OPINION OF ADVOCATE GENERAL ALBER

delivered on 6 December 2001 [1]

I — Introduction

1. These proceedings concern the free movement of chocolate products that contain vegetable fats other than cocoa-butter. Italy prohibits such products lawfully manufactured in other Member States of the Community from being marketed under the name 'chocolate', requiring that they be marketed in Italy under the name 'chocolate substitute'.

II — Legal framework

(1) *Community law*

Council Directive 73/241/EEC of 24 July 1973 on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption (hereinafter 'Directive 73/241') [2] contains the following provisions:

Seventh recital

'whereas the use of vegetable fats other than cocoa-butter in chocolate products is permitted in certain Member States, and extensive use is made of this facility; whereas, however, a decision relating to the possibilities and forms of any extension of the use of these fats in the Community as a whole cannot be taken at the present time, as the economic and technical data currently available are not sufficient to enable a final position to be adopted; whereas the situation will consequently have to be re-examined in the light of future developments.'

1 — Original language: German.

2 — OJ 1973 L 228, p. 23.

Article 14(2)(a)

'2. This Directive shall not affect the provisions of national laws:

(a) at present authorising or prohibiting the addition of vegetable fats other than cocoa-butter to the chocolate products defined in Annex I. At the end of a period of three years [3] from the notification of this Directive the Council shall decide, on a proposal from the Commission, on the possibilities and the forms of extending the use of these fats to the whole of the Community;

(b) ...'

3 — This requirement was met not after three years, as planned, but only with the adoption of Directive 2000/36/EC. This will be referred to again in footnote 23 below.

Annex I

'1. For the purposes of this Directive, the following definitions shall apply:

...

1.16 *Chocolate*

The product obtained from cocoa nib, cocoa mass, cocoa powder or fat-reduced cocoa powder and sucrose with or without added cocoa-butter, having, without prejudice to the definition of chocolate vermicelli, gianduja nut chocolate and couverture chocolate, a minimum total dry cocoa solids content of 35% — at least 14% of dry non-fat cocoa solids and 18% of cocoa-butter — these percentages to be calculated after the weight of the additions provided for in paragraphs 5 to 8 has been deducted;

...

7. (a) Without prejudice to Article 14 (2)(a), edible substances, with the

exception of flour and starches and of fats and fat preparations not derived exclusively from milk, may be added to chocolate, plain chocolate, couverture chocolate, milk chocolate, milk chocolate with high milk content, couverture milk chocolate and to white chocolate.

...'

(2) *Italian law*

2. Directive 73/241 was transposed into Italian law by Law No 351 of 30 April 1976 (hereinafter 'Law No 351/76'). Under Article 6 of that Law all products which resemble chocolate but whose composition does not comply with the definitions given in the annex to the Law are designated chocolate imitations. The only vegetable fat contained in the products listed in the annex to the Law is cocoa-butter.

3. The ministerial circular of 28 March 1994 excluded chocolate products lawfully manufactured in a Member State of the Community and containing other vegetable fats from the application of Article 6 of Law No 351/76. A further circular from the Health Ministry of 15 March 1996 changed that legal situation, specifying that chocolate products manufactured in the United Kingdom, Ireland and Denmark and containing vegetable fats other than cocoa-butter were to be marketed under the name 'chocolate substitute' ('surrogato di cioccolato').

III — Pre-litigation procedure

4. By letter of 12 February 1997 the Commission informed the Italian authorities that it considered the prohibition of the marketing of chocolate products containing vegetable fats other than cocoa-butter under the name 'chocolate' to be incompatible with Article 28 EC. By letter of 8 July 1997 the Italian Government disputed the contention that Article 28 EC had been infringed, arguing that Directive 73/241 represented complete harmonisation of the rules on the marketing of chocolate. Only products complying with this Directive were protected by the principle of the free movement of goods.

5. On 22 December 1997 the Commission then forwarded to the Italian Government a letter of reminder in which it reiterated its legal opinion. In subsequent contacts

between the authorities of the Italian Government and the Commission the two sides stood by their opinions. On 29 July 1998 the Commission sent the Italian Government a reasoned opinion, to which the Italian Government replied on 29 August 1998. It announced its intention of upholding the disputed prohibition. The two parties thus maintained their positions.

IV — Arguments of the parties and forms of order sought

(1) *The Commission*

6. The Commission considers the provisions of Article 6 of Law No 351/76 to be a measure having equivalent effect to a quantitative restriction. Referring to the provisions of Article 14(2)(a), the seventh recital and point 7(a) of Annex I, it takes the view that Directive 73/241 does not govern the question of the use of vegetable fats other than cocoa-butter in chocolate products. Although it is thus in principle left to the Member States to permit or prohibit the use of such vegetable fats, the legislation they adopt must be compatible with the other principles of Community law, such as the principle of the free movement of goods defined in Article 28 EC.

7. In the Commission's opinion, it follows from this that national legislation on the marketing of products containing vegetable fats other than cocoa-butter can rule only on manufacture in its own Member State. Compliance with Article 28 EC required that, as a general rule, the marketing of both types of product, chocolate with and chocolate without added vegetable fats other than cocoa-butter, be permitted in the Community under the name 'chocolate'. The only condition was that the minimum contents defined in Directive 73/241 be respected and that the products be lawfully manufactured in a Member State under the name 'chocolate'.

8. The Commission points out that the marketing of chocolate products containing vegetable fats other than cocoa-butter under the name 'chocolate' is permitted in all the Member States except Italy and Spain and that the manufacture of those products under the name 'chocolate' is permitted in six Member States.

9. The restriction of the free movement of goods is not removed, in the Commission's view, by the option of marketing the products concerned under the name 'choc-

olate substitute'. The Commission sees this too as an unjustified restriction of the free movement of goods.

10. The Commission also contends that the obligation to rename products leads to higher packaging and labelling costs and possibly to less favourable marketing conditions. Products bearing their normal, traditional names were usually held in higher esteem by the consumer. The use of a negative term, such as 'chocolate substitute', might reduce the product's value in the eyes of the consumer.

11. In the Commission's opinion, an obligation to rename products might be justified if the chocolate products concerned differed fundamentally in composition or manufacture from those usually marketed in the Community under that name. This could not, however, be assumed where vegetable fats other than cocoa-butter were added since these products were already accepted by Directive 73/241 as being chocolate.

12. The obligation to rename products was also disproportionate. The goal of protecting consumers could be achieved just as effectively by providing them with objective and impartial information on the packaging. This was a far less drastic means than prohibiting marketing under the name under which the product had been lawfully manufactured in a Member State and providing the option of marketing it under another name which moreover, had, negative connotations.

13. The Commission claims that the Court should:

(1) declare that, by prohibiting chocolate products which contain vegetable fats other than cocoa-butter and which have been lawfully manufactured in Member States in which the use of such substances is permitted from being marketed in Italy under the name under which they are marketed in their country of origin and by prescribing that such products may be marketed only under the name 'chocolate substitute', the Italian Republic has failed to fulfil its obligations under Article 28 EC;

(2) order the Italian Republic to bear the costs of the proceedings.

(2) *Italy*

14. Italy contends that the Court should:

(1) dismiss the application;

(2) order the Commission to bear the costs of the proceedings.

15. The Italian Republic considers the disputed legislation to be compatible with Article 28 EC. Article 14(2)(a) of Directive 73/241 explicitly authorised the Member States to retain their national legislation, regardless of whether they permitted or prohibited the use of vegetable fats other than cocoa-butter. The Commission's interpretation circumvented this provision. If products which did not comply with the legislation of the importing State might nevertheless be marketed under the name under which they were manufactured in the country of origin, the result would in effect be to permit the addition of substances prohibited under national legislation. This was inconsistent with the purpose of the authorisation in Article 14(2) of Directive 73/241.

16. The Commission's legal opinion also led to reverse discrimination. Manufacturers in Italy had to comply with the Italian legislation, which prohibited the addition of vegetable fats other than cocoa-butter. This put them at a disadvantage in competition with manufacturers in other Member States who were permitted to market products containing vegetable fats other than cocoa-butter in Italy under the name 'chocolate'.

17. The Italian Government denies that the disputed legislation results in a restriction of the free movement of goods. Products containing vegetable fats other than cocoa-butter might be marketed in Italy under the name 'chocolate substitute' ('surrogato di cioccolato').

18. The obligation to rename the product was justified from the angle of consumer protection. The addition of other vegetable fats altered the product so fundamentally that marketing it under the traditional name 'chocolate' was no longer justified. There was otherwise a danger of Italian consumers being misled since, when confronted with the name 'chocolate', they expected only products containing no vegetable fats other than cocoa-butter.

V — Legal analysis

(1) *Absence of harmonisation of Community law*

19. The parties disagree on the extent to which the marketing of chocolate products containing vegetable fats other than cocoa-butter under the name 'chocolate' is governed by Directive 73/241. The Commission maintains that it is not, and takes the view that the marketing of chocolate products containing vegetable fats other than cocoa-butter is governed by Article 28 EC. Italy, on the other hand, believes that the Directive sets out definitive provisions in as much as the Member States have been authorised to lay down rules on this matter, possibly even prohibiting the marketing of products which do not comply with their national legislation.

20. Both parties base their arguments on Article 14(2)(a) of the Directive, referred to under II(1) above. This provision reads: 'This Directive shall not affect the provisions of national laws at present authorising or prohibiting the addition of vegetable fats other than cocoa-butter to the chocolate products defined in Annex I'. The issue on which the parties disagree cannot be resolved solely by reference to the wording of this provision. It merely states that existing national legislation concerning the admissibility of the use of vegetable fats other than cocoa-butter is not affected by the Directive. Thus both provisions permitting the use of such vegetable fats and provisions prohibiting their use are declared to be consistent with Community law. This does not, however, answer the question regarding the extent to which products lawfully manufactured in other Member States may be marketed under the name 'chocolate' where they do not comply with national legislation.

21. The sentence of Article 14 quoted above must, however, be read in conjunction with the following sentence of this provision, which announces a future resolution of this issue: 'At the end of a period of three years from the notification of this Directive the Council shall decide, on a proposal from the Commission, on the possibilities and the forms of extending the use of these fats to the whole of the Community;...' From this it is evident that the intention was not to lay down rules in Directive 73/241 on the use of vegetable fats other than cocoa-butter but to leave them until a later act. It is thus hardly possible to share the view of the Italian Government, which sees the Directive as a definitive set of rules in as much as the

Member States are authorised to resolve the question of the admissibility of the marketing of products containing vegetable fats other than cocoa-butter even in respect of products lawfully manufactured in other Member States. The rules are, in fact, left to a Community act to be adopted at a later date.

22. The view presented here is confirmed by the seventh recital of the Directive, which states that 'a decision relating to the possibilities and forms of any extension of the use of these fats in the Community as a whole cannot be taken at the present time'. This proves that the Directive is not a definitive set of rules on the free movement of chocolate products containing vegetable fats other than cocoa-butter.

23. The rules announced in Article 14(2) of Directive 73/241 did not emerge until the adoption of Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption. [4] This specifies that certain vegetable fats other than cocoa-butter as listed in Annex II to the Directive may account for up to 5% of the finished product. However, as this provision does not have to be transposed into national law until 3 August 2003, it does not apply to the current action.

4 — OJ 2000 L 197, p. 19.

24. An interim conclusion to be drawn, therefore, is that, although Directive 73/241 sets out provisions on the use of the name 'chocolate', it does not constitute a definitive set of rules on the extent to which products containing vegetable fats other than cocoa-butter may be marketed under the name 'chocolate'. It thus represents no more than partial harmonisation of the use of the name 'chocolate'.

25. The parties are now at odds over the legal implications of this. While the Commission is of the opinion that under Article 28 the Member States are under an obligation to permit products lawfully manufactured in other Member States under the name 'chocolate' to be marketed in their territory under the name 'chocolate' used in the country of origin, Italy considers that any reference to Article 28 EC through Directive 73/241 must be ruled out since the freedom granted to the Member States by Article 14 to adopt rules on the admissibility of the use of these fats would otherwise be undermined.

26. According to the judgment in the *Cassis de Dijon* case, it is for the Member States to adopt for their territory any legislation concerning the manufacture and marketing of a product in cases where there are no

Community rules. 'Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.' However, obstacles to movement are acceptable only if they serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community. [5]

27. It follows from this case-law that, although the Member States are authorised to lay down rules in areas in which there is no or no more than partial harmonisation, [6] which, as stated above, is true of the use of the name 'chocolate' for products containing vegetable fats other than cocoa-butter, such rules must be compatible with the Treaty provisions concerning the free movement of goods. In other words, where they lead to a restriction of the free movement of goods, it must be considered whether there are compelling reasons for the restriction and it is therefore justified. The reason for this restriction is that the Member States would otherwise be authorised to partition their national markets in regard to products not covered by the Community rules, contrary to the objective of free movement pursued by the Treaty. [7] Given the case-law cited, one must therefore proceed on the basis that Article 14(2)(a) of Directive 73/241 does not preclude the application of Article 28 EC et seq.

28. This conclusion is not affected by the Italian Government's objection that the application of Article 28 EC leads to reverse discrimination. According to settled case-law, that article is not designed to ensure that goods of national origin always enjoy the same treatment as imported goods; a difference of treatment as between goods which is not capable of restricting imports or of prejudicing the marketing of imported goods does not fall within the prohibition contained in that article. [8] The possibility of the interpretation of

5 — Case 120/78 *Rewe-Zentral ('Cassis de Dijon')* [1979] ECR 649, paragraphs 8 and 14; Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 12; Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 15.

6 — For the imposition of language requirements see Case C-33/97 *Colim* [1999] ECR I-3175, paragraph 35.

7 — See Case C-3/99 *Ruwet* [2000] ECR I-8749, paragraph 47.

8 — Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 15; Case 98/86 *Mathot* [1987] ECR 809, paragraphs 7 and 8.

Article 14(2)(a) of Directive 73/241 presented here giving rise to competitive disadvantages for traders manufacturing in Italy is therefore irrelevant under Community law.

29. An interim conclusion to be drawn, therefore, is that the adoption of Directive 73/241 does not exclude recourse to Article 28 EC et seq.

(2) *Compatibility of the Italian legislation with Article 28 EC*

30. What therefore needs to be considered in the following is the extent to which the Italian legislation satisfies the requirements of Article 28 EC et seq.

31. Article 28 EC prohibits quantitative import restrictions and all measures having equivalent effect between Member States. According to settled case-law, a measure having equivalent effect to a quantitative restriction is any measure likely to hinder intra-Community trade directly or indirectly, actually or potentially. [9]

32. It thus needs to be examined how far the Italian prohibition of the marketing of products containing vegetable fats other than cocoa-butter under the name 'chocolate' results in an obstruction of the free movement of goods.

(a) Existence of an obstruction to the free movement of goods

33. Law No 351/76 prohibits products lawfully manufactured in other Member States under the name 'chocolate' and containing vegetable fats other than cocoa-butter from being marketed under this name in Italy. It thus forces manufacturers established in other Member States to alter the composition of their products if they want to market them in Italy under the name 'chocolate'. The Law therefore restricts the access of products lawfully manufactured in other Member States to

9 — Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; *Keck and Mithouard* (cited in footnote 5, paragraph 11).

the Italian market and consequently obstructs their free movement in the Community. [10] This is a measure having equivalent effect to a quantitative restriction within the meaning of Article 28 EC.

34. The Italian Government disputes this conclusion, pointing out that such products may be marketed in Italy under the name 'chocolate substitute'.

35. According to the case-law, it is not compatible with Article 28 EC and the objectives of a common market for national legislation to be allowed to restrict a generic term to one national variety alone to the detriment of other varieties produced, particularly in other Member States, by compelling the producers of the other varieties to use appellations which are unfamiliar to or less esteemed by the consumer. [11]

36. In the present case, the name 'chocolate' is not restricted to Italian products; it may be used for all products which contain as vegetable fat only cocoa-butter. However, the marketing of products which are lawfully manufactured in other Member States under the name 'chocolate', but contain vegetable fats other than cocoa-butter is prohibited. Traditionally, such chocolate products are not manufactured in Italy. As Italian products are not therefore affected by the prohibition, the rules benefit a typically domestic product and discriminate to the same degree against products lawfully manufactured under the name 'chocolate' in other Member States. Such conduct represents, according to the case-law to which reference has been made, a measure having equivalent effect to a quantitative restriction. [12]

37. As regards the option of marketing the products in question under the name 'chocolate substitute', it must be said that the possibility of negative feelings being aroused in the consumer is inherent in the use of this term. 'Substitute' is not an objective, neutral term that imparts a simple piece of information, as does the printed statement 'contains vegetable fats other than cocoa-butter', for example. The addition of the word 'substitute' implies that the product is not chocolate but merely a replacement. It is thus possible that the

10 — For similar cases concerning the composition of products see Case 193/80 *Commission* v *Italy* [1981] ECR 3019, paragraph 26, and Case 286/86 *Deserbais* [1988] ECR 4907, paragraph 12.

11 — Case 182/84 *Miro* [1985] ECR 3731, paragraph 22; *Deserbais* (cited in footnote 10, paragraph 12); *Commission* v *Italy* (cited in footnote 10, paragraph 26); Case 298/87 *Smanor* [1988] ECR 4489, paragraph 12; Case 27/80 *Fietje* [1980] ECR 3839, paragraph 10.

12 — See *Commission* v *Italy* (cited in footnote 10, paragraph 20).

consumer will consider this product inferior or esteem it less than a product marketed under the name 'chocolate'. It must therefore be assumed that the option of marketing the product under the name 'chocolate substitute' does not result in the disputed prohibition having no restrictive effect on the free movement of goods.

38. An interim conclusion to be drawn, therefore, is that the disputed Italian rules obstruct the free movement of goods. This obstruction is compatible with Community law only if it is justified.

(b) Justification of the restriction on the free movement of goods

39. In areas in which there are no Community rules it is settled case-law that obstacles to intra-Community trade resulting from disparities between provisions of national law must be accepted in so far as such provisions are applicable to domestic and imported products without distinction and may be justified as being necessary in order to satisfy overriding requirements relating in particular to consumer protection. However, in order to be permissible, such provisions must be proportionate to the objective pursued and that objective must not be capable of being achieved by measures which are less restrictive of intra-Community trade. [13]

40. The Italian legislation applies to domestic and imported products without distinction. The first condition is thus satisfied.

41. The Italian Government refers to consumer protection in justification of its rules. It claims that, when confronted with the term 'chocolate', Italian consumers expect products that contain as vegetable fat only cocoa-butter. The addition of vegetable fats other than cocoa-butter led to a fundamental change in the product. If the marketing of these products under the name 'chocolate' were permitted, there would be a danger of the consumer being confused and making mistakes.

42. The Court has accepted that consumer protection is an imperative requirement capable, in principle, of justifying measures

13 — *Ruwet* (cited in footnote 7, paragraph 50); Case C-313/94 *Graffione* [1996] I-6039, paragraph 17.

that restrict the free movement of goods. [14] Thus the second of the conditions referred to above is similarly satisfied.

43. It remains to be examined how far the disputed measure is necessary. The Commission is of the opinion that appropriate information for the consumer on the packaging of the product is a less drastic and equally suitable means of achieving the objective of protecting him against mistakes.

44. The case-law of the Court shows that, in the absence of harmonisation at Community level, national measures which are necessary in order to ensure that products are accurately described are compatible with Article 28 EC et seq. of the Treaty provided that they avoid any confusion on the part of consumers and ensure fairness in commercial transactions. [15] It must therefore be considered whether the disputed rules requiring that the product be renamed 'chocolate substitute' are necessary to ensure that the consumer is informed.

45. The prohibition of marketing under the name 'chocolate' and the option of marketing the products in question under the name 'chocolate substitute' are likely to protect Italian consumers against making a mistake. It is ensured that the only vegetable fat contained in products which they acquire under the name 'chocolate' is cocoa-butter. This protects them against confusing these products with products containing other vegetable fats. These rules are thus likely to ensure consumer protection.

46. To be compatible with Community law, however, the rules must not exceed what is necessary. As a less drastic measure the Commission proposes that appropriate labelling — with information on the ingredients — should be attached to products containing other vegetable fats. The Italian Government does not consider this enough and objects that, when confronted with the name 'chocolate', Italian consumers expect products that contain as vegetable fat only cocoa-butter.

47. The Italian Government's argument is similar to that advanced in the proceedings concerning the name 'vinegar', where it contended that the disputed national rules were necessary because the Italian consumer by time-honoured tradition treated all vinegars as wine-vinegar. The Court rejected this objection and ruled that under the Combined Nomenclature of the Com-

14 — *Rinvet* (cited in footnote 7, paragraph 50); Case 178/84 *Commission* v *Germany* [1987] ECR 1227, paragraph 30; *Smanor* (cited in footnote 11, paragraph 18).

15 — Case C-51/94 *Commission* v *Germany* [1995] ECR I-3599, paragraph 31; Case 216/84 *Commission* v *France* [1988] ECR 793, paragraph 11.

mon Customs Tariff vinegar is a generic term which national legislation cannot restrict to domestic products. Suitable labelling of types of vinegar manufactured from raw materials other than wine was considered to be generally sufficient to ensure the protection of the consumer. The Italian rules were regarded as a disproportionate restriction of the free movement of goods, given the availability of appropriate labelling as a less drastic means of protecting the consumer. [16] Similarly, the German Government attempted to justify the purity requirement for beer by arguing that the consumer associated the designation 'Bier' with a beverage manufactured from only the raw materials listed in Article 9 of the Biersteuergesetz. The restriction of the generic term 'Bier' to products manufactured in accordance with the purity requirement was intended to protect the consumer against confusion about the nature of the product. [17] The Court again rejected this argument on the grounds that consumers' conceptions are likely to vary from one Member State to another and to evolve in the course of time within a Member State, the establishment of the common market playing a major contributory role in this context. 'The legislation of a Member State must not 'crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them'.' [18] Here too, appropriate labelling of beers not manufactured in accordance with the purity requirement was considered adequate. The Court further ruled that national legislation which links the appellation 'Jenever' to a minimum alcohol content is not compatible with Article 28 EC and that the requirements of fair trading can also be met with regard for traditional practices by means of appropriate labelling of beverages with a lower alcohol content. [19] In similar cases concerning the composition of a product the Court has again considered labelling sufficient to protect the consumer's interests. [20] Given this settled case-law, the objection that, when confronted with the name 'chocolate', Italian consumers expect products containing as vegetable fat only cocoa-butter does not in principle seem capable of justifying the disputed rules.

48. The Court has, however, defined the limit of what can be achieved with appropriate labelling as being the stage at which the product concerned is altered in a

16 — *Commission* v *Italy* (cited in footnote 10, paragraphs 25 to 27).

17 — *Commission* v *Germany* (cited in footnote 14, paragraph 26).

18 — *Commission* v *Germany* (cited in footnote 15, paragraph 32).

19 — *Miro* (cited in footnote 11, paragraphs 20, 24 and 25).

20 — *Commission* v *Italy* (cited in footnote 10, paragraph 23); *Commission* v *Germany* (cited in footnote 14, paragraph 35); *Deserbais* (cited in footnote 10, paragraphs 10, 13 and 19). The judgment in *Smanor* concerned the treatment which the product in question had undergone during its manufacture (cited in footnote 11, paragraph 19 et seq.).

respect that is essential for its composition. [21] This is the point of the objection raised by the Italian Government, which sees the addition of other vegetable fats as fundamentally altering the product.

49. It therefore needs to be considered whether the addition of vegetable fats other than cocoa-butter leads to a fundamental change in the composition of the product and whether appropriate labelling can consequently no longer be regarded as a sufficient means of informing the consumer adequately and protecting him against mistakes.

50. The first point to be made here is that in what is now very extensive case-law on the use of names of foodstuffs the Court has always geared its rulings to an intelligent consumer who can reasonably be expected and trusted to inform himself. [22] Thus, according to the case-law, it must be assumed that consumers who are guided in their purchasing decisions by the composition of products first read the list of ingredients. Although the Court has recognised the danger of consumers being misled in specific cases, [23] and to this extent the objections voiced by the Italian Government are in principle justified, this danger must be regarded as slight, according to present case-law, and cannot justify obstacles to the free movement of goods. [24] There is no obvious reason for deviating from the settled case-law in these proceedings.

51. Prohibiting the use of a name is, moreover, never considered justified unless the product concerned is so different, as regards its composition, from the products generally known by that name in the Community that it cannot be regarded as falling within the same category. [25] The Italian Government takes the view that the addition of other vegetable fats changes the product so fundamentally that to market it under the name 'chocolate' would be to mislead the consumer.

52. Point 1.16 of Annex I to Directive 73/241 defines chocolate as the product obtained from cocoa nib, cocoa mass, cocoa powder or fat-reduced cocoa powder and sucrose, which, though made with or without added cocoa-butter, contains at least 18% cocoa-butter. This indicates that cocoa-butter is to be regarded as an essential ingredient of chocolate within the meaning of Directive 73/241.

21 — *Deserbais* (cited in footnote 10, paragraph 13).

22 — See *Ruwet* (cited in footnote 7, paragraph 53).

23 — *Commission* v *Germany* (cited in footnote 15, paragraph 34).

24 — *Commission* v *Germany* (cited in footnote 15, paragraph 34).

25 — *Smanor* (cited in footnote 11, paragraph 21); *Deserbais* (cited in footnote 10, paragraph 13).

53. It must also be emphasised that the other vegetable fats added to chocolate products are designated 'cocoa butter equivalents' by Directive 2000/36. Although, as pointed out above, this Directive is not applicable in the present case, the rules it contains can be used to show that the vegetable fats at issue in this case may replace cocoa-butter. As stated above, however, cocoa-butter is, according to Directive 73/241, an essential ingredient of chocolate. This might indicate that the products which — in excess of the required minimum content of cocoa-butter — may replace cocoa-butter as equivalents are also to be regarded as essential ingredients, with the result that their addition should lead to a fundamental change in the product.

54. It should be pointed out, however, that the products which may not be marketed in Italy under the name 'chocolate' do comply with Directive 73/241 in respect of the prescribed minimum content of cocoa-butter. The question is thus whether the addition of yet other vegetable fats to a product which complies with Directive 73/241 in respect of the prescribed minimum content of cocoa-butter results in a fundamental change in the composition of this product. The claims that, according to Directive 73/241, cocoa-butter is an essential ingredient of chocolate products and that cocoa-butter equivalents should also be regarded as essential ingredients are not therefore, in the final analysis, decisive for the question raised here.

55. It should be borne in mind, on the other hand, that, according to an undisputed submission by the Commission, the products in question are lawfully manufactured under the name 'chocolate' in six Member States. According to a further undisputed submission by the Commission, the marketing of these products under the name 'chocolate' is prohibited only in Spain and Italy. All the other Member States permit them to be marketed under the name 'chocolate'. These facts indicate that the addition of vegetable fats other than cocoa-butter does not result in so fundamental a change in the composition of the product that it can no longer be regarded as falling within the category of chocolate.

56. It should also be pointed out that the addition of vegetable fats other than cocoa-butter is explicitly permitted by Directive 2000/36 up to a maximum of 5% of the total weight. Although, as explained above, that Directive does not apply to this case, the new rules can be regarded as reflecting the acceptance by the market and thus, in particular, by the consumer of the use of the name 'chocolate' for products that contain vegetable fats other than cocoa-butter. This is not to ignore the public debate on this subject that raged during the consideration of Directive 2000/36. These future rules indicate, however, that the

addition of other vegetable fats should not be seen as so fundamentally changing the product that it can no longer justifiably be deemed to fall within the category of chocolate.

57. This conclusion is endorsed by the Combined Nomenclature (CN) of the Common Customs Tariff. Chocolate is listed under CN Code 1806 with other food preparations containing cocoa. Products containing cocoa-butter are listed under subheadings 1806 20 10, 1806 20 30 and 1806 20 50. All other subheadings, some of which explicitly use the term 'chocolate', such as subheading 1806 90, do not refer to the content of cocoa-butter or other vegetable fats. This indicates that the name 'chocolate' should be regarded as a generic term whose use does not depend on the addition or absence of vegetable fats other than cocoa-butter.

58. The conclusion to be drawn, therefore, is that the addition of other vegetable fats to products having the minimum content of cocoa-butter required by Directive 73/241 does not result in so fundamental a change in the product that it can no longer justifiably be deemed to fall within the category of chocolate. In the light of the case-law to which reference has been made, an obligation to rename products which have been lawfully manufactured in other Member States under the name 'chocolate' is not justified.

59. The reservations which the Italian Government derives from legitimate concern for consumer protection should be taken into account by ensuring that the consumer is informed clearly enough of the addition of such other fats.

60. The final conclusion to be drawn is therefore that prohibiting the use of the name 'chocolate' is not the least drastic means of informing the Italian consumer of the fact that the product contains vegetable fats other than cocoa-butter. The requirement that the product be appropriately labelled has less of an adverse impact on the free movement of goods. The Italian rules are thus disproportionate and so fail to justify the restriction on the free movement of goods which has been identified. The Commission's action should therefore be upheld.

VI — Costs

61. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for. As the Italian Republic has been unsuccessful and the Commission has made an application, Italy should be ordered to pay the costs.

VII — Conclusion

62. For the foregoing reasons it is proposed that the Court should rule as follows:

(1) The Italian Republic has failed to fulfil its obligations under Article 28 EC by prohibiting chocolate products which contain vegetable fats other than cocoa-butter and which have been lawfully manufactured in Member States where the use of such substances is permitted from being marketed in Italy under the name under which they are marketed in their country of origin.

(2) The Italian Republic shall bear the costs of the proceedings.