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.

"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?"

For a proper understanding of that question it should be said that Article 51 of Decree No 162 of 12 February 1965 (in the version as amended by Article 3 of Law No 207 of 6 April 1966 and Article 18 of Law No 739 of 9 October 1970) provides as follows: "Synthetic ethyl alcohol and products containing acetic acid not originating in the acetic fermentation of wine ... 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 41 (in the version as amended by Article 14 of Law No 739 of 9 October 1970) provides that "the word 'vinegar' or 'wine vinegar' is reserved to the product obtained from the acetic fermentation of wine" having a certain acidity and a certain quantity of alcohol. Finally, under Article 94 of the same decree, contraventions of the provisions of Article 51 are punishable by a fine of between 2 and 20 million lire and, in more serious cases or in the event of a second or subsequent offence, by a term of imprisonment not exceeding three years.

The Commission, taking the view that the prohibition imposed by that article is incompatible with Community law, by letter of 14 December 1978 commenced proceedings against the Italian Government under Article 169 of the EEC Treaty and its reasoned opinion was given on 28 November 1978. However, proceedings have not been commenced before the Court. The Pretore, Bolzano, for his part, has asked that that prohibition be appraised in the light of Article 30 of the EEC Treaty and so has put in the form of a request for a preliminary ruling a question which falls rather within the framework of the said Article 169. It is settled in fact that the procedure governed by Article 177 of the EEC Treaty has the purpose not of establishing the lawfulness of given national rules in the light of Community law but rather of clarifying the meaning and scope of Community rules.

That notwithstanding, in so far as it is possible to discern the existence of a problem of interpretation of a general nature, the Court has never refused to deliver a ruling on questions of the same kind as that framed in the present case. Accordingly, I consider that the topic in dispute must be examined despite the inappropriate wording of the question, the content of which may be stated more precisely in the following terms: does a national prohibition on carrying, holding for sale, marketing or using in any manner for human consumption, vinegar not derived from the acetic fermentation of wine come within the category of quantitative restrictions on imports or measures having equivalent effect referred to in Article 30 of the EEC Treaty?

2. In my opinion, a national law having the content which I have indicated amounts to a complete barrier on intra-

Community trade in the product in question. Indeed, the impossibility of carrying or of using in any manner, for human consumption, certain types of vinegar totally prevents their importation from other Member States.

Undoubtedly, a rule of that kind is incompatible with the prohibition laid down in Article 30 of the Treaty of Rome. It is well settled that, in accordance with consistent decisions of this Court, the expression "measures having an effect equivalent to quantitative restrictions" includes "all trading rules of Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" — see the judgments of 15 December 1976 in Case 41/76, *Donckerwolcke* [1976] ECR 1921, and of 13 March 1979 in Case 119/78, *Distilleries Peureux* [1979] ECR 975, at paragraph 22 of the decision. From that it follows that an actual, even if indirect, impediment to trade such as that constituted by national rules of the kind in question certainly contravenes the prohibition laid down in Article 30.

It is made no less a contravention by the fact that the restrictive national rule subjects imported and national products to the same treatment (as is the case with the rule which lies at the source of the present dispute). The character of a national rule falling within the scope of Article 30 lies in the fact in its being a complete barrier to the importation from other Member States of a given product: that fact is enough for it to be regarded as offending against the rule of free movement of goods even if the said rule prevents the marketing of the product in question irrespective of the country in which it has been manufactured.

3. It is true that, notwithstanding the prohibitions contained in Articles 30 and 34 of the EEC Treaty, Member States are not entirely deprived of the power of promulgating, where certain conditions are satisfied, provisions which impose a direct or indirect obstacle to trade within the Community. In that regard, the judgment of 20 February 1979 in Case 120/78, *REWE* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, stated that Member States retain the power to introduce restrictions which are "necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer". As I observed in the opinion which I delivered on 27 September 1979 in Case 15/79, *Groenveld* v *Produktschap voor Vee en Vlees*, that list (which, as the expression "in particular" which precedes it signifies, is purely illustrative) only partly corresponds to Article 36 of the EEC Treaty and recognizes in broader terms the lawfulness of national rules departing from the Community prohibitions subject to the condition that those rules "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" (paragraph 14 of the decision in the above-mentioned judgment of 20 February 1979).

I do not consider, however, that a rule of the same kind as the Italian one which has given rise to the main proceedings

may be regarded as justified in the light of the tests mentioned in the *REWE* judgment of 20 February 1979.

First, in fact, the prohibition on placing on the market and using for foodstuffs intended for human consumption any kind of vinegar which has not been produced by the acid fermentation of wine may not be regarded as justified by the need to protect public health. In particular, apple vinegar is not injurious to health: that appears even from analyses carried out for the criminal proceedings pending before the Italian court. In its observations submitted on 8 November 1979 to the Commission (after, as has already been mentioned, the Commission had commenced the procedure under Article 169 of the Treaty) the Italian Government itself did not adopt the view that the Italian rules were necessary to protect public health.

Secondly, the restrictive measures in question cannot be said to be justified as a means of safeguarding fairness in commercial relationships or the position of consumers. The latter may be well protected by means of rules on labelling which require a clear indication of the ingredients of which certain foodstuffs are composed and that without putting in jeopardy the free movement of goods. A solution of that nature was envisaged in the same *REWE* judgment of 20 February 1979. The issue in that case was whether Community rules left a Member State free to fix a minimum alcohol content for beverages sold on its territory at a higher level than Community standards and the Court held that it was not possible "to regard the mandatory fixing of minimum alcohol content as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products". Applying analogous tests to the present case I consider that the consumer is suitably protected where there is marked on the container of the vinegar, clearly and in the language of the country where it is marketed, that the product is not produced from the acetic fermentation of wine. Clearly, every Member State has the power to impose that precaution upon traders.

In the observations submitted in the course of the procedure under Article 169 the Italian Government contended that the prohibitions contained in its legislation were indispensable for the effective avoidance and suppression of fraud in the preparation and sale of vinegar. I rather think that such an argument (unaccompanied, moreover, by any evidence) cannot be accepted. It suffices to bear in mind that in other countries, for example, in the Federal Republic of Germany, vinegar not derived from wine is widely sold without that giving rise to insuperable problems in regard to the investigation of fraud. In any event, it would appear to me to be difficult to show that the possible existence of technical difficulties in analysing the organoleptic characteristics of the product may constitute a sufficient ground for sacrificing the principle of the free movement of goods.

Also in the observations to which I have already referred, the Italian Government contends that the restrictive rules are necessary in order to "guarantee an

outlet for considerable quantities of wine which would otherwise flow back on to the market creating serious problems for its equilibrium, with associated intervention at the expense of the European Agricultural Guidance and Guarantee Fund". But, as I have already observed in my opinion in Case 15/79 (already cited), "I do not think that the promotion of national products constitutes an interest of a general nature the protection of which, according to the case-law of the Court of Justice, justifies an exception to the free movement of goods within the Community."

Finally, as regards fiscal aims which might justify measures departing from the principle of free trade, it is hardly necessary to state that they have nothing to do with the matter of excluding from the market certain types of vinegar.

4. In conclusion, therefore, I consider that the question framed by the Pretore, Bolzano, by order of 26 October 1979 calls for the following answer:

"A prohibition on carrying, holding for sale, marketing, or using in any manner whatsoever for human consumption, any vinegar not derived from the acetic fermentation of wine falls within the concept of measures having an effect equivalent to quantitative restrictions, referred to in Article 30 of the EEC Treaty".