JUDGMENT OF THE COURT (First Chamber)

14 July 2005 *

In Case C-135/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 26 March 2003,

Commission of the European Communities, represented by G. Berscheid, B. Doherty, F. Jimeno Fernandez and S. Pardo Quintillán, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad and E. Braquehais Conesa, acting as Agents,

defendant,

* Language of the case: Spanish.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Lenaerts, J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges,

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 March 2005,

after hearing the Opinion of the Advocate General at the sitting on 17 March 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to 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 (OJ 1991 L 198, p. 1), as amended by Council Regulation (EC) No 1935/95 of 22 June 1995 (OJ 1995 L 186, p. 1) and, to include livestock production, by Council Regulation (EC) No 1804/1999 of 19 July 1999 (OJ 1999 L 222, p. 1; 'Regulation No 2092/91'),

— by failing to adopt the measures necessary to prevent misleading use of that term, thereby infringing Article 2 in conjunction with Article 10a of Regulation No 2092/91,

— 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 that 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 (OJ 2000 L 109, p. 29), and

— by maintaining in the Autonomous Community of Navarre, contrary to the same provisions, the use of the term 'bio', on its own or in conjunction 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 the organic production method,

the Kingdom of Spain has infringed that regulation and that directive, and in particular the abovementioned provisions of those measures.

Law

Community legislation

2 Regulation No 2092/91 established a framework of Community rules on production, labelling and inspection of organically-produced products. The fifth recital in the preamble states that that regulation seeks to ensure conditions of fair competition between the producers of such products, to ensure transparency at the various stages of production and to improve the credibility of such products in the eyes of consumers.

3 Article 2 of that regulation 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 purchaser 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 of that regulation provides:

'1. The labelling and advertising of a product specified in Article 1(1)(a) may refer to organic production methods only where:

(a) such indications show clearly that they relate to a method of agricultural production;

(b) the product was produced in accordance with the rules laid down in Articles 6 and 7 or imported from a third country under the arrangements laid down in Article 11;

(c) the product was produced or imported by an operator who is subject to the inspection measures laid down in Articles 8 and 9.

...'

5 Article 10a of Regulation No 2092/91 provides:

'1. Where a Member State finds irregularities or infringements relating to the application of this Regulation in a product coming from another Member State and bearing indications as referred to in Article 2 and/or Annex V it shall inform the Member State which designated the inspection authority or approved the inspection body and the Commission thereby.

2. 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 Furthermore, Article 2(1) of Directive 2000/13, which concerns foodstuffs as a whole, provides:

'1. The labelling and methods used must not:

(a) be such as could mislead the purchaser 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;

...'

National legislation

7 Article 3(1) of Royal Decree No 1852/1993 of 22 October 1993 on organic agricultural production and indications referring thereto on agricultural products and foodstuffs (BOE No 283 of 26 November 1993, p. 33528) originally provided:

'In accordance with the provisions of Article 2 of Regulation No 2092/91, a product shall in every case bear indications referring to the organic production method where in the labelling, advertising material or commercial documents such a product or its ingredients are described by the term "ecológico".

Similarly, in addition to the specific indications applicable by the Autonomous Communities, it will be possible to use the words: "obtenido sin el empleo de productos químicos de síntese", "biológico", "orgánico", "biodinámico", and their respective compound nouns, and the terms "eco" and "bio", whether or not used with the name of the product, its ingredients or its brand name.'

8 That decree was amended by Royal Decree No 506/2001 of 11 May 2001 (BOE No 126 of 26 May 2001, p. 18609). Article 3(1) now provides:

'In accordance with the provisions of Article 2 of Regulation (EC) No 2092/91, as 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 such a 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 its brand name.'

9 The third and fifth recitals in the preamble to that royal decree state that that amendment was necessary in order to eliminate any doubt about the terms which, under Community legislation, are reserved for organic production and to eliminate all confusion which may arise from those terms for the consumer, whilst taking into consideration the actual situation of the food sector in Spain, in which use of the term 'bio' has become widespread to describe foodstuffs which have certain characteristics unconnected with organic production methods.

10 Furthermore, as regards the Autonomous Commune of Navarre, Article 2 of Regional Decree No 617/1999 of 20 December 1999 (Navarre BO No 4 of 10 January 2000) provides that a product is regarded as bearing indications referring to the organic production method where the product is designated by the terms 'ecológico', 'obtenido sin el empleo de productos químicos de síntesis', 'biológico', 'orgánico', 'biodinámico' or by the abbreviations 'eco' and 'bio'.

11 Regional Decree No 212/2000 of 12 June 2000 (Navarre BO No 83 of 10 July 2000) added the following paragraph to Article 1 of Regional Decree No 617/1999:

'This decree shall not apply to dairy products in respect of which the term "bio" has been customarily and continuously used because that term bears no relation to the organic method of production.'

12 The recital in the preamble to that regional decree explains that that amendment takes account of the actual situation in the Navarre region where the term 'bio', which is applied to dairy products, does not generally correspond to the concept or the method of organic production.

The pre-litigation procedure

13 During the drafting stage of Royal Decree No 506/2001, the Commission received several complaints drawing its attention to that legislative amendment and claiming that it infringed Regulation No 2092/91. Since that royal decree was adopted notwithstanding the approach made by its services to the Spanish authorities, the Commission initiated the infringement procedure under the first paragraph of Article 226 EC.

14 After giving the Kingdom of Spain the opportunity to submit its observations, the Commission delivered, on 24 April 2002, a reasoned opinion requesting that Member State to adopt the measures necessary to comply with that opinion within two months of its notification. The Spanish Government did not comply with the opinion and so the Commission brought the present action.

The action

Arguments of the parties

15 According to the Commission, Royal Decree No 506/2001, which reserves only the term 'ecológico' and its derivative 'eco' to the organic production method and consequently authorises the use of the term 'bio' for products which are not organically produced, infringes Articles 2, 5 and 10a of Regulation No 2092/91. Article 2 of that regulation clearly precludes the use of derivatives of terms which designate the organic production method in respect of products which have not been organically produced. The term 'bio' is expressly referred to in that article as an example of such a derivative. In the list of terms in the various languages set out in that article, the reference to the term 'ecológico' alone in the case of Spanish has no bearing on that interpretation. That list, introduced by the phrase 'in particular', contains examples only and is not exhaustive.

16 The context and purpose of Article 2 of Regulation No 2092/91 confirm that interpretation. Indeed it would be inconceivable in the common market that the term 'bio' be protected in some Member States and not in others.

17 Moreover, according to current usage in Spain and contrary to the contention of the Spanish Government, consumers attribute the same weight to the terms 'ecológico' and 'biológico'. That finding is corroborated by the earlier version of Royal Decree No 1852/1993, which provided that the terms 'biológico' and 'bio', on the one hand, and 'ecológico' and 'eco', on the other, could be used without distinction to describe organically-produced products. The same applies in respect of the rules in force in the Autonomous Community of Navarre.

18 It is clear from specific examples that the terms 'ecológico' and 'biológico' are often used in the same way in Spain. Numerous products labelled 'biológico' bear an indication on their packaging that they are organically produced. The Spanish press also uses the two terms interchangeably.

19 The Commission received complaints that, in Spain, the term 'bio' was being used unlawfully and fraudulently. Faced with such a situation, the Member States are required under Article 10a(2) of Regulation No 2092/91 to take whatever measures and action are required to prevent such use. Since the Spanish Government has failed to take such measures it should be declared that that provision too has been infringed.

20 For the same reasons, namely the fact that the Spanish authorities tolerate the fraudulent use of the term 'bio', the Commission submits that it should also be declared that those authorities have infringed Article 2(1)(a)(i) of Directive 2000/13. The authorisation to market under the 'biológico' or 'bio' label foodstuffs which have not been organically produced results in consumers being misled as to the method of manufacture or production of the foodstuffs concerned, all the more so since genuine organically-produced products are usually offered at a significantly higher price.

21 As regards more particularly the rules in force in the Navarre Autonomous Community, the Commission submits that they rightly reserve the use of the terms 'biológico' and 'bio' to organically-produced products. However, an exception has wrongly been included in respect of dairy products.

22 The Spanish Government denies the alleged failure to fulfil obligations. It contends that the Court should dismiss the Commission's action and order that institution to pay the costs. It claims that it is clear from the wording of Article 2 of Regulation No 2092/91 in the version applicable in the present case that reference should be made, when designating the organic method of production, to the linguistic indications set out in the list in that article. That list specifically sets out for Spanish the term 'ecológico' and not the terms 'biológico' or 'bio'. Producers are therefore free in Spain to use the terms 'biológico' or 'bio' for products which have not been organically produced without that usage being treated as unlawful or fraudulent.

23 The Spanish Government claims that in the absence of any harmonisation of the indications in question at Community level, the differences between the Member States' rules must be accepted. If the drafters of Regulation No 2092/91 had wanted the designation of organically-produced products to be subject to the same rules in all Member States, they should have imposed the same term, translated into the various Community languages, in each of those States. The list in question shows however that that is not the case.

24 In the Spanish consumer's mind, the term 'bio', which is much less well-known in Spain than in other Member States, does not in fact refer to the organic method of production but is instead associated with products which in general terms are wholesome and good for the health. An opinion poll conducted in 1999 in Madrid

revealed that only 3% of those polled associated the term 'bio' with the organic production method whilst 86% associated it simply with dairy products, primarily yoghurt. It cannot therefore be accepted that that term is used in Spain to denote the organic production method.

25 The Spanish Government therefore disputes the complaints alleging infringement of Articles 2, 5 and 10a of Regulation No 2092/91 and Article 2 of Directive 2000/13. Since it is clear from the opinion poll relied on that the vast majority of Spanish consumers do not associate the term 'bio' with the organic production method, the practice in question cannot mislead them.

26 The Commission challenges the objectivity, reliability and relevance of that opinion poll. It submits that since the meaning of certain terms changes very quickly in the sector in question, a poll conducted in 1999 has no weight with regard to the situation as it was in 2002. Similarly, the poll in question was based on a very small sample and, given the questions asked and the methods used, no firm conclusion can be drawn from it.

27 At the hearing the Spanish Government stated, in reply to a question from the Court, that most of the autonomous communities have regional rules which are identical to those in force in the Navarre Autonomous Community, allowing interchangeably with 'ecológico' and 'eco', a number of other terms to denote organically-produced products, often including 'biológico' and 'bio'.

28 Similarly, at the hearing the parties made submissions on the potential effect on the outcome of the dispute of the version of Regulation No 2092/91 as amended by

Council Regulation (EC) No 392/2004 of 24 February 2004 (OJ 2004 L 65, p. 1), and by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 346).

29 Indeed, Regulation No 392/2004 added, in Article 2 of Regulation No 2092/91, a provision that the terms listed in that article in the various languages 'shall be regarded as indications referring to the organic production method throughout the Community and in any Community language'. That version of Article 2 is in particular the subject of the reference for a preliminary ruling giving rise to the judgment of 14 July 2005 in Case C-107/04 *Comité Andaluz de Agricultura Ecológica* [2005] ECR I-7137.

30 Whilst the Commission submits that that amendment to Article 2 of Regulation No 2092/91 is merely declaratory of the implicit meaning of the previous wording of that provision, the Spanish Government contends that it is a substantial amendment which however has no bearing on the present infringement proceedings.

Findings of the Court

31 As a preliminary point it should be noted that according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be

determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-63/02 *Commission* v *United Kingdom* [2003] ECR I-821, paragraph 11, and Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, paragraph 33). Subsequent changes cannot be taken into account by the Court (see, inter alia, Case C-482/03 *Commission* v *Ireland*, not published in the ECR, paragraph 11).

32 Since the date of the Commission's reasoned opinion was 24 April 2002 and the period accorded to the Kingdom of Spain was two months, the question whether there has been a failure to fulfil obligations as alleged must be assessed in the light of Regulation No 2092/91 and not that regulation as amended by Regulation No 392/2004.

33 Article 2 of Regulation No 2092/91 refers as regards the labelling, advertising material or commercial documents of organically-produced products to 'indications in use in each Member State, suggesting to the purchaser that the product, ... [has] been obtained in accordance with the rules of [organic] production' and 'in particular' to 'the ... terms or their usual derivatives' set out in a list containing, in respect of each of the 11 official languages of the Community then in force, one or two expressions. In the case of 5 of the 11 languages, there is only one expression on that list which corresponds to the French term 'biologique'. In the case of three other languages there is only one expression which corresponds to the French term 'écologique'. In respect of German, two expressions corresponding to those two terms are cited without distinction and for each of the two remaining languages another expression is given.

34 That list, which is introduced by the words 'in particular', is by no means exhaustive. It follows that the Member States may, where current usage changes in their

territory, add expressions other than those set out in that list to their national legislation to refer to the organic production method.

35 In the version applicable to the present infringement proceedings, the wording of Article 2 of Regulation No 2092/91 is unequivocal in that regard. Since in the case of Spanish the expression 'ecológico' alone, encompassing the derivative 'eco', is included in the list set out in that article, the Spanish Government cannot be criticised for failing to prevent producers of products which are not organically-produced from using other expressions such as, in this case, 'biológico' or 'bio'.

36 Contrary to the Commission's submission, it further does not follow from the wording of that Article 2 that the derivative 'bio' must, because it is mentioned in that article as a usual derivative, be accorded specific protection in all Member States and in all languages, including those in respect of which, on the list in that article, terms are mentioned which do not correspond to the French expression 'biologique'. As has been noted above, that was so at the time of the facts in 5 of the 15 Member States. The reference in Article 2 of Regulation No 2092/91 to the derivatives 'bio, eco, etc.' does not justify reserving special treatment to the term 'bio' alone.

37 Whilst it may be desirable, given the increasing importance of the market for organically-produced products at Community level, to harmonise the indications in respect of such products, it is for the Community legislature to react to such a need. The amendment to Article 2 of Regulation No 2092/91 by Regulation No 392/2004 is evidence of such a development. As is clear from the judgment in *Comité Andaluz de Agricultura Ecológica*, cited above, the version of Article 2 resulting from that amendment must in fact be interpreted as meaning that the expressions set out in that article must be protected in all of the official languages of the Community.

38 However, that amendment has no bearing on the previous legislative situation, in the light of which the present infringement proceedings must be assessed. The adoption of a new version of Article 2 of Regulation No 2092/91 suggests the intention of the legislature to amend that article and not to leave it unchanged. If there had been no such intention, the adoption of the legislative amendment in question would not have been necessary.

39 Lastly, the Commission cannot succeed in its argument that the Kingdom of Spain was required also to reserve, in addition to the use of the single expression 'ecológico' and its derivative 'eco', the use of the term 'bio' to organically-produced products because of use of that term in Spain which led Spanish consumers to regard that term nevertheless as referring to the organic production method.

40 It is true, as the Commission contends, that the content of the national legislation prior to the amendment introduced by Royal Decree No 506/2001 and the legislation in force in the Navarre Autonomous Community provide important evidence in that regard. The same is true of the information provided by the Spanish Government at the hearing, in reply to a question from the Court, that in many other regions, the use of the terms 'biológico' or 'bio' seems to be reserved to organically-produced products. Moreover, the doubt cast by the Commission on the opinion poll relied on by the Spanish Government is also prima facie not wholly unfounded.

41 It should however be noted that it is settled case-law that, in an action for failure to fulfil obligations, it is for the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission which must provide the Court with the evidence necessary for the Court to establish that the obligation has not been fulfilled, and it may not rely on any presumption (see, inter alia, Case C-194/01 *Commission* v *Austria* [2004] ECR I-4579, paragraph 34, and *Commission* v *Germany*, cited above, paragraph 35). In the present case, apart from the indications

referred to above relating to some use of the terms 'biológico' and 'bio' on the Spanish market, the Commission has not shown that, in that market, those terms suggest to Spanish purchasers in general that the products concerned are organically produced. Whilst, in that respect, the doubt cast by the Commission on the opinion poll relied on by the Spanish Government is not unfounded, it nevertheless remains the case that the Commission has adduced no evidence to show that, in Spain, when the period laid down in the reasoned opinion expired, the use of the terms 'biológico' or 'bio' to designate organically-produced products was so widespread that the Spanish consumer associated those terms with the organic method of production. The Commission has therefore not succeeded in refuting the assertion made in the recital in the preamble to Royal Decree No 506/2001 that, in adopting that royal decree, the use of the term 'bio' had become widespread in Spain to designate foodstuffs which have certain characteristics unconnected with the organic method of production.

42 Since an infringement of the obligations arising from Article 2 of Regulation No 2092/91 in the version applicable to the present proceedings cannot therefore be declared, it follows that an infringement of Articles 5 and 10a of that regulation and Article 2(1)(a)(i) of Directive 2000/13, which depends upon that infringement, cannot be regarded as made out either.

43 Furthermore, in respect of the infringement which the Commission alleges arises from the use of the term 'bio' in the Navarre Autonomous Community, it suffices to find that the Court's reasoning in respect of Royal Decree No 506/2001 also applies in respect of the regional rules applicable in the Navarre Autonomous Community. Consequently, there can be no declaration of infringement in that respect either.

44 In those circumstances, the action must be dismissed in its entirety.

Costs

45 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Spain has applied for costs, and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]