JUDGMENT OF THE COURT (Second Chamber)

8 July 2004 *

In Case C-166/03,

Commission of the European Communities, represented by B. Stromsky, acting as Agent, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues and F. Million, acting as Agents,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, by reserving the term 'gold' for articles of a fineness of 750 parts per thousand, whilst those of a fineness of 375 or 585 parts per thousand are described as 'gold alloy', the French Republic has failed to fulfil its obligations under Article 28 EC,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet, J.N. Cunha Rodrigues (Rapporteur), R. Schintgen and N. Colneric, Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 19 February 2004,

gives the following

Judgment

1 By application lodged at the Court Registry on 10 April 2003, the Commission of the European Communities brought an action under Article 226 EC in which it sought a declaration that, by reserving the term 'gold' for articles of a fineness of 750 parts per thousand, whilst those of a fineness of 375 or 585 parts per thousand are termed 'gold alloy', the French Republic has failed to fulfil its obligations under Article 28 EC.

Legal background

2 Article 522a of the Code général des impôts (General Tax Code), as amended by Law No 94-6 of 4 January 1994 adjusting the legislation on guaranteed standards for precious metals and the supervisory powers of customs agents concerning the administrative situation of certain persons (JORF of 5 January 1994, p. 245, hereinafter the CGI), provides:

'Only articles made of gold of a fineness of more than 750 parts per thousand may be termed "gold" when being marketed for retail sale to individuals.

Those articles containing gold of a fineness of 585 or 375 parts per thousand are to be termed "gold alloy" and their fineness stated when being marketed for sale to individuals.'

The pre-litigation procedure

3 As it considered that that provision was in breach of Article 28 EC, the Commission initiated the infringement procedure under Article 226 EC. Having given the French Republic formal notice that it should submit its observations, the Commission issued a reasoned opinion on 19 September 2001 calling on that Member State to take the measures necessary to comply with it within two months of its notification.

4 By letter of 4 February 2002 the French Republic stated that Article 522a of the CGI was necessary in order to satisfy overriding requirements relating to consumer protection and fair trading and requested the Commission to reconsider its assessment. The Commission decided to bring this action.

The application

Arguments of the parties

5 The Commission submits that Article 522a of the CGI prohibits the marketing in France as 'gold' of articles containing gold of a fineness of 585 or 375 parts per

thousand, whereas such articles may be described as gold in their Member State of origin, and requires those articles to be described as 'gold alloy', a term less well-known to and less highly regarded by the consumer. The provision may make the articles more difficult to market in France and thus, at least indirectly, constitute an obstacle to trade between Member States. Consequently, if they cannot be justified on the ground of public interest, the contested rules of designation constitute measures having equivalent effect to quantitative restrictions prohibited by Article 28 EC.

6 The Commission considers that those rules of designation are neither necessary to ensure consumer protection and fair trading nor justified with regard to Article 28 EC. It would suffice for Member States to lay down rules requiring adequate labelling ensuring correct information was given on the actual quantity of gold present in the different articles for sale.

7 The French Government denies that the existence of two categories of articles has an appreciable effect on intra-Community trade. By failing to show that there was an effect on intra-Community trade, the Commission has not discharged the burden of proof incumbent upon it in an action for failure to fulfil obligations.

8 In the view of the French Government, the existence of two terms, 'gold' and 'gold alloy', for articles whose gold content is substantially different, fulfils the need to give consumers information to ensure their protection. That is where may be found the public interest sufficient to justify a measure relating to the designation of such articles in light of the requirements of Article 28 EC.

9 Furthermore, the system requiring a double description ensures that the consumer is better informed than would be the case were the Commission's suggestion to be followed, namely labelling indicating only the gold content of the articles. The latter system gives raw technical information to consumers, whereas the double description goes further by giving them an easily-understood explanation as to the quality of the products in question.

10 In those circumstances, the French Government takes the view that the system of designation laid down by Article 522a of the CGI is not in breach of Article 28 EC.

Findings of the Court

11 The Court has consistently held that any measure likely directly or indirectly to hinder, actually or potentially, intra-Community trade is to be deemed to be a measure having equivalent effect to quantitative restrictions and, on that basis, prohibited by Article 28 EC (Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5, and Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 66).

12 The Commission states, without contradiction from the French Government, that articles containing gold of a fineness of 375 or 585 parts per thousand are legally marketed under the term 'gold' in Member States other than France.

13 It is not disputed that the term 'gold alloy' is less attractive to consumers than the term 'gold'.

14 The requirement to sell such articles under the term 'gold alloy', imposed by Article 522a of the CGI, whereas in their countries of origin they are marketed under the term 'gold', is, in those circumstances, likely to hinder intra-Community trade.

15 It follows that that provision of the CGI should be considered a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 28 EC, without it being necessary to prove that it has had an appreciable effect on intra-Community trade.

16 As for the question whether such a rule may, nevertheless, be justified with regard to Community law, it should be remembered that, according to the Court's case-law, national rules adopted in the absence of common or harmonised rules and applicable without distinction to national products and to products imported from other Member States may be compatible with the Treaty in so far as they are necessary in order to satisfy overriding requirements relating, inter alia, to fair trading and consumer protection, where they are proportionate to the objective pursued and that objective is not capable of being achieved by measures which are less restrictive of intra-Community trade (Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 27).

17 It is common ground that the terms to be used to indicate the proportion of the precious metal content of articles and the method by which it should be indicated are, as Community law currently stands, not harmonised. It is also common ground that Article 522a of the CGI is applicable without distinction to French products and to products imported from other Member States.

18 Furthermore, the provision of the CGI in question is admittedly intended to ensure fair trading and consumer protection.

19 However, the contested legislation imposes, in respect of articles of the two lower levels of purity marketed at the retail stage to individuals, a redundant double designation, since it requires the use not only of the fineness of the article, which gives objective information on its level of purity, but also the term 'gold alloy' which gives much less precise information on the same subject.

20 It follows that the system requiring a double description laid down by Article 522a of the CGI is not proportional to the aim of ensuring fair trade and consumer protection, and that that aim can be achieved by measures less restrictive to intra-Community trade.

21 Consequently, it must be held that, by reserving the term 'gold' for articles of a fineness of 750 parts per thousand, whilst those of a fineness of 375 or 585 parts per thousand are termed 'gold alloy', the French Republic has failed to fulfil its obligations under Article 28 EC.

Costs

22 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 in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Declares that, by reserving the term 'gold' for articles of a fineness of 750 parts per thousand, whilst those of a fineness of 375 or 585 parts per thousand are termed 'gold alloy', the French Republic has failed to fulfil its obligations under Article 28 EC;**

2. **Orders the French Republic to pay the costs.**

Timmermans Puissochet Cunha Rodrigues

Schintgen Colneric

Delivered in open court in Luxembourg on 8 July 2004.

R. Grass C.W.A. Timmermans

Registrar President of the Second Chamber