JUDGMENT OF THE COURT (Fourth Chamber)

7 September 2006 *

In Case C-489/04,

REFERENCE for a preliminary ruling under Article 234 EC by the Verwaltungsgericht Sigmaringen (Germany), made by decision of 28 September 2004, received at the Court on 29 November 2004, in the proceedings

Alexander Jehle, Weinhaus Kiderlen

v

Land Baden-Württemberg,

THE COURT (Fourth Chamber),

composed of K. Schiemann, President of the Chamber, E. Juhász and E. Levits (Rapporteur), Judges,

* Language of the case: German.

Advocate General: A. Tizzano,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 15 December 2005,

after considering the observations submitted on behalf of:

— Alexander Jehle, Weinhaus Kiderlen, by A.H. Meyer and B. Klaus, Rechtsanwälte,

— the Greek Government, by V. Kontolaimos and K. Marinou, acting as Agents,

— the Italian Government, by I. M. Braguglia, acting as Agent, assisted by D. Del Gaizo, avvocato dello Stato,

— the Cypriot Government, by C. Likourgos and A. Markoulli, acting as Agents,

— the Commission of the European Communities, by M. Nolin and F. Erlbacher, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Commission Regulation (EC) No 1019/2002 of 13 June 2002 on marketing standards for olive oil (OJ 2002 L 155, p. 27), as amended by Commission Regulation (EC) No 1176/2003 of 1 July 2003 (OJ 2003 L 164, p.12), ('Regulation No 1019/2002').

2 The reference was submitted in the course of proceedings between Mr Jehle, Weinhaus Kiderlen ('the applicant in the main proceedings') and Land Baden-Württemberg concerning the right of the applicant in the main proceedings to market olive oil by the so-called 'bag in the box' method.

Legal context

3 Article 1(1) of Regulation No 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organisation of the market in oils and fats (OJ, English Special Edition 1965-1966, p. 221), as amended by Council Regulation (EC) No 1513/2001 of 23 July 2001 (OJ 2001 L 201, p. 4), ('Regulation No 136/66'), provides that a common organisation of the market in oil seeds, oleaginous fruit, vegetable oils and fats, and oils and fats of fish or marine mammals is to be established. Article 1(2) lays down a list of products to which Regulation No 136/66 applies, including olive oil.

4 Article 35(1) of Regulation No 136/66 requires for the marketing of olive oils and olive-pomace oils the use of the descriptions and definitions set out in the Annex to that regulation. Article 35(2) states that only oils as referred to in points 1(a) and (b), 3 and 6 of the Annex may be marketed at the retail stage.

5 Article 35a(1) of Regulation No 136/66 reads as follows:

'Marketing standards covering in particular quality grading, packaging and presentation may be laid down in respect of the products referred to in Article 1.

Where such standards are laid down, the products to which they apply may be marketed only in accordance with those standards.'

6 The Annex to Regulation No 136/66, entitled 'Descriptions and definitions of olive oils and olive-pomace oils referred to in Article 35', reads as follows:

'1. Virgin olive oils:

Oils obtained from the fruit of the olive tree solely by mechanical or other physical means under conditions that do not lead to alteration in the oil, which have not undergone any treatment other than washing, decantation, centrifugation or filtration, to the exclusion of oils obtained using solvents or using adjuvants having a chemical or biochemical action, or by re-esterification process and any mixture with oils of other kinds.

Virgin olive oils are exclusively classified and described as follows:

(a) Extra virgin olive oil

Virgin olive oil having a maximum free acidity, in terms of oleic acid, of 0.8 g per 100 g, the other characteristics of which comply with those laid down for this category.

(b) Virgin olive oil

Virgin olive oil having a maximum free acidity, in terms of oleic acid, of 2 g per 100 g, the other characteristics of which comply with those laid down for this category.

...

3. Olive oil — composed of refined olive oils and virgin olive oils

Olive oil obtained by blending refined olive oil and virgin olive oil other than lampante oil, having a free acidity content expressed as oleic acid of not more than 1g per 100 g, and the other characteristics of which comply with those laid down for this category.

...

6. Olive-pomace oil

Oil obtained by blending refined olive-pomace oil and virgin olive oil other than lampante oil, having a free acidity content expressed as oleic acid of not more than 1g per 100 g, and the other characteristics of which comply with those laid down for this category.'

7 Article 1 of Regulation No 1019/2002 provides:

'1. Without prejudice to Directive 2000/13/EC, this regulation lays down specific standards for retail-stage marketing of the olive oils and olive-pomace oils referred to in points 1(a) and (b), 3 and 6 of the Annex to Regulation No 136/66/EEC.

2. For the purposes of this regulation, retail stage means the sale to the final consumer of oil as referred to in paragraph 1, presented in the natural state or incorporated in a foodstuff.'

8 Article 2 of Regulation No 1019/2002 provides:

'Oils as referred to in Article 1(1) shall be presented to the final consumer in packaging of a maximum capacity of five litres. Such packaging shall be fitted with an opening system that can no longer be sealed after the first time it is opened and shall be labelled in accordance with Articles 3 to 6.

However, in the case of oils intended for consumption in restaurants, hospitals, canteens and other similar collective establishments, the Member States may set a maximum capacity exceeding five litres for packaging depending on the type of establishment concerned.'

9 Articles 3 to 7 of Regulation No 1019/2002 concern labelling on packaging and Articles 8 to 10 govern monitoring of the application of the regulation and the measures necessary to ensure compliance with it.

10 Articles 11 and 12 of Regulation No 1019/2002 provide for various temporary arrangements to allow for a period of adaptation to the new rules introduced by that regulation and to enable the means necessary for their application to be adopted.

11 The purpose 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), as amended by Directive 2003/89/EC of the European Parliament and of the Council of 10 November 2003, as regards indication of the ingredients present in foodstuffs (OJ 2003 L 308, p. 15), ('Directive 2000/13'), according to the fourth recital in the preamble thereto, is to enact Community rules of a general nature applicable horizontally to all foodstuffs put on the market.

12 That directive lays down the principles which the labelling and methods used must observe (Article 2), and a list of particulars which are required to be indicated on the labelling of all foodstuffs, for example the name under which the product is sold, the list of ingredients and the date of minimum durability (Article 3). The conditions and exceptions relating to those particulars are set out in Articles 4 to 17.

13 Article 14 of Directive 2000/13 provides thus that, where foodstuffs are offered for sale to the ultimate consumer or to mass caterers without prepackaging, or where foodstuffs are packaged on the sales premises at the consumer's request or prepackaged for direct sale, the Member States are to adopt detailed rules concerning the manner in which the particulars specified are to be shown and may decide not to require the provision of all or some of these particulars, provided that the purchaser still receives sufficient information.

The main proceedings and the questions referred

14 The applicant in the main proceedings sells olive oil at retail level by the 'bag in the box' method. For that purpose, the oil is poured by the bottler into a double-layered plastic pouch ('bag'), with a capacity of five litres and bearing an indication of origin and an inspection seal. The bag is fitted with a special non-resealable opening, with a membrane which has to be pierced before oil can be poured from the bag. This plastic bag is placed in an earthenware container ('box') with just a spout coming out for pouring the product. These parts together ('the bag in the box') enable the client to obtain the desired quantity of oil drawn off into a receptacle which he has brought himself or purchased there in the shop. The client is able to read the information on the origin, quality and price of the oil on the label which the applicant in the main proceedings has attached to the earthenware container.

15 In February 2004 the Landratsamt Ravensburg, Amt für Veterinärwesen und Verbraucherschutz (Office for Veterinary Matters and Consumer Protection of the Ravensburg District Authority, 'the Landratsamt Ravensburg') ordered the applicant to cease marketing olive oil by the method described above. The Landratsamt Ravensburg stated that according to the first paragraph of Article 2 of Regulation No 1019/2002 olive oil may be sold to consumers only in pre-sealed packaging having a maximum capacity of five litres.

16 The applicant in the main proceedings then applied to the Verwaltungsgericht (Administrative Court) Sigmaringen for a declaration that Regulation No 1019/2002 does not prohibit the applicant from continuing to sell olive oil by the 'bag in the box' method. It submitted inter alia that Regulation No 1019/2002 does not regulate the sale of olive oil in bulk, but only the sale of packaged olive oil, and that consequently Article 2 does not contain a prohibition on the sale of olive oil in bulk, but merely a requirement as to the marketing of packaged olive oil.

17 According to the applicant in the main proceedings, since Regulation No 1019/2002 was adopted to supplement Directive 2000/13, the latter continues to apply in all those areas not specifically governed by the regulation. Article 14 of Directive 2000/13 allows for the possibility of presenting foodstuffs to the final consumer without prepackaging, by requiring the Member States to adopt detailed rules concerning the manner in which the particulars are to be shown.

18 The applicant in the main proceedings also argued that the 'bag in the box' procedure is such as to guarantee the consumer a level of protection comparable to that offered by restricting sales of olive oil to prepackaged oil. That procedure ensures, in particular, that consumers are not offered oil which is of poor quality owing to additions or which bears false declarations of origin.

19 The national court has certain doubts as to this view, however, in particular in that it is possible to refill the plastic bag without any great effort and that the consumer cannot view the label attached to the bag but only the reproduction of that label attached to the receptacle in which that bag is contained.

20 The Landratsamt Ravensburg disputes the interpretation proposed by the applicant in the main proceedings, maintaining that the first paragraph of Article 2 of Regulation No 1019/2002 contains a prohibition on the presentation of unpackaged olive oil to the final consumer.

21 In those circumstances, the Verwaltungsgericht Sigmaringen decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Articles 1 to 12 of [Regulation] (EC) No 1019/2002 ... to be construed as meaning that those provisions also lay down rules governing the presentation of unpackaged olive oils and olive-pomace oils to final consumers?

(2) Is the first paragraph of Article 2 of [Regulation] No 1019/2002 ... to be construed as containing a prohibition on the presentation of unpackaged olive oils and olive-pomace oils to final consumers?

(3) Alternatively, is the first paragraph of Article 2 of [Regulation] No 1019/2002 ... to be construed restrictively as meaning that, while it does contain a prohibition on the presentation of unpackaged olive oils and olive-pomace oils to the final consumer, that prohibition does not apply to the sale of unpackaged olive oils and olive-pomace oils effected according to the "bag in the box" method?'

The questions

The first and second questions

22 By the first and second questions, which should be taken together, the national court is essentially asking whether Regulation No 1019/2002, and in particular the first paragraph of Article 2 thereof, is to be construed as meaning that olive oils and olive-pomace oils can be presented to the final consumer only in packaging in accordance with the requirements laid down by that provision.

23 It should be pointed out that the argument advanced by the applicant in the main proceedings that sale to the final consumer of olive oil and olive-pomace oil in bulk is permitted, since the purpose of Regulation No 1019/2002 is merely to lay down marketing standards for prepackaged olive oil and olive-pomace oil, leaving the marketing of those oils in bulk outside the scope of that regulation, cannot be accepted.

24 Regulation No 1019/2002 has its legal basis in Article 35a of Regulation No 136/66, and the first sentence of paragraph (1) of that article states that marketing standards covering in particular quality grading, packaging and presentation may be laid down in respect of the products referred to in Article 1 thereof. The products listed in the latter provision, which include olive oil and olive-pomace oil, are all identified by their specific descriptions and tariff numbers under the combined nomenclature.

Those products are neither defined nor distinguished according to considerations connected with their packaging.

25 The products covered more particularly by Regulation No 1019/2002 are set out in Article 1(1) thereof. These are olive oils and olive-pomace oils, mentioned in points 1(a), 1(b), 3 and 6 of the Annex to Regulation No 136/66, in which they are classified according to quality characteristics and regardless of the way they are marketed, whether packaged or in bulk.

26 In order to guarantee, inter alia, the authenticity of olive oils, Regulation No 1019/2002 has laid down marketing standards for the packaging of those oils. Thus, the first paragraph of Article 2 of Regulation No 1019/2002 provides that oils are be presented to the final consumer in packaging of a maximum capacity of five litres and which is to be fitted with an opening system that can no longer be sealed after the first time it is opened. That packaging must also be labelled in accordance with Articles 3 to 6 of Regulation No 1019/2002.

27 Those standards apply to all the oils referred to in Article 1(1) of Regulation No 1019/2002 and provide for only one exception, set out expressly in the second paragraph of Article 2. That exception, which does not in any case concern the requirement to present oils in packaging but concerns only the capacity of that packaging, allows the Member States, in the case of oils intended for consumption in collective establishments, to set a maximum capacity for such packaging exceeding five litres depending on the type of establishment concerned.

28 It is clear from all the above that, save for the exception referred to in the previous paragraph, olive oils and olive-pomace oils can be presented to final consumers only if they accord with the standards laid down in the first paragraph of Article 2 of Regulation No 1019/2002 and in particular the packaging requirement to which that provision refers. According to the second paragraph of Article 35a(1) of Regulation No 136/66, where marketing standards are laid down, the products to which they apply may be marketed only in accordance with those standards.

29 That interpretation is not incompatible with the proviso inserted by Article 1(1) of Regulation No 1019/2002 according to which the marketing standards for olive oils and olive-pomace oils are to be laid down 'without prejudice to Directive 2000/13/EC'.

30 According to the first recital of Regulation No 1019/2002, the specific labelling rules laid down by that regulation supplement those laid down in Directive 2000/13/EC, which are rules of a general nature applicable horizontally to all foodstuffs put on the market. Consequently, the reference to Directive 2000/13 contained in Article 1(1) of Regulation No 1019/2002 cannot mean that it is intended to provide for a derogation or dispensation from the specific rules in Regulation No 1019/2002 on the labelling of olive oils and olive-pomace oils, but only that it seeks to ensure, in addition to compliance with those specific rules, that the more general rules laid down by Directive 2000/13 are observed.

31 Thus, in relation to the labelling of olive oils and olive-pomace oils, the provisions of Directive 2000/13 requiring, for example, the net quantity or the sell-by date to be

shown, apply in parallel with the specific rules provided for by Regulation No 1019/2002, in particular Articles 3 to 6.

32 Article 14 of Directive 2000/13, by contrast, which is relied on by the applicant in the main proceedings, is not relevant in so far as it allows the Member States to adopt detailed rules concerning the manner in which the particulars specified in Articles 3 and Article 4(2) of that directive are to be shown on foodstuffs presented without prepackaging, since, first, the first paragraph of Article 2 of Regulation No 1019/2002 prohibits such packaging of olive oils and olive-pomace oils, and second, the Member States only retain competence in relation to the maximum capacity of packaging intended for collective establishments.

33 The first and second questions must therefore be answered to the effect that Regulation No 1019/2002, and in particular the first paragraph of Article 2 thereof, must be construed as meaning that olive oils and olive-pomace oils may be presented to the final consumer only in packaging which complies with the requirements laid down by that provision.

The third question

34 By the third question, which is posed in the alternative, the national court asks essentially whether the first paragraph of Article 2 of Regulation No 1019/2002 can be construed as meaning that a method of marketing such as that used by the applicant in the main proceedings ('the bag in the box method') is not prohibited by that provision.

35 The applicant in the main proceedings argued that the 'bag in the box' procedure is such as to guarantee the consumer a level of protection comparable to that offered by restricting the sale of olive oil to prepackaged oil. That is why the referring court is in doubt as to whether the characteristics of this method of marketing may be taken to justify not prohibiting it.

36 It should be recalled, in this respect, that in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts is a matter for the national court. The Court therefore has no jurisdiction to give a ruling on the facts in the main proceedings or to apply the rules of Community law which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court (see Joined Cases C-211/03, C-299/03 and C-316/03 to C-318/03 *HLH Warenvertrieb and Orthica* [2005] ECR I-5141, paragraph 96).

37 The Court may, however, supply the national courts with the principles of interpretation relating to Community law which may be useful in the application of the Community rule (Case 35/75 *Matisa Maschinen* [1975] ECR 1205, paragraph 3).

38 As stated in paragraph 28 of the present judgment, the second paragraph of Article 35a(1) of Regulation No 136/66 provides that where marketing standards are laid down, the products to which they apply may be marketed only in accordance with those standards.

39 It follows that any particular method of marketing olive oils and olive-pomace oils has to be assessed in the light of the conditions laid down in the first paragraph of Article 2 of Regulation No 1019/2002 and must be considered to be incompatible with that regulation where those conditions are not met.

40 In this case, it is clear that, under the method of marketing used by the applicant in the main proceedings, the purchase of olive oil or olive-pomace oil by the final consumer can only be made if the oils are decanted, at the place of purchase, from a container which is open or which is to be opened into a receptacle purchased or brought by that consumer.

41 However, owing to the fact the oil has to be decanted, such a method of marketing does not meet the condition set out in the first paragraph of Article 2 of Regulation No 1019/2002, which requires the olive oil to be presented to the final consumer, that is to say, offered for sale, in packaging fitted with an opening system that can no longer be sealed after the first time it is opened.

42 In those circumstances, it cannot be maintained, as the applicant in the main proceedings has sought to do, that the container from which the olive oil and the olive-pomade oil are decanted is capable of satisfying the conditions relating to maximum capacity, the opening system and labelling set out in the first paragraph of Article 2 of Regulation No 1019/2002. The condition relating to a suitable opening system introduced in accordance with the second recital in the preamble to Regulation No 1019/2002 requires, in order to guarantee the authenticity of the olive oil, that the packaging be able to be opened by the final consumer himself.

43 By the same token, it cannot be maintained, as the Commission of the European Communities has sought to do, that a method of marketing such as that at issue in the main proceedings must be considered to be lawful in so far as the receptacles into which the oil is poured fulfil the conditions as to maximum capacity, the opening system and labelling set out in the first paragraph of Article 2 of Regulation No 1019/2002. Fixing a suitable opening system on the receptacle only at the point of delivery to the final consumer cannot serve to fulfil the objective pursued by imposing such a system, since any risk of compromising the authenticity of the olive oil and the olive-pomace oil will arise at a stage prior to such delivery.

44 Furthermore, making assessment of the lawfulness of the method of marketing dependent on an examination of the receptacles which may be brought in by consumers and into which the olive oil and olive-pomace oil are decanted at the place of purchase would make that method of marketing lawful in some cases and not in others, without, however, there being any substantive difference. Such an approach would make it difficult to monitor compliance with Regulation No 1019/2002.

45 In the light of the foregoing, the third question must be answered to the effect that the first paragraph of Article 2 of Regulation No 1019/2002 is to be construed as prohibiting a method of marketing, such as that used by the applicant in the main proceedings, which does not meet the conditions laid down by that provision.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Commission Regulation (EC) No 1019/2002 of 13 June 2002 on marketing standards for olive oil, as amended by Commission Regulation (EC) No 1176/2003 of 1 July 2003, and in particular the first paragraph of Article 2 thereof, must be construed as meaning that olive oils and olive-pomace oils may be presented to the final consumer only in packaging which complies with the requirements laid down by that provision.**

2. **The first paragraph of Article 2 of Regulation No 1019/2002, as amended by Regulation (EC) No 1176/2003, must be construed as prohibiting a method of marketing, such as that used by the applicant in the main proceedings, Weinhaus Kiderlen, which does not meet the conditions laid down by that provision.**

[Signatures]