

JUDGMENT OF THE COURT (Fifth Chamber)

16 July 1998 *

In Case C-210/96,

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

Gut Springenheide GmbH,

Rudolf Tusky

and

Oberkreisdirektor des Kreises Steinfurt — Amt für Lebensmittelüberwachung,
Joined party: **Oberbundesanwalt beim Bundesverwaltungsgericht,**

on the interpretation of Article 10(2)(e) of Council Regulation (EEC) No 1907/90 of 26 June 1990 on certain marketing standards for eggs (OJ 1990 L 173, p. 5),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, J. C. Moitinho de Almeida, D. A. O. Edward and J.-P. Puissochet (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Gut Springenheide GmbH and Rudolf Tusky, by Bernhard Stürer, Rechtsanwalt, Münster,
- the French Government, by Catherine de Salins, Deputy Director at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Frédéric Pascal, seconded to that directorate from the central administration, acting as Agents,
- the Austrian Government, by Franz Cede, Botschafter at the Federal Ministry of Foreign Affairs, acting as Agent,
- the Swedish Government, by Lotty Nordling, Rättschef in the Ministry of Foreign Affairs, acting as Agent,
- the Commission of the European Communities, by Klaus-Dieter Borchardt, of its Legal Service, acting as Agent, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of Gut Springenheide GmbH and Rudolf Tusky, represented by Bernhard Stür; of the German Government, represented by Corinna Ullrich, Regierungsrätin zur Anstellung in the Federal Ministry of Justice, acting as Agent; and of the Commission, represented by Klaus-Dieter Borchardt and Hans-Jürgen Rabe, at the hearing on 29 January 1998,

after hearing the Opinion of the Advocate General at the sitting on 12 March 1998,

gives the following

Judgment

- ¹ By order of 8 February 1996, received by the Court on 20 June 1996, the Bundesverwaltungsgericht referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Council Regulation (EEC) No 1907/90 of 26 June 1990 on certain marketing standards for eggs (OJ 1990 L 173, p. 5).
- ² The questions have been raised in proceedings brought by Gut Springenheide GmbH (hereinafter 'Gut Springenheide') and its director, Rudolf Tusky, against Oberkreisdirektor des Kreises Steinfurt — Amt für Lebensmittelüberwachung (Chief Administrative Officer of the Rural District of Steinfurt — Office for Supervision of Foodstuffs, hereinafter 'the Office for Supervision of Foodstuffs') concerning a description appearing on packs of eggs marketed by Gut Springenheide and an insert enclosed in the packs.

Community legislation

- 3 Regulation (EEC) No 2771/75 of the Council of 29 October 1975 on the common organisation of the market in eggs (OJ 1975 L 282, p. 49) provides for the adoption of marketing standards relating in particular to grading by quality and weight, packaging, storage, transport, presentation and marketing of eggs. On the basis of that regulation, the Council adopted Regulation No 1907/90, which repealed and replaced Regulation (EEC) No 2772/75 of 29 October 1975 on marketing standards for eggs (OJ 1975 L 282, p. 56).
- 4 Article 10(1) of Regulation No 1907/90 lists the particulars which packs of eggs must bear. These include the name or business name, and address of the undertaking which has packed the eggs or had them packed; however the name, business name or the trade mark used by that undertaking may be shown only if it contains no wording incompatible with the regulation relating to the quality or freshness of the eggs, to the type of farming used for their production or to the origin of the eggs (Article 10(1)(a)).
- 5 Article 10(2) of the regulation provides that packs may also carry certain additional information, including statements designed to promote sales, provided that such statements and the manner in which they are made are not likely to mislead the purchaser (Article 10(2)(e)). That provision was amended by Council Regulation (EEC) No 2617/93 of 21 September 1993 (OJ 1993 L 240, p. 1), so as to make clear that the optional additional information for publicity purposes on egg packs may include symbols and refer to eggs and to other items. However that amendment is of no relevance in the present case.

- 6 Under the first subparagraph of Article 10(3) of Regulation No 1907/90, further dates and indications concerning the type of farming and the origin of the eggs may only be used in accordance with rules to be laid down under the procedure set out in Article 17 of Regulation No 2771/75. Those rules are to cover in particular the terms used in indications of the type of farming and the criteria concerning the origin of the eggs.
- 7 Article 14 of Regulation No 1907/90 provides that packs may not bear any indications other than those laid down in the Regulation.
- 8 On 15 May 1991, the Commission adopted Regulation (EEC) No 1274/91 introducing detailed rules for implementing Regulation (EEC) No 1907/90 (OJ 1991 L 121, p. 11). Article 18 of that regulation lists, in particular, the terms indicating the type of farming as referred to in Article 10(3) of Regulation (EEC) No 1907/90 which eggs as well as small packs may carry. Article 18 was amended by Commission Regulation (EC) No 2401/95 of 12 October 1995 (OJ 1995 L 246, p. 6).

The main proceedings

- 9 Gut Springenheide markets eggs ready-packed under the description '6-Korn — 10 frische Eier' (six-grain — 10 fresh eggs). According to the company, the six varieties of cereals in question account for 60% of the feed mix used to feed the hens. A slip of paper enclosed in each pack of eggs extols the beneficial effect of this feed on the quality of the eggs.
- 10 On 24 July 1989, having repeatedly advised Gut Springenheide of its reservations with regard to the description 'six-grain — 10 fresh eggs' and the pack insert, the

Office for the Supervision of Foodstuffs gave the company notice that it must remove them. Also, a fine was imposed on its director, Rudolf Tusky, on 5 September 1990.

- 11 By judgment of 11 November 1992, the Verwaltungsgericht (Administrative Court), Münster, dismissed the declaratory action brought by Gut Springenheide and Rudolf Tusky on the ground that the description and the pack insert infringed Paragraph 17(1) of the Lebensmittel- und Bedarfsgegenständegesetz (Foodstuffs and Consumer Goods Law) under which misleading descriptions were prohibited.
- 12 Gut Springenheide and Rudolf Tusky appealed unsuccessfully against that judgment. The appeal court considered that the description and the pack insert in question infringed Article 10(1)(a) and (2)(e) of Regulation No 1907/90. According to that court, the description 'six-grain — 10 fresh eggs', which is also a trade mark, and the pack insert were likely to mislead a significant proportion of consumers in that they implied falsely that the feed given to the hens is made up exclusively of the six cereals indicated and that the eggs have particular characteristics.
- 13 Gut Springenheide and Rudolf Tusky then brought an appeal on a point of law before the Bundesverwaltungsgericht (Federal Administrative Court). They argued that the description and the pack insert at issue provided the consumer with vital information and that the appeal court had not produced any expert opinion to prove that they misled the purchaser.
- 14 The Bundesverwaltungsgericht took the view that the outcome of the proceedings turned on Article 10 of Regulation No 1907/90, but had doubts regarding the interpretation of Article 10(2)(e), which allows packs to bear statements designed to promote sales provided that they are not likely to mislead the purchaser. According to the referring court, that provision could be interpreted in two ways. Either the misleading nature of the statements in question is to be assessed in the light of the actual expectations of consumers, in which case those expectations

ought, if necessary, to be ascertained by means of a survey of a representative sample of consumers or on the basis of an expert's report, or the provision in question is based on an objective notion of a purchaser, which is only open to legal interpretation, irrespective of the actual expectations of consumers.

- 15 Accordingly, the Bundesverwaltungsgericht ordered that proceedings be stayed and the following questions be referred to the Court of Justice for a preliminary ruling:

- '1. In order to assess whether, for the purposes of Article 10(2)(e) of Regulation (EEC) No 1907/90, statements designed to promote sales are likely to mislead the purchaser, must the actual expectations of the consumers to whom they are addressed be determined, or is the aforesaid provision based on a criterion of an objectified concept of a purchaser, open only to legal interpretation?
2. If it is consumers' actual expectations which matter, the following questions arise:
 - (a) Which is the proper test: the view of the informed average consumer or that of the casual consumer?
 - (b) Can the proportion of consumers needed to prove a crucial consumer expectation be determined in percentage terms?
3. If an objectified concept of a purchaser open only to legal interpretation is the right test, how is that concept to be defined.'

Preliminary considerations

- 16 In the first place, the French Government expresses doubts about the admissibility of the questions referred, since Regulation No 1907/90 came into force on 1 October 1990, that is to say, after the events in issue in the main proceedings.
- 17 On this point, it should be noted, first, that the provisions of Article 10(2)(e) of that regulation which are of relevance in the present case are substantially equivalent to those contained in the second paragraph of Article 21 of Regulation No 2772/75, as amended by Council Regulation (EEC) No 1831/84 of 19 June 1984 (OJ 1984 L 172, p. 2), which Regulation No 1907/90 repealed and replaced.
- 18 Second, Gut Springenheide, the German Government and the Commission all pointed out at the hearing that, since, in the main proceedings, the appellants seek to have their practices declared to be in compliance with the rules in force, the referring court must take account of the provisions applicable at the time when it gives judgment, or, at the very least, those in force when the action was brought. Thus, the action in the main proceedings does not concern the fine imposed on the director of the appellant company.
- 19 The questions referred by the Bundesverwaltungsgericht must therefore be answered (see, to that effect, Case C-203/90 *Gutshof-Ei* [1992] ECR I-1003, paragraph 12).
- 20 The French Government also takes the view that there is no need to consider the interpretation of Article 10(2)(e) of Regulation No 1907/90, sought by the referring court, because that provision prohibits in any event a description such as that in issue in this case. It argues that the description 'six-grain — 10 fresh eggs' refers

to the feeding of laying hens and therefore concerns the type of poultry farming as referred to in Article 10(3) of the Regulation. Article 18(1) of Regulation No 1274/91, which lists exhaustively the terms, indicating the type of farming, that may appear on packs, does not list the description in issue.

21 That interpretation cannot be upheld.

22 Under Article 18 of Regulation No 1274/91, as amended by Regulation No 2401/95, small packs containing a certain category of eggs may carry one of the following terms to indicate the type of farming as referred to in Article 10(3) of Regulation No 1907/90: 'Free range eggs', 'Semi-intensive eggs', 'Deep litter eggs', 'Perchery eggs (Barn eggs)' and 'Eggs from caged hens'. Those terms may be used only for eggs produced in poultry enterprises meeting the criteria set out in Annex II to the regulation, which essentially concern the ground or floor area available for the hens, and not the type of feed.

23 According to the 18th recital of Regulation No 1274/91, those provisions are intended to safeguard the consumer from misleading statements which might otherwise be made with the fraudulent intention to obtain prices higher than those prevailing for eggs of hens raised in batteries. They are thus confined to regulating the description of the type of farming which egg packs may bear, irrespective of the type of feed given to the animals, which in any case does not depend on the type of farming.

24 Commission Regulation (EEC) No 1538/91 of 5 June 1991 introducing detailed rules for implementing Regulation (EEC) No 1906/90 on certain marketing standards for poultry (OJ 1991 L 143, p. 11) does not support any other conclusion.

- 25 Whilst it is true that Article 10 of that regulation, read together with its Annex IV, includes amongst the optional descriptions of the type of farming some referring to the type of feed, those are separate rules, with specific provisions, which, for the reasons given by the Advocate General at paragraphs 31 to 38 of his Opinion, cannot be relied on in this case in order to interpret Regulation No 1274/91.
- 26 It follows from the foregoing that the provisions of Regulations Nos 1907/90 and 1274/91 regarding the descriptions of the type of farming of laying hens do not preclude egg packs from bearing a description such as 'six-grain — 10 fresh eggs'.

The questions referred for a preliminary ruling

- 27 By its three questions, which it is appropriate to answer together, the referring court is essentially asking the Court of Justice to define the concept of consumer to be used as a standard for determining whether a statement designed to promote sales of eggs is likely to mislead the purchaser, in breach of Article 10(2)(e) of Regulation No 1907/90.
- 28 In answering those questions, it should first be noted that provisions similar to Article 10(2)(e), intended to prevent consumers from being misled, also appear in a number of pieces of secondary legislation, applying generally or in particular fields, such as Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1), or Council Regulation (EEC) No 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wines and grape musts (OJ 1989 L 232, p. 13).

- 29 The protection of consumers, competitors and the general public against misleading advertising is also regulated by Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17). Under Article 2(2) of that directive, misleading advertising means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.
- 30 There have been several cases in which the Court of Justice has had to consider whether a description, trade mark or promotional text is misleading under the provisions of the Treaty or of secondary legislation. Whenever the evidence and information before it seemed sufficient and the solution clear, it has settled the issue itself rather than leaving the final decision for the national court (see, in particular, Case C-362/88 *GB-INNO-BM* [1990] ECR I-667; Case C-238/89 *Pall* [1990] ECR I-4827; Case C-126/91 *Yves Rocher* [1993] ECR I-2361; Case C-315/92 *Verband Sozialer Wettbewerb* [1994] ECR I-317; Case C-456/93 *Langguth* [1995] ECR I-1737; and Case C-470/93 *Mars* [1995] ECR I-1923).
- 31 In those cases, in order to determine whether the description, trade mark or promotional description or statement in question was liable to mislead the purchaser, the Court took into account the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect, without ordering an expert's report or commissioning a consumer research poll.
- 32 So, national courts ought, in general, to be able to assess, on the same conditions, any misleading effect of a description or statement designed to promote sales.

- 33 It should be noted, further, that, in other cases in which it did not have the necessary information at its disposal or where the solution was not clear from the information before it, the Court has left it for the national court to decide whether the description, trade mark or promotional description or statement in question was misleading or not (see, in particular, *Gutshof-Ei*, cited above; Case 94/82 *De Kievsorsch* [1983] ECR 947; and Case C-313/94 *Graffione* [1996] ECR I-6039).
- 34 In Case C-373/90 *X* [1992] ECR I-131, paragraphs 15 and 16, in which Directive 84/450 was in point, the Court held, *inter alia*, that it was for the national court to ascertain in the circumstances of the particular case and bearing in mind the consumers to which the advertising was addressed, whether advertising describing cars as new despite the fact that they had been registered for the purposes of importation, without ever having been driven on a road, could be misleading in so far as, on the one hand, it sought to conceal the fact that the cars advertised as new were registered before importation and, on the other hand, that fact would have deterred a significant number of consumers from making a purchase. The Court also held that advertising regarding the lower prices of the cars could be held to be misleading only if it were established that the decision to buy on the part of a significant number of consumers to whom the advertising in question was addressed was made in ignorance of the fact that the lower price of the vehicles was matched by a smaller number of accessories on the cars sold by the parallel importer.
- 35 The Court has not therefore ruled out the possibility that, in certain circumstances at least, a national court might decide, in accordance with its own national law, to order an expert's opinion or commission a consumer research poll for the purpose of clarifying whether a promotional description or statement is misleading or not.
- 36 In the absence of any Community provision on this point, it is for the national court, which may find it necessary to order such a survey, to determine, in accordance with its own national law, the percentage of consumers misled by a promotional description or statement that, in its view, would be sufficiently significant in order to justify, where appropriate, banning its use.

- 37 The answer to be given to the questions referred must therefore be that, in order to determine whether a statement or description designed to promote sales of eggs is liable to mislead the purchaser, in breach of Article 10(2)(e) of Regulation No 1907/90, the national court must take into account the presumed expectations which it evokes in an average consumer who is reasonably well-informed and reasonably observant and circumspect. However, Community law does not preclude the possibility that, where the national court has particular difficulty in assessing the misleading nature of the statement or description in question, it may have recourse, under the conditions laid down by its own national law, to a consumer research poll or an expert's report as guidance for its judgment.

Costs

- 38 The costs incurred by the German, French, Austrian and Swedish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber)

in answer to the questions referred to it by the Bundesverwaltungsgericht by order of 8 February 1996, hereby rules:

In order to determine whether a statement or description designed to promote sales of eggs is liable to mislead the purchaser, in breach of Article 10(2)(e) of Regulation (EEC) No 1907/90 of 26 June 1990 on certain marketing standards for eggs, the national court must take into account the presumed expectations

which it evokes in an average consumer who is reasonably well informed and reasonably observant and circumspect. However, Community law does not preclude the possibility that, where the national court has particular difficulty in assessing the misleading nature of the statement or description in question, it may have recourse, under the conditions laid down by its own national law, to a consumer research poll or an expert's report as guidance for its judgment.

Gulmann

Wathelet

Moitinho de Almeida

Edward

Puissochet

Delivered in open court in Luxembourg on 16 July 1998.

R. Grass

C. Gulmann

Registrar

President of the Fifth Chamber