prohibition imposed by a Member State on importing or marketing vinegar containing acetic acid not derived from the acetic fermentation of wine comes within that provision where the vinegar involved is lawfully produced and marketed in another Member State.

In Case 788/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the Pretura di Bolzano for a preliminary ruling in the criminal proceedings against

HERBERT GILLI AND PAUL ANDRES

on the interpretation af Article 30 of the EEC Treaty,

THE COURT (Second Chamber)

composed of: A. Touffait, President of Chamber, P. Pescatore and O. Due, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

In the main proceedings before the Pretura di Bolzano Herbert Gilli and Paul Andres, the defendants in those proceedings, challenged the compatibility

with Community law and in particular with Article 30 of the EEC Treaty of certain provisions of the rules adopted in Italy in relation to the production and marketing of vinegar.

In Italy this matter is governed first of all by Law No 991 of 9 October 1964 (Gazzetta Ufficiale No 265 of 28 October 1964) which delegates to the government power to adopt rules for the suppression of fraud in the preparation and marketing of musts, wines and vinegars. Article 2 (6) of that Law stipulates that the decree shall prohibit the direct or indirect use in the food sector of synthetic alcohols and products containing acetic acid not arising from the fermentation of wine or piquette.

In accordance with that Law Article 51 of Decree No 162 of the President of the Republic of 12 February 1965 (Gazzetta Ufficiale No 73 of 23 March 1965) provides:

"Synthetic ethyl alcohol and products containing acetic acid not originating in the acetic fermentation of wine or piquette and products derived from the acetic fermentation of wine or piquette which cannot be classified as vinegar in accordance with Article 41 shall not be carried, held for sale, marketed or dealt with in any manner whatsoever for use, directly or indirectly, for human consumption".

Article 51 of Decree No 162 was amended by Law No 739 of 9 October 1970 (Gazzetta Ufficiale No 270 of 24 October 1970) which simply deleted the words "or piquette".

The word "vinegar" is reserved by Article 41 of Decree No 162 to "products obtained from the acetic fermentation of wine" having:

(a) a total acidity expressed as acetic acid of 6 grams at least per 100 ml;

(b) a quantity of alcohol not in excess of 1.5% by volume.

It should further be pointed out that under Article 94 of Decree No 162 infringements of Article 51 are punishable by fines ranging from 2 to 20 million lire and in addition by imprisonment not exceeding three years in the most serious cases.

Finally Article 60 of Decree No 162 provides that "the provisions of this decree shall apply in a similar manner to products imported from abroad".

For infringement of Article 51 of Decree No 162 the Fraud Department of San Michele all'Adige summoned Herbert Gilli, importer and wholesaler of food products, residing in Cornedo all'Isarco (Bolzano) and Paul Andres, trader, residing in Bolzano, before the Pretura di Bolzano.

The first is charged with having marketed and stocked for the purpose of sale apple vinegar made by the company Richard Hengstenberg, Esslingen (Federal Republic of Germany), containing acetic acid not derived from the acetic fermentation of wine; the second is charged with having stocked the same product for sale.

In the proceedings before the Pretura di Bolzano counsel for Gilli claimed that the prohibition in Article 51 of Decree No 162 on importing apple vinegar from

the Federal Republic of Germany and marketing it in Italy was a measure having an effect equivalent to a quantitative restriction and thus contrary to Article 30 of the EEC Treaty and he denied that the prohibition was justified under Article 36 of the EEC Treaty.

In consequence the Pretura di Bolzano stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

"Must the expression 'quantitative restrictions on imports and all measures having equivalent effect' contained in Article 30 of the Treaty establishing the EEC be understood as meaning that the prohibition referred to in Article 51 of Decree No 162 of the President of the Republic of 12 February 1962 on putting on the market products containing acetic acid not derived from the acetic fermentation of wine must be considered as being a quantitative restriction on imports or a measure having equivalent effect?"

The order making the reference was lodged at the Court Registry on 31 October 1979. Pursant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged on 14 January 1980 by the Commission of the European Communities, represented for this purpose by A. Prozzillo and R. Wägenbaur, acting as Agents, and on 25 January 1980 by the defendants in the main proceedings represented by Roland Riz, of the Bolzano Bar.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

By order dated 12 March 1980 the Court decided pursuant to Article 95 of the Rules of Procedure to refer this case to the Second Chamber.

II — Observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations of the defendants in the main proceedings

First of all the defendants state that although the Court of Justice is not required in proceedings under Article 177 of the Treaty to rule on the compatibility of rules of national law with the provisions of Community law, nevertheless it has jurisdiction to provide the national court with "all items of information relating to Community law to enable the national court to judge the compatibility of the said rules with the Community rules in question". Consequently they may claim that the question put to the Court for its views "may certainly be considered by it".

The defendants in the main proceedings cite Cases 41/76, *Donckerwolcke*, judgment of 15 December 1976 [1976] ECR 1921, and 120/78 *REWE*, judgment of 20 February 1979 [1979] ECR 649, and maintain that the expression "quantitative restrictions on imports and all measures having equivalent effect" must be understood as meaning "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".

According to the defendants in the main proceedings Article 51 of Decree No 162 prevents vinegar not derived from the acetic fermentation of wine from being introduced into the national territory. That measure is therefore an obstacle to the free movement of goods within the Member States of the EEC. Further it cannot be made lawful by Article 36 of the EEC Treaty.

First of all from the point of view of the protection of public health the defendants in the main proceedings maintain that apple vinegar "is more conducive to health than vinegar from wine because of its high content of potassium" and contains no injurious substances. Consequently apple vinegar is not injurious to public health and this is also supported by Danilo Avancini, Director of the Provincial Agricultural Institute of San Michele all'Adige.

Next, from the point of view of protecting consumers, containers of the apple vinegar have a label which is sufficiently explicit to show that it is apple vinegar and this rules out any possibility of confusion with wine vinegar. Thus consumers are not misled as to the quality of the product by hypothetical confusion with other similar products.

Finally from the point of view of the requirements of fair competition between producers of vinegar there is no risk in this case of unfair competition between producers of vinegar because the containers of apple vinegar are clearly distinguishable from others and also because apple vinegar is considerably dearer than wine vinegar.

The defendants in the main proceedings are of the opinion that the aim of Article 51 of Decree No 162 is to protect national producers of wine and products derived from grapes, such as wine vinegar, and maintain that this defence of the national interests is contrary to one of the basic principles of the EEC, namely the principle of free movement of goods, and is therefore in particular contrary to Article 30 of the EEC Treaty.

In conclusion the defendants in the main proceedings ask the Court to rule that the words "quantitative restrictions on imports and all measures having equivalent effect" in Article 30 of the EEC Treaty must be interpreted as "covering also a prohibition on holding for the purposes of sale or marketing products containing acetic acid not derived from the acetic fermentation of wine where this means a complete prohibition on the import into Italy of a sub-product of the common agricultural production, more precisely vinegar different from that derived from the acetic fermentation of wine".

B — Observations of the Commission

The Commission informs the Court of Justice that upon complaint by a Member State against the Italian legislation concerning vinegar it has concluded that there is a breach of Article 30 of the EEC Treaty and has commenced proceedings against Italy.

It considers that the question put by the Pretura is "whether the prohibition on importing products containing acetic acid not derived from the acetic fermentation of wine, in particular apple vinegar, is a measure compatible with Article 30".

The Commission refers to the established case-law of the Court regarding Article 30 of the EEC Treaty and maintains that since the Italian rules allow only wine vinegar and in particular exclude apple vinegar they make impossible the sale in Italy of vinegar other than wine vinegar. Since the Federal Republic of Germany, the country of origin of apple vinegar in this case, allows the marketing of all vinegars, the Italian rules in the matter therefore appear as "a complete obstacle

directly and actually hindering intra-Community trade and in particular the export of apple vinegar originating in Germany".

The Commission then considers the Italian rules from the point of view of whether they may be justified "as being necessary in order to satisfy mandatory requirements relating ... to the protection of public health, the fairness of commercial transactions and the defence of the consumer (paragraph 8 of the aforementioned *REWE* case).

It is true that Law No 991 of 9 October 1964 includes among its aims the necessity of guaranteeing to consumers the origin and quality of vinegar. The Commission however maintains that where "there is a requirement, which, as in the present case or so it appears, is respected, for a label explaining to the consumer the composition and particulars of the product in question and there is no question of any considerations relating to public health, it is not possible to see how protection of the consumer can justify a prohibition of certain vinegars which are nevertheless readily marketed in other Member States".

In fine it considers that the main aim of the prohibition on using for human consumption vinegars other than wine vinegar is to ensure an outlet for the surplus production of wine. Although the interests of agricultural policy may in fact explain the Italian Government's desire to protect itself against imports of competing products, nevertheless they cannot justify the prohibition in question from the point of view of Community law.

The Commission further observes that the simple abolition of the prohibition on importing vinegar containing acetic acid not derived from the acetic fermentation of wine would not be sufficient to allow such vinegar to be marketed in Italy without restriction in view of the scope of Article 41 of Decree No 162 which reserves the description "vinegar" to products obtained from the acetic fermentation of wines.

In view of all the factors to which it has referred the Commission proposes that the question put by the Pretura di Bolzano should be answered as follows:

"The concept of measures having an effect equivalent to quantitative restrictions on import in Article 30 of the EEC Treaty must be interpreted as also covering a prohibition enacted by a Member State on importing or marketing vinegar containing acetic acid not derived from the acetic fermentation of wine and in particular apple vinegar where the product in question is lawfully produced and marketed in another Member State".

III — Oral procedure

The accused in the main proceedings, represented by Roland Riz, of the Bolzano Bar and the Commission, represented by its Agents, Mr Wägenbaur and Mr Prozzillo, submitted oral argument and answered questions from the Court at the sitting on 8 May 1980.

The Advocate General delivered his opinion at the sitting on 29 May 1980.

Decision

1 By order of 26 October 1979, which was received at the Court on 31 October 1979, the Pretore, Bolzano, submitted to the Court of Justice under Article 177 of the EEC Treaty a question directed to establishing whether the prohibition, contained in Article 51 of Decree No 162 of the President of the Italian Republic of 12 February 1965 (Gazzetta Ufficiale No 73 of 23 March 1965), hereinafter referred to as "Decree No 162", as amended by Article 20 of Law No 739 of 9 October 1970, on marketing products containing acetic acid not derived from the acetic fermentation of wine constitutes a quantitative restriction on imports or a measure having equivalent effect, referred to in Article 30 of the EEC Treaty.

2 That question has been raised in the context of criminal proceedings for fraud brought against two traders residing in Bolzano, one of them charged with marketing and holding for the purpose of sale apple vinegar made in Germany containing acetic acid not derived from the acetic fermentation of wine, and the other charged with holding the same product for the purpose of sale, being offences created and made punishable by Articles 51 and 94 of Decree No 162 which prohibits the use, directly or indirectly, for human consumption of, *inter alia,* products containing acetic acid not derived from the fermentation of wine, even where those products are imported from abroad.

3 The accused in the main proceedings submitted that the prohibition on importing apple vinegar from the Federal Republic of Germany and marketing it in Italy constituted a measure having an effect equivalent to a quantitative restriction contrary to Article 30 of the EEC Treaty and the national judge requested the Court to give a preliminary ruling on the following question:

"Must the expression 'quantitative restrictions on imports and all measures having equivalent effect' contained in Article 30 of the Treaty establishing the EEC be understood as meaning that the prohibition referred to in Article 51 of Decree No 162 of the President of the Republic of 12 February 1965 on putting on the market products containing acetic acid not derived from the acetic fermentation of wine must be considered as being a quantitative restriction on imports or a measure having equivalent effect?"

4 The national court is thereby asking for assistance in the matter of interpretation in order to enable it to assess whether a prohibition such as that laid down by Article 51 of Decree No 162 does or does not come within the category of the quantitative restrictions on imports or measures having equivalent effect referred to in Article 30 of the EEC Treaty.

5 In the absence of common rules relating to the production and marketing of the product in question it is for Member States to regulate all matters relating to its production, distribution and consumption on their own territory subject, however, to the condition that those rules do not present an obstacle, directly or indirectly, actually or potentially, to intra-Community trade.

6 It is only where national rules, which apply without discrimination to both domestic and imported products, may be justified as being necessary in order to satisfy imperative requirements relating in particular to the protection of public health, the fairness of commercial transactions and the defence of the consumer that they may constitute an exception to the requirements arising under Article 30.

7 However, it appears from the documents in the file on the case that it is not in dispute that, first, apple vinegar contains no injurious substances and is not harmful to health and, secondly, the receptacles containing that vinegar are provided with a sufficiently clear label indicating that it is in fact apple vinegar, thus avoiding any possibility of the consumer's confusing it with wine vinegar.

8 Thus there is no factor justifying any restriction on the importation of the product in question from the point of view either of the protection of public health or of the fairness of commercial transactions or of the defence of the consumer.

9 From that it follows that the provisions relating to the prohibition on the marketing of products containing acetic acid other than that derived from wine as set out in Article 51 of Decree No 162 do not 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.

10 In practice, the principal effect of provisions of this nature is to protect domestic production by prohibiting the putting on to the market of products from other Member States which do not anwer the descriptions laid down by the national rules.

11 It appears therefore that a unilateral requirement, imposed by the rules of a Member State, prohibiting the putting on to the market of vinegars not produced from the acetic fermentation of wine constitutes an obstacle to trade which is incompatible with the provisions of Article 30 of the Treaty.

12 Consequently, the answer to the question submitted by the Pretore, Bolzano, should be that the concept of "measures having equivalent effect" to "quantitative restrictions on imports", occurring in Article 30 of the EEC Treaty, is to be understood as meaning that a prohibition imposed by a Member State on importing or marketing vinegar containing acetic acid not derived from the acetic fermentation of wine, and in particular apple vinegar, comes within that provision where the product involved is vinegar lawfully produced and marketed in another Member State.

Costs

13 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As the proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the question referred to it by the Pretore, Bolzano, by order of 26 October 1979, hereby rules:

The concept of "measures having equivalent effect" to "quantitative restrictions on imports", occurring in Article 30 of the EEC Treaty, is to

be understood as meaning that a prohibition imposed by a Member State on importing or marketing vinegar containing acetic acid not derived from the acetic fermentation of wine, and in particular apple vinegar, comes within that provision where the product involved is vinegar lawfully produced and marketed in another Member State.

Touffait Pescatore Due

Delivered in open court in Luxembourg on 26 June 1980.

A. Van Houtte
Registrar

A. Touffait
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 29 MAY 1980 [1]

Mr President,
Members of the Court,

1. This Court has had many occasions upon which to interpret the concept of "measures having an effect equivalent to quantitative restrictions" (on exports or imports) contained in Articles 30 and 34 of the EEC Treaty. The present dispute will allow that case-law to be expanded and will go towards defining in greater detail the meaning of Article 30 and its field of application.

I would briefly summarize the facts.

Herbert Gilli and Paul Andres are traders (a wholesaler and retailer respectively) in foodstuffs in the province of Bolzano and have been charged with a contravention of Articles 51 and 94 of Decree No 162 of the President of the Italian Republic of 12 February 1965, the former for marketing and holding for sale a quantity of apple vinegar and the latter for also holding for sale the same product. Criminal proceedings were accordingly commenced before the Pretore [magistrate], Bolzano, and in the context of those proceedings the Pretore, by order of 26 October 1979, requested this Court to deliver a preliminary ruling on the following question:

1 — Translated from the Italian.