



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

11 April 2013 *

(Regulation (EC) No 178/2002 — Consumer protection — Food safety — Public information — Placing on the market of food unfit for human consumption, but not constituting a health risk)

In Case C-636/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht München I (Germany), made by decision of 5 December 2011, received at the Court on 9 December 2011, in the proceedings

Karl Berger

v

Freistaat Bayern,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, J. Malenovský, U. Löhmus, M. Safjan and A. Prechal, Judges,

Advocate General: P. Mengozzi,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 9 January 2013,

after considering the observations submitted on behalf of:

- K. Berger, by R. Wallau and M. Grube, Rechtsanwälte,
- Freistaat Bayern, by G. Himmelsbach, Rechtsanwalt,
- the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,
- the Danish Government, by C. Vang, acting as Agent,
- the United Kingdom Government, by H. Walker, acting as Agent,
- the European Commission, by S. Grünheid and L. Pignataro-Nolin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: German.

gives the following

Judgment

- 1 This request for a preliminary ruling relates to the interpretation of Article 10 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1).
- 2 The request has been made in proceedings between Karl Berger and the Freistaat Bayern which put in issue the latter's administrative liability on account of information made available to the public in relation to the former's products.

Legal context

EU law

Regulation No 178/2002

- 3 Article 1(1) and the first subparagraph of Article 1(2) of Regulation No 178/2002 provide:

'1. This Regulation provides the basis for the assurance of a high level of protection of human health and consumers' interest in relation to food, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the effective functioning of the internal market. It establishes common principles and responsibilities, the means to provide a strong science base, efficient organisational arrangements and procedures to underpin decision-making in matters of food and feed safety.

2. For the purposes of paragraph 1, this Regulation lays down the general principles governing food and feed in general, and food and feed safety in particular, at Community and national level.'
- 4 Article 3 of the regulation contains the following definitions:

'For the purposes of this Regulation:

...

9. "risk" means a function of the probability of an adverse health effect and the severity of that effect, consequential to a hazard;

...

14. "hazard" means a biological, chemical or physical agent in, or condition of, food or feed with the potential to cause an adverse health effect;

...'
- 5 Article 4(2) to (4) of the regulation provides:

'2. The principles laid down in Articles 5 to 10 shall form a general framework of a horizontal nature to be followed when measures are taken.

3. Existing food law principles and procedures shall be adapted as soon as possible and by 1 January 2007 at the latest in order to comply with Articles 5 to 10.

4. Until then, and by way of derogation from paragraph 2, existing legislation shall be implemented taking account of the principles laid down in Articles 5 to 10.'

6 Article 5(1) of Regulation No 178/2002 states:

'Food law shall pursue one or more of the general objectives of a high level of protection of human life and health and the protection of consumers' interests, including fair practices in food trade, taking account of, where appropriate, the protection of animal health and welfare, plant health and the environment.'

7 Article 10 of Regulation No 178/2002 is worded as follows:

'Without prejudice to the applicable provisions of Community and national law on access to documents, where there are reasonable grounds to suspect that a food or feed may present a risk for human or animal health, then, depending on the nature, seriousness and extent of that risk, public authorities shall take appropriate steps to inform the general public of the nature of the risk to health, identifying to the fullest extent possible the food or feed, or type of food or feed, the risk that it may present, and the measures which are taken or about to be taken to prevent, reduce or eliminate that risk.'

8 Article 14(1), (2) and (5) of the regulation provides:

'1. Food shall not be placed on the market if it is unsafe.

2. Food shall be deemed to be unsafe if it is considered to be:

(a) injurious to health;

(b) unfit for human consumption.

...

5. In determining whether any food is unfit for human consumption, regard shall be had to whether the food is unacceptable for human consumption according to its intended use, for reasons of contamination, whether by extraneous matter or otherwise, or through putrefaction, deterioration or decay.'

9 The first and second subparagraphs of Article 17(2) of the regulation provide:

'Member States shall enforce food law, and monitor and verify that the relevant requirements of food law are fulfilled by food and feed business operators at all stages of production, processing and distribution.

For that purpose, they shall maintain a system of official controls and other activities as appropriate to the circumstances, including public communication on food and feed safety and risk, food and feed safety surveillance and other monitoring activities covering all stages of production, processing and distribution.'

10 Article 19(1) of Regulation No 178/2002 is worded as follows:

‘If a food business operator considers or has reason to believe that a food which it has imported, produced, processed, manufactured or distributed is not in compliance with the food safety requirements, it shall immediately initiate procedures to withdraw the food in question from the market where the food has left the immediate control of that initial food business operator and inform the competent authorities thereof. Where the product may have reached the consumer, the operator shall effectively and accurately inform the consumers of the reason for its withdrawal, and if necessary, recall from consumers products already supplied to them when other measures are not sufficient to achieve a high level of health protection.’

11 The second paragraph of Article 65 of the regulation specifies inter alia that ‘Articles 14 to 20 shall apply from 1 January 2005’.

Regulation (EC) No 882/2004

12 Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ 2004 L 165, p. 1, and corrigendum OJ 2004 L 191, p. 1), provides in Article 7:

‘1. The competent authorities shall ensure that they carry out their activities with a high level of transparency. For that purpose, relevant information held by them shall be made available to the public as soon as possible.

In general, the public shall have access to:

(a) information on the control activities of the competent authorities and their effectiveness;

and

(b) information pursuant to Article 10 of Regulation (EC) No 178/2002.

2. The competent authority shall take steps to ensure that members of their staff are required not to disclose information acquired when undertaking their official control duties which by its nature is covered by professional secrecy in duly justified cases. Protection of professional secrecy shall not prevent the dissemination by the competent authorities of information referred to in paragraph 1(b). The rules of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ... remain unaffected.

3. Information covered by professional secrecy includes in particular:

— the confidentiality of preliminary investigation proceedings or of current legal proceedings,

— personal data,

— the documents covered by an exception in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents ...,

— information protected by national and Community legislation concerning in particular professional secrecy, the confidentiality of deliberations, international relations and national defence.’

- 13 In accordance with the second paragraph of Article 67 of Regulation No 882/2004, that regulation is applicable from 1 January 2006.

German law

- 14 Article 40 of the German Code on foodstuffs, consumer items and animal feed (Lebensmittel-Bedarfsgegenstände- und Futtermittelgesetzbuch), dated 1 September 2005 (BGB1. 2005 I, p. 2618), corrected on 18 October 2005 (BGB1. 2005 I, p. 3007), in the version in force from 17 September 2005 to 24 April 2006 ('the LFGB'), provided:

'(1) Within the framework of Article 10 of Regulation (EC) No 178/2002, the competent authority may inform the public of the name of the food or animal feed and the name or trade name of the food or animal feed manufacturer, processor or distributor; where doing so is better able to prevent risks, it may also release the name of the operator responsible for placing on the market. A public information measure, within the meaning of and in accordance with the above rules, may also be taken in the following cases:

...

4. where food, which is not injurious to health but is unfit for human consumption, in particular because it is nauseating, is or has been distributed in significant quantities or where, because of its specificity, it has been distributed only in small quantities but over a relatively lengthy period of time,

...

In the cases described in points 2 to 5 above, the public may be informed only if there is a particular public interest in doing so which outweighs the interests of the relevant parties.

(2) The authorities may inform the public only if other equally effective measures, in particular public information measures taken by the food or feed manufacturer or the economic operators, are not taken or not taken in time or do not reach consumers.

(3) Before the authorities inform the public, they must give the producer or trader an opportunity to set out his views, unless such a hearing jeopardises attainment of the objective pursued by the measures in question.

(4) There is no further need to inform the public where the product is no longer on the market or where, in the light of experience, it can be assumed that those products which were marketed have already been consumed. By way of derogation from the first sentence, information may be issued to the public where there is or has been an actual threat to health and it appears sensible to provide information in view of medical measures being taken.

(5) If it subsequently transpires that the information given to the public by the authorities was wrong or that the circumstances were misrepresented, the public must be informed of the error immediately where the operator concerned makes a request to that effect or where the public interest requires it. This announcement should be made in the same manner as that of the public information to which it relates.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 15 On 16 and 18 January 2006, the Passau Veterinary Office (Germany) carried out official inspections in several establishments of the Berger Wild GmbH business group ('Berger Wild'), which is active in the game meat processing and distribution sector. The authorities found that the hygiene conditions were inadequate and took samples of the game meat concerned, which were sent for analysis to the Bayerisches Landesamt für Gesundheit und Lebensmittelsicherheit (Bavarian Health and Food Safety Authority, the 'LGL'). Those analyses led to a finding that the food in question was unfit for human consumption and consequently was unsafe within the meaning of Regulation No 178/2002.
- 16 After considering Berger Wild's observations in relation to that finding, the Bayerisches Staatsministerium für Umwelt, Gesundheit und Verbraucherschutz (Bavarian State Ministry for the Environment, Health and Consumer Protection), by fax sent on 23 January 2006, declared its intention to inform the public, in accordance with Article 40(1), second sentence, point (4), of the LFGB, that the food items in relation to which anomalies had been detected during the aforementioned inspections were unfit for human consumption. The Ministry moreover informed the company that it would not inform the public if the company itself informed the public effectively and promptly.
- 17 Berger Wild objected to the proposal to inform the public on the basis that it was disproportionate. It proposed to issue a 'product warning' inviting its customers to attend their usual retail outlet in order to exchange the five game products listed in that warning; while the products might exhibit sensory anomalies, there was, in its view, no risk to health.
- 18 In a press release dated 24 January 2006, the Minister for Consumer Protection of Freistaat Bayern (the 'competent minister') announced that game meat products marketed by Berger Wild were to be recalled. According to the press release, '[i]nspections carried out by the [LGL] revealed that samples of meat from the batches listed below gave off a rancid, nauseous, musty or acidic smell. In six out of the nine samples examined, the putrefaction process had already started. Berger [Wild] is required to take back meat from those same batches which is still on the market'.
- 19 In that press release, it was also stated that, during inspections of three Berger Wild establishments, revoltingly unhygienic conditions had been encountered. The competent authorities immediately issued a temporary prohibition on Berger Wild from marketing products manufactured or processed by it in those establishments. An exception was made for those foodstuffs of the company which the test results proved to be beyond reproach health-wise.
- 20 The competent minister indicated, in a press release dated 25 January 2006, entitled 'Recall of game meat (Berger Wild, Passau) ..., recall measures extended – numerous products unfit for human consumption', that the classification 'unfit for human consumption' was already applicable to 12 commercialised frozen products and to 6 samples of fresh meat originating from that company, one of which was even contaminated with salmonella. Concerning the 12 samples unfit for human consumption, the minister added: 'The results of the microbiological tests carried out by the LGL, which will be available by the end of the week, will show whether they are injurious to health'.
- 21 That press release mentioned, in addition, the emergency measures which had been taken and set out an updated list of those products which had been recalled.
- 22 The competent minister published another press release on 27 January 2006.
- 23 In a speech given before the Bavarian State Parliament on 31 January 2006, that minister stated *inter alia* that Berger Wild was no longer able to market its goods, that it had declared itself insolvent that very day and that, therefore, any health risks resulting from further products being marketed could be excluded.

- 24 Following the press release of 25 January 2006, the Commission initiated, at the instigation of the Bundesamt für Verbraucherschutz und Lebensmittelsicherheit (Federal Office for Consumer Protection and Food Safety), a rapid alert in the rapid alert system for foodstuffs and animal feeds of the European Union.
- 25 Berger Wild considered it had suffered considerable losses as a result of the press releases put out by the Freistaat Bayern authorities, and brought an action for damages against the Freistaat Bayern before the Landgericht München I (Regional Court of Munich), in which it argued *inter alia* that Article 10 of Regulation No 178/2002 allowed for the public to be informed only where there was an actual threat to health, but not where the issue was merely foodstuffs unfit for human consumption. The Freistaat Bayern asserted on the contrary that that Article 10 allowed the competent national authorities to initiate a public alert, even where there was no actual threat to health.
- 26 The referring court, in the context of its preliminary assessment, regards the warnings issued to consumers on the basis of the LFGB as lawful, whilst nonetheless questioning whether the LFGB complies with Regulation No 178/2002. In that regard, that court further notes that, in proceedings brought before it by Berger Wild, according to which the meat samples had not been properly inspected, it found that there was no cause to doubt the assessment of the LGL according to which the foodstuffs were unfit for human consumption, whilst not actually injurious to health.
- 27 It was in those circumstances that the Landgericht München I decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does Article 10 of [Regulation (EC) No 178/2002] preclude rules of national law allowing information to be issued to the public mentioning the name of a food or animal feed and the name or trade name of the food or animal feed manufacturer, processor or distributor, in the event that the food is not injurious to health but is unfit for human consumption, particularly food that is nauseating, is or has been distributed in significant quantities or, because of its specificity, has been distributed only in small quantities but over a relatively lengthy period of time?’

(2) If the answer to the previous question is in the affirmative:

Would the answer to the first question be different if the situation at issue arose prior to 1 January 2007, but at a time at which national law had already been brought into line with the above regulation?’

The questions referred

- 28 The referring court proceeds on the assumption that, in the case in the main proceedings, the foodstuffs which were the subject of warnings pursuant to Article 40(1), second sentence, point (4), of the LFGB during January 2006 could not be regarded as injurious to human health. Therefore, by its two questions, which it is appropriate to consider together, the referring court asks in essence if Article 10 of Regulation No 178/2002 must be interpreted as precluding national legislation allowing information to be issued to the public, mentioning the name of a food and the name or trade name of the food manufacturer, processor or distributor, in a case where that food, though not injurious to health, is unfit for human consumption.
- 29 Article 10 of that regulation, which is the subject of the request for a preliminary ruling, simply places public authorities under an obligation to inform, where there are reasonable grounds to suspect that a food or feed may present a risk to human or animal health.

- 30 Accordingly, that provision as such does not prohibit public authorities from informing the public where a food is unfit for human consumption whilst not injurious to health.
- 31 In order to provide the referring court with a helpful answer to allow it to resolve the dispute before it, the Court considers that it is also necessary to give an interpretation of the second subparagraph of Article 17(2) of Regulation No 178/2002 even if that provision is not specifically mentioned in the request for a preliminary ruling before it (see to that effect, *inter alia*, Case C-243/09 *Fuß* [2010] ECR I-9849, paragraph 39 and case-law cited).
- 32 Pursuant to the second subparagraph of Article 17(2) of Regulation No 178/2002, which, under the second indent of Article 65 thereof, is applicable from 1 January 2005, Member States shall maintain a system of official controls and other activities as appropriate to the circumstances, including public communication on food safety and risk.
- 33 Article 7 of Regulation No 882/2004, which is applicable from 1 January 2006, provides *inter alia* that, firstly, in general, the public shall have access to information on the control activities of the competent authorities and their effectiveness, and, secondly, that the competent authority shall take steps to ensure that members of their staff are required not to disclose information acquired when undertaking their official control duties which by its nature is covered by professional secrecy in duly justified cases.
- 34 Article 14 of Regulation No 178/2002, applicable under the second paragraph of Article 65 thereof from 1 January 2005, sets out food safety requirements. Under Article 14(2), a food which is unfit for human consumption is said to be 'unsafe'.
- 35 In so far as a foodstuff is unacceptable for human consumption and accordingly unfit therefor, it does not fulfil the food safety requirements under Article 14(5) of Regulation No 178/2002, and is, in any event, such as to prejudice the interests of consumers, the protection of whom, as stated in Article 5 of that regulation, is one of the objectives of food law.
- 36 It follows from the above that, where food, though not injurious to human health, does not comply with the aforementioned food safety requirements because it is unfit for human consumption, national authorities may, as provided under the second subparagraph of Article 17(2) of Regulation No 178/2002, inform the public thereof in accordance with the requirements of Article 7 of Regulation No 882/2004.
- 37 The answer to the questions referred must therefore be that Article 10 of Regulation No 178/2002 must be interpreted as not precluding national legislation allowing information to be issued to the public mentioning the name of a food and the name or trade name of the food manufacturer, processor or distributor, in a case where that food, though not injurious to health, is unfit for human consumption. The second subparagraph of Article 17(2) of that regulation must be interpreted as allowing, in circumstances such as those of the case in the main proceedings, national authorities to issue such information to the public in accordance with the requirements of Article 7 of Regulation No 882/2004.

Costs

- 38 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 (Fourth Chamber) hereby rules:

Article 10 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, must be interpreted as not precluding national legislation allowing information to be issued to the public mentioning the name of a food and the name or trade name of the food manufacturer, processor or distributor, in a case where that food, though not injurious to health, is unfit for human consumption. The second subparagraph of Article 17(2) of that regulation must be interpreted as allowing, in circumstances such as those of the case in the main proceedings, national authorities to issue such information to the public in accordance with the requirements of Article 7 of Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.

[Signatures]