

OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 18 December 2008¹

I — Introduction

1. By order of 6 July 2007, received at the Court on 25 July 2007, the Corte d'appello di Torino (Court of Appeal, Turin) (Italy) has referred several questions for a preliminary ruling under Article 234 EC concerning, on the one hand, the validity of Council Regulation (EC) No 1347/2001 of 28 June 2001 supplementing the Annex to Commission Regulation (EC) No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92² ('Regulation No 1347/2001') as well as the validity of Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs³ ('Regulation No 2081/92') itself and, on the other hand, the interpretation of Regulation No 1347/2001.

2. More particularly, by its questions, the referring court wishes essentially to know whether the name 'Bayerisches Bier' was, having regard to the formal and substantive

requirements laid down in Regulation No 2081/92, validly registered under Regulation No 1347/2001 as a protected geographical indication ('PGI') and, if that is the case, to what extent that PGI affects the validity or usability of pre-existing trade marks used for beer in which the name 'Bavaria' appears.

3. The questions referred were raised in proceedings between, on the one hand, the Bayerischer Brauerbund eV ('Bayerischer Brauerbund') and, on the other, Bavaria NV and Bavaria Italia Srl ('Bavaria' and 'Bavaria Italia') concerning the use by the latter of international trade marks containing the word 'Bavaria'.

4. Related proceedings have been brought before the Community courts, namely, on 6 December 2007, Case T-178/06 *Bavaria v Council*, before the Court of First Instance and, on 20 March 2008, Case C-120/08 *Bayerischer Brauerbund*, before the Court of Justice. Both proceedings have been stayed, on 6 December 2007 and on 20 March 2008 respectively, until delivery of the judgment in the present case.

1 — Original language: English.

2 — OJ 2001 L 182, p. 3.

3 — OJ 1992 L 208, p. 1.

II — Legal framework

...

A — Regulation No 2081/92

2. This Regulation shall apply without prejudice to other specific Community provisions.'

5. Regulation No 2081/92 seeks to establish a framework of Community rules for the protection of registered designations of origin and geographical indications for certain agricultural products and foodstuffs where there is a link between the characteristics of the product or foodstuff and its geographical origin. That regulation provides for a system of registration at Community level of geographical indications and designations of origin which will confer protection in every Member State.

7. Annex I to that regulation, headed 'Foodstuffs referred to in Article 1(1)', mentions 'Beer' in its first indent.

8. Article 2(2) of Regulation No 2081/92 provides:

6. Article 1(1) and (2) of Regulation No 2081/92 provides:

'For the purposes of this Regulation:

'1. This Regulation lays down rules on the protection of designations of origin and geographical indications of agricultural products intended for human consumption referred to in Annex II to the Treaty and of the foodstuffs referred to in Annex I to this Regulation and agricultural products listed in Annex II to this Regulation.

...

(b) geographical indication: means the name of a region, a specific place, or, in

exceptional cases, a country, used to describe an agricultural product or a foodstuff:

common name of an agricultural product or a foodstuff.

— originating in that region, specific place or country, and

To establish whether or not a name has become generic, account shall be taken of all factors, in particular:

— which possesses a specific quality, reputation or other characteristics attributable to that geographical origin and the production and/or processing and/or preparation of which take place in the defined geographical area.'

— the existing situation in the Member State in which the name originates and in areas of consumption,

9. Article 3(1) provides:

— the existing situation in other Member States,

'Names that have become generic may not be registered.

— the relevant national or Community laws.

For the purposes of this Regulation, a "name that has become generic" means the name of an agricultural product or a foodstuff which, although it relates to the place or the region where this product or foodstuff was originally produced or marketed, has become the

Where, following the procedure laid down in Articles 6 and 7, an application of registration

is rejected because a name has become generic, the Commission shall publish that decision in the *Official Journal of the European Communities*.’

(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;

10. Under Article 13(1) of Regulation No 2081/92:

(d) any other practice liable to mislead the public as to the true origin of the product.

‘1. Registered names shall be protected against:

...’

(a) any direct or indirect commercial use of a name registered in respect of products not covered by the registration in so far as those products are comparable to the products registered under that name or in so far as using the name exploits the reputation of the protected name;

11. Article 14 of Regulation No 2081/92 concerns the relationship between protected designations of origin or geographical indications and trade marks. Article 14(2) (as originally enacted) and (3) provides:

(b) any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as “style”, “type”, “method”, “as produced in”, “imitation” or similar;

‘2. With due regard for Community law, use of a trade mark corresponding to one of the situations referred to in Article 13 which was registered in good faith before the date on

which application for registration of a designation of origin or geographical indication was lodged may continue notwithstanding the registration of a designation of origin or geographical indication, where there are no grounds for invalidity or revocation of the trade mark as provided respectively by Article 3(1)(c) and (g) and Article 12(2)(b) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks. [4]

3. A designation of origin or geographical indication shall not be registered where, in the light of a trade mark's reputation and renown and the length of time it has been used, registration is liable to mislead the consumer as to the true identity of the product.'

12. Article 14 of Regulation No 2081/92 was amended by Council Regulation (EC) No 692/2003⁵ with effect from 24 April 2003.

4 — OJ 1989 L 40, p. 1 (the 'Trade Marks Directive').

5 — Regulation of 8 April 2003 amending Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 2003 L 99, p. 1).

13. The 11th recital in the preamble to Regulation No 692/2003 states in that regard:

'Article 24(5) of the [Agreement on Trade-Related Aspects of Intellectual Property Rights] applies not only to trademarks registered or applied for but also those to which rights have been acquired through use before a specified date, notably that of protection of the name in the country of origin. Article 14(2) of Regulation (EEC) No 2081/92 should therefore be amended: the reference date now specified should be changed to the date of protection in the country of origin or of submission of the application for registration of the geographical indication or designation of origin, depending on whether the name falls under Article 17 or the Article 5 of that Regulation; also, in Article 14(1) thereof the reference date should become the date of application instead of the date of first publication.'

14. Article 14(2) of Regulation No 2081/92, as amended by Regulation No 692/2003, reads as follows:

'With due regard to Community law, a trademark the use of which engenders one of the situations indicated in Article 13 and which has been applied for, registered, or established by use, if that possibility is provided for by the legislation concerned, in good faith within the territory of the Community, before either the date of protection in the country of origin or the date of submission to the Commission of

the application for registration of the designation of origin or geographical indication, may continue to be used notwithstanding the registration of a designation of origin or geographical indication, provided that no grounds for its invalidity or revocation exist as specified by First Council Directive 89/104/EEC of 21 December [1988] to approximate the laws of the Member States relating to trade marks and/or Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.’

shall not apply. However, generic names shall not be added.

3. Member States may maintain national protection of the names communicated in accordance with paragraph 1 until such time as a decision on registration has been taken.’

15. As a derogation from the normal procedure provided for under Articles 5 to 7 of Regulation No 2081/92, Article 17 of that regulation sets up a simplified procedure for the registration of a PGI or a protected denomination of origin applicable to the registration of names already in existence on the date of entry into force of that regulation. Article 17 provides as follows:

16. The simplified procedure provided for under Article 17 of Regulation No 2081/92 was abolished, with effect from 24 April 2003, by Regulation No 692/2003.

‘1. Within six months of the entry into force of the Regulation, Member States shall inform the Commission which of their legally protected names or, in those Member States where there is no protection system, which of their names established by usage they wish to register pursuant to this Regulation.

B — *Regulation No 1347/2001*

2. In accordance with the procedure laid down in Article 15, the Commission shall register the names referred to in paragraph 1 which comply with Articles 2 and 4. Article 7

17. The effect of Regulation No 1347/2001 was to register the name ‘Bayerisches Bier’, notified by Germany, as a PGI under the simplified procedure laid down in Article 17

of Regulation No 2081/92 and to add that name to the Annex to Commission Regulation (EC) No 1107/96⁶ with effect from 5 July 2001.

tions provided for in Article 14(2) of Regulation (EEC) No 2081/92.’

18. The third and fourth recitals in the preamble to Regulation No 1347/2001 read as follows:

III — Factual background, procedure and questions referred

(3) The information provided confirms the existence of the name “Bavaria” as a valid trade mark. In view of the facts and information available, it was, however, considered that registration of the name “Bayerisches Bier” was not liable to mislead the consumer as to the true identity of the product. Consequently, the geographical indication “Bayerisches Bier” and the trade mark “Bavaria” are not in the situation referred to in Article 14(3) of Regulation (EEC) No 2081/92.

19. Bayerischer Brauerbund, which was founded in 1880, is a German association with the objective of promoting the common interests of Bavarian beer companies and, in particular, of protecting the PGI ‘Bayerisches Bier’ in Germany and abroad, of which it has been the proprietor since its registration by Regulation No 1347/2001. Since 1968, it has also been the proprietor of the international collective trade marks ‘Bayrisch Bier’ and ‘Bayerisches Bier’.

(4) The use of certain trade marks, for example, the Dutch trade mark “Bavaria” and the Danish trade mark “Høker Bajer” may continue notwithstanding the registration of the geographical indication “Bayerisches Bier” as long as they fulfil the condi-

20. Bavaria is a Dutch beer producer which operates on the international market. Originally named ‘Firma Gebroeders Swinkels’, ‘Bavaria’ has been its official company name since 1930. Bavaria Italia is part of the Bavaria group of companies.

6 — Regulation of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92 (OJ 1996 L 148, p. 1).

21. Bavaria and Bavaria Italia are, respectively, the proprietor and the user of several international trade marks, in force in Italy and

elsewhere, which contain, together with other expressions or figurative elements, the word 'Bavaria' as the core of those trade marks.

22. By proceedings brought before the Tribunale di Torino (District Court, Turin) on 27 September 2004, following similar proceedings in various other European States, in particular Germany and Spain, Bayerischer Brauerbund tried to stop Bavaria and Bavaria Italia from using, as regards Italy, those trade marks, by seeking an interlocutory ruling declaring that those marks were invalid or revoking them. Bayerischer Brauerbund took the view that the marks conflicted, for the purposes of Articles 13 and 14 of Regulation No 2081/92, with the PGI 'Bayerisches Bier' and, in any case, that they contained a geographical indication — the word 'Bavaria' — which was generic and misleading as to the geographical origin of the beer in question, since the beers concerned are Dutch.

23. By judgment of 30 November 2006, the Tribunale di Torino upheld the application of Bayerischer Brauerbund and forbade the use, as far as Italy is concerned, of the trade marks in question, on the grounds that they were misleading and conflicted with the PGI 'Bayerisches Bier'.

24. Bavaria and Bavaria Italia duly brought appeal proceedings against that decision before the referring court on a number of grounds.

25. According to the referring court, the ground of appeal which is material in the present context relates to the view taken by the Tribunale di Torino that it could not make a reference for a preliminary ruling under Article 234 EC on the validity of Regulation No 1347/2001, on the ground that Bavaria Italia should have contested that act directly on the basis of Article 230 EC, that is, within two months of its publication.

26. The referring court submits in that regard that the doubts raised as to the possibility of a preliminary ruling under the present circumstances should be addressed by the Court of Justice.

27. In addition, the referring court makes detailed reference to a number of arguments put forward by Bavaria and Bavaria Italia in order to challenge the validity of Regulation No 1347/2001 and the registration, by that regulation, of 'Bayerisches Bier' as a PGI, including the breach of general principles of law and the failure to comply with various procedural and substantive requirements laid down in Regulation No 2081/92, in particular Articles 2(2)(b), 14(3) and 17 thereof.

28. Against that background, the Corte d'appello di Torino has stayed proceedings and referred the following questions to the Court:

1. Is [Regulation No 1347/2001] invalid, possibly as a consequence of the invalidity of other acts, in light of the following:

Breach of general principles

- the invalidity of Article 1(1) of [Regulation No 2081/92], read in conjunction with Annex I thereto, in so far as it permits the registration of geographical indications relating to “beer”, which is an alcoholic beverage listed (wrongly) in that Annex as one of the “foodstuffs” referred to in Article 1(1), but which is not one of the “agricultural products” listed in Annex I to the EC Treaty and referred to in Article 32 (formerly Article 38) and Article 37 (formerly Article 43) thereof, which the Council took as the legal basis for its competence to adopt [Regulation No 2081/92];
- the invalidity of Article 17 of [Regulation No 2081/92] in so far as it provides for an accelerated registration procedure under which the rights of interested parties are substantially limited and impaired, in so far as it makes no provision for a right of opposition, in clear breach of

the principles of transparency and legal certainty, as is evident in particular from the complexity of the procedure for registering “Bayerisches Bier”, the protected geographical indication at issue, which took more than seven years from 1994 to 2001, and from the express acknowledgment to that effect in recital 13 in the preamble to [Regulation No 692/2003], Article 15 of which repealed — for those reasons — Article 17 of [Regulation No 2081/92];

Failure to comply with procedural requirements

- the failure of the indication “Bayerisches Bier” to satisfy the conditions laid down in Article 17 of [Regulation No 2081/92] for eligibility for registration in accordance with the simplified procedure provided for therein, in that, at the time when the application for registration was submitted, that indication was not a “legally protected name” in Germany, nor had it been “established by usage” there;
- the fact that the question whether the preconditions had been met for

registration of the indication “Bayerisches Bier” was not given due consideration either by the German Government before submitting the application, or by the Commission itself after receiving that application, contrary to the requirements established by the case-law of the Court of Justice (Case C-269/99 *Carl Kühne and Others* [2001] ECR I-9517);

- the fact that the application for registration of the indication “Bayerisches Bier” was not submitted in good time by the German Government in accordance with Article 17(1) of [Regulation No 2081/92] (six months after the entry into force of the Regulation, which took place on 24 July 1993), it being also the case that the subject-matter of the application initially submitted by the applicant company envisaged eight varying indications — with a reservation as to the possibility of later variations of an unspecified nature — which did not coalesce to form the current single indication “Bayerisches Bier” until well after the deadline on 24 January 1994;

requirements laid down in Article 2(2) (b) of [Regulation No 2081/92] for registration as a protected geographical indication, given the generic nature of that indication, which has historically designated beer produced in accordance with a particular method of production which originated during the 19th century in Bavaria, whence it spread throughout Europe and the rest of the world (the method known as “the Bavarian method”, based on bottom fermentation), and which even today in a number of European languages (Danish, Swedish, Finnish) is used as a generic term for beer and which, in any case, can at most identify, solely and generically, from among the numerous varieties of beer in existence any type of “beer produced in the German Land of Bavaria”, there being no “direct link” (Case C-312/98 *Warsteiner* [2000] ECR I-9187) between a specific quality, reputation or other characteristic of the product (beer) and its specific geographical origin (Bavaria), nor evidence that this is one of the “exceptional cases” required under Article 2(2)(b) of [Regulation No 2081/92] in order for it to be permissible to register a geographical indication containing the name of a country;

Failure to comply with substantive requirements

- failure of the indication “Bayerisches Bier” to satisfy the substantive
- the fact that, as emerges from the preceding paragraph, the indication “Bayerisches Bier” is a “generic”

indication, and as such ineligible for registration pursuant to Articles 3(1) and 17(2) of [Regulation No 2081/92];

IV — Legal analysis

A — *First question*

- the fact that registration of the indication “Bayerisches Bier” should have been refused pursuant to Article 14(3) of [Regulation No 2081/92], since, in the light of “the reputation and renown” of the Bavaria marks and “the length of time for which [they] have been used”, registration was “liable to mislead the consumer as to the true identity of the product”?

29. By its first question, which is divided into eight sub-questions (or grounds of invalidity), the Corte d’appello di Torino calls into question the validity of Regulation No 1347/2001 in light of a possible breach of general principles of Community law or of conditions laid down in Regulation No 2081/92, whether formal or substantive. The sub-questions concerning compliance with the general principles of Community law relate to Regulation No 2081/92, as the legal basis for Regulation No 1347/2001.

1. Admissibility

a) Main arguments of the parties

2. In the alternative, if Question 1 is held inadmissible or unfounded, should [Regulation No 1347/2001] be construed as meaning that recognition of the protected geographical indication “Bayerisches Bier” is to have no adverse effects on the validity or usability of pre-existing marks of third parties in which the word “Bavaria” appears?

30. In the present proceedings, written observations have been submitted by Bavaria and Bavaria Italia (jointly), Bayerischer Brauerbund, the Commission, the Council as well as by the German, Greek, Italian and Netherlands Governments. Those parties were represented at the hearing on 18 September 2008, at which, additionally, the Czech Government made oral submissions. The latter government stated that it shares, as

regards the substance of the first question referred, the views taken by the Commission, the Council, Germany and Italy, but, apart from that, concentrated its submissions on the question of the admissibility of the first question and on the second question referred.

not automatically imply that the mark 'Bavaria' can no longer be used.

31. Bayerischer Brauerbund, the Council, and the Czech, German, Greek and Italian Governments maintain that the question is inadmissible. Since Bavaria and Bavaria Italia are directly and individually concerned by Regulation No 1347/2001, as is clear from the third and fourth recitals in the preamble thereto, but did not bring an action under Article 230 EC for its annulment, they cannot plead before the national courts that that regulation is unlawful. According to the Council, it followed clearly from the registration effected by that regulation that the use of the mark 'Bavaria' may be affected. Bavaria was thus clearly able to grasp the consequences of that registration.

32. Bavaria and Bavaria Italia, the Commission and the Netherlands Government submit, by contrast, that the first question is admissible. Those parties maintain that Bavaria and Bavaria Italia could have entertained legitimate doubts as to whether they were directly and individually concerned by the provisions of Regulation No 1347/2001, since the effects of that regulation vis-à-vis those companies flowed from the application by the national court, in the case before it, of Articles 13 and 14 of Regulation No 2081/92, which seek to regulate the coexistence of existing trade marks with PGIs registered later. The Commission emphasised in this context that the registration in question does

b) Appraisal

33. The preliminary issue raised in this context by the referring court as well as by several parties is whether the first question referred, which calls into question the validity of Regulation No 1347/2001, as well as certain provisions of Regulation No 2081/92 on which it is based, is inadmissible having regard to the fact that Bavaria and Bavaria Italia have not brought an action for the annulment of Regulation No 1347/2001 before the Court of First Instance within the period laid down in Article 230 EC although they may have been entitled to do so.

34. As follows from the *TWD Textilwerke Deggendorf* case-law, a natural or legal person cannot, in principle, bring an indirect challenge to the validity of an act of a Community institution by means of a reference for a preliminary ruling if that person would have been entitled to do so directly on the basis of Article 230 EC.⁷

⁷ — See Case C-188/92 [1994] ECR I-833, paragraphs 13 to 15, and Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 36.

35. That limitation on the possibility of challenging a Community act by means of a reference for a preliminary ruling is intended to take account of the principle of legal certainty by preventing Community measures which involve legal effects from being called in question indefinitely. Otherwise, a person could overcome the definitive nature which a Community measure forming the basis of a decision adversely affecting him assumes as against that person even after expiry of the period for bringing a direct action provided for under the fourth paragraph of Article 230 EC.⁸

36. However, it appears clearly from settled case-law that a person is prevented from pleading the illegality of a Community act before the national court and from challenging its validity indirectly under Article 234 EC only if his entitlement to seek the annulment of that act under Article 230 EC was both plain and beyond doubt.⁹

37. Thus, as the present case concerns a regulation, the question to be asked is whether an action by Bavaria or Bavaria Italia against Regulation No 1347/2001 would undoubtedly have been admissible, since its provisions

constitute in reality a decision of direct and individual concern to them.¹⁰

38. In my view, it is not established that that is the case here.

39. As regards, in the first place, the requirement of direct concern,¹¹ it should be noted that if and to what extent the legal situation of companies and proprietors of trade marks other than those companies which use the name 'Bayerisches Bier', registered by Regulation No 1347/2001 as a PGI, is affected by that regulation depends in fact on the scope of protection which attaches to such registration. Thus, whether the user of a name such as 'Bavaria' is affected by the registration of 'Bayerisches Bier' as a PGI depends essentially on whether the use of the name concerned encroaches — under the terms of Article 13 of Regulation No 2081/92, or, if the name concerned is protected as a trade mark, under the terms of Article 14 of that regulation — on the PGI.

40. The answer to that question does not, however, follow automatically and without more from Regulation No 1347/2001 or Regulation No 2081/92, a point which is,

8 — See, to that effect, *TWD Textilwerke Deggendorf*, cited in footnote 7, paragraphs 16 to 18; *Nachi Europe*, cited in footnote 7, paragraph 37; and Case C-441/05 *Roquette Frères* [2007] ECR I-1993, paragraph 40.

9 — See, to that effect, inter alia, *TWD Textilwerke Deggendorf*, cited in footnote 7, paragraphs 24 and 25; *Nachi Europe*, cited in footnote 7, paragraph 37; *Roquette Frères*, cited in footnote 8, paragraphs 40 and 41; and Case C-241/95 *Accrington Beef and Others* [1996] ECR I-6699, paragraph 15.

10 — See *Roquette Frères*, cited in footnote 8, paragraph 41, and *Nachi Europe*, cited in footnote 7, paragraph 37.

11 — See as to that requirement, inter alia, Case C-386/96 P *Dreyfus v Commission* [1998] ECR I-2309, paragraph 43 and the case-law cited there.

moreover, demonstrated by the very substance of the present case.

41. In that context, it has also rightly been observed by some of the parties to the present proceedings that as regards, more particularly, Article 14(2) of Regulation No 2081/92, it is for the national court to decide whether the conditions laid down in that provision are satisfied and whether, as a result, the use of a trade mark such as 'Bavaria' may be continued.¹²

42. Finally, it is at least doubtful — and this is also an issue that arises in the present proceedings — to what extent the legal situation of Bavaria can be directly affected by the third and fourth recitals in the preamble to the regulation themselves.

43. In the light of the foregoing, it cannot in my view be said that it is plain that Bavaria is directly concerned by Regulation No 1347/2001, in conjunction with Regulation No 2081/92, for the purposes of bringing an action for annulment under the fourth paragraph of Article 230 EC.

12 — See Case C-87/97 *Gorgonzola* [1999] ECR I-1301, paragraph 36; see also points 156 to 158 below.

44. As regards, in the second place, the requirement that the contested measure be of individual concern to the persons challenging it, that is to say, that it affects them, according to the '*Plaumann* test', 'by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons',¹³ the present case must in my view be distinguished from *Codorníu* referred to by a number of parties to the present proceedings.

45. Firstly, as opposed to *Codorníu*, where it was clear that the Community provision at issue in that case, by reserving the right to use the term 'crémant' to producers from France and Luxembourg, prevented *Codorníu* from using its graphic trade mark 'Grand Cremant de Codorníu',¹⁴ it is much less evident in the present case to what extent the PGI 'Bayerisches Bier' in particular affects the use of the trade mark 'Bavaria' and therefore differentiates the proprietor of that trade mark from all other traders within the meaning of that case-law.

46. Secondly, and maybe more importantly, while it is true that the trade mark 'Bavaria' is singled out — alongside the trade mark 'Høker Bajer' — by being referred to expressly in the third and fourth recitals in the preamble to the contested regulation, account must in

13 — See Case 25/62 *Plaumann v Commission* [1963] ECR 95, 107; Case C-309/89 *Codorníu* [1994] ECR I-1853, paragraph 20; and Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 36.

14 — *Codorníu*, cited in footnote 13, paragraphs 21 and 22.

my opinion also be taken of the substance of that reference, namely a statement signalling that the use of the trade mark 'Bavaria' would not be adversely affected by the registration of 'Bayerisches Bier' as a PGI.

2. Substance

a) First sub-question concerning the legal basis of Regulation No 2081/92

47. It follows that Bavaria and Bavaria Italia could in my view entertain legitimate doubts as to their being directly and individually concerned by Regulation No 1347/2001, in conjunction with Regulation No 2081/92, and that it is not obvious that an action brought by them under Article 230 EC would have been admissible.¹⁵

49. By this question, the referring court queries the lawfulness of Regulation No 2081/92, given that it covers beer. Since beer is an alcoholic beverage, it cannot be treated as a 'foodstuff', as it is treated in that regulation, and in consequence it should have been excluded from the scope of the regulation. The referring court also questions the lawfulness of Regulation No 2081/92 in light of the fact that, since beer is not among the 'agricultural products' listed in Annex I to the EC Treaty, Articles 32 EC and 37 EC are not appropriate legal bases for the adoption of that regulation.

i) Main arguments of the parties

48. I therefore consider that the first question referred is admissible.

50. The Netherlands Government, Bavaria and Bavaria Italia share the doubts expressed in the first sub-question. Bavaria and Bavaria Italia maintain that the inclusion of beer among 'foodstuffs' is arbitrary and incorrect and that beer should have been excluded from the scope of Regulation No 2081/92 in the same way as wine was excluded pursuant to the second subparagraph of Article 1(1) thereof. They add that beer is not covered only tangentially by Regulations No 2081/92 and No 1347/2001. According to Bavaria and Bavaria Italia, the legal nature of PGIs as

15 — I should add that were the Court to find that in the factual and legal circumstances underlying the present case, where it was arguably at least suggested by the regulation concerned itself that Bavaria might not be affected by the registration at issue, Bavaria should nevertheless have brought an action for annulment, and were the Court thus to take a relatively restrictive stance on the admissibility of references for a preliminary ruling on validity, that might have the effect of encouraging unnecessary 'preventive' actions for annulment, for example by proprietors of trade marks, which would not be in the interest of the efficient administration of justice in the Community.

genuine intellectual property rights made it necessary to base Regulation No 2081/92, not on Article 37 EC, but on Article 308 EC and/or on Articles 94 EC and 95 EC.

exclusion of wine and spirits from its scope is based on other reasons and that there is no need to exclude all alcoholic beverages.

51. Bayerischer Brauerbund, the Commission and the Council, and the German, Greek and Italian Governments dispute the interpretation suggested by the referring court and maintain that Article 37 EC is the correct legal basis for the adoption of Regulation No 2081/92. Moreover and more generally, the Italian Government does not accept that the legality of Regulation No 2081/92 may be called into question in order to challenge the legality of Regulation No 1347/2001.

53. Bayerischer Brauerbund, the Commission and the Council, and the German and Italian Governments also submit that the primary or paramount aim of Regulation No 2081/92 is that laid down in Article 37 EC and, according to the case-law of the Court, that it is that provision that must be used as the legal basis.

ii) Appraisal

52. According to the German Government and the Council, beer is a foodstuff when considered in the light of the definition of ‘foodstuff’ set out in Article 2 of Regulation (EC) No 178/2002.¹⁶ The German Government also maintains, as does the Italian Government, that a schematic interpretation of Regulation No 2081/92 shows that the

54. First of all, the view must be rejected that beer is not to be regarded as a ‘foodstuff’ and could thus not be included as such in Annex I to Regulation No 2081/92. That view is not only contradicted by the important role beer plays traditionally, as the Czech Government emphasised at the hearing, in the gastronomy and eating habits of several Member States. Also, as the German Government and the Council have observed, beer appears to meet, for example, the definition of ‘foodstuff’ set out in Article 2 of Regulation No 178/2002,

¹⁶ — Regulation of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1).

whereby 'food' or 'foodstuff' means 'any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans'.

55. It should be noted, secondly, that it cannot be inferred from the fact that, as specified in Article 1(1) of Regulation No 2081/92, the Community legislature has decided to exclude wine products and spirit drinks from the scope of application of that regulation, that it lacked competence to include any alcoholic beverages or, more particularly, beer in the scope of that regulation. As is clear from the eighth recital in the preamble to Regulation No 2081/92, wines and spirit drinks were not included in the regulation on the ground that those beverages were already covered by specific Community legislation providing for a higher level of protection.

56. As regards, thirdly, the use of Article 37 EC as a legal basis although beer is not one of the agricultural products mentioned in Annex I to the EC Treaty, it appears from settled case-law that that article is the appropriate legal basis for any legislation concerning the production and marketing of agricultural products listed in Annex I to the Treaty which contributes to the achievement of one or more of the

objectives of the common agricultural policy set out in Article 33 EC.¹⁷

57. It is also established case-law that if examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component.¹⁸

58. In similar vein, the Court has held, in a context comparable to that of the present case, that where a legislative measure contributes to the achievement of one or more of the objectives of the common agricultural policy set out in Article 33 EC, it must be adopted on the basis of Article 37 EC even though, in addition to applying essentially to products mentioned in the Annex to the Treaty referred to by that article, it also covers other products not included in that annex.¹⁹

17 — See, to that effect, Case 68/86 *United Kingdom v Council* [1988] ECR 855, paragraph 14; Case 131/86 *United Kingdom v Council* [1988] ECR 905, paragraph 19; Case C-131/87 *Commission v Council* [1989] ECR 3743, paragraph 28; and Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraph 133.

18 — See, inter alia Case C-338/01 *Commission v Council* [2004] ECR I-4829, paragraph 55; Case C-155/91 *Commission v Council* [1993] ECR I-939, paragraphs 19 and 21; and Case C-36/98 *Spain v Council* [2001] ECR I-779, paragraph 59.

19 — See, to that effect Case C-11/88 *Commission v Council* [1989] ECR 3799, paragraph 15, and *United Kingdom v Commission*, cited in footnote 17, paragraphs 133 and 134.

59. In that light, it appears that Regulation No 2081/92 could validly be adopted on the basis of Article 37 EC in that it is clear that it covers principally products that are listed in Annex I to the Treaty and only a limited number of other products, such as beer, which are not mentioned in that annex. Thus, the fact that the regulation also refers to beer, which is not mentioned in Annex I to the Treaty, does not in my opinion of itself call into question the choice of Article 37 EC as a legal basis, particularly as beer constitutes a product whose production and marketing plainly contribute to the achievement of the objectives of the common agricultural policy.

60. I therefore take the view that the plea of invalidity concerning the legal basis of Regulation No 2081/92 is unfounded.

b) Second sub-question concerning the validity of Article 17 of Regulation No 2081/92

61. By the second sub-question, the national court is essentially asking whether Article 17 of Regulation No 2081/92 — by virtue of which Regulation No 1347/2001 was approved — is void, since the accelerated registration procedure established thereunder is in clear breach of the principles of

transparency and legal certainty in that no provision is made for a right of opposition for the economic operators concerned.

i) Main arguments of the parties

62. According to the Netherlands Government and Bavaria and Bavaria Italia, the grounds of invalidity referred to in the second sub-question are well founded.

63. Bavaria and Bavaria Italia point to the difference between Article 17 of Regulation No 2081/92 and Article 7 of that regulation, which makes express provision for a right of objection to the normal registration procedure. The wording of the 13th recital in the preamble to Regulation No 692/2003 implicitly acknowledges that Article 17 of Regulation No 2081/92 is void. Furthermore, *Kühne*²⁰ is in their view not applicable in the present case, in so far as in that case the third parties concerned had been able to play an active part in the national procedure in accordance with which the German Government had proposed the application for registration.

²⁰ — Case C-269/99 [2001] ECR I-9517.

64. Bayerischer Brauerbund, the Commission and the Council, and the German, Greek and Italian Governments dispute the interpretation proposed by the referring court. They essentially maintain that, although Article 17 of Regulation No 2081/92 made no provision for a right of opposition along the lines of Article 7, the fact remains that the third parties concerned are free to air their objections before the authorities of the Member States, who can then place them before the Regulatory Committee set up in accordance with Article 15 of the regulation, as has happened moreover in the present case. They also emphasise that the essential reason for repealing Article 17 of Regulation No 2081/92 was that it had originally been conceived as provisional and had exhausted its effects.

65. The Commission and the Council point out that the lawfulness of Article 17 of Regulation No 2081/92 has been recognised by the Court on a number of occasions and that the procedure laid down in that provision is not one which leads to the substantive conditions for registration being examined without due care — rather to the contrary as appears from the present case. They add that the 13th recital in the preamble to Regulation No 692/2003 merely sets out certain observations as to the difficulties that arise owing to the lack of any right of objection under Article 17 of Regulation No 2081/92: it does not, however, call into question the lawfulness of that provision.

ii) Appraisal

66. Contrary to the view taken by the Netherlands Government and Bavaria and Bavaria Italia, it can be inferred from *Kühne*²¹ that the simplified registration procedure provided for by Article 17 of Regulation No 2081/92 was not considered unlawful by the Court on the ground that — contrary to the position under the normal procedure, where Article 7 of that regulation applies — it did not enable interested third parties to object to a proposed registration.

67. In that case, the Court found that, although reference was made to the fact that the simplified registration procedure failed to provide for a right in favour of third parties to object to a proposed registration, the application of that procedure was lawful even where third parties had raised, at national level, objections to the registration of the designation in question.²² In that context, the Court also confirmed that it is indeed the national level at which account must be taken of possible objections of third parties who consider their rights infringed by the registration or the application for registration.²³

68. In that regard, as the German Government has submitted, it was also open to interested parties from other Member States to make objections to the competent German

21 — Cited in footnote 20.

22 — See, to that effect, in particular, paragraphs 35 and 40 of the judgment.

23 — See, to that effect paragraphs 41, 57 and 58 of the judgment.

authorities — or to their own Member State — regarding the registration of the PGI at issue, although the lawfulness of the application of the simplified procedure is, by contrast, as can be deduced from *Kühne*, not conditional upon third parties actually making use of that possibility.²⁴

69. It appears, moreover, from the information made available to the Court that Bavaria was in fact able, in the framework of the legislative process leading to the adoption of Regulation No 1347/2001, to make its view known to the Commission via the Netherlands authorities and to submit detailed observations in that regard.

70. As regards, next, the abolition of the simplified procedure by Regulation No 692/2003 and as regards the 13th recital in the preamble to that regulation, which makes reference to such abolition, I concur with the Council and the Commission that that recital does not amount to an ‘acknowledgement’, by the Community legislature, that the simplified procedure thus abolished was unlawful. First, that recital can simply be read as an acknowledgement that that procedure raises concerns of legal certainty and transparency, which is less than to say that it is unlawful for that reason. Secondly and in any event, whether a provision of secondary Community law such as Article 17 of Regulation No 2081/92 is actually lawful or not does not depend on a possible indication to that effect by the Community legislature in the

preamble to a Community act amending that provision.

71. Accordingly, the ground of opposition to the validity of Article 17 of Regulation No 2081/92 is unfounded.

c) Third, fourth and fifth sub-questions concerning a possible failure to comply with procedural requirements

72. By these questions, which it is appropriate to examine together, the referring court asks, first, whether the indication ‘Bayerisches Bier’ satisfied the conditions for the application of the simplified procedure under Article 17 of Regulation No 2081/92, that is to say, whether — at the time when the application for registration was submitted — the indication concerned was ‘legally protected’, or ‘established by usage’, in the Member State which had submitted the application. Secondly, the referring court asks whether Regulation No 1347/2001 is void given that the pre-conditions for registration of the PGI ‘Bayerisches Bier’ had not been given due consideration either by the German Government or by the Commission, and the application for registration of the indication had not been submitted in good time.

²⁴ — See paragraph 40 of the judgment.

i) Main arguments of the parties

73. The Netherlands Government and Bavaria and Bavaria Italia maintain that none of the conditions laid down in Article 17 of Regulation No 2081/92 was satisfied and that Regulation No 1347/2001 is void on the grounds stated by the referring court.

74. As regards the condition that the name be 'legally protected', Bavaria and Bavaria Italia point out that at the time of the application for registration there was no system in place in Germany dealing specifically with the legal protection of geographical indications. On that point, they state that neither the rules on unfair competition nor the collective marks registered in the name of Bayerischer Brauerbund can be regarded as constituting legal protection for the purposes of Article 17 of Regulation No 2081/92 — and the same is true as regards the bilateral agreements on the protection of geographical indications signed between Germany and France (1960), Italy (1963), Greece (1964), Switzerland (1967) and Spain (1970).²⁵

25 — France: BGBl. 1961 II, p. 23 (Convention of 8 March 1960, *United Nations Treaty Series* (UNTS) 1969 II No 2064, vol. 747, p. 2); Italy: BGBl. 1965 II, p. 157 (Convention of 23 July 1963, UNTS 1967 II No 1815); Greece: BGBl. 1965 II, p. 177 (Convention of 16 April 1964, UNTS 1972 II No 564, vol. 609, p. 27); Switzerland: BGBl. 1969 II, p. 139, and BGBl. 1965 II, p. 157 (Convention of 7 March 1967); and Spain: BGBl. 1972 II, p. 110 (Convention of 11 September 1970, UNTS 1995 II No 492, vol. 992, p. 87).

75. As to the condition that the name be 'established by usage', Bavaria and Bavaria Italia maintain that the indication 'Bayerisches Bier' has never designated any individual product: on the contrary, it denotes any type of beer produced in Bavaria, even though the characteristics of those beers vary widely.

76. Bavaria and Bavaria Italia go on to submit that, in the light of the statements made in support of the registration and the substantive observations contained in them, it was obvious that the application for registration had no basis and that, in consequence, the verification undertaken by both the German Government and the Commission as to whether the conditions under Regulation No 2081/92 had been complied with was vitiated by manifest error. Bavaria and Bavaria Italia claim in that regard that the initial application made a general reference to all types of beer produced in Bavaria, drawing no distinction in relation to other beers, and that the statement of reasons given in Regulation No 1347/2001 is inadequate.

77. Lastly, Bavaria and Bavaria Italia maintain that the amendments to the application for registration, made after the expiry of the deadline laid down in Article 17 of Regulation No 2081/92, are material and that it is therefore legitimate to conclude that the application was not submitted in good time.

78. Taking the contrary view, Bayerischer Brauerbund, the Commission, the Council, and the German, Greek and Italian Governments essentially maintain that the conditions laid down in Article 17 of Regulation No 2081/92 are satisfied in the present case, regard being had to the bilateral agreements mentioned above and the documents produced by the German authorities. The Council and the Italian Government submit that it is in any event for the Member States to assess whether the indication was legally protected or established by usage. In the second place, the arguments relating to the examination of the preconditions for registration of the PGI and the expiry of the period for submitting the application for registration are unfounded, since the application was examined with all due care and the application for registration was submitted in good time. The Commission points out in that regard that the essential elements of the product specification listed in Article 4(2) of Regulation No 2081/92 have never been amended.

ii) Appraisal

79. As regards the question of compliance with the six-month period laid down under Article 17 of Regulation No 2081/92, which should be examined in the first place, it should be noted at the outset that it is common ground that the original application was submitted by the German Government to the Commission on 20 January 1994, and thus before that period expired on 26 January 1994.

80. As to the subsequent amendments to the original application referred to by the referring court and the exchange of information between the Commission and the German authorities taking place after the expiry of the six-month period, it should be recalled that the Court observed in *Kühne*, which also concerned an application lodged by the German Government, that ‘unlike Article 5 of Regulation No 2081/92, which provides expressly that, in the normal procedure, the application for registration is to be accompanied by the specification, Article 17 of the regulation is confined to requiring the Member States to notify the Commission which of their legally protected names or, in those Member States where there is no protection system, which of their names established by usage they wish to register’. It concluded that in those circumstances Article 17 of Regulation No 2081/92 ‘cannot be interpreted as requiring the Member States to communicate, within the six months’ time-limit, the final version of the specification and the other relevant documents, so that any amendment of the specification originally submitted would lead to the application of the normal procedure.’²⁶

81. Thus, the Court held in that case that the amendments in question,²⁷ made after the expiry of the six-month period, did not make the application of the simplified procedure unlawful.²⁸

²⁶ — See *Kühne*, cited in footnote 20, paragraph 32.

²⁷ — The amendments in question concerned a request for registration as a geographical indication rather than a designation of origin, a change in the area covered and a change in the proportion of raw materials permitted to come from outside that area. See, to that effect, Opinion of Advocate General Jacobs in that case, cited in footnote 20, paragraphs 40 and 44.

²⁸ — See paragraphs 33 and 34 of the judgment.

82. In that light and bearing in mind the degree of precision and completeness which can realistically be expected from the Member States as regards the initial application to be lodged within the six-month period laid down by Article 17 of Regulation No 2081/92, it does not appear that the amendments to the application for registration and the supplementary documents and information provided by the German Government in the present case, concerning in particular the varieties of beers concerned by the application, substantially changed the subject-matter of the original application such as to render the registration procedure unlawful.

83. It should be noted in particular in that regard that essential elements of the product specification such as the name of the product and the geographical indication 'Bayerisches Bier', the description of the product and the definition of the geographical area remained unchanged during the registration procedure.

84. I therefore conclude that the application for registration of the indication 'Bayerisches Bier' is not to be considered as having been made outside the period laid down under Article 17 of Regulation No 2081/92.

85. In order to assess whether the other grounds raised by the referring court concerning compliance with the procedural

requirements under the simplified procedure are well founded, it is appropriate to recall the division of powers and obligations in the system of registration established by Regulation No 2081/92 between the Member State concerned, on the one hand, and the Commission, on the other, which the Court set out in *Kühne*.²⁹

86. According to that system, it is, both in the context of a normal and a simplified procedure, for the Member State concerned to check whether the application for registration is justified with regard to the conditions laid down by Regulation No 2081/92 and, if it considers that the requirements of that regulation are satisfied, to forward it to the Commission. The Commission then undertakes only a 'simple formal examination' to check whether those requirements are satisfied.³⁰

87. The Court attributed that system of division of powers particularly to the fact that registration assumes that it has been verified that a certain number of conditions have been met, which requires, to a great extent, detailed knowledge of matters particular to the Member State concerned, matters which the competent authorities of that State are best placed to check.³¹

29 — Cited in footnote 20, paragraphs 50 to 54.

30 — See *Kühne*, cited in footnote 20, paragraph 52.

31 — See paragraph 53 of that judgment.

88. In that context, in so far as the referring court makes, first, reference to a possible failure on the part of the German Government properly to consider, before submitting the application, whether the conditions for registration of the indication ‘Bayerisches Bier’ had been met, it suffices to note that it would be for the national court to rule on the lawfulness of the application for registration.³²

89. As regards, secondly, the question whether the Commission properly fulfilled its task in the present case of checking that the conditions for registration laid down by Regulation No 2081/92 were satisfied, it must be stated that there is nothing in the file to indicate, in general, that the Commission did not discharge its duty to undertake the formal examinations that were required. On the contrary, as the Commission and the Council rightly emphasise, it appears that the indication at issue was registered only after a lengthy procedure of seven years and as a result of an extensive discussion and assessment of the question whether the various conditions for registration were met in this case. In that regard, it should also be stated that the first recital in the preamble to Regulation No 1347/2001 itself indicates that additional information was requested in order to ensure that the registration of ‘Bayerisches Bier’ complied with Articles 2 and 4 of Regulation No 2081/92.

90. In my view, therefore, the general criticism to the effect that the question of

compliance with the preconditions of registration under Article 17 of Regulation No 2081/92 was not given due consideration is clearly unfounded.

91. As regards, finally, the question raised by the referring court as to whether the indication ‘Bayerisches Bier’ was a ‘legally protected name’ or ‘established by usage’ as required under Article 17 of Regulation No 2081/92, it should again be noted that it is for the competent authorities of the Member States concerned to make that assessment, on the basis of which the Commission may proceed, unless that assessment appears to be tainted by a manifest error, to registration of the indication.³³

92. In that regard, it must be observed in the present case that, in so far as Bavaria and Bavaria Italia maintain that there was no system in place in Germany specifically designed to address the legal protection of geographical indications or at least a system having a comparable effect or purpose, their arguments are in my view based on an incorrect understanding or, in any event, too narrow an understanding of Article 17(1) of Regulation No 2081/92. Account must be taken of the fact that at the time when the

32 — See, to that effect, *Kühne*, cited in footnote 20, paragraphs 57 and 58.

33 — See to that effect *Kühne*, cited in footnote 20, in particular paragraph 60.

Community system of protection established by Regulation No 2081/92 entered into force, a system of that kind for the protection of designations of origin and geographical indications did not exist in a number of Member States, including Germany.³⁴ The concepts of 'legally protected names' and 'establishment by usage' should therefore not be interpreted narrowly, as any interpretation must have the result of enabling the various Member States, despite their different legal traditions, to apply for registration of designations and indications under the simplified procedure.

labels containing the denomination 'Bayerisches Bier' and certain publications submitted to it by the German Government, that that name was established by usage, a conclusion which can in my view validly be drawn, or in any event can be drawn without committing a manifest error. It should be added in that respect that legal protection and usage of a name are not necessarily mutually exclusive concepts, in particular as usage of a name may under some systems even constitute a prerequisite for its legal protection.

93. That being said, I concur with the German Government that the five bilateral agreements on the protection of the indication 'Bayerisches Bier' referred to in the application for registration would of themselves suffice to establish legal protection of that name in Germany for the purposes of the application of the simplified procedure.

95. It appears therefore that the Commission could rightly assume that the indication 'Bayerisches Bier' satisfied the conditions of being legally protected or established by usage so as to warrant registration under the simplified procedure laid down under Article 17 of Regulation No 2081/92.

94. Furthermore, it appears in any event that the Commission inferred from those agreements, in combination with various beer

96. It follows that it must be held that the grounds mentioned by the referring court as regards a possible failure to comply with the procedural requirements for the application of the simplified procedure under Article 17 of Regulation No 2081/92 are unfounded.

34 — See *Kühne*, cited in footnote 20, paragraph 33; see also in that context Joined Cases C-465/02 and C-466/02 *Germany and Denmark v Commission* [2005] ECR I-9115, paragraph 98.

d) Sixth and seventh sub-questions concerning a possible failure to comply with substantive requirements laid down in Articles 2(2)(b), 3(1) and 17(2) of Regulation No 2081/92

of Article 2(2)(b) of Regulation No 2081/92. Secondly, there is no direct link between any quality, reputation or other characteristic of the beer in question and its geographical origin in Bavaria.

97. By those sub-questions, which it is appropriate to examine together, the referring court is essentially asking whether the registration of 'Bayerisches Bier' as a PGI could be void in so far as it is in reality a 'generic term' and exhibits no 'direct link', within the meaning of *Warsteiner*,³⁵ between a specific quality, reputation or other characteristic and its specific origin (Bavaria), with the result that it fails to satisfy the substantive conditions laid down in Articles 2(2)(b), 3(1) and 17(2) of Regulation No 2081/92.

100. Bavaria and Bavaria Italia maintain, next, that the generic nature of the indication 'Bayerisches Bier' came about because of the widespread use of the Bavarian production method based on bottom fermentation. One of the ways in which the truth of that assertion is borne out is the use of the word 'Bavaria', or its translations in other languages, as an element of names, trade marks and labels of companies the world over, including Germany, and as a synonym for beer in at least three Member States (Denmark, Sweden and Finland).

i) Main arguments of the parties

98. In the opinion of the Netherlands Government and Bavaria and Bavaria Italia, the grounds of invalidity raised in those sub-questions are well founded.

101. Bayerischer Brauerbund, the Commission and the Council, and the German, Greek and Italian Governments dispute the interpretation suggested by the referring court.

99. Bavaria and Bavaria Italia submit, first, that, since Bavaria is a country, the registration of a PGI with the same name in circumstances where there is no special factor to justify doing so is an infringement

102. With regard, specifically, to the conditions laid down under Article 2(2)(b) of Regulation No 2081/92, the Commission contends, first, that it is for the Member

³⁵ — Case C-312/98 [2000] ECR I-9187.

State concerned to verify that these are satisfied, the controls carried out by the Commission and Council being peripheral and limited to confirming the absence of manifest error.

ii) Appraisal

103. In any event, as Bayerischer Brauerbund, the Commission, the Council, and the German and Italian Governments maintain, under Regulation No 1347/2001, the determining factor justifying registration of 'Bayerisches Bier' as a PGI was not so much the quality of the beer, or some other characteristic, but its reputation. Moreover, it is plain that 'country' refers to a Member State or to a third country, but not to a region.

104. As regards the generic nature of the term, those interveners share the view that there is nothing in the order for reference to invalidate the reasoning set out in the recitals in the preamble to Regulation No 1347/2001. The Italian Government adds that this is a matter which can be raised only in the course of the registration procedure and that, in any event, Bavaria and Bavaria Italia have failed to show that, at the time when the application for registration was submitted, the indication had become generic. Bayerischer Brauerbund maintains that this matter is a question of fact, the assessment of which lies outside the jurisdiction of the Court in the context of a reference for a preliminary ruling. The German Government again refers to the bilateral agreements referred to in point 74 above as evidence that the indication is not generic.

105. It should be noted at the outset that although registration under the simplified procedure presupposes that the name concerned fulfils the substantive requirements of Regulation No 2081/92, which flow from the definition of the concept of geographical indication laid down in Article 2(2)(b) of that regulation and from the prohibition of registration of names which are or have become generic laid down in Articles 3(1) and 17(2) of that regulation,³⁶ and although the Commission has a duty to verify before registration that the name appears to satisfy those requirements,³⁷ judicial scrutiny of the substance of those questions must nevertheless remain limited in certain respects.

106. Such limitations follow, on the one hand, from the fact that, as was set out above, the duty to verify compliance with the substantive requirements of Regulation No 2081/92 incumbent on the Commission may itself, as a consequence of the division of powers

36 — See, to that effect, inter alia, Joined Cases C-289/96, C-293/96 and C-299/96 *Denmark, Germany and France v Commission* [1999] ECR I-1541, paragraph 92.

37 — See, in that regard, point 86 above, and *Denmark, Germany and France v Commission*, cited in footnote 36, in particular paragraph 54.

between the Member State concerned and the Commission, be limited in so far as such verification requires detailed knowledge of matters which the competent authorities of that State are best placed to check.³⁸

107. On the other hand, in so far as it is indeed for the Commission to undertake the necessary assessment of compliance with the substantive requirements for registration, it must be noted that to the extent that it is clear that such assessment may involve complex and factually sensitive determinations — which is particularly the case as regards the question whether or not a term is used in a generic way in the Member States — the Commission should in fact be accorded a certain margin of appreciation.³⁹

108. Against that background, I do not think that the points raised by the referring court with regard to the substantive requirements of Regulation No 2081/92 establish that the registration of the name ‘Bayerisches Bier’ by Regulation No 1347/2001 should be considered invalid.

38 — See to that effect points 85 to 87 above, and *Kühne*, cited in footnote 20, paragraphs 50 to 54 and 59 et seq.

39 — See to that effect case-law in various areas of Community law concerning the exercise of powers by the Community institutions in matters involving complex economic and/or social assessments: inter alia Case C-99/99 *Italy v Commission* [2000] ECR I-11535, paragraph 26; Case C-150/94 *United Kingdom v Council* [1998] ECR I-7235, paragraph 49; Joined Cases C-27/00 and C-122/00 *Omega Air* [2002] ECR I-2569, paragraph 65; Case C-87/00 *Nicoli v Eridania* [2004] ECR I-9397, paragraph 37; Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 83; and Case C-169/95 *Spain v Commission* [1997] ECR I-135, paragraph 34.

109. So far as compliance with Article 2(2)(b) of Regulation No 2081/92 is concerned, that article requires, first, that a direct link exists between both a specific quality, reputation or other characteristic of the product and its specific geographical origin.⁴⁰

110. In that regard, as the Commission and the Council have clarified, the decision to register the name ‘Bayerisches Bier’ as a PGI was, in accordance with the specification submitted, primarily based on the reputation which attaches in their view, in general, to beer originating in Bavaria.

111. The Commission apparently found that particular reputation of beer produced in Bavaria, at the time of registration, to be rooted in the long tradition of brewing in Bavaria and early measures taken there in order to ensure a certain quality of production as evidenced, for example, by the German ‘Reinheitsgebot’ dating back to 1516. That conclusion could in my view legitimately be drawn.

40 — See *Warsteiner*, cited in footnote 35, paragraph 43, and Joined Cases C-321/94 to C-324/94 *Pistre and Others* [1997] ECR I-2343, paragraph 35.

112. In so far as the referring court also noted that on the market at present there is no product called 'Bayerisches Bier' having such a direct link with its origin but rather a wide range of beers of various types which have in common only that they have been produced by breweries in Bavaria, that objection seems to be based on a misconception of the nature of a PGI and on a degree of confusion between the notion of a PGI and that of a trade mark. What is decisive, for the purposes of registering a PGI, is not whether the quality, reputation or other characteristic of a specific type or brand of beer is attributable to its geographical origin, but whether such a link can be established between the beverage 'beer' and the geographical origin concerned. Similarly, PGIs are not designed to distinguish a specific product or producer but can be used by all producers and with regard to all products, in this case by all types of beer, which emanate from the geographical area concerned and which satisfy the relevant product specifications.

113. Secondly, the definition of geographical indication laid down in Article 2(2)(b) of Regulation No 2081/92 requires that such an indication must contain 'the name of a region, a specific place or, in exceptional cases, a country'.

114. Although it may still exceptionally be possible to register the PGI at issue even if Bavaria were to be considered as a 'country', I

think that view, supported by Bavaria and Bavaria Italia and by the Netherlands Government, must be rejected. Bavaria is a *Land*, and thus one of the federal entities of the German Federal State and it is as such not appropriate — it being evident that Germany constitutes a country — to treat Bavaria as also being a 'country' within the meaning of Article 2(2)(b) of Regulation No 2081/92. Rather, therefore, Bavaria should be regarded as a 'region' within the meaning of that provision — a region, one may add, with a particularly strong cultural identity and particular traditions in which also beer has its prominent place.

115. It therefore does not appear from the matters referred to by the referring court that the registration of 'Bayerisches Bier' failed to comply with the requirements of Article 2(2) (b) of Regulation No 2081/92.

116. As for the question whether the indication 'Bayerisches Bier' should have been regarded as a generic term within the meaning of Articles 3(1) and 17(2) of Regulation No 2081/92, it should be recalled that according to settled case-law, in order to assess the generic character of a name, it is necessary 'to take into account the places of production of the product concerned both inside and outside the Member State which obtained the registration of the name at issue, the consumption of that product and how it is

perceived by consumers inside and outside that Member State, the existence of national legislation specifically relating to that product, and the way in which the name has been used in Community law'.⁴¹

117. As regards, more specifically, the argument addressed by the referring court that the indication at issue was used historically to designate — since the 19th century — a particular method of production, based on bottom fermentation, originating in Bavaria but has since spread throughout Europe, it should be noted, first of all, that even if that may have been the case, just as a name originally linking products to a certain region may become generic over time, it is possible for formerly generic terms to be used again in the sense of a geographical indication of a product, as was, according to the Commission and the Council, the case with 'Bayerisches Bier' after 1940.

118. In that regard, moreover, as the Commission has pointed out and as is also apparent from the fifth recital in the preamble to Regulation No 1347/2001, the Commission invited all the Member States to submit information regarding the use of the name 'Bayerisches Bier' or parts of it in order to assess, with regard to the Community situation as a whole, whether that term was generic in nature.

119. Although it is true that five Member States, as Bavaria and Bavaria Italia emphasised, appear to have indicated that that name or its translations may have become generic within the respective Member State, the Commission found, having assessed evidence made available to it, that only in Denmark are the terms 'bajersk' and 'bajer' on the point of becoming used generically to denote beer.

120. That finding of the Commission to the effect that in one Member State terms related to 'Bayerisches Bier' are becoming generic, which is based on an assessment of the evidence which I do not regard to be manifestly tainted by errors, does not of itself preclude that indication from being eligible for registration by virtue of Articles 3(1) and 17(2) of Regulation No 2081/92.⁴²

121. It appears therefore that the factors set out by the referring court do not warrant the

⁴¹ — See Case C-132/05 *Commission v Germany* [2008] ECR I-957, paragraph 53, and *Germany and Denmark v Commission*, cited in footnote 34, paragraphs 76 to 99.

⁴² — See, in this context, *Germany and Denmark v Commission*, cited in footnote 34, paragraphs 75 to 84.

conclusion that the indication ‘Bayerisches Bier’ was registered contrary to the prohibition of registration of names which are or have become generic laid down in Articles 3(1) and 17(2) of that regulation or that the Commission went beyond its margin of appreciation when assessing whether that condition of registration was satisfied.

122. It follows that the grounds of invalidity contained in the sixth and seventh sub-questions are unfounded.

e) Eighth sub-question concerning a possible failure to comply with substantive requirements laid down in Article 14(3) of Regulation No 2081/92

123. By this question, the referring court essentially wishes to know whether the registration of ‘Bayerisches Bier’ ought not to have been refused in accordance with Article 14(3) of Regulation No 2081/92, since, in the light of ‘the reputation and renown’ of the Bavaria trade marks and the length of time for which they have been used, the indication ‘Bayerisches Bier’ was ‘liable to mislead the consumer as to the true identity of the product’.

i) Main arguments of the parties

124. According to the Netherlands Government and Bavaria and Bavaria Italia, that question should be answered in the affirmative.

125. Bavaria and Bavaria Italia consider this question to be closely linked to the second question, which concerns the coexistence of the PGI ‘Bayerisches Bier’ with the trade mark ‘Bavaria’. They argue that, since the third recital in the preamble to Regulation No 1347/2001 does not accept that there is a likelihood of consumers being misled within the meaning of Article 14(3) of Regulation No 2081/92, such a likelihood must also be rejected in the context of the analysis relating to the coexistence of the above terms and, in consequence, their coexistence must be allowed.

126. Bayerischer Brauerbund, the Commission, the Council, and the German, Greek, and Italian Governments maintain that the situation contemplated in Article 14(3) of Regulation No 2081/92 is not that of ‘Bayerisches Bier’ and ‘Bavaria’.

127. The Commission and the Council point to the broad discretion left to the institutions by Article 14(3) of Regulation No 2081/92.

Together with the German Government, they emphasise that on the basis of the information and facts gathered in the course of the procedure and given the number of registered trade marks containing the word 'Bavaria' or similar terms, even if it cannot be ruled out that those marks have acquired a distinctive character through their prolonged and intensive use, the evidence provided was not sufficient to support the conclusion that consumers would have associated beers labelled 'Bavaria' with (the companies) Bavaria and Bavaria Italia, rather than with the German *Land* of Bavaria. That is especially the case as many 'Bavarian' beers and other products from Bavaria and bearing that name were available commercially at the time. Accordingly, it was found on the basis of the information available that the registration of 'Bayerisches Bier' would not be likely to mislead consumers as to the true identity of the product.

ii) Appraisal

128. Article 14(3) of Regulation No 2081/92 is clearly designed to protect a trade mark existing at the time of registration in that it prohibits registration of a designation of origin or geographical indication if registration is liable to mislead the consumer as to the true identity of the product. As I understand that provision, it is thus designed to prevent a product bearing a PGI from being confused by the consumer with a given trade mark product.

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129. Whether that is the case must be assessed by the Community legislature, according to the wording of that provision, 'in the light of a trade mark's reputation and renown and the length of time it has been used'.

130. In the present case, as is apparent from the third recital in the preamble to Regulation No 1347/2001, the Council and the Commission, recognising the existence of the name 'Bavaria' as a valid trade mark, concluded on the basis of the facts and information available that the registration of 'Bayerisches Bier' as a PGI was not liable to mislead the consumer as to the true identity of the product as regards the trade mark 'Bavaria'.

131. It must be noted in that regard that neither the referring court nor the parties to the present proceedings, in particular Bavaria and Bavaria Italia and the Netherlands Government, have in fact provided any material to demonstrate the extent to which that finding may be incorrect.

132. It therefore suffices to note that it is undisputed that the name 'Bavaria' is a well-known and established mark which has been used for a long time, as Bavaria and Bavaria Italia themselves have emphasised. It appears also from the submissions of the Commission

and the Council that, in examining whether the conditions of Article 14(3) of Regulation No 2081/92 were fulfilled, they took particular account of the length of time for which and the intensity with which the mark Bavaria has been used and of the distinctive character it has accordingly acquired.

f) Conclusion in respect of the assessment of validity

135. In the light of all the foregoing, it must be held that this assessment has not revealed anything which would establish the invalidity of Regulation No 1347/2001, or of Regulation No 2081/92 on which it is based.

B — *Second question*

133. In that light, the finding to the effect that the geographical indication ‘Bayerisches Bier’ and the trade mark ‘Bavaria’ are not in the situation which Article 14(3) of Regulation No 2081/92 is designed to cover appears not to be incorrect or to go beyond the discretion of the Commission and the Council in determining that issue,⁴³ given that the higher the reputation or renown of a mark, and thus the stronger its distinctiveness, the lower will be the likelihood that consumers may be misled to the extent of ascribing a product with a given PGI to that trade mark.

136. By its second question, which is asked in the event that the first question is held inadmissible or unfounded, the referring court essentially asks what effects the registration of ‘Bayerisches Bier’ as a PGI may have on pre-existing trade marks containing the word ‘Bavaria’. In particular, it wishes to know whether Regulation No 1347/2001 is to be construed as meaning that that registration may not have any adverse effects on the validity or usability of those trade marks.

1. Main arguments of the parties

134. It follows that the ground of invalidity concerning a possible failure to comply with Article 14(3) of Regulation No 2081/92 must be considered as unfounded.

137. Bavaria and Bavaria Italia maintain that the coexistence of the PGI ‘Bayerisches Bier’ with the pre-existing marks containing ‘Bavaria’ is expressly permitted, with binding effect for the national courts, by virtue of the fourth recital in the preamble to Regulation No 1347/2001. In any event, if follows from

⁴³ — See in that regard points 106 and 107 above.

the third and fourth recitals in the preamble to that regulation that the conditions laid down under Article 14(2) of Regulation No 2081/92 are satisfied.

preamble to Regulation No 1347/2001. Even it is for the national court to apply Article 14(2) of Regulation No 2081/92, it cannot reasonably be maintained that a finding on the part of the Community legislature does not hold good both for the Community and for the Member States. In any event, the national courts can apply Article 14(2) only with regard to the time after registration.

138. They emphasise, in the first place, that the trade marks predate the registration of the PGI, as does the use of the term 'Bavaria' in the company name. In the second place, the validity and good faith of the trade marks, as well as the absence of any risk that they may be misleading, were confirmed both by the position of the various representatives during the *travaux préparatoires* for Regulation No 1347/2001, expressed in a number of documents as well as in the fourth recital to the regulation, and by the constant references to the Netherlands as being the country of origin of the beer in the above marks and indications.

140. By the same token, it runs counter to the broad logic of Regulation No 2081/92 for the indication 'Bayerisches Bier' to be protected as a PGI because the Commission and the Council have found no conflict with the registered 'Bavaria' trade marks, whereas, by contrast, if the national courts find such a conflict, the protection given will be to 'Bayerisches Bier', to the detriment of the 'Bavaria' marks.

139. The Netherlands Government supports the position taken by Bavaria and Bavaria Italia and maintains that, throughout the registration procedure, the Commission and the German Government favoured the coexistence of the registered 'Bavaria' trade marks with the PGI 'Bayerisches Bier', and that this was reflected both in the minutes entered in the file and in the fourth recital in the

141. Bayerischer Brauerbund and the Commission, as well as the Czech, German, Greek, and Italian Governments, point out, by contrast, that it is, in any event, for the national court to assess whether the conditions under Article 14(2) of Regulation No 2081/92 are satisfied and, accordingly, whether the use of the 'Bavaria' trade marks may continue.

142. The Czech Government states that Article 14(2) and 14(3) of Regulation No 2081/92 have distinct objectives which may not be merged. Whereas compliance with Article 14(3) has to be assessed before registration, Article 14(2) concerns the use of a trade mark after registration and can thus lead to a national court prohibiting the use of an earlier trade mark.

143. According to the Commission, Regulation No 1347/2001 does not reflect any definitive position as to the coexistence of the PGI 'Bayerisches Bier' with the trade marks containing the word 'Bavaria'. In the view of the Greek Government, the recitals in the preamble to that regulation constitute evidence that consumers will not be misled.

144. Bayerischer Brauerbund maintains that the third recital in the preamble to Regulation No 1347/2001 relates only to Article 14(3) of Regulation No 2081/92, and cannot be applied to Article 14(2). According to Bayerischer Brauerbund, the conditions laid down under Article 14(2) are not satisfied in the present case in so far as, first, the marks in question are likely to mislead consumers as to the geographical provenance of the beer in question and, secondly, the marks have not been registered in good faith, since they are in breach of the national and international legislation applicable in the State of registration of the mark at the time when the application for registration was submitted.

2. Appraisal

145. As appears from the order for reference and the submissions, inter alia, of Bavaria and Bavaria Italia, the present question as to whether the registration of 'Bayerisches Bier' as a PGI by Regulation No 1347/2001 may affect the validity or usability of pre-existing marks containing the word 'Bavaria' is asked with reference, in particular, to the third and fourth recitals in the preamble to that regulation.

146. It should therefore be noted at the outset that the preamble to a Community act is descriptive of the motivation and intent of the Community legislature as regards the adoption of that act. As such, the recitals in the preamble to a Community act may therefore serve the Court, in so far as they set out the reasons for its adoption, as a basis for an assessment of the validity of the act concerned,⁴⁴ or, in that they may illustrate the object and purpose of a legislative act, can also be taken into account in the interpretation of the operative provisions of that act.⁴⁵

44 — See, for example, Case C-304/01 *Spain v Commission* [2004] ECR I-7655, paragraph 50; Case C-336/00 *Martin Huber* [2002] ECR I-7699, paragraph 35; and Case 250/84 *Eridania and Others* [1986] ECR 117, paragraph 37.

45 — See, for example, Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraphs 42 and 44, and Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 44.

147. By contrast, the recitals in the preamble to a Community act have no binding legal force of themselves and independently of the operative provisions of that act.⁴⁶

148. Thus, in the present case, the third and fourth recitals in the preamble to Regulation No 1347/2001 cannot as such be relied on as a basis for the coexistence of the marks containing ‘Bavaria’ with the PGI ‘Bayerisches Bier’.

149. Rather, the legal effects which the act of registration as a PGI, such as Regulation No 1347/2001 in the present case, entails are determined by Regulation No 2081/92, on which that registration is based.⁴⁷ If or how far the registration of ‘Bayerisches Bier’ as a PGI by Regulation No 1347/2001 may affect the validity or use of the pre-existing ‘Bavaria’ trade marks must consequently be assessed by reference to Article 14 of Regulation No 2081/92, which specifically governs the relationship between names registered under that regulation and trade marks.

46 — See to that effect for example Case C-162/97 *Nilsson* [1998] ECR I-7477, paragraph 54.

47 — The fact that the referring court made reference in this question only to Regulation No 1347/2001 does not preclude the Court from also taking into consideration Regulation No 2081/92: see to that effect, *inter alia*, Case C-315/92 *Verband Sozialer Wettbewerb ('Clinique')* [1994] ECR I-317, paragraph 7, and Case C-153/03 *Weide* [2005] ECR I-6017, paragraph 25.

150. In that regard, as several parties have correctly observed, Article 14(2) and 14(3) of Regulation No 2081/92 each have distinct objectives and functions in the balance that regulation seeks to strike between the protection of geographical indications and designations of origin, on the one hand, and trade mark rights, on the other.

151. As far as Article 14(3) of the regulation is concerned, that provision offers, as mentioned above, protection to pre-existing trade marks in so far as it prevents the registration of an indication or designation, the use of which would result in a likelihood of confusion with an earlier trade mark.⁴⁸

152. Article 14(3) of Regulation No 2081/92 thus acts as a barrier to registration, if properly applied by the Community legislature, of indications and designations likely to be confused with an existing trade mark within the specific meaning of that provision,

48 — See points 128 and 129 above.

without, however, ruling out the possibility that the pre-existing trade mark may still conflict with the registered name for the purposes of Article 13 of Regulation No 2081/92.

binding determination that the geographical indication 'Bayerisches Bier' may coexist with trade marks containing the word 'Bavaria'.

153. The 'compatibility test' based on the likelihood of confusion, as envisaged under Article 14(3) of the regulation, falls short of covering all the situations in which, according to the scope of protection afforded under Article 13 of the regulation, trade marks may encroach on names registered under that regulation. For example, it is clear that it would be possible for a protected designation to be evoked, for the purposes of Article 13(1) (b) of Regulation No 2081/92, where there was no likelihood of confusion between the products concerned and even where no Community protection extended to the parts of the designation which were echoed in the term or terms at issue.⁴⁹

155. By contrast, the principle of coexistence is enshrined in Article 14(2) of Regulation No 2081/92, which lays down the conditions under which an earlier trade mark — even though its use corresponds to one of the situations covered by Article 13 of the regulation⁵⁰ — may continue to be used notwithstanding the registration of a designation or indication.

154. It follows that the finding by the Community legislature in the present case, referred to in the third recital in the preamble to Regulation No 1347/2001, to the effect that the condition of registration laid down in Article 14(3) is satisfied, cannot amount to a

156. As is clear from its wording, that provision allows for the continued use of a trade mark which conflicts with a protected geographical indication or designation of origin for the purposes of Article 13 of Regulation No 2081/92 only on condition that, first, that trade mark was registered in good faith before the date on which the application for registration of a designation of origin or a geographical indication was lodged and, secondly, provided that there are no grounds for the invalidity or revocation of the trade mark as laid down under Article 3(1) (c) and (g) and Article 12(2)(b) of the Trade Marks Directive.

49 — See *Gorgonzola*, cited in footnote 12, paragraph 26.

50 — If that is not the case, there is, from the point of view of the protection afforded under Regulation No 2081/92, *a priori* no conflict between the registered name and the trade mark concerned.

157. In other words, in those limited circumstances, that is to say, where the earlier trade mark was not registered in good faith — a point which, according to *Gorgonzola*, turns essentially on the question whether the application for registration of the trade mark concerned was made in compliance with the rules of law, both national and international, in force at the time when that application was lodged — or, even though it was registered in good faith, if that trade mark is liable to be declared invalid or revoked on the specific grounds set out in the relevant provisions of the Trade Marks Directive, the protection of the registered designation of origin or geographical indication would prevail over the pre-existing trade mark.⁵¹

158. In that regard, it is important to note that the Court clearly stated in *Gorgonzola* that it is for the national court to determine whether the trade mark concerned has been registered in good faith and whether it is liable to be declared invalid or revoked on the basis of the Trade Marks Directive.⁵²

159. This implies that it is not for the Community legislature to make that determi-

nation when registering a designation of origin or geographical indication under Regulation No 2081/92.

160. It is clear from the preceding considerations that by stating in the fourth recital in the preamble to Regulation No 1347/2001 that the use of certain trade marks like 'Bavaria' may continue notwithstanding the registration of the geographical indication 'Bayerisches Bier' as long as they fulfil the conditions provided for in Article 14(2) of Regulation No 2081/92, the Community legislature merely restated the legal situation which results in any event from that article.

161. I therefore propose to answer the second question referred to the effect that Regulation No 1347/2001, in conjunction with Regulation No 2081/92, is to be interpreted as meaning that the registration of 'Bayerisches Bier' as a protected geographical indication does not affect the validity or usability of pre-existing trade marks of third parties containing the word 'Bavaria', provided, however, that those marks were registered in good faith and are not liable to be invalid or revoked on the basis of the Trade Marks Directive, as provided for under Article 14(2) of Regulation No 2081/92, which it is for the national court to determine.

⁵¹ — See *Gorgonzola*, cited in footnote 12, paragraphs 35 and 37.

⁵² — See *Gorgonzola*, cited in footnote 12, paragraphs 36 and 42 respectively.

V — Conclusion

162. I therefore propose that the Court answer the questions referred as follows:

- (1) Assessment of the question referred has not revealed any factors capable of affecting the validity of Council Regulation (EC) No 1347/2001 of 28 June 2001 supplementing the Annex to Commission Regulation (EC) No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92 or of Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs on which it is based.

- (2) Regulation No 1347/2001, in conjunction with Regulation No 2081/92, is to be interpreted as meaning that the registration of 'Bayerisches Bier' as a protected geographical indication does not affect the validity or usability of pre-existing trade marks of third parties containing the word 'Bavaria', provided, however, that those marks were registered in good faith and are not liable to be invalid or revoked on the basis of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks as provided for under Article 14(2) of Regulation No 2081/92, which it is for the national court to determine.