Case 281/83

Commission of the European Communities
v
Italian Republic

'Measures having an effect equivalent to a quantitative restriction — Vinegar'

Summary

Action against a Member State for failure to fulfil its obligations — Judgment of the Court declaring that a Member State has failed to fulfil its obligations — Effects — Obligations of the Member State at fault — Compliance with the judgment in full — Specific circumstances (EEC Treaty, Arts 169 and 171)

A declaration by the Court, in a judgment given in proceedings against a Member State for failure to fulfil its obligations, that 'by restricting the designation "vinegar" to wine vinegar' the Member State has failed to fulfil its obligations under Article 30 *et seq.* of the Treaty, obliges that State to adopt appropriate measures to abolish in their entirety any rules or practices in national law restricting the designation in question exclusively to wine vinegar.

A legislative amendment cannot be regarded as complying precisely and in full with the judgment if, whilst creating a new generic designation ('agro'), the amendment continues to restrict the traditional designation ('aceto') to wine vinegar, so that other categories of natural vinegars may only be designated by terms which are less well known to, and less appreciated by, national consumers.

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 12 June 1985 *

Mr President,
Members of the Court,

1. In its judgment of 9 December 1981 in Case 193/80 (*Commission* v *Italian Republic* [1981] ECR 3019), the Court held that:

'by prohibiting the marketing and importation of vinegars of agricultural origin

* Translated from the French.

other than those originating in the acetic fermentation of wine and by restricting the designation "vinegar" to wine vinegar, the Italian Republic has failed to fulfil its obligations under Article 30 *et seq.* of the EEC Treaty'.

The Court thereby declared that Italian Law No 991 of 9 October 1964 and Presidential Decree No 162 of 12 February 1965 were not in conformity with Community law, inasmuch as they prohibited the marketing and sale of all products containing acetic acid which did not originate in the acetic fermentation of wine or piquette, and since the said decree restricted in particular the designation 'vinegar' to products obtained by such fermentation.

2. Following that judgment, Article 1 of Italian Law No 527 of 2 August 1982 (*Gazzetta Ufficiale* No 221 of 12 August 1982, p. 5735) laying down 'Rules relating to the production and marketing of "agri" (vinegars)' authorized the importation and marketing, under the designation 'agro di' (vinegar made from . . .) followed by the raw material from which it is obtained, of the product derived from the acetic fermentation of alcohol of agricultural origin fit for human consumption.

However, Article 1 (3) provides that 'the designation "aceto" (vinegar) or "aceto di vino" (wine vinegar) . . . must be accompanied by the designation "agro di vino" (vinegar made from wine). The term "aceto" must also be used in connection with "agro di vino" '.

In other words, wine vinegar must, in accordance with that legislation, be designated as 'agro di vino — aceto'. All other vinegars of agricultural origin, for instance those obtained from cider or malt, must be designated as 'cider vinegar' or 'malt vinegar' and *not* as 'vinegar'. This was acknowledged by the Italian Republic when the Commission, following the adoption of that law, initiated the procedure under Article 171 of the EEC Treaty, in accordance with Article 169 thereof.

3. In the Commission's view, the Italian Law of 2 August 1982 is contrary to the letter and the spirit of the Court's judgment of 9 December 1981 on the ground that it continues to restrict the designation 'vinegar' exclusively to wine vinegar and its use is even rendered compulsory in connection with that product. It therefore constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the EEC Treaty.

According to the Italian Republic, the Court's judgment in Case 193/80 contained a two-fold requirement. In the first place, it imposed on Italy an obligation to abolish the prohibition on the importation and marketing of vinegars other than wine vinegar, which Italy complied with by adopting the Law of 2 August 1982. Secondly, it required Italy to settle the question of the designation of those products, which are new to Italian consumers. It was therefore necessary, in its view, to provide accurate and impartial information for the benefit of consumers who, having regard to the legislation previously in force, were familiar only with wine vinegar.

According to the Italian Government, the term 'agro' is a *generic* designation applied to all vinegars of agricultural origin (obtained from wine, apples and so on), whilst the term 'aceto' is a *specific* designation and must accompany, not replace, the designation 'agro di vino'. Although, as the Commission maintains, the Court in its judgment of 9 December 1981 considered the term 'vinegar' to be a generic designation, that is to say a designation relating to the category of vinegars of agri-

cultural origin, the genus and the variety were combined in Italy in wine vinegar alone, which was marketed to the exclusion of any other kind of vinegar. The Court, by adopting the term 'vinegar' used in the Common Customs Tariff, had, in the absence of any other reference, taken the view that this was the generic designation.

However, in the exercise of its lawful powers relating to trade descriptions, the Italian legislature, in view of the traditional use in Italy of the term 'aceto' to designate wine vinegar, had created a new generic designation known as 'agro', applicable to all vinegars and replacing the term 'vinegar' adopted by the Court. In so doing, it attributed a specific meaning to the term 'vinegar' so as to protect consumers who were accustomed to that designation. That was recognized by the Court as a legitimate concern since it acknowledged in its judgment in Case 193/80 that 'the concern of the Italian Government to protect consumers may be justified' (paragraph 27 of the decision) and is an overriding factor the importance of which is emphasized in the sixth recital in the preamble to Council Directive 79/112/EEC of 18 December 1978 (Official Journal 1979, L 33, p. 1).

Thus, according to the Italian Government, the term 'vinegar' continues to be valid as a trade description in order to identify in common parlance a product to which Italian consumers are traditionally accustomed. The difference between the new generic term and the customs designation is not, in Italy's view, sufficient to render the former term incompatible with the relevant rules of Community law.

In its reply, the Commission stated that the Court had already rejected that argument by holding that the generic designation 'vinegar' had been applied to all the varieties of that product derived from the acetic fermentation of agricultural raw materials and that consumers could be afforded protection by the affixing of suitable labels 'giving the nature of the product sold' and indicating 'the type of vinegar offered for sale' (paragraph 27 of the decision in Case 193/80). In the Commission's view, Law No 527 has the *effect* of confusing people, as a result of the new generic designation 'agri' which is unknown to Italian consumers, and has as its *purpose* to continue at all costs to restrict the designation 'aceto' to wine vinegar. Finally, however it may be worded, Directive 79/112 cannot be interpreted in such a manner as to justify situations which are contrary to the EEC Treaty, and in particular Article 30 thereof.

4. The Court is aware that the Italian Government had drawn up a draft law which, had it been adopted, would no doubt have brought to an end the infringement complained of. That draft law has not yet been examined by the Italian Parliament.

5. It is exceptional for action to be taken against a Member State under Article 171 of the EEC Treaty for failure to fulfil an obligation. To my knowledge, this is only the third such action.

According to Article 171, if the Court finds that a Member State has failed to fulfil an obligation under the Treaty, the State is required to take the necessary measures to comply with the judgment of the Court.

The Commission seeks a declaration that:

'by continuing to restrict the designation "vinegar" exclusively to wine vinegar,

although such a restriction was held to be incompatible with Article 30 of the EEC Treaty by the Court of Justice in its judgment of 9 December 1981 in Case 193/80, the Italian Republic has failed to fulfil its obligations under Article 171 of the Treaty'.

Let me say at once that I intend to find in favour of the Commission.

The Court has already pointed out that wine vinegar is a 'typically national product' in Italy (paragraph 20 of the decision in Case 193/80). Accordingly, the Court has already taken into consideration the special nature of the Italian market, as described by the Italian Republic, namely that in Italy only wine vinegar was known and marketed particularly as a result of the restrictive legislation previously in force.

In its judgment, the Court acknowledged that

'in the absence of common rules relating to the marketing of a product it is for the Member States to regulate on their own territory all matters relating to the marketing of that product and that obstacles to movement within the Community resulting therefrom must be accepted' (paragraph 21 of the decision in Case 193/80).

However, it immediately went on to emphasize that the rules laid down must be necessary and held that there was no mandatory requirement such as the protection of public health, consumer protection or fair trading which made it possible to regard the Italian legislation on vinegars of agricultural origin as necessary. The Court took account of the argument that Italian consumers have become accustomed to the term 'aceto' being used in commerce for wine vinegar alone, which the Italian Republic has again advanced in this case, but, whilst the Court conceded that it was necessary for the Italian Government to afford protection to consumers, it stated quite unequivocally in paragraph 27 of its decision that it was sufficient for that purpose to affix

'suitable labels giving the nature of the product sold and containing a description or additional information specifying the type of *vinegar* offered for sale, provided that such a requirement applies to *all vinegars* including *wine vinegar*' (emphasis added).

The Court expressed itself in those terms after stating in paragraph 26 of its decision that

'vinegar is a generic term and it would not be compatible . . . in particular with the fundamental principle of the free movement of goods for national legislation to be able to restrict a generic term to one national variety alone to the detriment of other varieties produced, in particular, in other Member States'.

The Court therefore accepted a distinction based on an indication of the *raw material* used in the manufacture of vinegar, and not on a *description* of that product when it is marketed.

Can it be said that by substituting 'agro' for 'aceto' as the generic designation, the Italian Republic has made no more than an insignificant alteration in the terminology within the limits set by the Court in its judgment?

I do not think so. There is no need in that regard to engage in lengthy semantic disquisitions. It is sufficient to state that if the term 'aceto' is maintained in order to

designate wine vinegar, it will, in view of the 'time-honoured tradition' relied upon by the Italian Government in these proceedings, continue to have in the minds of consumers the generic meaning which the new Italian law seeks to attribute to the term 'agro'. Consequently, the compulsory restriction of the designation 'aceto' to wine vinegar alone will perpetuate in this respect the situation which the Court criticized in its judgment of 9 December 1981.

That should not have been the outcome of the application of Article 171 of the EEC Treaty in the light of the Court's judgment which seeks to preserve the comprehensive character of any generic description.

Since the consumer can be protected by other means, in particular by the methods carefully spelt out by the Court, I cannot advise the Court to uphold the position adopted by the Italian Government.

6. Accordingly, I suggest that the Court should:

Declare that by restricting, under Law No 527 of 2 August 1982, the designation 'aceto' (vinegar) exclusively to wine vinegar, although such a restriction was held to be incompatible with Article 30 of the EEC Treaty by the Court of Justice in its judgment of 9 December 1981 in Case 193/80 *(Commission* v *Italy* [1981] ECR 3019), the Italian Republic has failed to fulfil its obligations under Article 171 of the EEC Treaty;

Order the Italian Republic to pay the costs.