JUDGMENT OF THE COURT (Fifth Chamber)
26 November 1985 *

In Case 182/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Gerechtshof [Regional Court of Appeal], Arnhem, for a preliminary ruling in the criminal proceedings pending before that court against

Miro BV, whose registered office is at Zaandam,

on the interpretation of Article 30 of the EEC Treaty with regard to a national provision governing the marketing of jenever,

THE COURT (Fifth Chamber),

composed of: U. Everling, President of Chamber, R. Joliet, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

after considering the observations submitted on behalf of:

Miro BV by O. W. Brouwer, of the Amsterdam Bar,

the Netherlands Government by I. Verkade, Secretaris-Generaal at the Ministry of Foreign Affairs, in the written procedure, and by A. Bos in the oral procedure,

the Belgian Government by R. Hobaer, Director at the Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, assisted by T. Biebaut,

* Language of the Case: Dutch.

the Government of the Federal Republic of Germany by M. Seidel, Ministerialrat at the Ministry of the Economy, and A. Bleckmann, Professor of Law at the University of Münster, in the written procedure, and by A. Bleckmann in the oral procedure,

the Italian Government by M. Conti, avvocato dello Stato, in the written procedure, and by O. Fiumara in the oral procedure,

the Commission of the European Communities by Th. van Rijn, a member of its Legal Department,

after hearing the Opinion of the Advocate General delivered at the sitting on 11 July 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By judgment of 18 June 1984, which was received at the Court on 10 July 1984, the Gerechtshof, Arnhem, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 30 of the Treaty in order to determine whether the application of national rules on the use of the appellation 'jenever' to products imported from other Member States is compatible with the prohibition of measures having an effect equivalent to quantitative restrictions on imports.

2 That question was raised in an appeal brought by the company Miro BV against a judgment of the Arrondissementsrechtbank [District Court], Arnhem, given in criminal proceedings brought by the Public Prosecutor at Arnhem, imposing upon it a fine for infringing the Verordening Benaming van Jenever [Regulation on the Appellation of Jenever] of 22 August 1979.

3 Article 2 (1) of the Verordening Benaming van Jenever prohibits 'the appellation "jenever" or "genever", "Schiedamse jenever" (genever), "Schiedam", "Schiedammer", "Holland gin", "Friesche jenever" (genever), "Graanjenever" (genever), "Hollandse jenever" (genever), "Oude Klare" or any other similar appellation which may reasonably induce purchasers to believe that a distilled beverage is jenever' from being used in respect of a beverage which does not meet the definition laid down in Article 1 (4). That article provides *inter alia* that jenever must have an alcohol content of at least 35%.

4 In 1983 Miro, which, amongst other businesses, runs off-licences in the Netherlands, began to sell in those off-licences jenever imported from Belgium with an alcohol content of 30%. The bottles bore labels with the appellation 'Nolens — Supra Hasselt — Jonge Jenever — Genièvre — 30% vol.' and the name of the producer, 'NV G. S. F. Bruggeman SA, B-9000 Gent, Grauwpoort 1'.

5 It is clear from the documents before the Court that jenever having an alcohol content of only 30% has been lawfully produced and marketed in Belgium for a long time and that at the time of the facts at issue there were no special rules in Belgium regarding the minimum alcohol content of jenever. Since then, a Belgian Royal Decree of 6 June 1984 has prescribed a minimum alcohol content of 30% for jenever.

6 At the Community level, the Commission submitted a proposal to the Council on 22 June 1982 for a regulation laying down general rules on the definition, description and presentation of spirituous beverages and of vermouths and other wines of fresh grapes flavoured with plants and other aromatic substances (Official Journal 1982, C 189, p. 7) which provides that jenever must have a minimum alcohol content of 30%. The Council has not yet taken any decision on that proposal.

7 When examining whether the application of the Verordening Benaming van Jenever to 'Nolens Jonge Jenever' imported by Miro from Belgium was compatible with Article 30 of the EEC Treaty, the Gerechtshof, Arnhem, found that it made the marketing of the product in the Netherlands more difficult and onerous because it was necessary to change the label and abandon the traditional appellation. Referring to the judgment of the Court of 20 February 1979 in Case

120/78, *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (the *Cassis de Dijon* case) it took the view that the label of 'Nolens Jonge Jenever' provided sufficient indication that it was a Belgian product with an alcohol content of 30%, and thus avoided any risk of confusion with Netherlands jenever having an alcohol content of 35% or more and a higher price so that there was no mandatory requirement of consumer protection to justify banning the sale of 'Nolens Jonge Jenever' in the Netherlands.

8 On the other hand the Gerechtshof, Arnhem, doubted whether such a ban was necessary for the purposes of fair trading. It pointed out in this regard that, despite the absence of any risk of confusion, the Netherlands distillers who may not market jenever having an alcohol content of less than 35%, are in a worse competitive position owing to the difference in excise duty and value-added tax on jenever of 30% strength and jenever of 35% strength which, according to the calculations of the Gerechtshof, was HFL 1.62 in the spring of 1983 and HFL 1.89 from 1 February 1984.

9 In order to resolve that doubt the Gerechtshof, Arnhem, referred the following question to the Court for a preliminary ruling:

'Assuming that:

(1) legislation exists in Member State A requiring a certain kind of alcoholic beverage, referred to below as jenever, to have a minimum alcohol content of 35% and making it a punishable offence for the appellation jenever to be used for jenever having a lower alcohol content;

(2) in 1982 sales of jenever in Member State A amounted to approximately 45% of the total market in distilled beverages;

(3) in Member State A the difference in excise duty and VAT on one litre of distilled alcohol of 30% strength and one litre of 35% strength totalled on the sale to the consumer HFL 1.62 (and since 1 February 1984 amounts to HFL 1.89);

(4) in Member State B there is no legislation in force prescribing a minimum alcohol content for jenever;

(5) there are still no common rules in the EEC governing the production and sale of jenever;

must the extension of Member State A's prohibition to jenever having an alcohol content of 30% lawfully produced and marketed in Member State B as a result of which sales of the beverage in Member State A are hindered or barred then be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by Article 30 of the EEC Treaty?'

10 In effect the Court is being asked to clarify, with reference to a case such as the one in point, its abovementioned case-law on the prohibition of measures having an effect equivalent to quantitative restrictions laid down in Article 30 of the Treaty. According to that case-law, in the absence of common rules governing the marketing of the relevant products, obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applying without distinction to national and imported products, may be justified as being necessary to satisfy mandatory requirements of *inter alia* consumer protection and fair trading.

11 First of all, as regards the requirements of consumer protection, Miro, the Belgian Government and the Commission refer to the findings contained in the judgment of the Gerechtshof, Arnhem, and submit that consumers are sufficiently protected in this case by the label which clearly indicates the product's origin and alcohol content.

12 The Netherlands and German Governments consider that the Netherlands legislation in question is justified by mandatory requirements of consumer protection. They take the view that labelling measures are insufficient to eliminate the risk that the consumer may confuse the traditional beverage with another product having a lower alcohol content. In this regard they contend that most consumers, who do not know that the beverage traditionally known as jenever must have an alcohol content of 35% and who are acquainted only with that

beverage are not given sufficient notice simply by statements on the bottle label. Such measures are in any event completely ineffective where the beverage is sold in hotels and restaurants.

13 The German Government further submits on this point that the question whether a ban on using the appellation 'jenever' is necessary for products which do not satisfy certain requirements depends on the commercial view prevailing in the country concerned. Since the national authorities are in the best position to judge such facts, it is for those authorities and not the Court to reach a decision on them. When the national legislature, which is competent to take such a decision, has settled the matter, the national court is bound by its assessment.

14 As regards the latter argument, it must be stated that neither Article 30 of the Treaty nor indeed Article 36 reserves certain matters to the exclusive jurisdiction of the Member States. When in order to satisfy mandatory requirements recognized by Community law national legislation creates obstacles to the fundamental principle of the free movement of goods, it must observe the limits laid down by Community law. It is for the Court, which interprets Community law in the final instance, and for the national courts, which reach their decisions on the basis of that interpretation, to ensure that those limits are observed. In the final analysis the German Government's argument amounts to a repudiation of review by the Court and therefore runs counter to the uniformity and effectiveness of Community law. It must therefore be rejected.

15 On the question whether the Netherlands legislation is necessary to protect consumers it need only be pointed out that the Gerechtshof, Arnhem, found in its judgment that in the present case the labelling of'Nolens Jonge Jenever' was sufficient to avoid the risk of confusion on the part of the consumer and that the application of the Netherlands legislation to that product was not justified by mandatory requirements of consumer protection. In those circumstances the Gerechtshof clearly did not intend to ask the court any question on this point.

16 The examination in the present case must therefore be confined to the question whether the need to ensure fair trading can justify the application of the Netherlands legislation in question to imported products, especially in view of the

competitive advantage enjoyed by foreign manufacturers on the Netherlands market owing to the price difference arising from the fact that excise duties and taxes are proportional to alcohol content.

17 Miro doubts whether the requirements of fair trading may be invoked when consumer protection is not at issue. If that were possible then, in its view, national producers would in fact be protected against competition from imported products. It also points out that Netherlands producers sell on the Belgian market jenever which is produced in the Netherlands for export and which has an alcohol content of 30%.

18 The Belgian Government stresses in particular that jenever with an alcohol content of 30% has traditionally been produced in Belgium. A country cannot have a monopoly over the generic name of a product. Normal competition on a common market requires that the consumer should have the opportunity to make his choice on the basis of quality and price.

19 The Commission considers that the concept of fair trading relates to the law on unfair competition as referred to for example in the Paris Convention on the Protection of Industrial Property. The concept has always related to certain actions of traders and not to objective market conditions such as the way in which taxes and excise duty are calculated. It cannot therefore justify a ban such as that at issue in the present case.

20 The Netherlands Government points out that the Netherlands production of jenever is the largest in the world. The alcohol content of 35% is one of the inherent characteristics of this traditional national product. Without a ban on using the traditional appellations for a product not having the traditional qualities it would be impossible to maintain the standard of quality and the stage would be reached where even beverages with an alcohol content of 20% or 15% would have to be accepted as jenever. In its view, producers must be prevented from using the good reputation of a world-famous product to the advantage of a different product which has an additional price advantage owing to differences in excise duties and taxes which are proportional to the alcohol content.

21 In the same connection the Italian Government submits that equality between competing producers is an essential element of fair competition between them. Where, as in the present case, such equality is affected by differences in taxation of interchangeable products such as jenever with an alcohol content of 30% and jenever with an alcohol content of 35%, a Member State may lawfully prevent certain traders from gaining an unfair competitive advantage as a result of those differences by prohibiting those traders from marketing the product under the same appellation.

22 The Court would first draw attention to its established case-law (see its judgments of 20 February 1975 in Case 12/74 *Commission* v *Germany* [1975] ECR 181 and 9 February 1981 in Case 193/80 *Commission* v *Italy* [1981] ECR 3019) according to which it would not be compatible with Article 30 of the Treaty and the objectives of a common market for national legislation to be allowed to restrict a generic term to one national variety alone to the detriment of other varieties produced, particularly in other Member States, by compelling the producers of the other varieties to use appellations which are unfamiliar to or less esteemed by the consumer.

23 The fixing of limits for the alcohol content of beverages may indeed lead to a standardization of the products on the market and of their appellations and thus provide more transparency in trading. Therefore, in the absence of common rules, a Member State cannot in principle be denied the possibility of establishing rules under which the right to use certain traditional appellations is subject to the observance of a minimum limit for alcohol content.

24 However, as the Court has already held in its judgment of 13 March 1984 (Case 16/83 *Prantl* [1984] ECR 1299), in a system of a common market interests such as fair trading must be guaranteed with regard on all sides for the fair and traditional practices observed in the various Member States.

25 It cannot therefore be regarded as an essential requirement of fair trading for national rules fixing the minimum alcohol content of a traditional beverage to be complied with by products of the same kind imported from another Member State

if they are lawfully and traditionally manufactured and marketed under the same appellation in the Member State of origin and the purchaser is provided with proper information. If in such circumstances the free movement of imported goods were to be subject to the condition that there should first exist Community rules, the fundamental principle of a unified market and its corollary, the free movement of goods would be rendered meaningless.

26 The fact that imported products may have a price advantage as a result of the application of national taxes and excise duties which are proportional to the alcohol content is irrelevant in this regard. Such differences in taxes and excise duties charged under national legislation are part of the objective conditions of competition of which every trader may freely take advantage, provided that purchasers are given information so that they can freely make their choice on the basis of the quality and price of the products.

27 The answer to the question submitted by the Gerechtshof, Arnhem, must therefore be that the prohibition of measures having an effect equivalent to quantitative restrictions on imports laid down in Article 30 of the EEC Treaty prevents a Member State from applying to products of the same kind imported from another Member State national rules under which the appellation of a national beverage may be used only if that beverage has a minimum alcohol content if those products are lawfully and traditionally manufactured and marketed under the same appellation in the Member State of origin and purchasers are provided with proper information.

Costs

28 The costs incurred by the Netherlands, Belgian, German and Italian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT (Fifth Chamber)

in answer to the question referred to it by the Gerechtshof, Arnhem, by judgment of 18 June 1984, hereby rules:

The prohibition of measures having an effect equivalent to quantitative restrictions on imports laid down in Article 30 of the EEC Treaty prevents a Member State from applying to products of the same kind imported from another Member State national rules under which the appellation of a national beverage may be used only if that beverage has a minimum alcohol content if those products are lawfully and traditionally manufactured and marketed under the same appellation in the Member State of origin and purchasers are provided with proper information.

Everling Joliet

Due Galmot Kakouris

Delivered in open court in Luxembourg on 26 November 1985.

P. Heim
Registrar

U. Everling
President of the Fifth Chamber