

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

4 December 2019 (*)

(Reference for a preliminary ruling — Protection of geographical indications and designations of origin for agricultural products and foodstuffs — Regulations (EC) No 510/2006 and (EU) No 1151/2012 — Article 13(1) — Regulation (EC) No 583/2009 — Article 1 — Registration of the name ‘Aceto Balsamico di Modena (PGI)’ — Protection of the non-geographical components of that name — Scope)

In Case C-432/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 12 April 2018, received at the Court on 2 July 2018, in the proceedings

Consorzio Tutela Aceto Balsamico di Modena

v

Balema GmbH,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis (Rapporteur), E. Juhász, M. Ilešič and C. Lycourgos, Judges,

Advocate General: G. Hogan,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 23 May 2019,

after considering the observations submitted on behalf of:

- Consorzio Tutela Aceto Balsamico di Modena, by A. Ringle and A. Rinkler, Rechtsanwälte,
- Balema GmbH, by C. Eggers and C. Böhler, Rechtsanwälte,
- the German Government, by J. Möller, M. Hellmann and U. Bartl, acting as Agents,
- the Greek Government, by G. Kanellopoulos, A.-E. Vasilopoulou and E.-E. Krompa, acting as Agents,
- the Spanish Government, by A. Rubio González and L. Aguilera Ruiz, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and S. Fiorentino, avvocato dello Stato,
- the European Commission, by B. Eggers, D. Bianchi, B. Hofstätter and I. Naglis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 July 2019,

gives the present

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1 of Commission Regulation (EC) No 583/2009 of 3 July 2009 entering a name in the register of protected designations of origin and protected geographical indications [Aceto Balsamico di Modena (PGI)] (OJ 2009 L 175, p. 7).
- 2 The request has been made in the context of a proceedings between Consorzio Tutela Aceto Balsamico di Modena ('the Consorzio'), a consortium of producers of products designated by the name 'Aceto Balsamico di Modena (PGI)', and Balema GmbH concerning the use by the latter of the term 'balsamico' on the labels of vinegar-based products which do not meet the specifications set for that protected geographical indication ('PGI').

Legal framework

Regulation (EC) No 510/2006

- 3 Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 2006 L 93, p. 12) repealed and replaced Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1). That regulation was in turn largely repealed and replaced with effect from 3 January 2013 by Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ 2012 L 343, p. 1).
- 4 The second subparagraph of Article 3(1) of Regulation No 510/2006, the wording of which reproduced that of the second subparagraph of Article 3(1) of Regulation No 2081/92 and which now appears, in essence, in point (6) of Article 3 of Regulation No 1151/2012, provided:

'For the purposes of this regulation, a "name that has become generic" means the name of an agricultural product or a foodstuff which, although it relates to the place or the region where this product or foodstuff was originally produced or marketed, has become the common name of an agricultural product or a foodstuff in the Community.'
- 5 Article 7 of Regulation No 510/2006, headed 'Objection/decision on registration', provided in paragraph 1 and in the first, third and fourth subparagraphs of paragraph 5 thereof:

'1. Within six months from the date of publication in the *Official Journal of the European Union* [of the single document and the reference to the publication of the product specification], any Member State or third country may object to the registration proposed, by lodging a duly substantiated statement with the Commission.

...

5. If an objection is admissible ..., the Commission shall invite the interested parties to engage in appropriate consultations.

...

If no agreement is reached, the Commission shall take a decision in accordance with the procedure referred to [in Articles 5 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for

the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23)], having regard to fair and traditional usage and the actual likelihood of confusion.

The decision shall be published in the *Official Journal of the European Union*.

6 Those provisions have been reproduced, in essence, respectively, in the first subparagraph of Article 51(1), the first subparagraph of Article 51(3), Article 52(3)(b) and Article 52(4) of Regulation No 1151/2012.

7 Article 13(1) and (2) of Regulation No 510/2006, the wording of which reproduced, without any substantive changes, that of Article 13(1) and (3) of Regulation No 2081/92 and which now appears in Article 13(1) and (2) of Regulation No 1151/2012, provided:

‘1. Registered names shall be protected against:

- (a) any direct or indirect commercial use of a registered name in respect of products not covered by the registration in so far as those products are comparable to the products registered under that name or in so far as using the name exploits the reputation of the protected name;
- (b) any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as ‘style’, ‘type’, ‘method’, ‘as produced in’, ‘imitation’ or similar;
- (c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;
- (d) any other practice liable to mislead the consumer as to the true origin of the product.

Where a registered name contains within it the name of an agricultural product or foodstuff which is considered generic, the use of that generic name on the appropriate agricultural product or foodstuff shall not be considered to be contrary to points (a) or (b) in the first subparagraph.

2. Protected names may not become generic.’

Regulation No 583/2009

8 As stated in the citations in its preamble, Regulation No 583/2009 was adopted on the basis of Regulation No 510/2006, in particular the third and fourth subparagraphs of Article 7(5) thereof.

9 Recitals 2 to 5, 7, 8 and 10 to 12 of Regulation No 583/2009 state:

- ‘(2) Germany, Greece and France submitted objections to the registration under Article 7(1) of Regulation [No 510/2006]. ...
- (3) Germany’s objection referred in particular to the concern that the registration of “Aceto Balsamico di Modena” as a protected geographical indication would adversely affect other products that have been placed lawfully on the market for at least five years and sold as Balsamessig/Aceto balsamico, as well as to the alleged generic character of these terms. ...
- (4) France’s objection concerned the fact that “Aceto Balsamico di Modena” does not have its own reputation that is distinct from that of “Aceto balsamico tradizionale di Modena”, which has already been registered as a protected designation of origin under Council Regulation (EC) No 813/2000 [of 17 April 2000 supplementing the Annex to Commission Regulation (EC) No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in

Article 17 of Regulation (EEC) No 2081/92 (OJ 2000 L 100, p. 5)]. France claims that consumers could be misled as to the nature and origin of the product in question.

- (5) Greece stressed the importance of balsamic vinegar production in Greece, which is marketed under names such as “balsamico” or “balsamon” and the negative impact that registration of the name “Aceto Balsamico di Modena” would have on these products, which have been placed lawfully on the market for at least five years. Greece also maintains that the terms “aceto balsamico”, “balsamic”, etc. are generic.

...

- (7) Given that no agreement was reached between France, Germany, Greece and Italy within the designated timeframe, the Commission must adopt a decision ...

- (8) The Commission has requested the opinion of the scientific committee for designations of origin, geographical indications and certificates of specific character ... as to whether the conditions for registration were met. The committee stated in its unanimous opinion submitted on 6 March 2006 that the name “Aceto Balsamico di Modena” has an undeniable reputation on the national and international market, as demonstrated by its frequent use in numerous recipes in many Member States, and the many references to it on the internet, in the press and other media. “Aceto Balsamico di Modena” therefore meets the inherent condition for the product having a specific reputation linked to that name. The committee noted the fact that these products have co-existed on the market for hundreds of years. It also noted that “Aceto Balsamico di Modena” and “Aceto balsamico tradizionale di Modena” are different as regards their characteristics, customer base, usage, method of distribution, presentation and price, thereby ensuring the fair treatment of the producers in question and not misleading consumers. The Commission fully concurs with these points.

...

- (10) It appears that Germany and Greece did not refer to the entire name, i.e. “Aceto Balsamico di Modena” in their objections regarding the generic nature of the name proposed for registration, but only to some elements of it, namely the words “aceto”, “balsamico” and “aceto balsamico”, or to translations thereof. However, protection is granted to the term “Aceto Balsamico di Modena” as a whole. Individual non-geographical components of that term may be used, even jointly and also in translation, throughout the [European Union], provided the principles and rules applicable in the [European Union]’s legal order are respected.

- (11) In the light of the above, the name “Aceto Balsamico di Modena” should be entered in the register of protected designations of origin and protected geographical indications.

- (12) The measures provided for in this regulation are in accordance with the opinion of the Standing Committee on Protected Geographical Indications and Protected Designations of Origin.’

10 Article 1 of Regulation No 583/2009 provides that ‘the name contained in Annex I to this Regulation shall be entered in the register’. That annex refers to ‘Aceto Balsamico di Modena (PGI)’.

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

11 Balema produces and markets vinegar-based products made from wines from the Baden region (Germany), which it has been selling for at least 25 years. The labels of those products bear the terms ‘Balsamico’ and ‘Deutscher balsamico’, among others, which are included on those labels under the legends ‘Theo der Essigbrauer, Holzfassreifung, Deutscher balsamico traditionell, naturtrüb aus badischen Weinen’ (Theo the vinegar brewer, maturation in wooden barrels, German balsamic vinegar, traditional,

naturally cloudy, made from Baden wines) or ‘1. Deutsches Essig-Brauhaus, Premium, 1868, Balsamico, Rezeptur No 3’ (first German vinegar brewery, premium, 1868, balsamic, recipe No 3).

- 12 The Consorzio, considering that the use by Balema of the term ‘Balsamico’ infringes the PGI ‘Aceto Balsamico di Modena’, sent it a letter of formal notice. In response, Balema brought an action in the German courts seeking a negative declaration of its obligation to refrain from using that term for vinegar-based products produced in Germany, in the form of the labels referred to in the preceding paragraph. Given that that action was dismissed at first instance, that company lodged an appeal, which was upheld on the grounds, in particular, that that use did not infringe point (b) of the first subparagraph of Article 13(1) of Regulation No 1151/2012, as the protection granted to that PGI by Regulation No 583/2009 was conferred only on the entire name ‘Aceto Balsamico di Modena’.
- 13 Seised of an appeal on a point of law lodged by the Consorzio against that decision, the Bundesgerichtshof (Federal Court of Justice, Germany) considers that the success of that action depends on whether the use of the term ‘Balsamico’ or the phrase ‘Deutscher balsamico’ infringes point (a) or (b) of the first subparagraph of Article 13(1) of Regulation No 1151/2012, which entails determining first of all whether the protection granted for the name ‘Aceto Balsamico di Modena’ by Article 1 of Regulation No 583/2009 covers only that entire name or extends to the use of the individual non-geographical terms thereof.
- 14 The referring court considers that it is clear from the second subparagraph of Article 13(1) of Regulation No 1151/2012 and the case-law of the Court of Justice that the protection of a name that consists of several terms, registered as a designation of origin or geographical indication, may extend to the individual terms of which it consists. However, the scope of protection of a PGI made up of several elements can legitimately be restricted by the act registering the name concerned. The referring court also considers that the Commission’s insertion, in the recitals of regulations registering protected names, of comments that restrict the scope of protection does not constitute an unlawful derogation from Regulation No 1151/2012, as the Commission is authorised, in accordance with that regulation, to take a decision on registration in cases in which an opposition has been lodged and an agreement has not been reached.
- 15 The referring court takes the view that, in the present case, recitals 3, 5 and 10 of Regulation No 583/2009 militate in favour of a restriction of the scope of protection to the name ‘Aceto Balsamico di Modena’ as a whole, excluding its individual non-geographical components. In addition, that court considers that, although, for the protected designations of origin (‘PDOs’) ‘Aceto balsamico tradizionale di Modena’ and ‘Aceto balsamico tradizionale di Reggio Emilia’, registered by Regulation No 813/2000, the lawfulness of the free use of the non-geographical components of those entire names is, in the absence of any reference in that regard in the regulation registering them, to be assessed in each particular case on the basis of point (b) of the first subparagraph of Article 13(1) and the second subparagraph of Article 13(1) of Regulation No 1151/2012, it is nonetheless not contradictory, in the case of the PGI at issue before it, to accept that its protection has been restricted by Regulation No 583/2009, as the absence of clarification to that effect in the regulation registering those PDOs could simply be attributable to the fact that there was no objection.
- 16 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does the protection of the entire name “Aceto Balsamico di Modena” extend to the use of the individual non-geographical components of the term as a whole (“Aceto”, “Balsamico”, “Aceto Balsamico”)?’

The request for the oral procedure to be reopened

- 17 Following the delivery of the Advocate General’s Opinion, the Consorzio asked the Court, by letter of 7 August 2019, to order the reopening of the oral part of the procedure. In support of its request, the Consorzio claims, in essence, that the Advocate General’s Opinion is based on new elements, which have not yet been debated between the parties, relating to the registration of the PDOs ‘Aceto balsamico tradizionale di Modena’ and ‘Aceto balsamico tradizionale di Reggio Emilia’ and that common terms

could be at issue, and that the proposed answer does not address the real issue in the case or allow the referring court properly to resolve the dispute pending before it. It also follows from that Opinion that the Court does not have sufficient information to give a ruling.

18 Pursuant to Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be decisive for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

19 That is not the situation in the present case. In addition to the fact that the existence of a new fact is not alleged, the Consorzio and the other parties who have participated in this procedure have been able to set out, during both the written and oral part of that procedure, the arguments in fact and in law which they considered relevant to answering the question referred. In that regard, it should be noted, in particular, with regard to the alleged new elements to which the Consorzio refers, that the first element was expressly considered by the referring court in its reference for a preliminary ruling and that the second element was raised by the Commission, among others, in its written observations and was the subject of a written question put by the Court to the parties to be answered at the hearing. Therefore, the Court considers, after hearing the Advocate General, that it has all the necessary elements at its disposal to rule and that the case should not be decided on the basis of a new fact or an argument that has not been debated between the parties or the interested persons.

20 Furthermore, as regards the criticisms made of the Advocate General's Opinion, it must be borne in mind, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court make no provision for interested parties to submit observations in response to the Advocate General's Opinion (judgments of 25 October 2017, *Polbud — Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 23 and the case-law cited, and of 25 July 2018, *Mitsubishi Shoji Kaisha and Mitsubishi Caterpillar Forklift Europe*, C-129/17, EU:C:2018:594, paragraph 25).

21 Second, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. In this regard, the Court is not bound either by the Opinion delivered by the Advocate General or by the reasoning which led to that Opinion. As a consequence, the fact that a party disagrees with the Advocate General's Opinion, irrespective of the questions examined in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgments of 25 October 2017, *Polbud — Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 24, and of 25 July 2018, *Mitsubishi Shoji Kaisha and Mitsubishi Caterpillar Forklift Europe*, C-129/17, EU:C:2018:594, paragraph 26).

22 In the light of the foregoing, the Court, after hearing the Advocate General, considers that there is no need to order the reopening of the oral part of the procedure.

Consideration of the question referred

23 By its question, the referring court asks, in essence, whether Article 1 of Regulation No 583/2009 must be interpreted as meaning that the protection of the name 'Aceto Balsamico di Modena' extends to the use of the individual non-geographical terms of that name.

24 In accordance with Article 1 of Regulation No 583/2009, read in conjunction with recital 11 of and Annex I to that regulation, the name 'Aceto Balsamico di Modena (PGI)' is registered and entered in the register of protected designations of origin and protected geographical indications. Therefore, according to the wording of that Article 1, it is the name 'Aceto Balsamico di Modena' as a whole that is registered and, consequently, protected.

- 25 In that regard, the Court has already held that, under the system of protection created by Regulation No 2081/92, which was reproduced in Regulation No 510/2006 and is now provided for in Regulation No 1151/2012, questions concerning the protection to be accorded to the various constituent parts of a registered name are matters which fall for determination by the national court on the basis of a detailed analysis of the facts presented before it by the parties concerned (see, to that effect, judgments of 9 June 1998, *Chiciak and Fol*, C-129/97 and C-130/97, EU:C:1998:274, paragraph 38, and of 26 February 2008, *Commission v Germany*, C-132/05, EU:C:2008:117, paragraph 30).
- 26 However, the Court has also held that, as regards a ‘compound’ name registered in accordance with Regulation No 2081/92, the fact that, for that name, there is no footnote, in the regulation registering that name, specifying that registration is not sought for one of the parts of that name does not necessarily mean that each of its parts is protected. The Court pointed out that, even if it may prove to be the case that it follows from Article 13 of Regulation No 2081/92 that, in the absence of specific circumstances pointing to the contrary, the protection afforded by that provision covers not only the compound name as a whole, but also each of its constituent parts, that will be the case only if that constituent part is not a generic or a common term (see, to that effect, judgment of 9 June 1998, *Chiciak and Fol*, C-129/97 and C-130/97, EU:C:1998:274, paragraphs 37 and 39).
- 27 Given that the system for the protection of geographical indications and designations of origin for agricultural products and foodstuffs contained in Regulation No 2081/92 was, as regards the protection of those names, reproduced, without any substantive changes, in Regulation No 510/2006 and subsequently in Regulation No 1151/2012 and the provisions of Article 13 of that first regulation were reproduced, also without any substantive changes, in Article 13 of each of those subsequent regulations, it must be noted that that case-law remains relevant and that it therefore also applies to compound names, such as the PGI at issue, registered pursuant to Regulation No 510/2006 and now protected by Regulation No 1151/2012.
- 28 It is apparent from the specific circumstances of the registration, by Regulation No 583/2009, of the name ‘Aceto Balsamico di Modena’ that the protection conferred on that name cannot extend to the individual non-geographical terms of that name.
- 29 In that regard, it must be pointed out that the operative part of an act is indissociably linked to the statement of the reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (judgments of 27 June 2000, *Commission v Portugal*, C-404/97, EU:C:2000:345, paragraph 41 and the case-law cited, and of 29 April 2004, *Italy v Commission*, C-91/01, EU:C:2004:244, paragraph 49).
- 30 In the present case, it is apparent from recital 8 of Regulation No 583/2009 that it is the name ‘Aceto Balsamico di Modena’ that has an undeniable reputation on the national and international market and that it is therefore that compound name as a whole which meets the inherent condition for the product having a specific reputation linked to that name.
- 31 Moreover, as regards the objections to the registration of that name submitted by the Federal Republic of Germany and the Hellenic Republic, it is stated in recital 10 of that regulation that those Member States ‘did not refer to the entire name, i.e. “Aceto Balsamico di Modena” ... but only to some elements of it, namely the words “aceto”, “balsamico” and “aceto balsamico”, or to translations thereof’; that ‘however, protection is granted to the term “Aceto Balsamico di Modena” as a whole’ and that ‘individual non-geographical components of that term may be used, even jointly and also in translation, throughout the [European Union], provided the principles and rules applicable in the [European Union]’s legal order are respected’.
- 32 Consequently, in recital 11 of that regulation, it is stated that ‘in the light of the above, the name “Aceto Balsamico di Modena” should be entered in the register of protected designations of origin and protected geographical indications’.

- 33 It thus follows unequivocally from the recitals of Regulation No 583/2009 that the non-geographical terms of the PGI at issue, namely ‘aceto’ and ‘balsamico’, and their use in combination and in translation cannot benefit from the protection for the PGI ‘Aceto Balsamico di Modena’ that was granted by Regulation No 510/2006 and is now ensured by Regulation No 1151/2012.
- 34 Moreover, first, it is established that the term ‘aceto’ is a common term, as previously held by the Court (see, to that effect, judgment of 9 December 1981, *Commission v Italy*, 193/80, EU:C:1981:298, paragraphs 25 and 26). Second, the term ‘balsamico’ is the Italian translation of the adjective ‘balsamic’ which has no geographical connotation and which, in the case of vinegar, is commonly used to refer to a vinegar with a bitter-sweet flavour. It is therefore also a common term within the meaning of the case-law referred to in paragraph 26 of this judgment.
- 35 Lastly, as the Advocate General has also pointed out, in essence, in points 57 and 58 of his Opinion, that interpretation of the scope of the protection conferred on the PGI at issue is appropriate in the light of the registrations of the PDOs ‘Aceto balsamico tradizionale di Modena’ and ‘Aceto balsamico tradizionale di Reggio Emilia’ which were, moreover, as stated in the recitals to Regulation No 583/2009, also taken into account by the Commission when that regulation was adopted. The use in the text of those PDOs of the terms ‘aceto’ and ‘balsamico’ and their use in combination and in translation cannot be considered likely to infringe the protection conferred on the PGI at issue.
- 36 In the light of all the foregoing considerations, the answer to the question referred is that Article 1 of Regulation No 583/2009 must be interpreted as meaning that the protection of the name ‘Aceto Balsamico di Modena’ does not extend to the use of the individual non-geographical terms of that name.

Costs

- 37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fifth Chamber) hereby rules:

Article 1 of Commission Regulation (EC) No 583/2009 of 3 July 2009 entering a name in the register of protected designations of origin and protected geographical indications [Aceto Balsamico di Modena (PGI)] must be interpreted as meaning that the protection of the name ‘Aceto Balsamico di Modena’ does not extend to the use of the individual non-geographical terms of that name.

[Signatures]

* Language of the case: German.