Journal 1984 L 312, p. 7), Council Regulation (EEC) No 3791/85 of 20 December 1985 (Official Journal 1985 L 367, p. 6) and, finally, by Council Regulation (EEC) No 3494/86 of 13 November 1986 (Official Journal 1986 L 323, p. 1).

Articles 16 to 22 of Regulation No 2772/75, as amended, lay down the rules governing the marking of egg packs within the Community.

Article 16 defines 'large packs' as 'packs which contain more than 30 eggs' and 'small packs' as 'those which contain 30 eggs or less'.

* Language of the case: German.

Pursuant to Article 17(1), large packs must be provided with a band or label which must bear (a) the name or business name and the address of the undertaking which has graded or arranged for the grading of the goods; (b) the packing centre's distinguishing number; (c) the quality and weight grading; (d) the number of eggs packed; (e) packing period or date, at least as regards large packs containing either small packs on which the word 'extra is used' or small packs bearing the packing date; (f) particulars as to refrigeration or the method of preservation in respect of refrigerated or preserved eggs.

Article 17(5) provides that the management code or the stock control code may appear on large packs. Paragraph 5 was added by Regulation No 3341/84.

Article 18(1) requires the following to be shown on small packs: (a) the name or business name and the address of the undertaking which has packed the eggs or had them packed; the trade-mark used by the undertaking may be shown if it contains no wording relating to the quality or freshness of the eggs which is incompatible with the regulation; (b) the packing centre's distinguishing mark; (c) the quality and weight grading; (d) the number of eggs packed (e) the packing period or packing date and the recommended sell-by date; (f) particulars as to refrigeration or the method of preservation in respect of refrigerated or preserved eggs.

Article 19 allows the use of the word 'extra' on small packs containing Grade A eggs, showing the date of packing and provided with a band, where the air space in such eggs has a height of less than 4 mm at the time of packing.

Article 20(2) requires the words 'eggs of different sizes' to appear on small packs when eggs are displayed or offered for sale which, although of the same quality grading, except for Grade A eggs bearing the date of packing and provided with a band, are of different weight gradings.

The first paragraph of Article 21 provides that 'packs shall not bear any indications other than those laid down in this regulation'.

The second paragraph provides 'However, small packs may carry the following additional information:

(a) the selling price;

(b) the retail management code or the stock control code;

(c) statements designed to promote sales, provided that such statements and the manner in which they are made are not likely to mislead the purchaser . . . .'

Originally, Article 21 of Regulation No 2772/75 contained only one paragraph. The second and third paragraphs were added by Council Regulation (EEC) No 1831/84 of 19 June 1984 amending Council Regulation (EEC) No 2772/75 of 29 October 1975 on marketing standards for eggs (Official Journal 1984 L 172, p. 2).

Regulation No 2772/75, as amended, was repealed and replaced by Council Regulation (EEC) No 1907/90 of 26 June 1990 on certain marketing standards for eggs (Official Journal 1990 L 173, p. 5).

## II — The dispute in the main proceedings and the reference for a preliminary ruling

Gutshof-Ei produces, collects, sells and stores eggs.

It has an approved packing centre from which it delivers eggs direct to retailers, by-passing wholesalers.

It transports the eggs from its packing centre to retail shops in cartons containing approximately 24 small packs of 10 eggs.

Those large cartons bear on the sides, in addition to the business name 'Gutshof-Ei' the words 'Legefrische . . . die Sie schmecken' [new laid . . . as you can taste] and, on the ends, 'Legefrische' [new laid].

Relying on an order of 25 October 1982 issued jointly by the Ministry of Food and the Social Affairs Ministry of the Land Baden-Württemberg (EM No 84-1230 SM No VI/6 — 8755.1), the authorities of the city of Bühl objected to those indications and threatened Gutshof-Ei with an injunction to cease using them.

They claimed that, according to the abovementioned order, which refers to Regulation No 2772/75, the term 'legefrisch' may be used in Baden-Württemberg only for eggs that are no older than three days, are marketed direct by the producer and have an air-space of not more than 3 mm, conditions which were not fulfilled by the eggs marketed by Gutshof-Ei.

Gutshof-Ei, considering itself entitled to used those words on its large packs, brought an action before the Verwaltungsgericht (Administrative Court) Karlsruhe for a declaration upholding its right to do so. In support, it claimed that the abovementioned order infringed Council Regulation No 2772/75.

By decision of 23 August 1989, the Verwaltungsgericht Karlsruhe dismissed that action on the ground that the order did not infringe Regulation No 2772/75. According to that court, the regulation authorized, in the case of large packs, only the indications

mentioned in Article 17. The use of the term 'legefrisch' was also unlawful because it referred to the date of laying. The use of the term 'frisch' was also unlawful since it was reserved for quality designations. Finally, the use of the term 'legefrisch' was incompatible with the aim of consumer protection pursued by Regulation No 2772/75.

Gutshof-Ei appealed against that decision to the Verwaltungsgerichtshof (Higher Administrative Court) Baden-Württemberg.

In support of its appeal it referred to subparagraph (c) of the second paragraph of Article 21 of Regulation No 2772/75, which allows the use on small packs of 'statements designed to promote sales, provided that such statements and the manner in which they are made are not likely to mislead the purchaser' and contended that lawful indications on small packs, with which the consumer most frequently came into contact, must *a fortiori* be allowed on large packs. In its view, the fact the Article 21 envisaged the use of statements designed to promote sales only on small packs was the result of a drafting error.

It added that information concerning the laying date was intended to inform the consumer. It contended that its distribution system enabled it to guarantee that the eggs delivered by it reached retailers two or three days after laying and pointed out that it took back eggs which were not sold immediately. It thus considered that there was no risk of the consumer being misled.

The Verwaltungsgerichtshof Baden-Württemberg, the appeal court, considered that it could not reject outright the view that Article 21 should be interpreted as not prohibiting the use on large packs of statements intended to promote sales. If that were the case, it would have to decide whether objectively accurate statements, like the term 'new laid' used by Gutshof-Ei, could nevertheless be regarded, in certain circumstances, as being 'likely to mislead the purchaser' within the meaning of that provision. Finally, in the event of an affirmative answer, it would remain to be determined whether statements intended to promote sales, such as 'new laid' for example, could refer to the freshness of the eggs when there was a theoretical risk of confusion with quality gradings of eggs allowed by the regulation.

By order of 20 June 1990, the Verwaltungsgerichtshof therefore stayed the proceedings and referred 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?'

## III — Procedure before the Court

The order for reference was received at the Court Registry on 4 July 1990.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 3 October 1990 by Erzeugergemeinschaft Gutshof-Ei GmbH, represented by Mr Volkmann-Schuck, Rechtsanwalt Hamburg, and on 5 October 1990 by the Commission of the European Communities, represented by Ulrich Wölker, a member of its Legal Service, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

By decision of 24 September 1991, the Court assigned the case to the First Chamber, pursuant to Article 95(1) and (2) of the Rules of Procedure.

## IV — Summary of the written observations submitted to the Court

Both the Commission and the plaintiff in the main proceedings point out that the marketing standards applicable to eggs contained in Regulation No 2772/75 have been amended since the national court sought a preliminary ruling.

Regulation No 1907/90 of 16 June 1990 repeals and replaces Regulation No 2772/75 with effect from 1 October 1990, although Article 23 authorizes the Member States to continue to apply the old marketing standards for eggs laid down in Regulation No 2772/75 until 1 July 1991.

Pursuant to Article 10(2) of Regulation No 1907/90, 'Both large and small packs may . . . carry the following . . . information: . . . (e) statements designed to promote sales, provided that such statements and the

manner in which they are made are not likely to mislead the purchaser.'.

*The first question*

According to the *Commission*, the indications 'Legefrische . . . die Sie schmecken' and 'Legefrische' are statements designed to promote sales which are permitted — according to the clear terms of Regulation No 2772/75 — only for small packs, as is indicated by the fourth recital in the preamble to Regulation No 1831/84 which inserted that provision in Regulation No 2772/75.

It is clear from an examination of Articles 16 to 20 that even the initial version of Regulation No 2772/75 drew a distinction between large and small packs. That distinction is also apparent from Regulation No 3341/84 which added, in Article 17(5) of Regulation No 2772/75, special rules applying solely to large packs. There can thus be no question of a drafting error.

That conclusion is not undermined by Regulation (EEC) No 1295/70 of the Commission of 12 July 1970 amplifying the provisions relating to the marketing of certain egg packs covered by Regulation (EEC) No 1619/68 on marketing standards for eggs (Official Journal, English Special Edition 1970 (II) p. 408 or by Commission Regulation (EEC) No 36/85 of 7 January 1985 amending Regulation (EEC) No 1295/70 amplifying the provisions relating to the marketing of certain egg packs covered by Regulation (EEC) No 2772/75 on marketing standards for eggs (Official Journal 1985 L 5, p. 5), to which the national court refers.

Firstly, Regulation No 1295/70, in its initial version of 1 January 1970, is not relevant to determination of the question since the term 'statements designed to promote sales' was not inserted in Regulation No 2772/75 until 1984. Secondly, it also draws a clear distinction between large and small packs. As for Regulation No 36/85, which amends Regulation No 1295/90, although the first recital in its preamble contains ambiguous wording, its sole purpose is to adapt Regulation No 1295/70 to the changes made to Regulation No 2772/75 by Council Regulations Nos 1831/84 and 3341/84.

Finally, in the Commission's view, the distinction drawn between large and small packs is accounted for first, as the national court emphasized, by the concern to facilitate trade (simplification of controls, uninterrupted movement of goods) by keeping the information given on large packs to a minimum and, secondly, by the aim pursued by the Council, as expressed in the fourth recital in the preamble to Regulation No 1831/84, of improving consumer information by allowing small packs to bear additional information since consumers have most contact with packs of that kind.

For *Gutshof-Ei*, the change made to marketing standards by Regulation No 1907/70, in particular to the wording of

Article 10(2)(e) of that regulation, clearly confirms that, as a result of a drafting error, large packs were not mentioned in Regulation No 1831/84.

In its view, there is no substantive reason for limiting advertising to small packs. It contends, first, that consumers have more contact with small packs than with large packs and, secondly, that the reformulation of the marketing standard laid down in Article 19(2)(e) of Regulation No 1907/90 makes it clear that there is no basis for the fear expressed by the national court regarding the smooth flow of trade which, in the latter's view, might account for the distinction made between small and large packs.

*The second and third questions*

According to the *Commission*, it is apparent from the order for reference that, by its second and third questions, the national court seeks ultimately to establish whether or not Community law prohibits statements designed to promote sales which refer to the freshness of the eggs and whether the accuracy of the indications is relevant in that respect.

The Commission emphasizes that in its judgment in Case C-304/88 *Ministère Public* v *Paris* [1989] ECR 4361 the Court held that the prohibition of indicating the date of laying of eggs imposed by Regulation No 2772 was lawful.

It points out that in that judgment the Court based that finding of lawfulness on the concordant observations of the Council and the Commission to the effect that, first, if such indications were permitted it would not be possible to supply the consumer with reliable information which could easily be verified by the national authorities and, secondly, only a general prohibition allows all producers to be guaranteed equal conditions of competition since the technical facilities by means of which indications concerning the date of laying are available only to the largest producers.

According to the Commission, the reasons underlying the prohibition of showing the date of laying are still valid. It is true that Regulation No 1907/90 no longer, in principle, prohibits an indication of the date of laying (Articles 7(b) and 10(2)(c] but it makes that possibility dependent upon the adoption by the Commission of implementing provisions. Until such time as those provisions have been adopted, the prohibition of indicating the date of laying remains applicable.

The Commission concedes that the main proceedings are not directly concerned with the date of laying. The fact nevertheless remains that consumers might be misled both by a direct indication and by an indication designed to promote sales which refers indirectly to that date. It infers that the use of such indications is prohibited by the subparagraph (c) of the second paragraph of Article 21 of Regulation No 2772/75 and by Article 10(2)(e) of Regulation No 1907/90.

In the Commission's view, there is no doubt that the expression 'legefrisch', which associates the idea of freshness with the date of laying, indirectly indicates the date of laying, even though that date is not specified. Such an expression is likely to mislead purchasers and is therefore unlawful.

The Commission adds that since the danger of misleading consumers stems from the impossibility of general checks it is of little importance whether or not, in a particular case, the statement reflects the true situation.

Finally, it considers that the risk of the consumer being misled by such expressions also derives, contrary to the view of the national court, from Article 19 of Regulation No 2772/75. The Commission states that that provision governs the use on packs of the word 'extra' for Grade A eggs, that is to say fresh eggs. The use of the word 'extra' is regulated on the basis of quality criteria at Community level but that of the expression 'new laid' is not subject to any rules. The Commission considers it very likely that when confronted with expressions that are so similar ('extra frisch' and 'legefrisch') consumers will be induced to think that the use of the expression 'legefrisch' is linked with the conditions or controls imposed by Community law, as is the case where the expression 'extra frisch' is used.

According to *Gutshof-Ei*, the views expressed by the national court are based on a misconception as to what is likely to mislead the consumer. It considers that there is no doubt that objectively accurate statements may in exceptional cases be misleading.

In its view, two questions can show whether or not a statement designed to promote sales is misleading. The first is how consumers to whom the statement is addressed understand it spontaneously. The second is whether the impression given reflects the true facts and whether a false impression plays a role in the decision taken by the addressee of the advertising and more specifically, as far as the present case is concerned, whether it induces him to buy.

In the case of the impressions given by the expressions 'legefrische' and 'legefrisch ... die Sie schmecken', it considers that there is no possibility of consumers really associating them with a quality grade governed by legal provisions. There is no risk of creating such an impression, if only because of the colour contrasts and characters used, both of which are characteristic of advertising.

Moreover, such a false impression has no impact since a purely abstract view of a quality grading is entirely unrelated to any representation as to the specific quality of the eggs presented in that way.

According to Gutshof-Ei, there is likewise no risk whatever of those expressions being confused with the Grade A description 'extra frisch'. It contends that consumers are accustomed to seeing that statement, in accordance with Article 19 of Regulation

No 2772/75, printed on a band round small packs of Grade A eggs. The impression given by slogans on large packs, presented in an entirely different way, thus excludes any risk of confusion from the outset.

Gutshof-Ei observes, finally, that the national court affirms that the use of the word 'frisch' is restricted to indications of quality gradings and cannot therefore be used in advertising.

It contends, however, that none of the marketing standards provides that that expression must in general and without exception be reserved for descriptions laid down for quality gradings. In its view, the fourteenth recital in the preamble to Regulation No 2772/75 and the thirteenth recital in Regulation No 1907/90 indicate the contrary.

To reserve use of the term 'frisch' exclusively to indicate quality gradings would have a decisively restrictive impact on advertising. Freshness is an important quality criterion for eggs and that word must be available for advertising purposes.

Gordon Slynn
Judge-Rapporteur