

JUDGMENT OF THE COURT (Second Chamber)

10 January 2006<sup>\*</sup>

In Case C-147/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (France), made by decision of 4 February 2004, received at the Court on 22 March 2004, in the proceedings

**De Groot en Slot Allium BV,**

**Bejo Zaden BV**

v

**Ministre de l'Économie, des Finances et de l'Industrie,**

**Ministre de l'Agriculture, de l'Alimentation, de la Pêche et des Affaires rurales,**

Intervener,

**Comité économique agricole régional fruits et légumes de la région Bretagne (Cerafel),**

\* Language of the case: French.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, C. Gulmann, G. Arestis (Rapporteur) and J. Klučka, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,  
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 21 April 2005,

after considering the observations submitted on behalf of:

- De Groot en Slot Allium BV and Bejo Zaden BV, by C. Amigues and M. Bay, avocats,
  
- the Comité économique agricole régional fruits et légumes de la région Bretagne (Cerafel), by M. Jacquot, O. Prost and K. Merten-Lentz, avocats,
  
- the French Government, by G. de Bergues and A. Colomb, acting as Agents,

- the Netherlands Government, by H.G. Sevenster and D.J.M. de Grave, acting as Agents,
  
- the Commission of the European Communities, by M. Nolin and B. Stromsky, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 May 2005,

gives the following

### **Judgment**

- 1 The reference for a preliminary ruling relates to the interpretation of Council Directive 70/458/EEC of 29 September 1970 on the marketing of vegetable seed (OJ, English Special Edition 1970 (III), p. 674), as amended by Council Directive 88/380/EEC of 13 June 1988 (OJ 1988 L 187, p. 31) ('Directive 70/458'), and Council Directive 92/33/EEC of 28 April 1992 on the marketing of vegetable propagating and planting material, other than seed (OJ 1992 L 157, p. 1).
  
- 2 That question was raised in proceedings between, on the one hand, the Dutch companies De Groot en Slot Allium BV and Bejo Zaden BV ('De Groot and Bejo') and, on the other, the *Ministre de l'Économie, des Finances et de l'Industrie* (French Minister for Economy, Finance and Industry) and the *Ministre de l'Agriculture, de l'Alimentation, de la Pêche et des Affaires Rurales* (French Minister for Agriculture,

Food, Fisheries and Rural Affairs) ('the competent ministers') in proceedings brought by De Groot and Bejo for annulment of the implied decision rejecting their application for repeal of the Ministerial Order of 17 May 1990 on the marketing of shallots (JORF of 2 June 1990, p. 6557).

## Legal framework

### *Community legislation*

#### Directive 70/458

- 3 Point (A) of Article 2(1) of Directive 70/458 — which concerns the marketing of vegetable seed within the Community — sets out a list of vegetables which does not include shallots (*allium ascalonicum*).
- 4 Points (B), (C) and (D) of Article 2(1) distinguish between three categories of vegetable seed: basic seed, certified seed and standard seed.
- 5 Article 2(1a) of Directive 70/458 provides:

'Amendments to be made to the list of species referred to in [point] (A) in the light of the development of scientific or technical knowledge concerning the names and hybrids resulting from the crossing of species covered by this Directive shall be adopted in accordance with the procedure laid down in Article 40.'

6 Article 3(1), (2) and (3) of Directive 70/458 states:

'1. The Member States shall provide that vegetable seed may not be certified, checked as standard seed and marketed unless the variety is officially accepted in one or more Member States.

2. Each Member State shall establish one or more catalogues of the varieties officially accepted for certification, checking as standard seed and marketing in its territory. ...

...

3. A common catalogue of varieties of vegetable species shall, in accordance with the provisions of Articles 16 and 17, be established on the basis of the national catalogues of the Member States.'

7 The first paragraph of Article 4 of Directive 70/458 states that Member States are to ensure that a variety is accepted only if it is distinct, stable and sufficiently uniform. Article 5 of that directive specifies the conditions under which a variety is to be regarded as distinct, stable and sufficiently uniform.

8 Article 10(1) of Directive 70/458 provides inter alia that Member States are to arrange for official publication of the catalogue of varieties accepted in their territory and, where maintenance breeding of the variety is required, the name of the person or persons responsible for that in their countries.

9 Article 11(1) of Directive 70/458 states:

‘Any application or withdrawal of an application for acceptance of a variety, any entry in a catalogue of varieties as well as any amendment thereto shall be notified forthwith to the other Member States and the Commission.’

10 Article 11(2) of Directive 70/458 provides that Member States are, for each new variety accepted, to send the other Member States and the Commission a brief description of its characteristics in respect of use of which they have notice as a result of the acceptance procedure. If so requested, they must also send a description of the special characteristics which enable the variety to be distinguished from other similar varieties.

11 Article 12(1) and (2) of Directive 70/458 provides inter alia that Member States are to provide that the varieties accepted must be maintained in accordance with accepted practices for the maintenance of the variety and that it must at all times be possible to check such maintenance from the records kept by the person or persons responsible for the variety.

12 Article 13a of Directive 70/458 is worded as follows:

‘1. Member States shall ensure that any doubts which arise after the acceptance of a variety concerning the appraisal of its distinctness or of its name at the time of acceptance are removed.

2. Where, after acceptance of a variety, it is established that the condition concerning distinctness within the meaning of Article 5 was not fulfilled at the time of acceptance, acceptance shall be replaced by another decision or, where appropriate, a revocation, which conforms with this Directive.

By this other decision, the variety shall, with effect from the date of its initial acceptance, no longer be regarded as a variety known in the Community within the meaning of Article 5 ... .

3. Where, after acceptance of a variety, it is established that its name within the meaning of Article 10 was not acceptable when the variety was accepted, the name shall be adapted in such a way that it conforms with this Directive. Member States may permit the previous name to be used temporarily as an additional name. The detailed arrangements in accordance with which the previous name may be used as an additional name may be laid down in accordance with the procedure provided for in Article 40.'

<sup>13</sup> Article 14(1) of Directive 70/458 provides that:

'1. The Member States shall ensure that acceptance of a variety is revoked:

(a) if it is proved, on examination, that the variety is no longer distinct, stable or sufficiently uniform;

(b) if the person or persons responsible for the variety so request, except where there is maintenance of the variety.

2. Member States may revoke the acceptance of a variety:

- (a) if the laws, regulations and administrative provisions adopted in pursuance of this Directive are not complied with;
- (b) if, at the time of the application for acceptance or during examination, false or fraudulent particulars were supplied concerning the facts on the basis of which acceptance was granted.'

14 Article 15(1) of Directive 70/458 states that Member States are to ensure that a variety is deleted from their catalogues if acceptance of the variety has been revoked or if the period of validity of the acceptance has expired.

15 Article 16(1) and (2) of the directive provides:

'1. The Member States shall ensure that, after expiry of a period of two months following the publication referred to in Article 17, seed of varieties accepted in accordance with the provisions of this Directive or in accordance with principles corresponding to those of this Directive are subject to no marketing restrictions relating to variety.

2. By way of derogation from paragraph 1, a Member State may, upon application which will be dealt with as provided in Article 40, be authorised to prohibit the marketing in all or part of its territory of seed of the variety in question if the variety

is not distinct, stable or sufficiently uniform. The application shall be lodged before the end of the third calendar year following that of acceptance.'

16 Article 17(1) of the directive is worded as follows:

'The Commission shall, on the basis of the information supplied by the Member States and as this is received, publish in the *Official Journal of the European Communities* under the title "Common Catalogue of Varieties of Vegetable Species" ["the common catalogue"] a list of all varieties whose seed is, after the expiry of a period of two months, subject under Article 16 to no marketing restrictions as regards variety, and also the information required under Article 10(1) concerning the person or persons responsible for maintenance of the variety. The published notice shall indicate the Member States which have received an authorisation under Article 16(2) or Article 18. ...'

17 Article 18 of Directive 70/458 states:

'If it is established that the cultivation of a variety included in the common catalogue ... may be harmful from the point of view of plant health to the cultivation of other varieties or species growing in a Member State, that Member State may upon application which will be dealt with as provided in Article 40, be authorised to prohibit the marketing of the seed of that variety in all or part of its territory. Where there is imminent danger of the spread of harmful organisms and until such time as a final decision has been taken in accordance with the procedure laid down in Article 40, this prohibition may be imposed by the Member State concerned as soon as its application has been lodged.'

18 Article 35(1) of the directive provides:

‘The Member States shall make suitable arrangements for vegetable seed to be officially controlled, at least by check sampling, as regards compliance with the requirements of this Directive.’

19 Article 36 of Directive 70/458 requires Member States to ensure that seed of the categories ‘certified seed’ and ‘standard seed’ is subject to official post-control in the field by inspection to compare their varietal identity and purity with standard controls.

20 Article 38(1) and (2) of Directive 70/458 states:

‘1. If it is repeatedly found, during post-control tests carried out in the field, that seed of any one variety does not adequately satisfy the conditions laid down in respect of varietal identity [or varietal] purity, Member States shall ensure that the person marketing it is wholly or partially forbidden to market such seed (where appropriate, for a specified period).

2. Any measures taken under paragraph 1 shall be withdrawn as soon as it has been established with adequate certainty that the seed intended for marketing will in future satisfy the conditions as to varietal identity and purity.’

- 21 Lastly, Article 40 of Directive 70/458 provides that where the procedure laid down in that article is to be followed, the Standing Committee on Seeds and Propagating Material for Agriculture, Horticulture and Forestry, to which a reference is to be made in accordance with that article, is to deliver an opinion on the Commission's draft of measures to be adopted in the matter.

### Directive 92/33

- 22 Article 1(1) of Directive 92/33 states that the directive is to apply to the marketing of vegetable propagating and planting materials, other than seeds, within the Community. The first subparagraph of Article 1(2) states that Articles 2 to 20 and 24 of the directive are to apply to the genera and species, and their hybrids, listed in Annex II. That annex includes shallots (*allium ascalonicum*).

- 23 Article 1(3) of the directive provides that amendments to the list of genera and species in Annex II are to be adopted in accordance with the procedure laid down in Article 22 of that directive.

- 24 Article 9 of Directive 92/33 is worded as follows:

'1. Without prejudice to Article 2, vegetable propagating and planting material which belongs to genera or species listed in Annex II and is also covered by Directive 70/458/EEC shall not be marketed within the Community unless it belongs to a variety accepted in accordance with Directive 70/458/EEC.

2. Without prejudice to Article 2 and paragraphs 3 and 4 of this Article, vegetable propagating and planting material which belongs to genera or species listed in Annex II but which is not covered by Directive 70/458/EEC shall not be marketed within the Community unless it belongs to a variety officially accepted in at least one Member State.

The provisions laid down in Articles 4, 5 and 10(3) of Directive 70/458/EEC shall apply to the conditions for acceptance.

Articles 3(2) and (4), 6, 7, 8, 10(1), (2) and (4) and 11 to 15 of the said Directive shall apply *mutatis mutandis* to the procedures and formalities for acceptance and maintenance production.

The results of unofficial tests and practical information gathered in the course of growing may be taken into consideration in each instance.

3. Member States shall take all necessary steps to ensure that the official acceptance of varieties belonging to the genera or species referred to in paragraph 2 which was granted prior to 1 January 1993 in accordance with principles other than those laid down in Directive 70/458/EEC or on the basis of the fact that their material was marketed in their territory before that date expires on 30 June 1998 at the latest, unless the varieties in question have been accepted in accordance with paragraph 1 on th[at] date.

4. Varieties officially accepted in accordance with paragraphs 2 and 3 shall be entered in the common catalogue ... referred to in Article 17 of Directive 70/458/EEC. Articles 16(2) and (3), 17, 18 and 19 shall apply *mutatis mutandis*.

The publication in question shall designate the varieties accepted pursuant to paragraph 3 with a specific reference.'

25 Article 14 of Directive 92/33 states:

'1. The marketing of vegetable propagating and planting material which complies with the requirements and conditions of this Directive shall be subject to no restrictions as regards supplier, plant health, growing medium and inspection arrangements other than those laid down in this Directive.

2. The marketing of vegetable propagating and planting material whose variety is entered in the common catalogue ... shall not be subject to any restriction as regards variety other than those laid down or referred to in this Directive.'

### *National legislation*

26 Articles 1 and 2 of the Order of 17 May 1990 are worded as follows:

#### 'Article 1

Only varieties of *Allium cepa* L. var. *ascalonicum* derived from vegetative propagation by bulbs may be transported, held with a view to sale, offered for sale or sold under the name "shallots" ...

## Article 2

This Order shall apply to shallots (*Allium cepa* L. var. *ascalonicum*) intended for delivery to the consumer in their natural state, with the exception of green shallots with whole leaves and shallots intended for processing.

Once they have been prepared and packaged, the shallots must satisfy the requirements of this Order.<sup>7</sup>

- <sup>27</sup> Article L. 214-2 of the Code de la consommation (Consumer Code) provides that infringement of the Order of 17 May 1990 is to be punishable as a level-three offence.

### **The main proceedings and the question referred for a preliminary ruling**

- <sup>28</sup> The vegetable species named ‘shallot’ (*allium ascalonicum*), produced by vegetative propagation (that is to say, reproduced directly from bulbs), known as the ‘traditional shallot’, is grown mainly in France, in particular in Brittany and in the Loire Valley.
- <sup>29</sup> De Groot and Bejo have developed varieties of shallots under the names ‘Ambition’ and ‘Matador’, which are remarkable in that they reproduce themselves in a different way from traditional shallots. Both ‘Ambition’ and ‘Matador’ come from seed (sexual reproduction) and cannot be transplanted (seedling shallots).

- 30 In 1993, the 'Ambition' and 'Matador' varieties were submitted for acceptance in the Netherlands catalogue of vegetable varieties ('the national catalogue') and underwent tests, the results of which were confirmed by the results of comparative testing undertaken inter alia by the competent Netherlands official body. On 29 June 1995, in the light of the results of those tests, each of those varieties was admitted by decision of the competent Netherlands authorities to the national catalogue as new varieties of the species *allium ascalonicum* L. — Shallot.
- 31 After inclusion of those new entries, the Kingdom of the Netherlands notified the Commission and the Member States of the amendments made to the national catalogue and sent information regarding the characteristics of those varieties.
- 32 On 18 March 1997, the Commission published a first supplement to the 19th complete edition of the common catalogue, which added inter alia the 'Ambition' and 'Matador' varieties to that catalogue, under the species name *allium ascalonicum* L. (OJ 1997 C 87 A, p. 1). However, the particulars relating to the 'Ambition' and 'Matador' varieties were not amended in the 20th (OJ 1998 C 130 A, p. 1), the 21st (OJ 1999 C 167 A, p. 1), the 22nd (OJ 2003 C 308 A, p. 5) or the 23rd (OJ 2004 C 260 A, p. 8) complete editions of the common catalogue.
- 33 Since being included in the common catalogue, shallots of the 'Ambition' and 'Matador' varieties have been produced and marketed as 'shallots' in most Member States.
- 34 From 1999, De Groot and Bejo, which marketed mainly seedling shallots as finished products, adjusted their principal activity in order to focus on the marketing of shallot seed and, in particular, seed of the 'Ambition' and 'Matador' varieties. Accordingly, shallot seed of those varieties was also exported from the Netherlands

to the French market. However, in the light of the Order of 17 May 1990, De Groot and Bejo suspended exports of shallot seed to France.

- 35 During 2000, a complaint was lodged with the Commission by the French producers of traditional shallots regarding the marketing of seedling shallots. The Commission has yet to adjudicate on that complaint. The documents before the Court show that that complaint concerns the correctness of the entry in 1997 of shallot seed from the ‘Ambition’ and ‘Matador’ varieties in the common catalogue.
- 36 According to the order for reference, in February 2001 De Groot and Bejo submitted an application (*recours gracieux*) to the competent ministers for repeal of the Order of 17 May 1990, on the ground that it constituted a restriction on the freedom to market the products of those companies in France. At the same time, they lodged a complaint before the Commission in relation to the Order, claiming that, as the ‘Ambition’ and ‘Matador’ varieties were entered in the common catalogue, vegetables grown from those varieties could be freely marketed within the Community. The Commission has yet to adjudicate on the second complaint.
- 37 By application lodged on 8 June 2001 with the secretariat of the judicial section of the Conseil d’État (Council of State), De Groot and Bejo sought annulment of the refusal to be inferred from the failure of the competent ministers to respond to the application for repeal of the Order of 17 May 1990. De Groot and Bejo claim that the Order is contrary to Article 28 EC and to Directive 70/458. In those proceedings, the Comité économique agricole régional fruits et légumes de la région Bretagne (‘Cerafel’) sought leave to intervene in support of the forms of order sought by the defendants in the main proceedings, and leave to do so was granted by the order for reference.

38 On the view that the assessment of the lawfulness of the Order of 17 May 1990 is necessarily dependent on the interpretation of Directives 70/458 and 92/33, the Conseil d'État decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'[Must the] provisions of Directive 70/458, read in conjunction with those of Directive 92/33, ... be interpreted in such a way that it is possible to include in the common catalogue ... only varieties of shallots which reproduce without seeds, by vegetative propagation, and, accordingly, [could] the varieties 'Ambition' and 'Matador' ... lawfully be included in the common catalogue in the entry dealing with shallots[?]'

### **The question referred for a preliminary ruling**

39 Before addressing the substance of the question, it should be noted that the Order of 17 May 1990 concerns shallots as a final product intended for sale, whereas Directives 70/458 and 92/33 relate to the intra-Community marketing of elements for reproduction. Those directives concern the intra-Community marketing of (i) vegetable seed accepted for inclusion in the common catalogue and (ii) vegetable propagating and planting material relating to a variety which is entered in the common catalogue, without any restriction as regards variety.

40 However, although the subject-matter of Directives 70/458 and 92/33 is not the same as that of the national legislation at issue in the main proceedings, that does not mean that the directives are fundamentally irrelevant to the main proceedings on the ground that, unlike the Order of 17 May 1990, they do not govern the marketing of the final product and the name under which it may be sold.

- 41 It must be noted in that regard that, given the prohibition laid down by the Order of 17 May 1990 on marketing, as ‘shallots’, any shallots other than traditional ones and the provision made for criminal penalties to apply in cases where the Order is infringed, economic operators in the sector, in particular the farmers and distribution networks concerned, have no interest in importing shallot seed if, at a later stage in the process, it becomes impossible in practice to market the resulting product under the same name.
- 42 Those are the circumstances in which, by the question referred for a preliminary ruling, the national court is essentially asking, first, whether the entry of the ‘Ambition’ and ‘Matador’ shallot varieties in the common catalogue as vegetable seed was made in accordance with Directives 70/458 and 92/33 and, secondly, whether Community law precludes national legislation, such as the Order of 17 May 1990, which permits only vegetables produced by vegetative propagation, to the exclusion of those from seed, to be marketed in France as ‘shallots’.
- 43 It is therefore appropriate to adjudicate, first, on the inclusion of varieties of shallot produced from seed in the common catalogue and, secondly, on the question whether Community law precludes national legislation such as the Order of 17 May 1990.

*The inclusion of varieties of shallot produced from seed in the common catalogue*

- 44 Shallots are not among the vegetables listed in Article 2(1)(A) of Directive 70/458. Accordingly, the provisions of that directive, taken alone, do not contemplate the entry of seed varieties of that vegetable, such as the ‘Ambition’ and ‘Matador’ varieties, in the common catalogue.

- 45 The fact remains that shallots are included in Annex II to Directive 92/33, which concerns the marketing within the Community of vegetable propagating and planting material, other than seed. It follows that the 'Ambition' and 'Matador' varieties of the 'shallot' vegetable cannot be entered in the common catalogue pursuant to that directive as varieties of seed.
- 46 However, although shallots do not appear in the list of vegetables set out in Article 2(1)(A) of Directive 70/458, it is a matter of agreement that on 29 June 1995 the competent Netherlands authorities entered those varieties of shallots in the national catalogue as new varieties of seed of the species *allium ascalonicum*. Under reference to Article 11(2) of Directive 70/458, those authorities sent a copy of the catalogue to the Commission which, on 18 March 1997, published a first supplement to the 19th complete edition of the common catalogue. That supplement added, inter alia, the 'Ambition' and 'Matador' varieties to the common catalogue, designated under the *allium ascalonicum* species, qua seeds.
- 47 In those circumstances, the question arises as to whether such an entry is precluded if the provisions of Directive 70/458 are read in conjunction with those of Directive 92/33.
- 48 De Groot and Bejo submit, as does the Netherlands Government, that the provisions of Directive 70/458, read in conjunction with those of Directive 92/33, are to be interpreted as meaning that shallot varieties which reproduce themselves from seed may be entered in the common catalogue. The fact that only one catalogue exists means that the two lists of vegetables set out in those directives are to be considered together when the question arises as to whether a variety may be entered in the catalogue.

49 In particular, the Netherlands Government argues that even though shallots are not explicitly referred to as a vegetable species in Directive 70/458, it is apparent that, since that directive falls to be construed in conjunction with Directive 92/33, the varieties of that plant which have been grown from seed may be entered in the common catalogue. The purpose of those directives, each of which is to be understood as complementing the other, is to establish a common catalogue of varieties, irrespective of their manner of reproduction. Support for that argument is to be found in the fact that the list of species set out in Article 2(1)(A) of Directive 70/458 is not exhaustive.

50 By their arguments, the companies and the Netherlands Government essentially submit that the fact that there is a single common catalogue has a bearing on the rules laid down under Directives 70/458 and 92/33 to govern the entry of vegetables in the catalogue, making the lists of vegetables set out in those directives mutually complementary. In those circumstances — according to that argument — in order for Directive 70/458 to apply to a vegetable which does not appear in the list set out in Article 2(1)(A) thereof, it is sufficient for that vegetable to be referred to in Annex II to Directive 92/33.

51 It is true, of course, that there is only a single common catalogue of vegetable species which lists the varieties whose seed belongs to the species of vegetables listed in Article 2(1)(A) of Directive 70/458, as well as the varieties whose propagating and planting material belongs to the genera and species covered by the list set out in Annex II to Directive 92/33.

52 However, that does not mean that those two lists are mutually complementary and that vegetable varieties may be entered in the common catalogue irrespective of whether the list in which they appear is that set out in Directive 70/458 or that set out in Directive 92/33.

53 It must be pointed out, in the first place, that each of those directives defines its own scope. As is evident from their respective titles, Directive 70/458 concerns the marketing within the Community of vegetable seed and Directive 92/33 concerns the marketing within the Community of vegetable propagating and planting material other than seed. Accordingly, by virtue of the very wording of its title, Directive 92/33 is intended to cover products which do not fall within the scope of Directive 70/458.

54 Next, it is clear from Article 9(1) and (2) of Directive 92/33 that the Community legislature provided for different consequences, depending on whether a vegetable appears both in the list set out in Article 2(1)(A) of Directive 70/458 and that set out in Annex II to Directive 92/33, or is referred to only in the latter.

55 The distinction thus made in Article 9(1) and (2) of Directive 92/33 shows that the Community legislature did not intend that, should the question arise as to whether a vegetable variety appearing in the list set out in Annex II to Directive 92/33 falls to be entered in the common catalogue, that list and the list set out in Article 2(1)(A) of Directive 70/458 were to be mutually complementary, regardless of the fact that each has a separate scope.

56 Lastly, the list of vegetable species set out in Article 2(1)(A) of Directive 70/458 is not exhaustive and, accordingly, Article 2(1a) of that directive lays down the procedure to be followed in order to include other vegetables on that list. A similar provision is to be found in Article 22 of Directive 92/33, to which Article 1(3) of that directive refers.

- 57 The fact that provision has been made in, and specific to, each directive, whereby amendments may be made to the respective contents of the two lists referred to in paragraph 55 of this judgment, is persuasive evidence in rebuttal of the arguments put forward in the present case by De Groot and Bejo and by the Netherlands Government concerning the complementary nature of those lists.
- 58 Furthermore, under Article 40 of Directive 70/458, a reference to the Standing Committee on Seeds and Propagating Material for Agriculture, Horticulture and Forestry, which is to deliver an opinion on the extension of the list set out in Article 2(1)(A) of that directive, may be made for the purposes of such extension by, *inter alia*, a representative of a Member State. It follows that any Member State may initiate an amendment to the contents of that list.
- 59 It must be pointed out in that regard that, notwithstanding the fact that the list in Article 2(1)(A) of Directive 70/458 has been amended on numerous occasions, shallots have never been added to the vegetable species listed, even though that would clearly have been possible.
- 60 In those circumstances, a variety of vegetable seed which does not appear in the list of vegetables set out in Article 2(1)(A) of Directive 70/458 cannot be entered in the common catalogue if the procedures laid down in that directive have not been complied with.
- 61 In that regard, De Groot and Bejo argue that Member States may not, through application of the national legislation, prohibit the marketing of a variety of vegetable seed entered in the common catalogue, unless they follow the specific procedures laid down for that purpose by the relevant Community legislation. According to De Groot and Bejo, once seed varieties have been entered in the common catalogue, the marketing of those varieties must not be made subject within the Community to any restriction on grounds of seed variety.

62 De Groot and Bejo also maintain that the entry of the 'Ambition' and 'Matador' varieties in the national catalogue was notified by the Netherlands authorities to the Commission and the Member States, as a version of the common catalogue including that entry was published in the *Official Journal of the European Communities* on 18 March 1997. It follows that, since the French Republic failed to challenge that entry in 1995 or 1997 — as it was entitled to do and in accordance with the procedures laid down for that purpose — it may not restrict or prohibit the marketing of those varieties in its territory on the ground that their entry in the common catalogue was unlawful.

63 Those arguments are based on a false premiss. They would be relevant only if the vegetables in question — shallots — were referred to in the list of vegetable species set out in Article 2(1)(A) of Directive 70/458. Only in that case would it be necessary to determine whether the procedure for admission to the common catalogue complied with the requirements of that directive and, if appropriate, to take steps inter alia to revoke or withdraw such admission.

64 However, such a determination does not fall to be made in the present case, precisely because Article 2(1)(A) of Directive 70/458 does not include shallots in the list of vegetable species to which that directive applies. In consequence, contrary to the submissions of De Groot and Bejo in the present case, the entry of shallots in the common catalogue as seed could not be challenged under Articles 13a, 14 or 35 to 38 of that directive.

65 It follows from all of the foregoing considerations that the provisions of Directive 70/458, read in conjunction with those of Directive 92/33, do not support the inference that, where a vegetable does not appear in the list set out in Article 2(1)(A) of Directive 70/458, a variety of that vegetable may nevertheless be entered in the common catalogue as seed on the ground that such a vegetable appears in the list set out in Annex II to Directive 92/33.

- 66 Consequently, as shallots do not appear in the list of vegetables falling within the scope of Directive 70/458, the entry by the Commission of the ‘Ambition’ and ‘Matador’ varieties as seeds of that vegetable in the common catalogue after the national catalogue was sent to it by the competent authorities of the Kingdom of the Netherlands was not made in compliance with that directive.

*Interpretation of Article 28 EC*

- 67 As the ‘Ambition’ and ‘Matador’ shallot varieties were unlawfully entered as vegetable seeds in the common catalogue, Directive 70/458 does not apply in the present case, and there is accordingly no need to consider whether that directive precludes national legislation such as the Order of 17 May 1990.
- 68 That being so, the question arises whether any other provision of Community law, to which the national court does not refer, precludes the Order of 17 May 1990, which allows only traditional shallots to be marketed as ‘shallots’. The Court may be moved to take into consideration rules of Community law to which the national court has not referred in its question, in order to provide that court with a satisfactory answer (Case C-271/01 *COPPI* [2004] ECR I-1029, paragraph 27, and Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 24 and the case-law cited there).
- 69 In that regard, it should be noted that De Groot and Bejo argued before the national court that the Order of 17 May 1990 infringes Article 28 EC.

- 70 On that point, it should be recalled that the free movement of goods is a fundamental principle of the EC Treaty which finds expression in the prohibition laid down in Article 28 EC of quantitative restrictions on intra-Community imports and all measures having equivalent effect.
- 71 The prohibition in Article 28 EC of measures having equivalent effect to restrictions covers all rules enacted by the Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see, inter alia, Case C-192/01 *Commission v Denmark* [2003] ECR I-9693, paragraph 39, and Case C-41/02 *Commission v Netherlands* [2004] ECR I-11375, paragraph 39 and the case-law cited there).
- 72 It must be held that national legislation such as that at issue in the main proceedings constitutes an obstacle to intra-Community trade.
- 73 The Order of 17 May 1990, which essentially allows only vegetables grown by vegetative propagation to be marketed as ‘shallots’ in France, makes it impossible in that Member State to market as ‘shallots’ seeds of that vegetable, or products grown from those seeds, which come from other Member States, which obliges producers who wish to market those seeds and products in France to do so under another name.
- 74 The fact that producers are compelled to use names which are unknown to consumers, or less highly regarded by them, is likely to make the marketing of the products in question more difficult and thus impede trade between Member States (see, to that effect, Case C-12/00 *Commission v Spain* [2003] ECR I-459, paragraph 82 and the case-law cited there).

- 75 It must be noted in that regard that obstacles to intra-Community trade resulting from disparities between provisions of national law may be accepted if such provisions are necessary in order to satisfy overriding requirements relating, inter alia, to consumer protection and if those provisions are proportionate to the objective pursued, the circumstances being such that the objective cannot be attained by means of measures less restrictive of intra-Community trade.
- 76 In that context, the Court has already held that it is legitimate for a Member State to ensure that consumers are properly informed about the products which are offered to them, thus giving them the possibility of making their choice on the basis of that information. In particular, Member States may, for the purpose of protecting consumers, require those concerned to alter the description of a foodstuff where a product offered for sale under a particular name is so different, in terms of its composition or production, from the products generally understood as falling within that description within the Community that it cannot be regarded as falling within the same category. However, where the difference is of minor importance, appropriate labelling should be sufficient to provide the purchaser or consumer with the necessary information (*Commission v Spain*, paragraphs 84 to 86 and the case-law cited there).
- 77 It is common ground in the present case that the differences between traditional shallots and seedling shallots relate essentially to their method of reproduction. But for that difference, the two kinds of shallots are substantially similar in appearance. Accordingly, the purpose of the Order of 17 May 1990, namely the protection of consumers, can be achieved by means of appropriate labelling stating that the shallots in question are grown from seed, not produced by vegetative propagation.
- 78 It follows that labelling displaying a neutral and objective statement, informing consumers that the shallots exported by De Groot and Bejo are seedling shallots, would suffice to ensure that consumers are adequately informed.

79 That being the case, a requirement such as that imposed by the Order of 17 May 1990 to the effect that only shallots produced by vegetative propagation are to be marketed as 'shallots' cannot be regarded as justified for the purposes of Article 28 EC.

80 It follows from all of the foregoing considerations that the answer to the question referred by the national court must be that:

- Directive 70/458 precludes the entry in the common catalogue, in the section relating to shallots, of the varieties 'Ambition' and 'Matador' as seed varieties;
  
- Article 28 EC precludes national legislation, such as the Order of 17 May 1990, which allows only vegetables produced by vegetative propagation to be marketed as 'shallots', to the exclusion of shallots grown from seed produced and marketed under that name in other Member States.

## Costs

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

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

**Council Directive 70/458/EEC of 29 September 1970 on the marketing of vegetable seed, as amended by Council Directive 88/380/EEC of 13 June 1988, precludes the entry in the common catalogue, in the section relating to shallots, of the varieties ‘Ambition’ and ‘Matador’ as seed varieties.**

**Article 28 EC precludes national legislation, such as the Order of 17 May 1990, which allows only vegetables produced by vegetative propagation to be marketed as ‘shallots’, to the exclusion of shallots grown from seed produced and marketed under that name in other Member States.**

[Signatures]