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CURTEA DE JUSTIȚIE A UNIUNII EUROPENE
SÚDNY DVOR EURÓPSKEJ ÚNIE
SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

JUDGMENT OF THE COURT (Ninth Chamber)

12 October 2017 *

(Reference for a preliminary ruling — Agriculture — Organic products — Control system established by Regulation (EC) No 834/2007 — Concept of ‘direct sale to the final consumer or user’)

In Case C-289/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 24 March 2016, received at the Court on 24 May 2016, in the proceedings

Kamin und Grill Shop GmbH

v

Zentrale zur Bekämpfung unlauteren Wettbewerbs eV,

THE COURT (Ninth Chamber),

composed of E. Juhász (Rapporteur), acting President of the Chamber, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Kamin und Grill Shop GmbH, by B. Ackermann, Rechtsanwältin,
- Zentrale zur Bekämpfung unlauteren Wettbewerbs eV, by C. von Gierke, C. Rohnke and T. Winter, Rechtsanwälte,

* Language of the case: German

– the European Commission, by A. Lewis and B. Eggers, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 8 June 2017,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 28(2) of Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 (OJ 2007 L 189, p. 1).
- 2 The request has been made in proceedings between *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* (an association whose mission is to combat unfair competition; ‘the Zentrale’) and *Kamin und Grill Shop GmbH* (‘Kamin’) concerning the lawfulness of the marketing of organic products when the obligations of notification and control laid down by Article 28(1) of Regulation No 834/2007 are not complied with.

Legal context

EU law

- 3 Recitals 3, 5, 22, 31 and 32 of Regulation No 834/2007 state:
 - ‘(3) The Community legal framework governing the sector of organic production should pursue the objective of ensuring fair competition and a proper functioning of the internal market in organic products, and of maintaining and justifying consumer confidence in products labelled as organic. It should further aim at providing conditions under which this sector can progress in line with production and market developments.
 - ...
 - (5) It is therefore appropriate to define more explicitly the objectives, principles and rules applicable to organic production, in order to contribute to transparency and consumer confidence as well as to a harmonised perception of the concept of organic production.
 - ...
 - (22) It is important to maintain consumer confidence in organic products. Exceptions from the requirements applicable to organic production should therefore be strictly limited to cases where the application of exceptional rules is deemed to be justified.

...

- (31) In order to ensure that organic products are produced in accordance with the requirements laid down under the Community legal framework on organic production, activities performed by operators at all stages of production, preparation and distribution of organic products should be submitted to a control system set up and managed in conformity with the rules laid down in 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)].
- (32) It might in some cases appear disproportionate to apply notification and control requirements to certain types of retail operators, such as those who sell products directly to the final consumer or user. It is therefore appropriate to allow Member States to exempt such operators from these requirements. However, in order to avoid fraud it is necessary to exclude from the exemption those retail operators who produce, prepare or store products other than in connection with the point of sale, or who import organic products or who have contracted out the aforesaid activities to a third party.’

4 The first subparagraph of Article 1(1) of Regulation No 834/2007 reads as follows:

‘This Regulation provides the basis for the sustainable development of organic production while ensuring the effective functioning of the internal market, guaranteeing fair competition, ensuring consumer confidence and protecting consumer interests.’

5 Article 2 of that regulation is worded as follows:

‘For the purposes of this Regulation, the following definitions shall apply:

- (a) “organic production” means the use of the production method compliant with the rules established in this Regulation, at all stages of production, preparation and distribution;
- (b) “stages of production, preparation and distribution” means any stage from and including the primary production of an organic product up to and including its storage, processing, transport, sale or supply to the final consumer, and where relevant labelling, advertising, import, export and subcontracting activities;

...’

6 Article 27 of that regulation provides:

‘1. Member States shall set up a system of controls and designate one or more competent authorities responsible for controls in respect of the obligations established by this Regulation in conformity with Regulation (EC) No 882/2004.

...

13. Member States shall ensure that the control system as set up allows for the traceability of each product at all stages of production, preparation and distribution in accordance with Article 18 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)], in particular, in order to give consumers guarantees that organic products have been produced in compliance with the requirements set out in this Regulation.

...’

7 Article 28 of Regulation No 834/2007 provides:

‘1. Any operator who produces, prepares, stores, or imports from a third country products in the meaning of Article 1(2) or who places such products on the market shall, prior to placing on the market of any products as organic or in conversion to organic:

- (a) notify his activity to the competent authorities of the Member State where the activity is carried out;
- (b) submit his undertaking to the control system referred to in Article 27.

...

2. Member States may exempt from the application of this Article operators who sell products directly to the final consumer or user provided they do not produce, prepare, store other than in connection with the point of sale or import such products from a third country or have not contracted out such activities to a third party.

...’

German law

8 The German legislature made use of the possibility provided for in Article 28(2) of Regulation No 834/2007 in Article 3(2) of the Gesetz zur Durchführung der Rechtsakte der Europäischen Union auf dem Gebiet des ökologischen Landbaus — Öko-Landbaugesetz (Law implementing the legal acts of the European Union in the area of organic farming; ‘the ÖLG’).

9 Paragraph 3(2) of the ÖLG provides:

‘(2) operators who supply products within the meaning of Article 1(2) of Regulation No 834/2007 as organic or in conversion to organic directly to final consumers or users are exempt from complying with the obligations of Article 28(1) of Regulation No 834/2007 provided that they do not themselves produce those products or arrange to have them produced, prepare them or arrange to have them prepared, store them or arrange to have them stored other than in connection with the point of sale, or import them or arrange to have them imported from a third country.’

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

- 10 Kamin operates a mail order business on the internet for fireplace and barbecue supplies. The products it offered for sale in December 2012 included various mixes of spices that it marketed under the description ‘Bio-Gewürze’ (organic spices). At that time Kamin was not yet subject to the control system laid down in Article 27 of Regulation (EC) No 834/2007.
- 11 By letter of 28 December 2012, described as a ‘formal notice’, the Zentrale objected to the offer for sale referred to in the previous paragraph of this judgment. The Zentrale considered that it amounted to unfair commercial practice in breach of Article 28(1) of Regulation No 834/2007, whereby an operator marketing organic products is required to submit his undertaking to a control system, and requested that Kamin give an undertaking to cease, subject to a penalty. Kamin complied with the request, but did not, however, admit the existence of such an infringement.
- 12 Zentrale subsequently brought an action seeking the refund of part of the costs of the formal notice, in the amount of EUR 219.35 plus interest.
- 13 That action was dismissed at first instance, but upheld on appeal.
- 14 The Bundesgerichtshof (Federal Court of Justice, Germany), seised of an appeal of a point of law, takes the view that the provisions of Article 28(2) of Regulation No 834/2007, according to which the products must be sold directly to the final consumer or user, may be interpreted in several ways.
- 15 On the one hand, it would be possible to take the view that that sale must take place where the products are stored, and when both the operator or his sales personnel and the consumer are present at the same time. According to that interpretation, neither online retail trade nor any other type of mail order retail trade would fall within the exemption in Article 28(2) of Regulation No 834/2007. On the other hand, that provision could also be interpreted to mean that the requirement that the sale must take place directly excludes sales in which a third party has intervened.

- 16 More specifically, the referring court points out that it is highly improbable that a final consumer or user, who acquires from an operator products that the operator has not produced himself, is better placed to control whether the requirements governed by Regulation No 834/2007 have been complied with when the sale occurs in a physical retail outlet, at the place where the products are stored, and in the presence of the operator or his sales personnel, than when the sale is carried out by mail order, including over the internet.
- 17 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘Is there already a “direct” sale to the final [consumer] within the meaning of Article 28(2) of Regulation No 834/2007 where the operator or his sales personnel sells the products to the final consumer without the intervention of a third party, or does a “direct” sale additionally require that the sale occurs at the place where the products are stored when both the operator or his sales personnel and the final consumer are present at the same time?’

Consideration of the question referred

- 18 By its question, the referring court asks, in essence, whether Article 28(2) of Regulation No 834/2007 must be interpreted as meaning that, in order for products to be regarded as being sold ‘directly’, within the meaning of that provision, to the final consumer or user, it is necessary for the sale to occur in the presence of both the operator or his sales personnel and the final consumer, or whether it is sufficient that the sale take place without the intervention of a third party.
- 19 Under Article 28(2) of Regulation No 834/2007, Member States may exempt from the application of the first paragraph of that article operators who sell products directly to the final consumer or user, provided they do not produce, prepare, store other than in connection with the point of sale or import such products from a third country or have not contracted out such activities to a third party.
- 20 At the outset, it should be emphasised that that provision, in so far as it allows Member States to exempt, subject to the conditions it lays down, certain operators from the control system governed by Regulation No 834/2007, introduces an exception to the rule enshrined in Article 28(1) of that regulation and must, as an exception to a rule, be interpreted restrictively (see, by analogy, judgment of 26 September 2013, *Dansk Jurist- og Økonomforbund*, C-546/11, EU:C:2013:603, paragraph 41).
- 21 Furthermore, the fact that recital 22 of Regulation No 834/2007 emphasises that exceptions to requirements for organic production must be restricted solely to cases where the application of exceptional rules may be deemed justified also supports a restrictive interpretation of the exemption provided for in Article 28(2)

of that regulation, given that, in accordance with Article 2(a) of that regulation, the concept of ‘organic production’ is defined as the use of the production method compliant with the rules established in that regulation, at all stages of production, preparation and distribution.

- 22 Next, it is settled case-law that, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (see judgment of 6 July 2017, *Air Berlin*, C-290/16, EU:C:2017:523, paragraph 22 and the case-law cited).
- 23 As concerns, in that regard, the provisions of Article 28(2) of Regulation No 834/2007, pursuant to which operators who sell products directly to the final consumer or user may be exempted from the application of Article 28(1), it should be noted that Article 28(2) includes several conditions intended to restrict the categories of sellers who may qualify for the exception provided for.
- 24 Thus, although the use of the word ‘directly’ is unquestionably designed to exclude any intervention by a third party, the other criteria included in that provision must also be taken into consideration.
- 25 The context and objectives of the legislation of which the provision at issue in the main proceedings is a part also support a restrictive interpretation.
- 26 Article 28(2) of Regulation No 834/2007 is one of the provisions of that regulation relating to the control of the requirements laid down pursuant to the EU legal framework concerning organic production. As stated in recital 31 of Regulation No 834/2007, for organic products to be produced in accordance with those requirements, the activities of operators at all stages of production, preparation and distribution of such products must be submitted to the controls system established by Article 27(1) of that regulation.
- 27 In accordance with Article 27(13) of that regulation, the control system is intended to guarantee the traceability of each product at all stages of production, preparation and distribution, in order, in particular, to give consumers guarantees that organic products have been produced in compliance with the requirements set out in that regulation.
- 28 In that context, recital 32 of Regulation No 834/2007, far from intending to establish a general exemption from the obligation provided for in Article 28(1) of that regulation, expressly refers to ‘certain types of retail operators’ and ‘some cases’, in order to limit the number of cases in which the application of notification and control requirements could appear to be disproportionate.
- 29 It would therefore be contrary to the system established by that regulation to endorse an interpretation which would transform an exemption, designed for specific and limited cases, both in number and in economic significance, into a rule that could amount to an exception to the control system for a large part of the online retail trade and other forms of mail order retail trade, notwithstanding the

fact that those distribution channels are of substantial and increasing importance in the context of organic production.

- 30 What is more, with regard to the objective of consumer protection, which entails, as stated in recitals 3 and 5 of Regulation No 834/2007, maintaining and justifying the confidence of consumers in products labelled as organic, it would be contrary to that objective to accept that the exception in Article 28(2) of Regulation No 834/2007 could also apply to cases other than those expressly provided for by the legislature.
- 31 Finally, the interpretation set out above of Article 28(2) of Regulation No 834/2007 is not called into question by the argument that it has not been established that the final consumer is better able, when purchases are made in a retail outlet, to control whether the requirements in Regulation No 834/2007 have been complied with than when purchases are made online or by mail order.
- 32 As the Commission pointed out, the exemption provided for in Article 28(2) of Regulation No 834/2007 is not founded on those considerations, but is intended, following a general assessment of the risks in the context of organic production, to comply with the principle of proportionality, by allowing an exception that is limited to cases in which the application of the notification and control requirements could be regarded as excessive.
- 33 In that regard, the Court agrees with the Commission that the application of such requirements appears to be fully justified in cases of online or mail order retail trade, given that the storage of products, generally in very large quantities, and the delivery by intermediaries carry the risk that products could be relabelled, exchanged or contaminated, a risk that cannot be regarded as low overall.
- 34 In the light of the foregoing, the answer to the question referred is that Article 28(2) of Regulation No 834/2007 must be interpreted as meaning that, in order for products to be regarded as being sold ‘directly’, within the meaning of that provision, to the final consumer or user, it is necessary for the sale to occur in the presence of both the operator or his sales personnel and the final consumer.

Costs

- 35 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 (Ninth Chamber) hereby rules:

Article 28(2) of Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing

Regulation (EEC) No 2092/91 must be interpreted as meaning that, in order for products to be regarded as being sold ‘directly’, within the meaning of that provision, to the final consumer or user, it is necessary for the sale to occur in the presence of both the operator or his sales personnel and the final consumer.

[Signatures]