

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 17 March 2005¹

I — Introduction

1. This reference for a preliminary ruling from the Tribunal Supremo concerns the interpretation of Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs.²

2. Under Spanish law, namely Real Decreto No 506/2001 of 11 May 2001 (hereinafter 'Royal Decree 506/2001'),³ in Spain the terms 'biológico' and 'bio' may be used to describe products which have not been obtained using the organic production method as defined in Regulation No 2092/91. The Comité Andaluz de Agricultura Ecológica (Andalusian Committee for Organic Agriculture, hereinafter 'Comité Andaluz') has raised proceedings challenging

this provision before the Tribunal Supremo. Its principal complaint is incompatibility with Regulation No 2092/91. The Tribunal Supremo asks the Court whether the regulation precludes the Spanish provisions.

II — Legal framework

A — Community law

3. The relevant provisions of Regulation No 2092/91 have been amended a number of times, most recently by Council Regulation (EC) No 392/2004 of 24 February 2004 amending Council Regulation (EEC) No 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs,⁴ and by the Acts of Accession with effect from 1 May 2004.⁵

¹ — OJ 2004 L 65, p. 1.

² — 6A, No. 8 of Annex II to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, OJ 2003 L 236, p. 346, at pp. 350 f.

¹ — Original language: German.

² — OJ 1991 L 198, p. 1.

³ — BOE (*Boletín Oficial del Estado*) of 26 May 2001.

4. Following this, Article 2 of Regulation No 2092/91 provides as follows:

	— in German:	ökologisch, biologisch,	
	— in Estonian:	mahe or ökoloogiline,	
‘For the purposes of this Regulation a product shall be regarded as bearing indications referring to the organic production method where, in the labelling, advertising material or commercial documents, such a product, its ingredients or feed materials are described in terms suggesting to the purchaser that the product, its ingredients or feed materials have been obtained in accordance with the rules of production laid down in Article 6. In particular the following terms or their usual derivatives (such as bio, eco etc.) or diminutives, alone or combined, shall be regarded as indications referring to the organic production method throughout the Community and in any Community language unless they are not applied to agricultural products in foodstuffs or feedingstuffs or clearly have no connection with this method of production:	— in Greek:	βιολογικό,	
	— in English:	organic,	
	— in French:	biologique,	
	— in Italian:	biologico,	
	— in Latvian:	bioloģiskā,	
	— in Lithuanian:	ekologiškas,	
	— in Hungarian:	ökológiai,	
	— in Spanish:	ecológico,	
	— in Maltese:	oragniku,	
	— in Dutch:	biologisch,	
— in Czech:	ekologické,		
— in Polish:	ekologiczne,		
— in Danish:	økologisk,	— in Portuguese:	biológico,

- in Slovak: ekologické, Article 3(1) thereof provided that a product should in any event be regarded as bearing indications referring to the organic production method where the product or its ingredients were described, in the labelling, advertising material or commercial documents, by the word 'ecológico'. Article 3(1) also provided that the following terms could be used: 'obtenido sin el empleo de productos químicos de síntesis' (produced without using synthetic chemicals), 'biológico' (biological), 'orgánico' (organic), 'biodinámico' (biodynamic), and the terms 'eco' (eco) and 'bio' (bio).
- in Slovenian: ekološki,
- in Finnish: luonnonmukainen,
- in Swedish: ekologisk.'

5. Article 5(1) and (3) of Regulation No 2092/91 lay down the conditions a product must satisfy before its labelling or advertising may refer to organic production methods.

8. Royal Decree 1852/1993 was amended by Royal Decree 506/2001. Article 3(1) now provides:

6. Article 5(3a) of Regulation No 2092/91 is a transitional provision relating to existing registered trade marks.

B — National law

7. In the Kingdom of Spain, organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs were initially regulated by Real Decreto No 1852/1993 of 22 October 1993⁶ (hereafter 'Royal Decree 1852/1993').

'In accordance with the provisions of Article 2 of Regulation (EEC) No 2092/91, as amended by Regulation (EC) No 1804/1999, a product shall in any event be regarded as bearing indications referring to the organic production method where such a product, its ingredients or feed materials are described, in the labelling, advertising material or commercial documents, by the term "ecológico" or its derivative "eco", alone or combined with the name of the product, its ingredients or its brand name.'

6 — BOE of 26 November 1993.

9. Thus, in Spain the terms ‘biológico’ and ‘bio’ are no longer reserved for products obtained by the organic production method, pursuant to Royal Decree 506/2001.

13. By order dated 1 December 2003 the Tribunal Supremo referred the following questions to the Court for a preliminary ruling:

III — Facts and questions referred

10. After the promulgation of Royal Decree 506/2001, amending Royal Decree 1852/1993, the Comité Andaluz raised proceedings before the Tribunal Supremo and applied for Royal Decree 506/2001 to be declared invalid.

11. The Tribunal Supremo has explained that under Spanish law natural and legal persons whose interests may be affected by a general provision of secondary legislation have standing to bring an action for annulment. If the general provision is found to be unlawful, on account of either technical or substantive flaws, it is declared void *erga omnes*.

12. The Comité Andaluz bases its action for annulment in essence on the proposition that the new Royal Decree is incompatible with Regulation No 2092/91.

‘1. Does Council Regulation (EEC) No 2092/91 of 24 June 1991, supplemented by Council Regulation (EC) No 1804/1999 of 19 July 1999, on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs regard, in all Member States, the terms “biológico” and “ecológico” and their derivatives “bio” and “eco” as indications which suggest to the purchaser that the product or its ingredients have been obtained in accordance with the rules on organic production?

2. Does Regulation (EEC) No 2092/91, supplemented by Regulation (EC) No 1804/1999, necessarily reserve, in all Member States, the terms “biológico” and “ecológico” and their derivatives “bio” and “eco” for products which have been obtained in accordance with the rules laid down in respect of organic production in that Regulation?

3. Does Article 2 of Regulation (EEC) No 2092/91, supplemented by Regulation (EC) No 1804/1999, reserve, in Spanish, only the term “ecológico” and its derivative “eco” for products which have been obtained in accordance with the rules laid down in respect of organic production in the regulation, so that it may not be contrary to European law to

use the term “biológico” and its derivative “bio” in Spain for non-organic products, if, through use, that term and its derivative have become a generic term and derivative, because in Spain they do not designate foodstuffs with particular characteristics connected with organic production methods?’

14. Following the enactment of Regulation No 392/2004, in response to a question from the Court the Tribunal Supremo stated that it had to decide on the validity of the Royal Decree by reference to the current version of Regulation No 2092/91. Accordingly, the answer to the reference for a preliminary ruling cannot be restricted to Regulation No 2092/91 as amended by Regulation No 1804/1999, but must take the most recent amendments into account.

16. Article 2 of Regulation No 2092/91 provides for when the description of a product constitutes a reference to production by organic agricultural methods. Article 5 of Regulation No 2092/91 lays down the conditions of organic production to be satisfied before a product may bear a reference to having been obtained by the organic production method. Thus, only products whose production satisfies the requirements of Regulation No 2092/91 may bear a reference to having been obtained by the organic production method.

17. The effect of Royal Decree 506/2001 is that products which do not satisfy the requirements laid down by Regulation No 2092/91 may also bear the term ‘biológico’ or ‘bio’.

IV — Legal analysis

15. By its questions the national court seeks an interpretation of Article 2 of Regulation No 2092/91 as amended by Regulation No 392/2004. In substance, it seeks to know whether it is compatible with the regulation to permit the use of ‘biológico’ and ‘bio’ for products which do not comply with the requirements of the regulation.

18. Article 2 of Regulation No 2092/91, as amended by Regulation No 392/2004, determines whether a product is to be regarded as bearing an indication referring to the organic production method by means of a general definition supplemented by a number of specific terms listed by language. The list of terms in Article 2 of Regulation No 2092/91 which constitute a reference to the organic production method includes only ‘ecológico’ for Spanish, and does not expressly mention ‘biológico’ or ‘bio’.

19. The national court asks whether the effect of Regulation No 2092/91 is that terms not expressly listed for the relevant Community language, in the present case Spanish, but listed expressly in relation to another Community language, also constitute references to the organic production method.

20. The general definition at the start of Article 2 provides that a product shall be regarded as bearing indications referring to the organic production method where

‘a product ... [is] described in terms suggesting to the purchaser that the product ... [has] been obtained in accordance with the rules of production laid down in Article 6.’

Thus, the general definition refers to consumers’ understanding.

21. The examples which follow are individual terms, arranged by language, whose use — like the use of their usual derivatives and diminutives — indicates that a product has been obtained by the organic production method.

22. In that connection, the text of the regulation, as amended by Regulation No 392/2004, makes it clear that the term listed for each language is an indication referring to the organic production method not only in that language but also in all the Community languages:

‘In particular the following terms or their usual derivatives (such as bio, eco etc.) or diminutives, alone or combined, shall be regarded as indications referring to the organic production method throughout the Community and *in any Community language*.’⁷

Thus, the terms listed in Article 2 for the individual Community languages apply in all Member States and in their respective translations in the other Community languages. The Spanish and French Governments agree with this view.

23. The Spanish entry does not include the word ‘biológico’, which would also include its derivative ‘bio’, but only the word ‘ecológico’. However, for German and Dutch the list includes ‘biologisch’, for French ‘biologique’, for Greek ‘βιολογικό’, for Italian ‘biologico’, for Latvian ‘biologiska’ and for Portuguese

⁷ — Emphasis added.

biológico' itself. It follows that under Article 2 of Regulation No 2092/91 a translation of the term 'biological' and its derivative 'bio' is to be regarded as an indication referring to the organic production method throughout the Community and in any Community language. Article 2 of Regulation No 2092/91 deems consumers to have a corresponding understanding.

24. It follows that in Spanish the terms 'biológico' and 'bio' are to be regarded as references to organic agriculture.

25. This Community-wide protection of a term used in even only one Member State to describe products obtained by the organic production method was the express will of those who enacted the regulation. The present wording of Article 2 of Regulation No 2092/91 was enacted by Regulation No 392/2004. The second recital in the preamble to Regulation No 392/2004 states that the protection of usual derivatives or diminutives applies independently of which language is used. The European Parliament's Rapporteur clearly stated that the new wording of Article 2 of the regulation would preclude the use of 'bio' for products not obtained by the organic production method.⁸

26. The purposes of Regulation No 2092/91 and the idea of the internal market, which has to be taken into account in interpreting secondary legislation so as to conform with the Treaty, confirm that these terms constitute references in all the Community languages.

27. The purpose of Regulation No 2092/91 is to promote organic production methods. To achieve this purpose, the regulation seeks first to protect consumers from misleading descriptions. Consumers should be able easily to identify products obtained using organic production methods. In the second place, the regulation seeks to protect producers of organic products from unfair competition. The rules are intended to protect products obtained using organic production methods from competition from cheaper products obtained by conventional agricultural methods.⁹

28. It would be inconsistent with these purposes if one and the same term, such as 'bio', were reserved in one Member State for products obtained by organic production methods but were left unprotected in other Member States. If 'bio' were protected in only some of the Community languages as a reference to the organic production method, then when shopping in other Member States,

8 — Report of Danielle Auroi on the proposal for a Council regulation amending Regulation (EEC) No 2092/91 on organic production of agricultural products and indications referring thereto in agricultural products and foodstuffs of 6 November 2003. A5-392 2003, p. 11.

9 — See the second and fifth recitals in the preamble to Regulation No 2092/91.

or when buying products marketed in other languages, consumers might wrongly think that the products were obtained by organic production methods. Moreover, in cross-border trade products obtained by organic production methods would be subject to direct competition from cheaper products obtained by conventional agriculture.

29. This would obstruct not only the regulation's purpose of preventing unfair competition. Such differences in the protection of descriptions could hinder intra-Community trade in products obtained by organic production methods. By contrast, uniform, Community-wide protection would not only prevent potential obstructions to free movement of goods, but would also help develop a uniform understanding throughout the Community, and this would promote trade in these products.

30. Thus, the history and a teleological interpretation of Article 2 of Regulation No 2092/91 confirm that under the regulation each of the terms listed for the individual languages, as well as its derivatives, are to be regarded as indications referring to the organic production method throughout the Community and in their respective translations.

31. However, there are exceptions to the Community law prohibition on using a term for products which have not been obtained by the organic production method where that term is used in another Community language to refer to the organic production method.

32. For example, Article 2 of the regulation expressly permits the use of terms protected in another Community language if they 'are not applied to agricultural products in foodstuffs or feedingstuffs or clearly have no connection with this method of production'.

33. If there is therefore no risk that consumers from one Member State will connect a term used in the language of another Member State to refer to products obtained by the organic production method, or its translation, with such products, and there is accordingly no risk of confusion, the term and its translation may be used in the first Member State for products which have not been obtained by the organic production method. This exception might apply, for example, to the translation of the word listed for Estonian ('mahe', which may be translated as 'mild').

34. It is for the national court to determine whether the terms 'biológico' and 'bio' would, for a Spanish consumer, clearly have no connection with the organic production method.

products does not gainsay this conclusion. If 'bio' and 'biológico' indicate production in accordance with the regulation for some products, it is to be assumed that consumers will assume such production in respect of other products too, and that the use of these descriptions can therefore be misleading.¹¹

35. However, it is possible to identify for the national court some considerations to be taken into account in answering this question.¹⁰ In making its assessment, it may take into account first the fact that the previous version of Royal Decree 1852/1993 expressly provided for the use of the terms 'biológico' and 'bio' for products produced in accordance with the regulation, in addition to the term 'ecológico'. If even the Spanish legislature equates the terms 'biológico' and 'bio' with the terms 'ecológico' and 'eco', it is to be assumed that Spanish consumers would do the same. This is because it is to be assumed that the legislature based the provision on consumers' existing understanding, and that the provisions strengthened, or at least fostered, such an understanding.

37. Nor does the disputed amendment of the Royal Decree contradict the conclusion drawn from the text of the Spanish laws as regards Spanish consumers' understanding. On the one hand, there still exist regional provisions which continue to instill in purchasers such a belief as regards the terms 'bio' and 'biológico'. On the other, it is not possible to draw the opposite conclusion of a change in consumers' understanding solely from the repeal of a provision relating to the use of these descriptions. Consumers' expectations deriving from the previous provisions will persist at least for a transitional period. For that reason, withdrawing protection abruptly from certain terms necessarily creates a risk that consumers will be misled. It would be justified only if it were actually established that consumers did not connect any reference to production in accordance with the regulation with descriptions which are no longer protected.

36. The fact that the previous version of the Royal Decree applied only to vegetable

¹⁰ — See my Opinion delivered today in Case C-135/03 *Commissio n v Spain*.

¹¹ — Until it was supplemented by Regulation No 1804/1999, Regulation No 2092/91 suffered a similar mistake in its wording, in that the protection given to words did not apply in relation to animal products.

V — Conclusion

38. For those reasons, I submit that the Tribunal Supremo's request for a preliminary ruling should be answered as follows:

- (1) Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs, as amended by Council Regulation (EC) No 392/2004 of 24 February 2004, reserves the terms 'biological' and 'ecological' and their derivatives throughout the Member States and in their respective translations in all the Community languages, i.e. in Spanish the terms 'biológico' and 'ecológico' as well as 'bio' and 'eco', in principle for products which have been obtained in accordance with the rules laid down in respect of organic production by that Regulation;

- (2) Article 2 of Regulation No 2092/91 permits the translation of a term expressly listed for a Community language in Article 2 to be used for products which have not been obtained by the organic production method only if the translation in the target language clearly has no connection with the organic production method.