OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 16 October 1986

My Lords,

'Pétillant de raisin', a partly fermented grape juice, is sold in France in a bottle which resembles, though I think is not identical with, the shape of the bottle in which champagne is commonly sold. In addition a mushroom-shaped cork with a metal cap is wired to the bottle.

A trader sought to import the beverage in this kind of bottle and cork into the Federal Republic of Germany. He was told that he could not do so since Article 52(3)(2) of the Weingesetz [Wine Law] of 1971 as amended prohibits the sale in Germany of imports which do not comply with that law or its implementing regulations. One of those is the 1971 Schaumwein-Branntwein-Verordnung [regulation on sparkling wine and spirits], Article 10(2) of which provides that champagne-type bottles and stoppers may only be used for sparkling wines and certain wines made from fruit other than grapes, or from rhubarb, malt or honey (see Article 10(1) of the Wine Law of 1930 and Article 75(4) of the Wine Law of 1971).

The matter was referred to the Commission though, after making the complaint, the trader in question discovered that, even if he were able to import 'pétillant de raisin' in this kind of bottle, the product would attract the same rate of tax as sparkling wine, which would be prohibitive, so he withdrew his complaint. The Commission, however, considers, and asks the Court in these proceedings to declare, that the Federal Republic of Germany is in breach of its obligations under Article 30 of the EEC Treaty in that Article 52(3)(2) of the Weingesetz of 1971, in conjunction with Article 10(2) of the regulation, prohibits the marketing in the Federal Republic of beverages such as 'pétillant de raisin' in the presentation in which they are usually manufactured and marketed in their country of origin.

The fact that the complaint was withdrawn and that the particular trader does not wish to import the product does not affect the Commission's right to pursue these proceedings. They are, however, limited to the question as to whether the German law and regulation to which I have referred violate Article 30; they are not concerned with the incidence of tax on the product at the same rate as for sparkling wine.

The parties are agreed that the German law and regulation do prohibit the importation of 'pétillant de raisin' in this bottle and cork and that they also prohibit the sale of a similar domestic product in the same form. The embargo is thus not directed solely at imports into the Federal Republic.

It is also agreed at the end of the day, as I understand it, that 'pétillant de raisin' falls within heading 22.04 of the Common Customs Tariff and that it is therefore covered by the relevant provisions of Council Regulations (EEC) No 337/79 on the common organization of the market in wine (Official Journal 1979, L 54, p. 1) and (EEC) No 355/79 laying down general rules for the description and presentation of wines and grape musts (Official Journal 1979, L 54, p. 99), but that it is not a sparkling wine covered by Regulation No 358/79 on sparkling wines produced in the Community (Official Journal 1979, L 54, p. 130) or by Council Regulation No 3309/85 on the description and presentation of sparkling wines (Official Journal 1985, L 320, p. 9).

The Federal Republic's answer to the claim is primarily that the German rules are mandatory requirements within the meaning of the Court's judgment in Case 120/78 *Cassis de Dijon* [1979] ECR 649 at p. 662. They are justified as being necessary for consumer protection and to prevent unfair competition. They are, moreover, totally compatible with Article 43(1) of Regulation No 355/79 which requires that the description and presentation of products such as the present 'must not be liable to cause confusion as to the nature, origin and composition of the products'; and they are consistent with the provisions of the regulations on sparkling wine to which I have referred, with Council directives on the labelling and presentation of foodstuffs and on misleading advertising (respectively 79/112/EEC (Official Journal 1979, L 33, p. 1) and 84/450/EEC (Official Journal 1984, L 250, p. 17] and with Article 10bis of the Paris Convention for the Protection of Industrial Property.

It is said that there is no objection to the product as such coming in. The argument is that people are so accustomed to sparkling wine and champagne being sold in the combination of this kind of bottle and this kind of stopper that they are bound to be confused whatever the label says and to think that 'pétillant de raisin' is sparkling wine. Moreover, to allow this combination of bottle and stopper to be used for this product allows the makers of 'pétillant de raisin' to take unfair advantage of the usage established by sparkling wine makers.

Even if it were right to look only at the bottle and the stopper I would not accept that that case is made out. This combination of bottle and stopper is not limited to use for champagne and sparkling wines as such; as the Commission has indicated it is used for other beverages and even the German legislation permits its use for sparkling fruit-based beverages which under no circumstances could be called champagne or sparkling wines. Thus one day, if not already, the German purchaser may have to look to see whether what he is buying is made from grapes or some other fruit.

In my view, however, it is not sufficient to look merely at the bottle and the stopper. The packaging must be looked at as a whole, including the label, or labels, and the price.

With wine from the Champagne district of France there could hardly be confusion because of the substantial difference in price between champagne and 'pétillant de raisin'. The real confusion relied on, however, is between sparkling wine made in Germany and 'pétillant de raisin' where the prices are

much closer. There is, however, here another important distinction between the two which is made clear on the bottles which were produced to the Court. It is stated on them that the maximum alcoholic content of 'pétillant de raisin' is 3%; it is well known that the alcoholic strength of sparkling wines is higher and by virtue of Article 11 of Council Regulation No 358/79 must normally not be less than 9.5% volume.

Moreover, I can see no valid reason why a sufficient description on the label should not make it abundantly clear to the potential purchaser that what he is being shown is not sparkling wine but some other product. The terms of such a label must obviously comply with Article 43(1) of Regulation No 355/79 and also with Articles 22 and 23 of the same regulation. If they do and they make clear what is in the bottle, that in my view is sufficient; it is not necessary, to prevent confusion or unfair competition, that the combination of this product, this bottle and this stopper should be totally prohibited. That is a disproportionate requirement. The fact that Community and international provisions on labelling and presentation exist does not, as it seemed to be suggested, make out the German case. On the contrary, they merely indicate that what is done by way of presentation and labelling must be sufficient. That is a question of fact in each case. It is to my mind quite impossible to say that adequate labelling even with this bottle and this stopper can never be sufficient.

The Federal Republic, to combat this, relies on the result of a survey which showed that when people were shown a photograph of a bottle containing 'pétillant de raisin', three-quarters thought when the label was wholly in French that it was sparkling wine, champagne or 'Sekt'; half of those interviewed thought the same even with an extra label in German stating 'teilweise gegorener Traubenmost' (partially fermented grape must). That may indicate that those labels were insufficient; it does not establish that labelling cannot be sufficient. Moreover, it is important to bear in mind that in the survey only a photograph was shown and that the particular labelling was not devised for the German market on which this product had not yet been sold in this form. Since the matter was not fully debated it is not necessary to consider whether Article 23(4) of Regulation No 355/79 or a broader principle requiring the avoidance of confusion makes it necessary to use the language of the country in which the product is to be sold.

The Federal Republic then relies on a statement contained in a Commission document of 1982 relating to a draft regulation on the definition, labelling and presentation of alcoholic drinks (published in Official Journal 1982, C 189, p. 7) where it was stated that labelling alone is not sufficient to protect the consumer. That, however, must be seen against the fourth recital to the draft, namely 'the customary means of informing the consumer is to include information on the label'. Moreover, it cannot mean that labelling alone is never sufficient to protect the consumer.

Nor does the fact, adverted to by the Federal Republic, that Article 8 of Council

Regulation No 358/79 on sparkling wine requires such wine to be 'stopped with a "mushroom" cork which has a cap and is wired to the bottle' mean that only such wines may be corked in this way.

The Court's decision in Case 6/81 *Beele* [1982] ECR 707 is also relied on. There it was accepted that national laws 'prohibiting precise imitation of someone else's product may not be regarded as exceeding the scope of the mandatory requirements which the protection of consumers and the fairness of commercial transactions constitute'. The Court was concerned there with a product which 'for no compelling reason' was made almost identical to a product already marketed which 'thereby needlessly causes confusion between the two products'. It seems to me that in a case like the present, where it is the packaging rather than the actual product which is at issue, different considerations arise and that the essential question is whether the labelling can, as I think it can, be sufficient to avoid confusion and unfair competition.

It is then said in the present case that there can be no reason for using this type of stopper since the pressure in the bottle is not great enough to require it — the pressure is only of 3 bar and the product can be sold with a screw top. It may be that it can be sold in an ordinary bottle with a screw top, though there is some dispute as to how far the use of a mushroom cork is necessary or desirable. Whatever the position, the type of bottle in question is used by the manufacturers of 'pétillant de raisin' for the sale of very large quantities in France and to a lesser extent elsewhere, and its use is accepted. It cannot, it seems to me, be said that it is being deliberately used in Germany to cause confusion or to compete unfairly. it does not seem to me that for the purposes of Article 30 of the EEC Treaty a trader has to show that the type of packaging he uses is essential and that no other will do. The question is whether confusion is likely to be caused or unfair competition to result.

The Federal Republic argues that it would be cheaper for the manufacturers to use ordinary bottles and corks or screw tops. This again may be right for a trader starting from the beginning. It is plain, however, as the Commission contends and as was recognized in Case 16/83 *Prantl* [1984] ECR 1299, that to require a manufacturer to use a completely different type of bottle for a particular Member State from that which he normally and lawfully uses may require substantial extra cost in installing new bottling processes and may constitute a hindrance to intra-Community trade.

Finally, it has been contended that it cannot be said that the use of this bottle was 'fair and traditional' as it was in the *Prantl* case so that its use may be restricted. There is clearly a factual difference between the two cases since in *Prantl* the particular bottle had been in use for many years, whereas in the present case it has only been used for this product since 1956. On the other hand, whereas the 'fair and traditional usage' test

may be appropriate in a case like *Prantl* where the question of indirect designation of origin arose, it does not seem to me that it has to be established in every case. If it did the development and marketing of new products would be stifled. The appropriate test in a case like the present is in my view that stated in *Cassis de Dijon* — whether the product was 'lawfully produced and marketed' in one Member State. If it is, it may be marketed in another Member State subject to mandatory requirements of the kind indicated in *Cassis de Dijon* and subject to the provisions of Article 36 of the Treaty. I would in any event accept that the sale of a product for 30 years in a particular container was capable of amounting to a fair and traditional usage.

In my opinion, the provisions of Article 52(3)(2) of the Weingesetz, in conjunction with Article 10(2) of the Schaumwein-Branntwein-Verordnung, which prohibit the marketing of beverages such as 'pétillant de raisin' in the presentation in which they are usually manufactured and marketed in their country of origin have not been shown to be justified as necessary for consumer protection or to prevent unfair competition and are accordingly contrary to Article 30 of the EEC Treaty. The Commission is entitled to the declaration it seeks and to its costs.