OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 13 December 1991 *

Mr President,
Members of the Court,

1. In the present proceedings the Court is again called on to interpret the Community legislation governing the marketing of eggs.

Gutshof-Ei, the appellant in the proceedings before the national court, is a company which produces and markets eggs. It delivers eggs from its packing centre to retailers in large cardboard boxes which bear on the sides various statements such as 'Legefrische . . . die Sie schmecken' [new laid . . . as you can taste] and 'Legefrische' [new laid].

Following objections raised by the competent authorities in the city of Bühl, Gutshof-Ei brought an action before the Verwaltungsgericht Karlsruhe (Administrative Court, Karlsruhe) for a declaration that it was entitled to use those statements on its large packs. The action was dismissed by judgment of 23 August 1989.

Gutshof-Ei appealed against that decision, contending in particular that subparagraph (c) of the second paragraph of Article 21 of Council Regulation (EEC) No 2772/75 of 29 October 1975 on marketing standards for eggs [1] allows the affixing to 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 that such indications, being allowed on small packs with which the consumers comes into contact most frequently, should *a fortiori* be allowed on large packs. The fact that Article 21 provides for the use of statements designed to promote sales only on small packs is therefore due, in the appellant's view, to a simple drafting error.

By order of 20 June 1990, the Verwaltungsgerichtshof Baden-Württemberg, before which the appeal was brought, decided to stay the proceedings and ask the Court of Justice whether Article 21 of Regulation No 2772/75 is to be interpreted as meaning that large packs of eggs too may bear statements designed to promote sales; in the event of an affirmative answer, whether statements which are objectively true may mislead consumers if they associate false assumptions with them, and also whether Article 21 prohibits on large packs of eggs statements designed to promote sales which concern the freshness of eggs.

2. With regard to the first question, let me say at the outset that, as is apparent from Articles 16 to 20 thereof, Regulation No

* Original language: Italian.
1 — OJ 1975 L 282, p. 56.

2772/75 draws, even in its initial version, a clear distinction between large and small packs. Moreover, as is absolutely clear from subparagraph (c) of the second paragraph of Article 21 of the regulation in question and from the fourth recital in the preamble to Regulation (EEC) No 1831/84,[2] which amended Regulation No 2772/75, the Council intended to restrict to small packs the possibility of affixing statements designed to promote sales. In fact, that provision states, in its first paragraph, that packs are not to bear any indications other than those provided for in the regulation and, in the next paragraph, that *small packs* may nevertheless carry statements designed to promote sales.

The clear distinction drawn by the Community legislature between large and small packs, both in the original text of the regulation and in the subsequent amendments, thus points to the conclusion that there was no drafting oversight in the present case.

It is true that the first recital in the preamble to Commission Regulation (EEC) No 36/85 of 7 January 1985 [3] appears to show that Council Regulation (EEC) No 3341/84[4] introduced the possibility of the statements already allowed for small packs by Regulation No 1831/84 appearing on large packs.

However, an examination of the text of Regulation No 3341/84 shows unequivocally that that instrument allows the affixing to large packs of eggs only of the management code or the stock control code and, also, it is clearly apparent from the operative part of Regulation No 36/85 that by that instrument — which in any event could not have amended a measure emanating from the Council — the Commission simply sought to adapt Regulation No 1295/70[5] to reflect the changes made to Regulation No 2772/75 by the later Regulations Nos 1831/84 and 3341/84.

Finally, it also seems impossible to accept the view advanced by the national court that the legislation in question should be interpreted as allowing statements designed to promote sales to be affixed to large packs used within only one Member State. There is no basis in the legislation for such a distinction and such a distinction would barely be conceivable under legislation intended to facilitate the marketing of a product in the framework of a common organization of the markets.

3. The considerations put forward with respect to the first question make it unnecessary for me to examine the second and third questions submitted by the national court. However, in order to give the national court a helpful answer for the

2 — OJ 1984 L 172, p. 2.

3 — OJ 1985 L 5, p. 5. The wording of the recital is as follows: 'Whereas, pursuant to Regulation (EEC) No 2771/75, as amended by Regulation (EEC) No 1831/84, the indication of the packing week number on egg packs has been replaced by that of the packing period; whereas small packs may, pursuant to the same regulation, bear certain indications; whereas Regulation (EEC) No 3341/84 introduced such a possibility in the case of large packs; whereas, therefore, Commission Regulation (EEC) No 1295/79 should be amended accordingly'.

4 — OJ 1984 L 312, p. 7.

5 — OJ English Special Edition 1970 (II) p. 408.

purpose of applying Community law in the case before it, I think it is appropriate also to examine Regulation (EEC) No 1907/90,[6] which repealed and replaced Regulation No 2772/75, redefining the marketing standards for eggs. The national court will probably have to apply to the case before it the legislation adopted in the meantime, on the interpretation of which the parties in fact submitted their observations. [7]

The answer to the first question would be considerably different if based on the new rules adopted by the Council. Article 10(2) of Regulation No 1907/90 provides that both large and small packs may carry on either inner or outer surfaces statements designed to promote sales, provided that such statements and the manner in which they are made are not likely to mislead the purchaser.

Whilst on the basis of that legislation the answer to the first question raises no problems and is incontestably affirmative, it becomes more complex to deal with the other questions, in which the national court essentially seeks to determine whether the Community legislation prohibits statements designed to promote sales which refer, albeit only in general terms, to the time of laying of the eggs and whether the truth of such statements is relevant in that regard.

6 — OJ 1990 L 173, p. 5.

7 — Both the appellant and the Commission referred in their written observations to Regulation No 1907/90.

4. For a proper understanding of the scope of the question it is necessary at this point to describe, if only summarily, the development of the Community legislation concerning indication of the date of laying of eggs, bearing in mind above all that the now repealed Regulation No 2772/75 contained an absolute prohibition of indicating the date of laying on the eggs (Article 15) and on the packs (Article 21).

As is apparent from the grounds of the judgment in Case 204/88 *Ministère Public* v *Paris*,[8] that prohibition was justified by the difficulty — in view of the extremely large number of producers — of carrying out the checks needed to ensure the accuracy of the date of laying. Whilst not disputing that reliable systems existed for checking the date of laying, the Commission had pointed out that such systems can in fact only be used by the big producers who are in a position to make the requisite investments for that purpose, emphasizing that in the event of only the latter being permitted to indicate the date of laying, the equality of marketing conditions for Community producers would be undermined. In those circumstances, the Community institutions decided that only the date of packing should be indicated, being easier to check because of the limited number of packing centres.

In the light of those arguments the Court stated in that judgment that, in view of the need to reconcile both the interests of producers and consumers and the — at times — divergent interests of different categories of producers, it did not appear that by prohibiting traders from indicating

8 — Case 204/88 [1989], ECR 4361.

the date of laying on the eggs marketed by them that the Community institutions had committed any manifest error in their overall assessment of the situation and of the nature of the measures required or exceeded in one way or another the general limits of their discretion.

In its later judgment in *Gold-Ei*,[9] the Court then made clear that wording such as 'packed on the day of laying' on the outside or inside of a pack, designed to inform the consumer of the date of laying, cannot be regarded as a statement designed to promote sales and is therefore prohibited by the first paragraph of Article 21 of Regulation No 2772/75, in the same way as an explicit indication of the date of laying.

It need hardly be pointed out that, as is apparent from the judgments cited, a general prohibition of that kind applies whether or not it is possible in certain circumstances to check reliably the date of laying.

5. The legal situation that I have described was partly modified by the adoption of Regulation No 1907/90, which now allows the indication of dates other than that of packing (seventeenth recital and Articles 7(b) and 10(2)(c), but makes that possibility dependent upon fulfilment of the conditions laid down by the Commission under the management-committee procedure (Article 10(3)). And in fact, by Regulation (EEC) No 1274/91 of 15 May 1991 introducing detailed rules for the implementation of Regulation (EEC) No 1907/90,[10] the Commission laid down that the possibility of affixing the date of laying on eggs and packs should be subject to compliance with particularly severe administrative formalities and controls intended to guarantee the accuracy of the information given to the consumer (see in particular Article 17 of Regulation No 1274/91).

The use of indications which, albeit indirectly, refer to the time of laying of the egg and in any way lead the consumer to presume the existence of Community checks of that time is therefore allowed under the new legislation but only if the trader accepts the obligations and controls provided for by Community law in order to guarantee the accuracy of such information.

6. As regards the additional risk that the consumer may be induced to believe that in addition to the gradings provided for by Community law there is a particular grade known as 'new-laid' eggs,[11] I must point out that such an eventuality depends on the manner in which such wording is shown on the pack and that a presentation clearly constituting advertising could avoid any such risk. However, assessments of such matters of fact fall within the exclusive purview of the national court.

9 — Case 372/89 [1991] ECR I-43.

10 — OJ 1991 L 121, p. 11.

11 — The risk is particularly great in some languages such as German because of the closeness of the terms 'extra fresh' provided for in Regulation No 1907/90 and 'new laid' ('extra frisch' and 'legefrisch').

7. In view of the foregoing considerations I therefore propose the following answer to the questions submitted by the Verwaltungsgerichtshof Baden-Württemberg:

(1) Article 21 of Regulation (EEC) No 2772/75, as amended by Regulation (EEC) No 1831/84, is to be interpreted as meaning that only small packs of eggs may carry statements designed to promote sales;

(2) Article 10 of Regulation (EEC) No 1907/90 extends that possibility to large packs;

(3) Article 10 of Regulation (EEC) No 1907/90 is to be interpreted as allowing the affixing to large and small packs statements which refer directly or indirectly to the time of laying of the eggs, subject to compliance with the conditions and limitations laid down by the Commission in order to guarantee the accuracy of such statements and provided that those statements are not likely to give rise to confusion with the quality gradings provided for by Community law.