JUDGMENT OF THE COURT (Sixth Chamber)

16 December 1999 *

In Case C-101/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesgerichtshof, Germany, for a preliminary ruling in the proceedings pending before that court between

Union Deutsche Lebensmittelwerke GmbH

and

Schutzverband gegen Unwesen in der Wirtschaft eV

on the interpretation of Article 3(1) of Council Regulation (EEC) No 1898/87 of 2 July 1987 on the protection of designations used in marketing of milk and milk products (OJ 1987 L 182, p. 36) and of Article 3(2) of Council Directive 89/398/EEC of 3 May 1989 on the approximation of the laws of the Member States

* Language of the case: German.

relating to foodstuffs intended for particular nutritional uses (OJ 1989 L 186, p. 27),

THE COURT (Sixth Chamber),

composed of: R. Schintgen (Rapporteur), President of the Second Chamber, acting as President of the Sixth Chamber, P.J.G. Kapteyn and G. Hirsch, Judges,

Advocate General: A. Saggio,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Union Deutsche Lebensmittelwerke GmbH, by K.A. Schroeter, Rechtsanwalt, Hamburg,

— Schutzverband gegen Unwesen in der Wirtschaft eV, by H.-G. Borck, Rechtsanwalt, Hamburg,

— the German Government, by E. Röder and C.-D. Quassowski, respectively Ministerialrat and Regierungsdirektor at the Federal Ministry of the Economy, acting as Agents,

— the Greek Government, by I. Chalkias, Assistant Legal Adviser at the State Legal Council, and I. Galani-Maragkoudaki, Special Deputy Legal

Adviser Special Legal Service to the Ministry of Foreign Affairs, acting as Agents,

— the French Government, by K. Rispal-Bellanger, Head of Subdirectorate at the Foreign Affairs Directorate of the Ministry of Foreign Affairs, and C. Vasak, Assistant Secretary for Foreign Affairs in that directorate, acting as Agents,

— the Austrian Government, by Christine Stix-Hackl, Gesandte at the Federal Ministry of Foreign Affairs, acting as Agent, and

— the Commission of the European Communities, by C. Schmidt, of its Legal Service, and K. Schreyer, a national civil servant on secondment to that service, acting as Agents.

having regard to the Report for the Hearing,

after hearing the oral observations of Union Deutsche Lebensmittelwerke GmbH, represented by K.A. Schroeter; of Schutzverband gegen Unwesen in der Wirtschaft eV, represented by H.-G. Borck; of the German Government, represented by W.-D. Plessing, Ministerialrat at the Federal Ministry of Finance, acting as Agent; of the Greek Government, represented by I. Chalkias; and of the Commission, represented by C. Schmidt, at the hearing on 24 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 10 June 1999,

gives the following

Judgment

1 By order of 5 March 1998, received at the Court on 9 April 1998, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions concerning the interpretation of Article 3(1) of Council Regulation (EEC) No 1898/87 of 2 July 1987 on the protection of designations used in marketing of milk and milk products (OJ 1987 L 182, p. 36, hereinafter 'the Regulation') and of Article 3(2) of Council Directive 89/398/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses (OJ 1989 L 186, p. 27, hereinafter 'the Directive').

2 Those questions have been raised in proceedings between Union Deutsche Lebensmittelwerke GmbH (hereinafter 'UDL'), a food-processing undertaking, and Schutzverband gegen Unwesen in der Wirtschaft eV, a registered association for protection against unfair business practices (hereinafter 'the Schutzverband'), concerning the designation under which UDL plans to sell two of its products.

The Community rules

3 Article 2(2) and (3) of the Regulation provides:

'2. For the purposes of this Regulation, "milk products" shall mean products derived exclusively from milk, on the understanding that substances necessary for their manufacture may be added provided that those substances are not used for the purpose of replacing, in whole or in part, any milk constituent.

The following shall be reserved exclusively for milk products:

— the designations listed in the Annex hereto,

— designations or names within the meaning of Article 5 of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, as last amended by Directive 85/7/EEC, actually used for milk products.

3. The term "milk" and the designations used for milk products may also be used in association with a word or words to designate composite products of which no part takes or is intended to take the place of any milk constituent and of which

milk or a milk product is an essential part either in terms of quantity or for characterisation of the product.'

4 Article 3 of the Regulation provides:

'1. The designations referred to in Article 2 may not be used for any product other than those referred to in that Article.

However, this provision shall not apply to the designation of products the exact nature of which is clear from traditional usage and/or when the designations are clearly used to describe a characteristic quality of the product.

2. In respect of a product other than those described in Article 2, no label, commercial document, publicity material or any form of advertising (as defined in Article 2 (1) of Directive 84/450/EEC) or any form of presentation, may be used which claims, implies or suggests that the product is a dairy product.

However, in respect of a product which contains milk or milk products, the designation "milk" or the designations referred to in the second subparagraph of Article 2 (2) may be used only to describe the basic raw materials and to list the ingredients in accordance with Directive 79/112/EEC.'

5 The annex to the Regulation contains, amongst the designations referred to in the first indent of the second subparagraph of Article 2(2), the designation 'cheese'.

6 Article 1 of the Directive provides:

'1. This Directive concerns foodstuffs for particular nutritional uses.

2. (a) Foodstuffs for particular nutritional uses are foodstuffs which, owing to their special composition or manufacturing process, are clearly distinguishable from foodstuffs for normal consumption, which are suitable for their claimed nutritional purposes and which are marketed in such a way as to indicate such suitability.

(b) A particular nutritional use must fulfil the particular nutritional requirements:

(i) of certain categories of persons whose digestive processes or metabolism are disturbed; or

(ii) of certain categories of persons who are in a special physiological condition and who are therefore able to obtain special benefit from controlled consumption of certain substances in foodstuffs; or

(iii) of infants or young children in good health.'

7 Article 3 of the Directive provides:

'1. The nature or composition of the products referred to in Article 1 must be such that the products are appropriate for the particular nutritional use intended.

2. The products referred to in Article 1 must also comply with any mandatory provisions applicable to foodstuffs for normal consumption, save as regards changes made to them to ensure their conformity with the definitions given in Article 1.'

8 Article 7(1) and (2) of the Directive provides:

'1. Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and

advertising of foodstuffs, as last amended by Directive 89/395/EEC, shall apply to the products referred to in Article 1, under the conditions set out below.

2. The designation under which a product is sold shall be accompanied by an indication of its particular nutritional characteristics; however, in the case of the products referred to in Article 1 (2) (b) (iii), this reference shall be replaced by a reference to the purpose for which they are intended.'

9 Article 2(1)(a) of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1) provides:

'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;

(ii) by attributing to the foodstuff effects or properties which it does not possess;

(iii) by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics.'

10 Article 5(1) of Directive 79/112, as amended by Council Directive 89/395/EEC of 14 June 1989 (OJ 1989 L 186, p. 17), provides:

'The name under which a foodstuff is sold shall be the name laid down by whatever laws, regulations or administrative provisions apply to the foodstuff in question or, in the absence of any such name, the name customary in the Member State where the product is sold to the ultimate consumer, or a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused.'

The main proceedings and the questions referred for a preliminary ruling

11 UDL is an undertaking belonging to the food-manufacturing industry which makes in particular cheese and products derived from cheese, including products intended for a particular nutritional or dietary use. It markets under the brand name 'Becel' foods in which the original animal fats containing saturated fatty acids have been replaced by vegetable fats rich in polyunsaturated fatty acids, which have the property of lowering cholesterol levels.

12 Since the beginning of the 1990s, UDL has been marketing under the designation 'dietary spread' two products bearing the brand name Becel which in the future it intends to sell under the designations '*Holländisches Appetitstück — Diät-Käse*

mit Pflanzenöl für die fettmodifizierte Ernährung' (Dutch appertiser — Dietary cheese containing vegetable oil for a fat-modified diet) and '*Diät Weichkäse mit Pflanzenöl für die fettmodifizierte Ernährung*' (Dietary soft cheese containing vegetable oil for a fat-modified diet). The description on the packaging is to state, for the first product, '*Dieser Diät-Kase ist reich an mehrfach ungesättigten Fettsäuren*' (This dietary cheese is rich in poly unsaturated fats) and, for the second, '*Dieser Diät-Kase ist ideal für eine cholesterinbewußte Lebensweise*' (This dietary cheese is ideal for a cholesterol-conscious lifestyle).

13 The Schutzverband took the view that the new designations and descriptions which UDL plans to put on the two 'Becel' products are unlawful on the ground that cheese is a milk product whereas, in the composition of the 'Becel' products, the milk fat is entirely replaced by vegetable fat. It therefore brought proceedings against UDL in the Landgericht (Regional Court) Hamburg for an order restraining that undertaking from using the designation 'cheese' for those products and from putting those descriptions on their packaging. Its application was dismissed by the Landgericht but upheld by the appeal court. UDL appealed on a point of law to the Bundesgerichtshof, which, considering that the case raised questions of interpretation of Community law, decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

(1) Is Article 3(1) of Council Regulation (EEC) No 1898/87 of 2 July 1987 on the protection of designations used in marketing of milk and milk products, read in conjunction with Article 3(2) of Council Directive 89/398/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses, to be interpreted as meaning that a milk product, in which the milk fat has been replaced on dietary grounds by vegetable fat, cannot be described as cheese?

(2) If the first question is to be answered in the affirmative, does it matter that the designation 'Dietary cheese (Dietary soft cheese) containing vegetable oil for a fat-modified diet' is complemented by additional descriptive material on

the packaging, such as 'This dietary cheese is rich in polyunsaturated fats ...' or 'This dietary cheese is ideal for a cholesterol-conscious lifestyle?'

The first question

14 Before this question is answered, it is necessary to determine whether Article 3(1) of the Regulation applies to foodstuffs intended for particular nutritional uses.

15 In this regard, it must be concluded that the respective aims of the Regulation and of the Directive are different and that the Directive does not exclude the application of the Regulation to foodstuffs intended for particular nutritional uses. Whereas the Regulation is designed to protect designations used for milk and milk products, having regard to their natural composition, in the interests of producers and consumers, the purpose of the Directive is to lay down precise rules for the labelling and presentation of the products which it covers in order to ensure that their nature and composition are appropriate for the particular nutritional purpose for which they are intended.

16 Contrary to UDL's contention, it does not follow from Article 3(2) of the Directive, read in combination with the Regulation, that Community law not only does not preclude the dietetic variant of a foodstuff from being designated by the same sales designation as the normal corresponding product but even requires its use for the designation of that variant.

17 As the German Government submits, it is clear from the wording of Article 3(2) of the Directive that this provision covers only 'changes' made to products and therefore concerns only their composition and not their designation.

18 That interpretation is borne out by the wording of the fourth recital in the preamble to the Directive from which it is clear that derogations from the general or specific provisions applicable to foodstuffs are necessary only where those provisions do not allow the composition or preparation of a foodstuff to be changed in order to meet the particular nutritional aim of the products covered by the Directive.

19 It follows from the foregoing considerations that the designation of foodstuffs intended for particular nutritional uses is governed by the Regulation and that consequently they may be designated by the generic designation of the foodstuffs for normal consumption corresponding to them only when their composition, whilst being changed to meet the particular nutritional aim, is not contrary to the provisions relating to the protection of that designation.

20 As regards the question whether the designation 'cheese' may be used for a product in which the milk fat has been replaced by vegetable fat, it must be recalled first of all that, according to Article 2(2) of the Regulation and its Annex, the designation 'cheese' may be used only for 'milk products', which are 'products derived exclusively from milk, on the understanding that substances necessary for their manufacture may be added, provided that those substances are not used for the purpose of replacing, in whole or in part, any milk constituent.'

21 Paragraph (3) of that article provides that 'the designations used for milk products may be also be used in association with a word or words to designate

composite products of which no part takes or is intended to take the place of any milk constituent and of which milk or a milk product is an essential part either in terms of quantity or for characterisation of the product.'

22 It is clear from the wording of those provisions that a milk product, in which one or other constituent of milk has been replaced, if only partially, may not be designated by one of the designations referred to in the first indent of the second subparagraph of Article 2(2) of the Regulation.

23 Consequently, products derived from milk, such as those in question in the main proceedings, in which a milk constituent, in this case the animal fat, has been entirely replaced by another substance, namely vegetable fat, do not fall within the category of 'milk products' as defined in Article 2(2) of the Regulation and, in accordance with Article 3(1) of the Regulation, may not be designated by the designation 'cheese'.

24 In view of those considerations, the answer to be given to the first question must be that Article 3(1) of the Regulation, read in conjunction with Article 3(2) of the Directive, is to be interpreted as meaning that a milk product in which the milk fat has been replaced by vegetable fat for dietetic reasons may not be designated as 'cheese'.

The second question

25 In reply to this question, it must be recalled that, according to Article 3(2) of the Regulation, which is applicable to products other than those referred to in

Article 2 thereof, such as the products in question in the main proceedings, 'no label, commercial document, publicity material or any form of advertising ... or any form of presentation may be used which claims, implies or suggests that the product is a dairy product'.

26 However, as the Greek Government has rightly pointed out, the use of the designation 'dietary cheese' for products such as those in question in the main proceedings may give the consumer the impression that those products are covered by the designation 'milk products' within the meaning of the Regulation when that is not the case, and the descriptions which UDL plans to place on their packaging are not likely to counteract that impression or to remove the ensuing risk of confusion.

27 Those descriptions not only do not clearly indicate that the milk fat has been entirely replaced by vegetable fat but they even increase the risk of confusion in the consumer's mind in that, in breach of Article 3(2) of the Regulation, they suggest, by the unlawful use of the term 'cheese', that those products are milk products.

28 Consequently, it must be held that the use of descriptions such as those set out in paragraph 12 above does not affect the prohibition of use of the designation 'dietary cheese' for products in which one or other of the constituents of milk has been replaced by another substance.

29 That conclusion is not shaken by UDL's argument that the prohibition of use of the term 'cheese' for products derived from milk in which a natural constituent

has been replaced by a foreign substance, even where descriptions appear on the packaging, is contrary to the principle of proportionality.

30 According to the settled case-law of the Court, the principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions should not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, and Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 96).

31 It is also settled case-law that, as regards judicial review of the observance of the abovementioned conditions, the Community legislature has, in matters concerning the common agricultural policy, a discretionary power which corresponds to the political responsibilities placed upon it by Article 40 of the EC Treaty (now, after amendment, Article 34 EC), Articles 41 and 42 of the EC Treaty (now Articles 35 EC and 36 EC) and Article 43 of the EC Treaty (now, after amendment, Article 37 EC). Consequently, the legality of a measure adopted in this area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (*Fedesa and Others*, cited above, paragraph 14, and *United Kingdom* v *Commission*, paragraph 97).

32 As is clear from the third and sixth recitals in the preamble to the Regulation, the objective pursued by the legislature is to protect the natural composition of milk and milk products in the interests of Community producers and consumers and to

avoid any confusion in consumers' minds between milk products and the other food products, including those consisting partly of milk components.

33 Secondly, it is not established that the use of the term 'cheese' together with explanatory descriptions, such as those in question in the main proceedings, to designate products of which the milk fat has been entirely replaced by vegetable fat would be certain to prevent confusion in consumers' minds as to the composition of the product which they are about to purchase. However, it is clear that such use would impair the protection of the natural composition of milk and milk products.

34 Consequently, the prohibition of the use of the term 'cheese' to designate products derived from milk in which a natural constituent of milk has been replaced by a foreign substance, even when explanatory descriptions appear on the packaging, does not constitute a measure manifestly inappropriate to achieving the objective pursued and consequently such a prohibition is not contrary to the principle of proportionality.

35 In view of the foregoing, the answer to be given to the second question must be that, in the case of products derived from milk in which a natural constituent of milk has been replaced by a foreign substance, a designation such as 'Dietary cheese (Dietary soft cheese) containing vegetable oil for a fat-modified diet' may not be used even when that designation is accompanied by additional descriptions

on the products' packaging, such as 'This dietary cheese is rich in polyunsaturated fats' or 'This dietary cheese is ideal for a cholesterol-conscious lifestyle'.

Costs

36 The costs incurred by the German, Greek, French and Austrian Governments and by the Commission, which have 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 (Sixth Chamber),

in answer to the questions referred to it by the Bundesgerichtshof by order of 5 March 1998, hereby rules:

1. **Article 3(1) of Council Regulation (EEC) No 1898/87 of 2 July 1987 on the protection of designations used in marketing of milk and milk products, read**

in conjunction with Article 3(2) of Council Directive 89/398/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses, is to be interpreted as meaning that a milk product in which the milk fat has been replaced by vegetable fat for dietetic reasons may not be designated as 'cheese'.

2. In the case of products derived from milk in which a natural constituent of milk has been replaced by a foreign substance, a designation such as 'Dietary cheese (Dietary soft cheese) containing vegetable oil for a fat-modified diet' may not be used even when that designation is accompanied by additional descriptions on the products' packaging, such as 'This dietary cheese is rich in polyunsaturated fats' or 'This dietary cheese is ideal for a cholesterol-conscious lifestyle'.

Schintgen Kapteyn Hirsch

Delivered in open court in Luxembourg on 16 December 1999.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber