OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 5 July 1990 *

Mr President,
Members of the Court,

1. In this case the Commission is asking the Court to declare that the Italian Republic has failed to fulfil its obligations by making the marketing of edible vegetable oils, other than olive oil, and of margarine and solid edible fats of animal or vegetable origin, other than butter and lard, imported from other Member States conditional on the addition of colour-reactive sesame oil.

2. A common organization of the market exists both in the sector of oils and fats [1] and in the sector of milk and milk products. [2] However the Commission is not asking the Court to declare that the Italian Republic has infringed any provision of the common organizations of the market. The Commission's case rests solely on Article 30 of the EEC Treaty, although the prohibition on measures having equivalent effect to quantitative restrictions forms an integral part of both common market organizations. [3]

3. The Italian Government does not deny that the obligation to add sesame oil to the products in question is in principle to be regarded as a measure having equivalent effect to a quantitative restriction within the meaning of the judgment in *Dassonville*. [4]

The parties also agree that the measure is applicable without distinction to the domestic and imported goods in question.

It is also common ground that the dispute must be resolved in accordance with the settled case-law of the Court of Justice (see primarily the 'Cassis de Dijon' judgment [5]) according to which, in the absence of Community rules, obstacles to the free movement of goods resulting from disparities between national laws must be accepted in so far as those rules are applicable without distinction to domestic and imported goods and in so far as they are necessary in order to satisfy imperative requirements which include the protection of the consumer and fairness of commercial transactions, and the resulting obstacle to the free movement of goods is not disproportionate to the aim pursued and the actual implementation thereof.

4. Of particular importance in this case is the condition that the national measure be

* Original language: Dutch.

1 — Regulation (EEC) No 136/66 of the Council of 22 September 1966 on the establishment of a common organization of the market in oils and fats (OJ, English Special Edition 1965-66, p. 221).

2 — Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176).

3 — See Article 3(1) of the basic regulation on fats and oils and Article 22(1) of the basic regulation on milk and milk products.

4 — Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, paragraph 5.

5 — Case 120/78 *REWE* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

necessary in order to satisfy the aforementioned imperative requirements. As I have already stated in my Opinion in another case[6] (at point 8), this condition is twofold: the measure in question must be relevant, that is, such as to achieve the object envisaged, and essential, because there is no alternative that would achieve the aim envisaged in a manner less restrictive of the free movement of goods.

The condition that the national measure must be *proportionate* to the objective pursued is also of some significance here. This requirement obliges Member States in appropriate circumstances to dispense with a measure which is 'necessary' in the aforementioned sense or to accept a less effective measure if the restrictive effect of the measure is disproportionate to the objective pursued (point 10 of the abovementioned Opinion).

5. According to the Italian Government, the contested measure is valid since it serves to protect consumers and the fairness of commercial transactions. The idea underlying the defence arguments can best be seen with regard to edible vegetable oils other than olive oil. At the end of the 1920s the Italian legislature prohibited the mixing of olive oils with other edible vegetable oils in the hope of thus putting a stop to the fraudulent practice of selling as pure olive oil such mixtures which, with the methods of analysis then available, were difficult to identify as such. In furtherance of that prohibition the obligation was laid down to add sesame oil to edible vegetable oils other than olive oil. Whenever a sufficient proportion of sesame oil is added to other vegetable oils, there is a change of colour. In this way pure olive oil can be visibly distinguished from a mixture of olive oils and other vegetable oils. The disputed measure is therefore said to be necessary for combating fraudulent practices such as to mislead the consumer in the olive oil sector. That aim can allegedly not be achieved by means of appropriate labelling. The Italian Government claims that the measure renders superfluous laboratory analysis on the reliability of which, at the present stage of technical development, it casts doubt in its pleadings. Finally the measure is said to serve the interests of the Community since the consumption of olive oil benefits from aid financed by the Community.

As regards margarine and solid edible fats of animal and vegetable origin, other than butter and lard, the Italian Government's position can be given in few words: to prevent such goods being marketed under the name 'butter'.

6. I agree with the Commission that the obligation to add sesame oil to other edible vegetable oils does not offer really effective protection against the fraudulent mixture of olive oils and other oils. As the Commission rightly pointed out, it is not difficult to buy vegetable oils that have not been mixed with sesame oil. The obligation to add sesame oil relates only to vegetable oils intended for direct consumption, that is some 50% of production and the Commission further

6 — Opinion delivered on 20 March 1990 in Case C-169/89 *Criminal proceedings against Gourmetterie Van den Burg* [1990] ECR I-2143.

notes that no supervision is exercised over the obligation to add sesame oil to such oils intended for consumption. Other oils that have not been mixed with sesame oil can also be freely purchased in the other Member States.

In those circumstances it is highly unlikely that anyone wishing to produce a prohibited mixture would be so naive or ignorant as to mix with the olive oil vegetable oils to which sesame oil has been added instead of vegetable oils without sesame oil which are freely available on the market. The obligation in question therefore offers no certainty that uncoloured oil which is marketed as olive oil is in fact pure olive oil. For an honest trader, on the other hand, it does constitute a serious obstacle to intra-Community trade in so far as a pre-condition for the importation into Italy of goods in free circulation in other Member States is a change in their composition.

From that it is plain that the contested measure is *not* capable of achieving the objective pursued (preventing consumers from being misled) effectively, that is in a manner that is *relevant* and has sufficient causal connection with that object. For those reasons the measure is therefore in itself not 'necessary' (see point 4 above).

7. Furthermore I consider that the Italian Government has also failed to make out its case that the obligation to add sesame oil is necessary in the sense of being essential because the object pursued cannot be achieved by other means forming less of an obstacle to trade, and that it is also in proportion to the aim pursued.

In this connection I also wish to stress that I find it difficult to share the Italian Government's doubts as to whether it is possible using modern-day analytical techniques to determine the composition of a mixture of olive oil and other vegetable oils in a manner that is scientifically beyond challenge; my view is supported *inter alia* by the fact that such techniques are laid down in an EEC regulation in order to detect the presence of oils of other kinds than olive oil.[7] At the hearing indeed the Italian Government's representative no longer sought to rely on this argument but he did claim that the Italian measure renders laboratory analyses superfluous.

The latter contention is questionable in my opinion. The only result that could be achieved by the Italian obligation to add sesame oil is that spot checks are no longer necessary on oil to which sesame oil has been added because the colour of such oils itself makes it plain that they are not pure olive oils. But *ex hypothesi* therefore the dealer in question has acted honestly and complied with the obligation to add sesame oil and it may be assumed that even if there had been no such obligation he would not have offered the goods in question as pure olive oil but would have described them correctly. In that case, however, both the obligation to add sesame oil and analysis of

7 — See Article 1 of Commission Regulation (EEC) No 1058/77 of 18 May 1977 of the characteristics of olive oil and of certain products containing olive oil and amending the Common Customs Tariff nomenclature as regards olive oil (OJ 1977 L 128, p. 6).

random samples are superfluous and correct labelling[8] would suffice in order to avoid misleading the consumer.

I therefore further conclude that even if, contrary to my view, the contested Italian rule were regarded as relevant, the Italian Government has *not* demonstrated that it is also *essential*.

8. For the sake of completeness I would add that it has also not been shown that the national measure, which certainly constitutes a substantial obstacle to intra-Community trade, is *proportionate* to the aim pursued, namely to protect consumers against fraudulent mixtures of foodstuffs. That is a requirement which must indeed also be taken into account when considering analyses (even carried out as spot checks) as a measure of supervision. In this respect too it is necessary to show that such spot checks are applied without distinction to domestic and imported products and are not so numerous as to be out of proportion to the aim pursued.

9. It is hardly necessary for me to consider the obligation to add sesame oil to margarine and other edible fats of animal and vegetable origin, other than butter and lard. The Italian Government's defence is all too scant. Its only justification for that obligation is that it prevents such goods being marketed under the name 'butter'.

In the absence of any further arguments or evidence from the Italian Government, I consider that what has been said above with regard to olive oil is equally applicable to these products.

Conclusion

10. I therefore suggest that the Court:

(1) declare that the Italian Republic has failed to comply with its obligations under Article 30 of the EEC Treaty by making the marketing of edible vegetable oils, other than olive oil, and of margarine and solid edible fats of animal and vegetable origin, other than butter and lard, imported from other Member States conditional on the addition of colour-reactive sesame oil;

(2) order the Italian Republic to pay the costs.

8 — See judgment in Case 261/81 *Rau* [1982] ECR 3961, in which the Court ruled that labelling provisions served to rule out the possibility of confusion between butter and margarine just as effectively as mandatory rules regarding the packaging of such products.