

OPINION OF ADVOCATE GENERAL
SAGGIO

delivered on 10 June 1999 *

1. This Opinion considers two questions, referred to the Court of Justice by the Bundesgerichtshof, which seek to establish whether a product derived from milk, in which, for dietary purposes, the natural milk fat has been replaced with vegetable fat, may none the less be marketed under the designation 'cheese', with the inclusion on the packaging, in this particular case, of additional information on the product's composition and specific use. The answer to these questions depends in particular on the interpretation of Council Regulation No 1898/87 of 2 July 1987 on the protection of designations used in the marketing of milk and milk products (hereafter: 'the Regulation'),¹ as well as Article 2(3) of Council Directive 89/398/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses (hereafter: 'the Directive').²

The legislative framework

2. Article 2(2) of the Regulation provides that the expression 'milk products' is to mean 'products derived exclusively from milk, on the understanding that substances necessary for their manufacture may be added, provided that those substances are not used for the purpose of replacing, in whole or in part, any milk constituent.' Article 2(3) further provides that 'the designations used for milk products may also be used in association with a word or words to designate composite products of which no part takes or is intended to take the place of any milk constituent and of which milk or a milk product is an essential part either in terms of quality or for characterisation of the product.' The designations reserved exclusively for milk products, listed in the Annex to the Regulation, include the designation 'cheese'.

* Original language: Italian.

1 — OJ 1987 L 182, p. 36. The regulation was most recently amended by Commission Regulation (EC) No 623/98 of 19 March 1998 (OJ 1998 L 83, p. 3).

2 — OJ 1989 L 186, p. 27. The directive was most recently amended by Directive 96/84/EC of the European Parliament and the Council of 19 December 1996 (OJ 1997 L 48, p. 20).

Article 3(1) of the Regulation then provides that the designations referred to in Article 2

‘may not be used for products other than those referred to in that Article.’³

3. Article 3(2) of the Directive provides that the products referred to in Article 1 (foodstuffs for particular nutritional uses⁴) must ‘comply with any mandatory provisions applicable to foodstuffs for normal consumption, save as regards changes made to them to ensure their conformity with the definitions given in Article 1.’

The facts and the questions referred for a preliminary ruling

4. The proceedings before the national court concern a dispute between the Schutzverband gegen Unwesen in der Wirtschaft e.V. (Registered Association for Protection against Unfair Business Practices) (hereafter: ‘the Schutzverband’), an association set up to safeguard competition, and the Union Deutsche Lebensmittelwerke GmbH (hereafter: ‘UDL’), a company which mainly produces cheese and products derived from cheese, including foodstuffs for particular nutritional uses and dietary foodstuffs. Under the brand

name ‘Becel’, UDL markets foodstuffs in which the animal fats, containing saturated fats, have been replaced by vegetable fats rich in polyunsaturated fats which have the effect of lowering cholesterol levels. The dispute concerns more specifically two products in the ‘Becel’ range, marketed from the beginning of the 1990s as ‘dietary spread’. The case arose because UDL wished to market those products under the designation ‘*Holländisches Appetitstück — Diät-Käse mit Pflanzenöl für die fettmodifizierte Ernährung*’ (Dutch appetiser — dietary cheese containing vegetable oil for a fat-modified diet) and ‘*Diät Weichkäse mit Pflanzenöl für die fettmodifizierte Ernährung*’ (Dietary soft cheese containing vegetable oil for a fat-modified diet) respectively; UDL also intended to include on the packaging of the first product the words: ‘This dietary cheese is rich in polyunsaturated fats’ and, on the second, the words: ‘This dietary cheese is ideal for a cholesterol-conscious lifestyle’.

5. The Schutzverband brought an action against UDL before the Landgericht (Regional Court) Hamburg, claiming that the designations and words that UDL was proposing to affix to the two products in issue had to be considered unlawful on the ground that while cheese falls into the category of milk and milk products, the two abovementioned products could not be included in that category because, in their case, all of the milk fat had been replaced by vegetable fat. It therefore sought an order restraining UDL from using the designation ‘cheese’ for the products in question and from including the abovementioned words on their packaging. The Landgericht dismissed the action. That

3 — Article 3(1) of the regulation ‘shall not apply to the designation of products the exact nature of which is clear from traditional usage and/or when the designations are clearly used to describe a characteristic quality of the product.’

4 — Pursuant to Article 1(2), that category includes those ‘foodstuffs which, owing to their special composition or manufacturing process, are clearly distinguishable from foodstuffs for normal consumption, which are suitable for their claimed nutritional purposes and which are marketed in such a way as to indicate such suitability.’

decision was appealed, and, overturning the decision at first instance, the appeal court allowed the appeal by the Schutzverband.

6. Thereafter, UDL lodged an appeal against the appeal court's decision with the Bundesgerichtshof, which has referred to the Court of Justice the following questions for a preliminary ruling on the interpretation of Article 3(1) of Council Regulation No 1898/87 of 2 July 1987 on the protection of designations used in the marketing of milk and milk products and of Article 3(2) of Council Directive 89/398/EC of 3 May 1989 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses. The questions referred by the Bundesgerichtshof are as follows:

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

(b) If the first question is to be answered in the affirmative, is it significant that the designation "dietary cheese (dietary

soft cheese) containing vegetable oil for a fat-modified diet" is complemented by additional descriptive material on the packaging, such as "this dietary cheese is rich in polyunsaturated fats" or "this dietary cheese is ideal for a cholesterol-conscious lifestyle?"

Observations of the parties

7. As regards the first question, UDL maintains that the relevant provisions of the Regulation and the Directive (Article 3(1) of the Regulation and Articles 3(2) and 7(1) and (2) of the Directive) have to be interpreted as meaning that, as a rule, the dietary alternative to a normal foodstuff must possess all the specific characteristics of the normal product, particularly as regards its manufacture, composition and nature, and its designation and labelling. According to UDL, the dietary product must comply with the requirements applicable to the foodstuff for normal consumption only in so far as this does not jeopardise its use as a product for particular nutritional use. On that basis, UDL concludes that such foodstuffs ought to be described using the same designation as is used for the corresponding product for normal consumption. In this case, therefore, it would be legitimate to use the term

‘cheese’, as this would enable consumers to distinguish the product in question from similar products.

The principal source of that analysis is Article 3(2) of the Directive, according to which products ‘characterised as “dietetic” or “dietary”’ must ‘comply with any mandatory provisions applicable to foodstuffs for normal consumption, save as regards changes made to them to ensure their conformity’ with dietetic or dietary uses.

According to UDL, that same conclusion is reached if account is taken of the need to protect quality foodstuffs from imitations. In that sense, the dietetic alternatives themselves constitute products with their own specific characteristics and, therefore, ought also to be protected against imitation.

8. As regards the second question, submitted in the alternative should the answer to the first question be that the dietetic products in issue cannot be described using the same designation used for the corresponding normal products, and more specifically the designation ‘cheese’, UDL points out that there are two possible ways of describing these products: they could be

described either using the normal term, that is the word ‘cheese’, or using a descriptive formula, which would have in any event to include the word ‘cheese’ in order to fulfil the function of an effective indicator for the product.

9. UDL then considers whether, as regards the use of the word ‘cheese’ to designate the dietetic products in issue, Article 3(1) of the Regulation is compatible with the principle of proportionality. It makes the general point that the provision is designed to protect consumers and to guarantee that milk and milk products are marketed in conditions of optimum competition. The first objective is automatically achieved because it has to be assumed that, since they have to contend with high levels of cholesterol and similar problems, the consumers of the dietetic products are well-acquainted with the product’s characteristics and, specifically, the fact that the natural fat has been replaced with vegetable fat, and are at any rate able to gather this from the words that appear on the packaging. As regards protecting the conditions of competition, UDL points out that dietetic products cost a great deal more than the corresponding normal products and do not appear on the market as imitations of the latter; they cannot, therefore, be considered to be in competition with them.

10. The Schutzverband, however, maintains that, according to the abovementioned provisions of the Regulation and

the Directive, a milk product in which the natural fat has been replaced with vegetable fat cannot be described as 'cheese', and any additional descriptive material appended to the packaging cannot eliminate the risk of confusion between the dietetic product and the corresponding product containing milk fat.

11. As regards the first question, the German Government takes the view that the relevant provision of the Directive ought to be interpreted in conjunction with the Regulation. Pursuing that line of argument, the German Government concludes that the exceptions to the system of designations, permitted for dietetic reasons, relate only to changes made to foodstuffs for dietetic purposes but do not affect product designation, which continues to be based on the need to avoid misleading consumers. Accordingly, milk products are characterised by the fact that they derive exclusively from milk. It follows that the descriptive formulas proposed by UDL to describe the two dietetic products in issue, which include the word 'cheese' even though the products contain no milk fat, are likely to mislead consumers and are not therefore compatible with the abovementioned provisions of the Regulation and the Directive.

As regards the second question, submitted in the alternative, the German Government goes on to state that it must be answered in

the negative, but only, of course, if the first question is answered in the affirmative.

12. The Austrian Government contends that the relevant legislation does not allow the designation 'cheese' to be used for a product whose composition differs substantially from that of the corresponding normal product. That obstacle cannot be overcome by specifying that this is a dietetic product. As far as the Austrian Government is concerned, it is in any event essential that a separate designation be used. Even if further descriptive material were added, the word 'cheese' could still not be used.

13. The French Government interprets Article 3(1) of the Regulation as meaning that a milk product in whose composition the milk fat has been replaced with vegetable fat cannot be designated as 'cheese'. It further considers that affixing descriptive material that includes the word 'cheese' to the packaging does not have the effect of lifting the prohibition on using that word to describe the product in question.

14. The Greek Government puts forward an argument similar to that of the French Government.

15. Finally, the Commission, too, considers that a milk product in which the natural milk fat has been replaced with another substance that is not derived from milk cannot be described using the designation 'cheese'; the Commission further states that this is borne out by the provisions of the Directive, given that they concern the nutritional characteristics of the dietetic products but do not affect the rules on product designation.

tetic products'). It should be pointed out that while, on the one hand, Article 3(2) of the Directive requires that dietetic products must comply with any mandatory provisions applicable to the corresponding foodstuff for normal consumption, it also provides for an exception to that requirement by allowing for the possibility that the composition of such products may be changed where necessary to ensure their conformity with the particular nutritional use for which they are intended.

The first question

It is therefore necessary to establish whether the prohibition on using the designation 'cheese' may be brought under that exception.

16. By its first question, the national court is asking the Court of Justice whether the prohibition laid down in Article 3(1) of the Regulation — which provides that the designations used for milk and milk products cannot be used for other products — must extend to other products derived from milk in which, for dietetic reasons, the natural fat has been replaced with vegetable fat, in accordance with Article 3(2) of the Directive. All the Member States that have submitted observations in the case, the Schutzverband and the Commission maintain that the prohibition must apply in such circumstances. Only UDL takes the opposite view.

18. According to UDL, not only do the provisions of Community law which guarantee the protection of the designations applicable to certain foodstuffs for normal consumption permit the dietetic alternatives to such products to be described using the sales designations reserved for foodstuffs for normal consumption, but they actually require that those designations be used, including for the dietetic alternatives.

17. In order to answer this question, it is first necessary to establish whether the prohibition laid down in Article 3(1) of the Regulation applies to products for particular nutritional uses (hereafter: 'die-

19. That argument cannot be accepted. It runs counter to the point made by the German Government that the exception provided for in the Directive plainly refers solely to the provisions relating to the composition of the product for normal consumption but not those concerning its designation. That is clear from the wording

of Article 3(2) of the Directive which refers to 'changes made to them (the products)', thus alluding to the substance of the products themselves and not their designation. Pointing to the same conclusion is the fact that the Directive regulates the composition of the foodstuffs for particular nutritional uses and indicates the supplementary information that has to be given to consumers, in addition to that provided for in Directive 79/112/EEC,⁵ but in no way relates to their designation which therefore remains entirely governed by the Regulation. It follows that, in principle, dietetic products may be marketed under the generic designation of the corresponding product for normal consumption, accompanied by an indication of their particular nutritional characteristics (see Article 7(2) of the Directive). That parallel designation cannot, however, be used, if the composition of the dietetic products is incompatible with the provisions on use of the above-mentioned designations.⁶

20. If those criteria are applied to this case, the producer has to be allowed to change

5 — Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1). The directive was most recently amended by European Parliament and Council Directive 97/4/EC of 27 January 1997 (OJ 1997 L 43, p. 21).

6 — For instance, while, in accordance with Article 3(2) of the directive, dieteric chocolate for diabetics has to contain all the mandatory constituents of chocolate for normal consumption, it can be produced by replacing the sugars that diabetics are unable to tolerate with fructose or certain sugar substitutes. In the absence of contrary provisions concerning the use of the designation 'chocolate', the chocolate thus produced will be able to be marketed under that same designation, to which should be added an expression identifying its special nature, such as the word 'dieteric'.

the constituents of a milk product to secure conformity with the intended nutritional use and to market the product thus modified. It has, however, to be pointed out that when the product is marketed it will not be able to be labelled with the protected designation if it does not contain the constituents of milk products which have, according to the Regulation, to be present before the protected designation can be used.

21. In conclusion, the result of applying the derogation provided for in the Directive cannot be to preclude application of the Regulation. Since it is specific in its content, which is designed to protect the designations of milk and milk products, the Regulation constitutes a *lex specialis* and, as such, takes precedence over the Directive, which encompasses all products for particular nutritional use without distinction and is therefore general in scope.

22. That conclusion is confirmed by the point that the Regulation contains no provision designed to exclude dietetic foodstuffs from its scope,⁷ and the fact that the

7 — The Commission proposal (OJ 1984 C 111, p. 7) did in fact provide for such an exclusion. Article 4 read: 'This Regulation shall not affect the provisions concerning foodstuffs for particular nutritional uses within the meaning of Directive 77/94/EEC ...'. The latter Directive (OJ 1977 L 26, p. 55) was in fact replaced by the Directive at issue here. The fact that the proposal was not accepted indicates that the Community legislature intended the regulation to apply to dietetic products also.

Directive contains no provision designed to preclude application of the Regulation. terms of quantity or for characterisation of the product.’

23. Having made those general points, it is now necessary to establish whether the prohibition on using the designation ‘cheese’ arising from Article 3(1) of the Regulation, has also to apply to those products derived from milk in which the natural fat has been replaced with vegetable fat for dietetic reasons.

24. Article 2(2) of, in conjunction with the Annex to, the Regulation provides that the designation ‘cheese’ is to be reserved solely for ‘milk products’ which include all products derived exclusively from milk. Article 2(2) further provides that to those products ‘may be added substances necessary for their manufacture provided that those substances are not used for the purpose of replacing, in whole or in part, any milk constituent.’ Similarly, Article 2(3) provides that ‘the designations used for milk products may also be used in association with a word or words to designate composite products of which no part takes or is intended to take the place of any milk constituent and of which milk or a milk product is an essential part either in

25. The actual wording of the abovementioned provisions is very clear. They have to be interpreted as meaning that products, including ‘cheese’, may be described using the designation ‘milk products’ only if they are products derived exclusively from milk and provided that no milk constituent has been replaced, even partially, during the manufacturing process. It follows that, where in a product, such as cheese, derived from milk, the natural milk fat is replaced with vegetable fat, that product can no longer be considered to be derived exclusively from milk. In accordance with Article 2 of the Regulation, the product thus manufactured cannot therefore be included in the category of ‘milk products’ and, consequently, cannot be described and marketed using the designation ‘cheese’.

26. That prohibition was introduced because of the need to protect consumers. As is clear from the sixth recital of the Regulation, the Community legislature wished specifically to ‘avoid any confusion in the mind of the consumer between milk products and other food products, including those consisting partly of milk components.’ That kind of confusion might well arise in the mind of a consumer faced with a product designated as ‘dietetic cheese’ in which the natural milk fat has been replaced with vegetable fat. In those circumstances, reading the word ‘cheese’, a

consumer may be led to believe that this is a product exclusively derived from milk, but that consumer will in fact be purchasing a product which, although derived from milk and manufactured using cheese-making processes, is quite different from cheese because one of its constituents — the milk fat — has been entirely replaced with a different constituent — vegetable fat — that milk products do not contain.

27. However, this interpretation of the prohibition on using the designation 'cheese' for products that do not fall into the category of 'milk products' does not further imply that it is impossible to use that designation for cheeses intended for a particular nutritional use. On the basis of the relevant legislation, as interpreted above, it is still possible to use the designation 'dietetic cheese' to describe a cheese in which the natural milk fat content has been substantially reduced but has not been replaced with other non-milk substances such as, for instance, fats of vegetable origin. The essential and defining constituent of a milk product, and thus of cheese, is that any non-milk substances added to the naturally-occurring substances during the manufacturing process should not have replaced, even in part, any of the product's natural constituents.

28. That interpretation of the scope of the prohibition at issue is consistent with the approach taken in the case-law of the Court of Justice on the compatibility with Community legislation, and in particular with Article 30 of the Treaty on the free movement of goods, of national legislation on milk products. For example, in its judgment of 14 July 1988 in Case 298/87, the Court recognised that where the gustatory characteristics of a product lawfully manufactured in one Member State and sold in another Member State are substantially different from the product manufactured in and marketed in the latter Member State under a name that has become customary, the authorities of that State may require that the product be marketed under a name other than that used for the customary national product. That case concerned the import of frozen yoghurt and, consequently, the nature and significance of the differences between frozen and fresh yoghurt. The Court recognised the compatibility with Community law of the prohibition under national law banning the use of the name 'yoghurt' to sell frozen products 'if the yoghurt, having undergone deep-freezing, no longer had the characteristics which the consumer expects when buying a product bearing the name "yoghurt"'.⁸ Taking the same approach, in its judgment of 22 September 1988, the Court confirmed, albeit in an *obiter dictum*, that it would be incompatible with Article 30 of the Treaty and, more generally, with the objectives of a common

8 — Case 298/87 *Smanor* [1988] ECR 4489, paragraphs 21 and 24 in particular.

market, to import and market goods, if 'a product presented under a particular name is so different, as regards its composition or production, from the products generally known by that name in the Community that it cannot be regarded as falling within the same category'.⁹ In that judgment too, then, the Court accepted, albeit extraneously to the structure of its reasoning, that, in the interest of consumer protection, it was necessary to preclude the use of the traditional name of the product where its composition had been substantially changed. At issue in that case was the use of the name 'cheese' for products with a certain minimum fat content. The Court did not accept that the conditions for prohibiting use of that name had been met in that case, but did recognise that it cannot be stated, in principle, that 'a Member State may not lay down rules making the use by national producers of a name for a cheese subject to the observance of a traditional fat content'.¹⁰

the Council of 27 January 1997 amending Directive 79/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, which, in exceptional cases, accords the authorities of the State of importation or marketing the possibility of prohibiting the use of the sales name of the Member State of production when the foodstuff it designates 'is so different, as regards its composition or manufacture, from the foodstuff known under that name' that it is not possible to guarantee correct information that would enable consumers to know the true nature of the foodstuff and to distinguish it from foodstuffs with which they could confuse it, by placing appropriate 'descriptive information' on the product packaging 'in proximity' to the sales name.

29. My interpretation of Article 3(1) of the Regulation is consistent with Directive 97/4/EC of the European Parliament and

30. For all of the above reasons, I propose that the answer to the first question should be that Article 3(1) of the Regulation, read in conjunction with Article 3(2) thereof, must be interpreted as meaning that a milk product in which the natural milk fat has been replaced with vegetable fat cannot be described using the designation 'cheese'.

9 — Case 286/86 *Ministère public v Deserbais* [1988] ECR, paragraph 13. That case concerned French legislation which penalised under the criminal law the use of the designation 'Edam' cheese for cheeses containing less than 40% fat.

10 — Paragraph 11 of the judgment in case 286/86, cited in footnote 9 above.

The second question

31. As I have proposed that the first question be answered in the affirmative, it is necessary to reply also to the second question, submitted by the national court in the alternative.

32. By its second question, the national court is asking whether it is significant that the designation 'dietary cheese containing vegetable oil for a fat-modified diet' is completed by additional descriptive material on the packaging, such as 'this dietary cheese is rich in polyunsaturated fats' or 'this dietary cheese is ideal for a cholesterol-conscious lifestyle.'

33. In my view, the addition of written explanations of this kind does not prevent it from being unlawful to use the designation 'cheese' for the abovementioned products, characteristic of all of which is the fact that the animal fat has been replaced with vegetable fat. The Community legislature recognises that the function of the designation 'cheese' is to guarantee to consumers that all the constituents of the product in question are present and that, consequently, if one or more of those constituents are absent, whatever additional information is provided, that designation cannot be used. That seems clear,

bearing in mind that one of the provisions of the Regulation, Article 3(2), specifically provides that 'in respect of a product other than those described in Article 2, no label, commercial document, publicity material or any form of advertising... or any form of presentation may be used which claims, implies or suggests that the product is a dairy product.'

34. In that connection, it has at any rate to be borne in mind that the abovementioned written explanations plainly do not imply any change in relation to the substance of the prohibition which is based on the need rigorously to protect consumers with respect to any changes in the product's composition. It follows that no additional explanation relating to the product name can have any effect on the scope of the prohibition. In other words, there is an absolute presumption that the use of the word 'cheese' to describe milk products whose composition has been changed as described above constitutes a risk to the

consumer that can be obviated only by means of the prohibition in question, but not, also, by providing information on the packaging.

35. The Court of Justice takes a similar approach in its case-law on the compatibility with Community law, and with Article 30 of the Treaty in particular, of national legislation on the designation of foodstuffs. I would point out that the Court has ruled that national legislation designed to guarantee that products are correctly designated, and thus to guarantee consumer information and fair trading, is not incompatible with Article 30 if it is justified on grounds of public interest in consumer protection.¹¹ I would further mention that, as I have already pointed out in my analysis of the first question, according to the Court, supplementing the name of the product with descriptive information may not be sufficient to guarantee that the consumer is properly informed, for instance, in the event that the characteristics of the product marketed differ substantially from those of the product with which the customary name is associated.¹²

11 — See, for example, Case 27/80 *Fietje* [1980] ECR 3839.

12 — Paragraph 23 of the judgment in Case 298/87 *Smanor*, cited in footnote 8 above. That case involved a label indicating the sell-by or use-by date. See also Case C-3/91 *Exportur* [1992] ECR I-5529, paragraphs 27 and 28.

36. In response, UDL states that if Article 3(1) of the Regulation is interpreted as meaning that the use of the word 'cheese' to describe products derived from milk in which one natural constituent has been replaced with a non-milk constituent is prohibited, and that prohibition applies even in the event that explanatory notes have been affixed to the packaging, it would have an excessive scope unnecessary for consumer protection and would therefore be incompatible with the principle of proportionality. UDL in fact takes the view that that protection could be provided just as effectively using the abovementioned explanatory notes. According to UDL, that consideration corroborates the view that the prohibition in issue ought in fact to be interpreted flexibly, by recognising that it is also possible to use the word 'cheese' for milk products in which the natural milk fat has been replaced with vegetable fat, always provided that information to the consumer is properly guaranteed.

37. That argument is unfounded. In the light of the general scheme of the Regulation at issue, and Article 3(1) in particular, it cannot be accepted.

38. It should be pointed out that the Regulation lays down rules governing the designation of milk products for the purpose of protecting the natural composition of such products in the interest of Community producers and consumers and recognises the need to 'avoid any confusion in the mind of the consumer between milk products and other food products, including those consisting in part of milk components'.¹³ It is well known that, in accordance with settled case-law of the Court of Justice, a provision may restrict the freedom of activity of an economic operator only to the extent that this is necessary to attain the objective the legislature is seeking to achieve through that restriction. That same case-law also emphasises that when, as in this case, the Community legislature intervenes in the area of economic activity, it must have a broad margin of discretion in relation to the decisions it takes.¹⁴

tion should be construed as absolute in scope. I believe that question should be answered in the affirmative. By using its margin of discretion, which is particularly broad where its acts affect economic activity, the Community legislature clearly considered that only a strict ban on the use of the designation 'cheese' for products derived from milk from which the natural milk fat has been removed could with certainty prevent any confusion that might arise in the mind of the consumer as a result of the use of the word 'cheese', even if accompanied by written explanations. It must be considered that it is the word 'cheese' that attracts the consumer's attention and informs his choice, whereas it can be assumed that, while the written explanations may have an influence on the consumer's choice, that influence will, in any event, be marginal. It follows that the prohibition in issue cannot be considered disproportionate to the aim pursued. That conclusion confirms the interpretation of Article 3(1) I proposed above.

39. By adopting this legislation, the Community legislature considered it crucial to introduce the prohibition in issue. The question arises whether, in the light of the principle of proportionality, that prohibi-

40. I would therefore propose that the Court answer the second question in the negative and more specifically to the effect that the prohibition laid down in Article 3(1) of the Regulation continues to apply even where the designation 'cheese' is complemented by additional descriptive material on the packaging, such as 'this dietary cheese is rich in polyunsaturated fats' or 'this dietary cheese is ideal for a cholesterol-conscious lifestyle'.

13 — See the sixth recital of the Regulation.

14 — See, most recently, Case C-150/94 *United Kingdom v Council* [1998] ECR I-7235; Case C-122/95 *Germany v Council* [1998] ECR I-973; Case C-4/96 *Northern Ireland Fish Producers' Organisation Ltd (NIFPO) and Northern Ireland Fishermen's Federation v Department of Agriculture for Northern Ireland* [1998] ECR I-681.

Conclusions

41. I therefore propose that the Court give the following answers to the questions submitted by the Bundesgerichtshof:

- (1) Article 3(1) of Council Regulation (EEC) No 1898/87 of 2 July 1987 on the protection of designations used in the marketing of milk and milk products, read in conjunction with Article 3(2) of Council Directive 89/398/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses, is to be interpreted as meaning that a milk product in which the natural milk fat has been wholly replaced by vegetable fat for dietetic reasons may not be designated as 'cheese'.

- (2) The prohibition contained in Article 3(1) of Council Regulation (EEC) No 1898/87 of 2 July 1987 on the protection of designations used in the marketing of milk and milk products continues to apply even if the designation 'dietary cheese (dietary soft cheese) containing vegetable oil for a fat-modified diet' is accompanied by additional descriptions on the products' packaging such as 'This dietary cheese is rich in polyunsaturated fats' or 'This dietary cheese is ideal for a cholesterol-conscious lifestyle'.