

Case C-478/07

Budějovický Budvar, národní podnik

v

Rudolf Ammersin GmbH

(Reference for a preliminary ruling
from the Handelsgericht Wien)

(Bilateral agreements between Member States — Protection in a Member State of a geographical indication of provenance of another Member State — Designation ‘Bud’ — Use of the mark ‘American Bud’ — Articles 28 EC and 30 EC — Regulation (EC) No 510/2006 — Community system of protection of geographical indications and of designations of origin — Accession of the Czech Republic — Transitional measures — Regulation (EC) No 918/2004 — Scope of the Community system — Exhaustive nature)

Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 5 February
2009 I - 7724
Judgment of the Court (Grand Chamber), 8 September 2009 I - 7757

Summary of the Judgment

1. *Free movement of goods — Exceptions — Protection of industrial and commercial property — Protection of a designation as a simple and indirect geographical indication of source — Conditions*
(Arts 28 EC and 30 EC)

2. *Free movement of goods — Exceptions — Protection of industrial and commercial property — Protection of a designation protected under a bilateral treaty between Member States as a geographical indication or designation of origin — Conditions*
(Art. 30 EC)
3. *Agriculture — Uniform legislation — Protection of geographical indications and designations of origin for agricultural products and foodstuffs — Uniform and exhaustive system of protection*
(Council Regulation No 510/2006)

1. In order to determine whether a designation which is not a geographical name can be considered to constitute a simple and indirect indication of geographical provenance, protection of which under the bilateral treaties concluded between Member States is capable of being justified on the basis of the criteria laid down in Article 30 EC, the national court must ascertain whether, according to factual circumstances and perceptions prevailing in the Member State of origin, that designation, even if it is not in itself a geographical name, is at least capable of informing the consumer that the product bearing that indication comes from a particular place or region of that Member State. However, if such an examination were to show that the designation at issue is not at least capable of evoking the geographical provenance of the product, its protection cannot be justified on the grounds of protection of industrial and commercial property within the meaning of Article 30 EC and would in principle run counter to Article 28 EC unless it could be justified on another basis.

The national court must, in addition, ascertain, also in the light of factual

circumstances and perceptions prevailing in the Member State of origin, whether that designation has not, either at the time of the entry into force of the bilateral instruments at issue or subsequently, become generic in that Member State, it being established that the aim of the system of protection introduced by those instruments falls within the sphere of the protection of industrial and commercial property within the meaning of Article 30 EC.

In the absence of any Community provision in that regard, it is for the national court to decide, in accordance with its own national law, whether a consumer survey should be commissioned for the purpose of clarifying the factual circumstances and perceptions prevailing in the Member State of origin in order to ascertain whether a designation can be classified as a simple and indirect indication of geographical source and has not become generic in that Member State. It is also in the light of that national law that the national court, if it finds it necessary to

commission a consumer survey, must determine, for the purposes of making the necessary assessments, the percentage of consumers that would be sufficiently significant.

(see paras 82-84, 89, 94, operative part 1)

2. Article 30 EC does not lay down specific requirements as to the quality and the duration of the use made in the Member State of origin of a designation protected under bilateral treaties concluded between Member States in order for its protection to be justified in the light of that article. Whether such requirements apply in the context of the dispute in the main proceedings must be determined by the national court in the light of the applicable national law, in particular the system of protection laid down by those bilateral instruments concluded between the Member States concerned.

(see paras 91, 93, 94, operative part 1)

3. The Community system of protection laid down by Regulation No 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs is exhaustive in nature, with the result that that regulation precludes the application of a system of protection laid down by agreements between two Member States, such as bilateral treaties, which confers on a designation, recognised under the law of a Member State as constituting a designation of origin, protection in another Member State where that protection is actually claimed despite the fact that no application for registration of that designation of origin has been made in accordance with that regulation.

The aim of Regulation No 510/2006 is not to establish, alongside national rules which may continue to exist, an additional system of protection for qualified geographical indications, like, for example, that introduced by Regulation No 40/94 on the Community trade mark, but to provide a uniform and exhaustive system of protection for such indications.

(see paras 114, 129, operative part 2)