

Press and Information Division

**PRESS RELEASE No 46/03**

22 May 2003

*Opinion delivered by Advocate General Tizzano in Case C-216/01*

*Budějovický Budvar v Rudolf Ammersin GmbH*

**ADVOCATE GENERAL TIZZANO PROPOSES THAT THE COURT OF JUSTICE SHOULD DECLARE THAT THE APPLICATION OF A BILATERAL AGREEMENT BETWEEN A MEMBER STATE AND A THIRD COUNTRY WHICH ACCORDS ABSOLUTE PROTECTION TO A MERE GEOGRAPHICAL INDICATION IS PERMISSIBLE.**

*By contrast a national measure which accords absolute protection, regardless of any risk of confusion, to an indication which establishes no link between the product and its origin is not permissible.*

The brewery ‘**Budějovický Budvar**’ is established in České Budějovice (Budweis, in German) in the Czech Republic and produces the beer ‘**Budweiser Budvar**’; it brought an action against an Austrian company (Ammersin), carrying on the business of selling beer and in particular importing from the United States an American beer called ‘**American Bud**’. This beer is produced by a brewery in Saint Louis (USA) which, since the end of the Second World War, has been exporting its beer to Europe.

The dispute concerns a bilateral international agreement entered into in 1976 between the Republic of Austria and the Federal Republic of Czechoslovakia (prior to its dissolution) for the protection of geographical indications of origin of typical foodstuffs traded between the two countries. By that agreement, Austria granted to the geographical designations of agricultural products from Czechoslovakia (a third country) a protection similar to that subsequently laid down, in respect of Community products, by the regulation on protected designations of origin (PDO).<sup>1</sup> Included in that list of designations is that of ‘**Bud**’.

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1. Council Regulation 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

In 1999, Budvar applied to the Handelsgericht (Commercial Court), Vienna for an order restraining Ammersin from further importing 'American Bud' on the grounds that it constituted an abuse of the indications of origin protected under the Austro-Czechoslovakian Treaty and was such as to alter market conditions thereby giving rise to confusion on the part of the consumers.

The Austrian court referred the matter to the Court of Justice seeking clarification of various points.

**Advocate General Tizzano has today delivered his Opinion.**

**The view of the Advocate General is not binding on the Court of Justice. The task of an Advocate General is to propose to the Court, in complete independence, a legal solution to a case.**

The Advocate General proposes that the Court should find that **the regulation on the protection of geographical indications and designations of origin permits the application of an agreement between a Member State and a third country which accords absolute protection to a geographical indication designating the origin of a product, even though its qualities are not particularly tied to the origin.**

First, according to the Advocate General, the regulation cannot apply to a designation, like 'Bud', from a third country.

Second, according to the Court's well-established case-law, national law may in any event decide to accord 'absolute' protection to a mere designation, without there being any particular ties between the origin of the product and its characteristics. The Advocate General notes, however, that the classification of the designation is a matter for the Austrian court.

However, according to the Advocate General, **the general principles on the free movement of goods permit the application of a bilateral agreement (between a Member State and a third country) which, for the purposes of protecting industrial and commercial property rights, accords absolute protection to a geographical indication which, whilst not constituting the name of a region or place in a third country, designates a product without particular ties to its qualities**, provided that the designation has not become generic in the State of origin.

How should an indication be assessed which does not establish any link between the product and the geographical origin, and which is to be protected absolutely notwithstanding the absence of any risk of confusion?

In the Advocate General's Opinion, this type of designation, entirely distinct from a geographical designation, cannot aspire to the protection accorded to industrial property rights.

Neither will it be protected in accordance with the principles of fair competition, since it is not such as to mislead consumers as to the origin of the product and would, instead, constitute

an unjustified advantage for producers established in a particular place vis-B-vis their competitors.

The Advocate General, therefore, proposes that the Court should find that the same principles **preclude a national measure from reserving to the producers of a third country the use of an indication entirely distinct from the category of geographical indications, which does not establish any link between the product and its origin, thereby according absolute protection, regardless of any risk of confusion.**

The Advocate General considers that it is for the national court to make an assessment on the merits whether, in the Czech Republic, the designation 'Bud' used in relation to beer evokes the city of Budweis in the minds of consumers.

The Austrian court further asks whether the Austro-Czechoslovakian Treaty should, however, prevail over the provisions of the EC Treaty where these conflict, in accordance with provisions of the EC Treaty on compliance with obligations arising from prior international agreements (i.e. concluded by the Member States before their accession to the Community).

The issue arises because the treaty was concluded in 1976, therefore well before the accession of Austria to the Community (1995), but was concluded with a State, Czechoslovakia, which ceased to exist in 1993, giving rise to the Czech Republic and the Slovak Republic, and it was only in 1997, i.e. after its accession to the Community, that the Republic of Austria officially confirmed the maintenance in force of that treaty in its relations with the Czech Republic.

In the Advocate General's opinion, the treaty in force today is the same treaty concluded in 1976, in respect of which there is found to be the succession of States between Czechoslovakia and the Czech Republic. Indeed, there does not appear to be any intention on behalf of the parties to break the contractual obligations laid down by the 1976 treaty; moreover, the recent practice of the Community institutions in the event of the formation of new independent States following secession or dismemberment is also that of the continuity of international contractual obligations and the automatic succession of the new State to the treaties concluded by the predecessor State. Lastly, this continuity corresponds to the express declarations of the parties.

The Advocate General, therefore, proposes that the Court should find that **the scheme laid down by the Austro-Czechoslovakian Treaty of 1976 prevails over the provisions of Community law, where these conflict, notwithstanding the fact that, on the Austrian side, the succession of States to the Austro-Czechoslovakian Treaty was officially recognised after the accession of Austria to the Community.**

Finally, the Austrian court asks to what extent the EC Treaty requires the Member States to interpret a bilateral agreement in such a way as to comply with Community law (that is to say, with the principles of free and fair competition) where it guarantees not only protection to consumers from being misled, but also absolute protection, whereas, at Community level, this is ensured in respect only of products corresponding to the characteristics laid down for the protected designations of origin, within the meaning of Regulation 2081/92.

On that point, the Advocate General notes that the EC Treaty provides that a bilateral agreement such as the 1976 agreement must be interpreted in accordance with Community law, but only where its text is ambiguous and it is capable of being read in accordance with Community law 'without distorting the meaning'; he stresses, however, that it is for the national court to determine whether this possibility exists, because that court alone is competent to interpret bilateral conventions which bind the Member States but which lie outside the scope of Community law.

**Note:** *After delivery of the Advocate General's Opinion, the judges of the Court of Justice of the EC begin their deliberation on the judgment, which they will deliver at a later date.*

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