JUDGMENT OF THE COURT (Fifth Chamber)
16 July 1998 *

In Case C-136/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal de Grande Instance, Paris, for a preliminary ruling in the proceedings pending before that court between

The Scotch Whisky Association

and

Compagnie Financière Européenne de Prises de Participation (Cofepp),

Prisunic SA and

Centrale d'Achats et de Services Alimentaires SARL (Casal)

on the interpretation of Council Regulation (EEC) No 1576/89 of 29 May 1989 laying down general rules on the definition, description and presentation of spirit drinks (OJ 1989 L 160, p. 1),

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet (Rapporteur), J. C. Moitinho de Almeida, P. Jann and L. Sevón, Judges,

Advocate General: J. Mischo,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— The Scotch Whisky Association, by E. Borysewicz, of the Paris Bar, and C. Walker, solicitor of the Supreme Court of England and Wales,

— Compagnie Financière Européenne de Prises de Participation (Cofepp), by M. Lesage-Catel Legrand, of the Paris Bar,

— Prisunic SA and Centrale d'Achats et de Services Alimentaires SARL (Casal), by F. Caquelin, of the Paris Bar,

— the French Government, by J.-F. Dobelle, Deputy Director in the Legal Directorate of the Ministry of Foreign Affairs, and R. Nadal, Assistant Foreign Affairs Secretary in that directorate, acting as Agents,

— the German Government, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and S. Maaß, Regierungsrätin in that ministry, acting as Agents,

— the Spanish Government, by L. Pérez de Ayala Becerril, Abogado del Estado, of the Community Legal Service, acting as Agent,

— the Irish Government, by M. A. Buckley, Chief State Solicitor, acting as Agent,

— the Italian Government, by U. Leanza, Head of the Legal Service in the Ministry of Foreign Affairs, acting as Agent, and O. Fiumara, Avvocato dello Stato,

— the United Kingdom Government, by S. Ridley, of the Treasury Solicitor's Department, acting as Agent, and

— the Commission of the European Communities, by J. L. Iglesias, Legal Adviser, and X. Lewis, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of The Scotch Whisky Association, represented by E. Borysewicz and C. Walker; of Compagnie Financière Européenne de Prises de Participation (Cofepp), represented by M. Lesage-Catel Legrand; of Prisunic SA and Centrale d'Achats et de Services Alimentaires SARL (Casal), represented by F. Caquelin; of the French Government, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and R. Nadal; of the Spanish Government, represented by S. Ortiz Vaamonde, Abogado del Estado, of the Community Legal Department, acting as Agent; of the Irish Government, represented by P. Gallagher SC and E. Barrington, BL; of the Italian Government, represented by O. Fiumara; of the United Kingdom Government, represented by D. Anderson, Barrister; and of the Commission, represented by X. Lewis, at the hearing on 5 February 1998,

after hearing the Opinion of the Advocate General at the sitting on 19 March 1998,

gives the following

Judgment

1 By order of 23 February 1996, received at the Court on 25 April 1996, the Tribunal de Grande Instance (Regional Court), Paris, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Council Regulation (EEC) No 1576/89 of 29 May 1989 laying down general rules on the definition, description and presentation of spirit drinks (OJ 1989 L 160, p. 1).

2 That question was raised in the context of proceedings brought by The Scotch Whisky Association, a company incorporated under the law of Scotland, with the objects of protecting and promoting the interests of the Scotch whisky trade throughout the world and of bringing legal proceedings to defend those interests, against Compagnie Financière Européenne de Prises de Participation ('Cofepp', formerly known as La Martiniquaise LM), Prisunic SA and Centrale d'Achats et de Services Alimentaires SARL (Casal), concerning the marketing by those companies of a drink with an alcoholic strength by volume of 30% under a description including the term 'whisky'.

3 Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1) laid down the general rules on the labelling of foodstuffs.

4 Article 2(1)(a) of that directive specifies that the labelling and methods used must not

'be such as could mislead the purchaser to a material degree, particularly:

(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production'.

5 Under Article 3(1)(1), the labelling on a foodstuff must include, *inter alia*, the name under which the product is sold, which is defined as follows in Article 5(1):

'The name under which a foodstuff is sold shall be the name laid down by whatever laws, regulations or administrative provisions apply to the foodstuff in question or, in the absence of any such name, the name customary in the Member State where the product is sold to the ultimate consumer, or a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused.'

6 Finally, under Article 7(1) of Directive 79/112:

'Where the labelling of a foodstuff places emphasis on the presence or low content of one or more ingredients which are essential to the specific properties of the foodstuff, or where the description of the foodstuff has the same effect, the minimum or maximum percentage, as the case may be, used in the manufacture thereof shall be stated.

This information shall appear either immediately next to the name under which the foodstuff is sold or in the list of ingredients in connection with the ingredient in question.

...'

7 The general rules on the definition, description and presentation of spirit drinks are laid down in Regulation No 1576/89, the fourth recital in the preamble to which states:

'... in view of the nature of the products in question and so that the consumer may have fuller information, specific provisions additional to these general rules [namely, those laid down in Directive 79/112] should be adopted and ... in particular, there should be incorporated, in the definition of products, concepts relating to maturation and minimum alcoholic strength for release for human consumption'.

8 A spirit drink is defined in Article 1(2) of that regulation as, *inter alia*, a drink intended for human consumption and having a minimum alcoholic strength of 15% by volume. It must be produced either directly by distillation or by the mixture of a spirit drink with 'one or more other spirit drinks' or 'one or more drinks'.

9 Whisky (or whiskey) is defined in Article 1(4)(b) of Regulation No 1576/89 as:

'A spirit drink produced by the distillation of a mash of cereals

— saccharified by the diastase of the malt contained therein, with or without other natural enzymes,

— fermented by the action of yeast,

— distilled at less than 94.8% vol., so that the distillate has an aroma and taste derived from the raw materials used,

and matured for at least three years in wooden casks not exceeding 700 litres capacity.'

10 A 'grain spirit' is defined in Article 1(4)(c)(1) as

'A spirit drink produced by the distillation of a fermented mash of cereals and having organoleptic characteristics derived from the raw materials used.'

11 Article 3 of Regulation No 1576/89 provides:

'1. With the exception of juniper-flavoured spirit drinks as defined in Article 1(4)(m)(1), for the spirit drinks listed below, the minimum alcoholic strength by volume for release for human consumption in the Community under one of the names listed in Article 1(4), with the exception of certain specific products whose alcoholic strength is indicated in Annex III, shall be as follows:

— 40%*whisky/whiskey*

...

— 35%grain spirit/grain brandy

...

4. Before 31 December 1992, the Council will review the minimum alcoholic strength of *whisky/whiskey* on the basis of a market study by the Commission.'

12 The first two paragraphs of Article 5 of Regulation No 1576/89, on which the case in the main proceedings turns, provide as follows:

'1. Without prejudice to measures adopted pursuant to Article 6, use of the names referred to in Article 1(4) shall be restricted to the spirit drinks defined therein, account being taken of the requirements laid down in Articles 2, 3, 4 and 12. These names must be used to describe the said drinks.

Spirit drinks which do not meet the specifications laid down for the products defined in Article 1(4) may not bear the names assigned therein to those products. They must be described as: "spirit drinks" or "spirits".

2. The names listed in paragraph 1 may be supplemented by geographical indications other than those in paragraph 3, provided that they do not mislead consumers.'

13 Article 6 of Regulation No 1576/89 provides:

'1. Special provisions may govern indications used in addition to the sales description, i. e.:

— the use of terms, acronyms or signs,

— the use of compound terms including any of the generic terms defined in Article 1(2) and (4).

2. Special provisions may govern the names of mixtures of spirit drinks and those of mixtures of drinks and spirit drinks.

3. The provisions referred to in paragraphs 1 and 2 shall be ... designed in particular to prevent the creation of confusion by the names referred to in those paragraphs, especially regarding products in existence when this Regulation enters into force.'

14 Under Article 7(1) and (2):

'1. In addition to complying with national legislation adopted in accordance with Directive 79/112/EEC, the labelling, presentation and advertising of spirit drinks defined in Article 1(4) intended for the final consumer shall comply with paragraphs 2 and 3.

2. (a) The name under which the products referred to in Article 1(2) and (4) are sold shall be one of the names to be used exclusively for such products under Articles 5 and 6(2).

(b) Where the labelling indicates the raw material used to produce the ethyl alcohol of agricultural origin, each agricultural alcohol used must be mentioned in descending order of quantity used.

(c) The name under which the spirit drinks referred to in paragraph 1 are sold may be supplemented by the term "blend" where the product has undergone blending.

(d) Saving exceptions, a maturation period may be specified only where it refers to the youngest alcoholic component and provided that the product was aged under revenue supervision or supervision affording equivalent guarantees.'

15 Article 8 provides:

'In order to be marketed for human consumption, spirit drinks produced in the Community may not be described by associating word[s] or phrases such as "like", "type", "style", "made", "flavour" or any other similar indications with any of the sales descriptions mentioned in this Regulation.'

16 Article 9(1) provides that the spirit drinks listed therein, which include whisky, may not bear in any form whatsoever in their presentation the generic name reserved for such drinks if they contain added ethyl alcohol of agricultural origin.

17 Under Article 12(1) of Regulation No 1576/89:

'Spirit drinks intended for export must comply with the provisions of this Regulation.'

18 Commission Regulation (EEC) No 1014/90 of 24 April 1990 laying down detailed implementing rules on the definition, description and presentation of spirit drinks (OJ 1990 L 105, p. 9) lays down provisions implementing Regulation No 1576/89; it has been amended by Commission Regulation (EEC) No 1781/91 of 19 June 1991 (OJ 1991 L 160, p. 5) and by Commission Regulation (EC) No 2675/94 of 3 November 1994 (OJ 1994 L 285, p. 5).

19 According to the second recital in the preamble to Regulation No 1014/90:

'... these clarifications and additional rules [in relation to Regulation No 1576/89] should in the first instance take account of the criteria followed when Regulation (EEC) No 1576/89 itself was adopted; ... another criterion should be that of avoiding all possible sources of confusion in the information given on labels and guaranteeing that the consumer is given the fullest and clearest information possible where labelling is concerned'.

20 Article 7b(1) of Regulation No 1014/90, inserted by Regulation No 1781/91, provides:

'Pursuant to Article 6(1), second indent, of Regulation (EEC) No 1576/89, the use of a generic term in a compound term shall be prohibited in the presentation of a spirit drink unless the alcohol in that drink originates exclusively from the spirit drink cited.'

21 Finally, Article 7c of Regulation No 1014/90, inserted by Regulation No 2675/94, provides:

'Where a spirit drink listed in Article 9 of Regulation (EEC) No 1576/89 is mixed with:

— one or more spirit drinks, whether or not defined in Article 1(4) of Regulation (EEC) No 1576/89, and/or

— one or more distillates of agricultural origin,

the sales description "spirit" or "spirit drink" must be shown clearly and visibly, without any other qualifying term, in a prominent position on the label.'

22 Cofepp is the proprietor of the trade mark 'Gold River', registered on 30 March 1988 to designate wines, spirits and liqueurs, more particularly whisky, which it uses for a drink having a minimum alcoholic strength of 30%, made by blending various Scotch, Canadian and American whiskies together with water. The label on the bottles containing that drink bears the words 'Blended Whisky Spirit' and 'spiritueux au whisky' ('whisky-based spirit').

23 On two occasions, in 1992 and 1993, The Scotch Whisky Association obtained a bailiff's official report attesting that Prisunic SA was, in a number of shops in Paris, offering Gold River brand spirit drinks for sale on the same shelving as whiskies.

24 The Scotch Whisky Association brought proceedings before the Tribunal de Grande Instance, Paris, against Cofepp, Prisunic SA and Centrale d'Achats et de Services Alimentaires SARL (Casal), seeking, *inter alia*, a finding that they had engaged in unfair competition against it.

25 In The Scotch Whisky Association's submission, Regulation No 1576/89, since it specifies that the minimum alcoholic strength for whisky is 40%, prohibits the marketing of a spirit drink with a strength of 30% under a designation containing the term 'whisky'.

26 Cofepp states that since Regulation No 1576/89 came into force, it has no longer used the description 'whisky' when marketing whisky of reduced alcoholic strength. Instead, it has used 'Blended Whisky Spirit' in English and 'spiritueux au whisky' in French, which it considers is compatible with Regulation No 1576/89. It argues that the regulation is not clear, since Regulation No 2675/94 was introduced to define drinks for which the description 'spirit' or 'spirit drink' must be used, without any other qualifying term, on the label. Cofepp interprets Regulation No 1576/89 as entailing a distinction between the addition of ethyl alcohol of agricultural origin — in which case the use of the term 'whisky' in the description of a spirit drink is prohibited — and dilution. Dilution, as Cofepp practises it by adding water to reduce the alcoholic strength of the blend of whiskies which it markets from 40% to 30%, is not, it claims, covered by the prohibition on the use of the generic term 'whisky'.

27 The Tribunal de Grande Instance, considering that an interpretation of Regulation No 1576/89 was necessary in order to settle the dispute, stayed proceedings and sought a ruling by the Court on the following question:

'Having regard to European rules, in particular Article 5 of Council Regulation (EEC) No 1576/89 of 29 May 1989, may the generic term "whisky" be included in the sales description of a spirit drink consisting entirely of whisky diluted with water, so that the alcoholic strength by volume is less than 40%?'

28 With a view to answering that question, it must first be noted that a drink such as Gold River is a spirit drink within the meaning of Article 1(2) of Regulation No 1576/89 and thus falls within the scope of that regulation.

29 Furthermore, the first subparagraph of Article 5(1) of Regulation No 1576/89 restricts use of the name 'whisky' to spirit drinks meeting the conditions set out in Articles 1(4)(b) and 3(1).

30 Thus, a drink such as Gold River, which consists entirely of whisky diluted with water so that the alcoholic strength by volume is less than 40%, does not constitute 'whisky' within the meaning of Regulation No 1576/89 and cannot be sold under that name — a finding which is not disputed in the context of the main proceedings.

31 Under the second subparagraph of Article 5(1), spirit drinks which do not meet the specifications laid down for the products defined in Article 1(4) may not bear the names assigned therein to those products (first sentence), but must be described as "spirit drinks" or "spirits" (second sentence).

32 In Cofepp's submission, the second sentence of that subparagraph should be interpreted as meaning that the drinks to which it refers must contain the terms 'spirit drink' or 'spirit' in their sales description but that other terms, such as 'whisky', may be added, since the addition of other terms informing consumers as to the ingredients of the mixture, and in particular as to its single alcoholic ingredient, is not regulated by that provision.

33 That interpretation cannot be upheld. As the Advocate General has noted in points 17 and 18 of his Opinion, Article 5(1) of Regulation No 1576/89 specifies both that a product such as Gold River must be described as a 'spirit drink' or 'spirit' and that it may not be given one of the names referred to in Article 1(4), which means that the term 'whisky' may not appear in the sales description of such a product.

34 Cofepp and the French Government have also relied on Article 6 of Regulation No 1576/89, which states that special provisions may govern indications used in addition to the sales description, to support their submission that indications may be freely used in addition to the sales description 'spirit drink' or 'spirit' imposed by the second sentence of the second subparagraph of Article 5(1), as long as no provisions have been adopted under Article 6 explicitly precluding them.

35 Here, it must be pointed out, as the Advocate General has done in points 23 to 25 of his Opinion, that indications may not be freely used in addition to the sales description.

36 First, such use requires authorisation to be given by the Commission under the derogating power conferred on it by Article 6(1) of Regulation No 1576/89.

37 As was held in Case C-217/91 *Spain* v *Commission* [1993] ECR I-3293, paragraph 20, the prohibition, set out in Article 5(1) of Regulation No 1576/89, of the use of a name referred to in Article 1(4) to describe spirit drinks other than those referred to therein, is fully applicable, subject only to the reservation that the Council intended to permit the Commission to derogate expressly from Article 5 in the exercise of the powers conferred on it by Article 6(1).

38 Second, it is clear from the actual wording of Article 6 that the Commission's power to derogate under Article 6(1) is limited, pursuant to Article 6(3), by the need to avoid 'the creation of confusion' by sales descriptions including additional indications, 'regarding products in existence when this Regulation enters into force'.

39 The use of an additional indication such as 'whisky' in the sales description is thus precluded by Article 5 of Regulation No 1576/89, subject to any derogations based on Article 6 thereof — and, in the present instance, there are none.

40 Cofepp has also maintained that Article 5 of Regulation No 1576/89 cannot be interpreted as prohibiting the use of a generic term referred to in Article 1(4) in the sales description of a drink which does not meet the specifications laid down for the product in question, since the regulation contains a separate provision enacting the only explicit prohibition in that regard. Thus, Article 9 expressly prohibits the use of a reserved generic term, such as 'whisky', in the presentation of a spirit drink composed of that product and of ethyl alcohol of agricultural origin. Such a provision would not be justified if Article 5 already contained that prohibition.

41 That interpretation cannot be upheld. Article 5 regulates sales descriptions, whilst Article 9 lays down a general prohibition, with regard to the presentation of the product as a whole, on the use of the reserved term in any form whatever.

42 Cofepp has further argued, on the basis of Regulation No 1014/90, as amended, which lays down provisions implementing Regulation No 1567/89, that since under Article 7b of Regulation No 1014/90, inserted by Regulation No 1781/91, use of a generic term in a compound term is not prohibited in the presentation of a spirit drink if the alcohol in that drink originates exclusively from the spirit drink cited, a product whose sole alcoholic ingredient is whisky must be able to use that term in its sales description. In addition, since Article 7c, inserted by Regulation No 2675/94, requires the use of the sales description, without any other qualifying term, on the label in the case of spirit drinks mixed with other spirit drinks or with distillates of agricultural origin, the addition of qualifying terms in the sales description is allowed in all other cases.

43 As the Advocate General has stated, at point 43 of his Opinion, the words 'spiritueux au whisky' do not constitute a compound term within the meaning of Article 7b of Regulation No 1014/90. In the first place, it is clear from the second recital in its preamble that Regulation No 1781/91 applies to liqueurs. Secondly, by

'compound term', the Community legislature intended to refer to a combination of the names of two different drinks, not the combination of the words 'spirit' and 'whisky', whisky being itself a spirit. Article 7c, inserted by Regulation No 2675/94, concerns products which bear no relation to a mixture of whisky and water and, as indicated in the preamble to Regulation No 2675/94, forms part of a general framework of ensuring fair competition between traditional protected spirit drinks and others and to avoid confusion on the part of the consumer. It cannot found an interpretation depriving Article 5 of Regulation No 1576/89 of its effect and leading to a result running counter to those aims.

44 Finally, Cofepp has relied on Directive 79/112, in particular Article 5(1) thereof, to argue that it is entitled to use the words 'au whisky' ('whisky-based') in its sales description of Gold River. Under Article 5(1) of the Directive, the name under which a foodstuff is sold is the name laid down by whatever mandatory provisions apply to it or, in the absence of any such name, a description of the foodstuff.

45 However, Article 5 of Regulation No 1576/89 is a mandatory provision as regards the sales description of a drink such as Gold River, and the use of a descriptive name for it is thus not possible.

46 None the less, pursuant to Article 7(1) of Directive 79/112, where the labelling of a foodstuff places emphasis on the presence or low content of one or more ingredients which are essential to the specific properties of the foodstuff, or where the description of the foodstuff has the same effect, the minimum or maximum percentage, as the case may be, used in the manufacture thereof must be stated, and that information must appear on the label either immediately next to the name under which the foodstuff is sold or in the list of ingredients.

47 Thus, whilst under Article 5(1) of Regulation No 1576/89 the term 'whisky' may not appear anywhere in the sales description of a product such as Gold River, it may none the less, pursuant to Article 7(1) of Directive 79/112, appear on the label of such a product, subject to the general proviso under Article 2(1) of that directive that the labelling of a foodstuff must not be such as could mislead the purchaser as to its characteristics and, in particular, its nature and properties. It must be pointed out, as was noted by the Advocate General at point 33 of his Opinion, that Regulation No 1576/89 is a specific legislative provision, and thus prevails over Directive 79/112. Consequently, whilst the term 'whisky' may appear without qualification in the list of ingredients, it may not, without defeating the prohibition of the use of the term 'whisky' in the sales description, appear in close proximity to that sales description unless it is clearly separated and more discreet.

48 The answer must therefore be that Article 5 of Regulation No 1576/89 prohibits the inclusion of the generic term 'whisky' in the sales description of a spirit drink containing whisky diluted with water, with an alcoholic strength by volume of less than 40%, or the addition of the term 'whisky' to the description 'spirit' or 'spirit drink' applied to such a drink.

Costs

49 The costs incurred by the French, German, Spanish, Irish, Italian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 (Fifth Chamber),

in answer to the question referred to it by the Tribunal de Grande Instance, Paris, by order of 23 February 1996, hereby rules:

Article 5 of Council Regulation (EEC) No 1576/89 of 29 May 1989 laying down general rules on the definition, description and presentation of spirit drinks prohibits the inclusion of the generic term 'whisky' in the sales description of a spirit drink containing whisky diluted with water, with an alcoholic strength by volume of less than 40%, or the addition of the term 'whisky' to the description 'spirit' or 'spirit drink' applied to such a drink.

Gulmann Wathelet Moitinho de Almeida

Jann Sevón

Delivered in open court in Luxembourg on 16 July 1998.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber