OPINION OF ADVOCATE GENERAL ALBER

delivered on 6 December 2001 [1]

I — Introduction

1. These proceedings concern the free movement of chocolate products that contain vegetable fats other than cocoa-butter. Spain prohibits such products lawfully manufactured in other Member States of the Community from being marketed under the name 'chocolate', requiring that they be marketed under the name 'chocolate substitute'.

II — Legal framework

(1) *Community law*

Council Directive 73/241/EEC of 24 July 1973 on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption (hereinafter 'Directive 73/241') [2] contains the following provisions:

Seventh recital

'whereas the use of vegetable fats other than cocoa-butter in chocolate products is permitted in certain Member States, and extensive use is made of this facility; whereas, however, a decision relating to the possibilities and forms of any extension of the use of these fats in the Community as a whole cannot be taken at the present time, as the economic and technical data currently available are not sufficient to enable a final position to be adopted; whereas the situation will consequently have to be re-examined in the light of future developments;'

1 — Original language: German.

2 — OJ 1973 L 288, p. 23.

Article 14(2)(a)

'2. This directive shall not affect the provisions of national laws:

(a) at present authorising or prohibiting the addition of vegetable fats other than cocoa-butter to the chocolate products defined in Annex I. At the end of a period of three years [3] from the notification of this Directive the Council shall decide, on a proposal from the Commission, on the possibilities and the forms of extending the use of these fats to the whole of the Community;

(b) ...'

Annex I

'1. For the purposes of this directive, the following definitions shall apply:

...

1.16 *Chocolate*

The product obtained from cocoa nib, cocoa mass, cocoa powder or fat-reduced cocoa powder and sucrose with or without added cocoa-butter, having, without prejudice to the definition of chocolate vermicelli, gianduja nut chocolate and couverture chocolate, a minimum total dry cocoa solids content of 35% — at least 14% of dry non-fat cocoa solids and 18% of cocoa-butter — these percentages to be calculated after the weight of the additions provided for in paragraphs 5 to 8 has been deducted;

...

7. (a) Without prejudice to Article 14(2)(a), edible substances, with the exception of flour and starches and of fats and fat preparations not derived exclusively from milk, may be added to chocolate, plain chocolate, couverture chocolate, milk chocolate, milk chocolate with high milk content, couverture milk chocolate and to white chocolate.

...'

3 — This requirement was met not after three years, as planned, but only with the adoption of Directive 2000/36/EC. This will be discussed again in point 23.

(2) *Spanish law*

2. Directive 73/241 was transposed into Spanish law by Royal Decrees Nos 822/1990 and 823/1990. Article 2(16) of Royal Decree No 822/1990 of 22 June 1990 defines 'chocolate' as a product manufactured from cocoa beans, cocoa mass, cocoa powder or fat-reduced cocoa powder and sucrose with or without added cocoa-butter. This definition complies with point 1.16 of Annex I to Directive 73/241. Article 4(1) of the Decree prohibits the addition of vegetable fats other than cocoa-butter to chocolate. Article 2(7) of Royal Decree No 823/1990 of 28 June 1990 requires products in which cocoa-butter is replaced by other vegetable fats to be designated 'chocolate substitute'.

III — Pre-litigation procedure

3. On 9 October 1989 the Spanish Government communicated to the Commission, pursuant to Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (hereinafter 'Directive 83/189'),[4] the drafts of Royal Decrees Nos 822/1990 and 823/1990, which were subsequently adopted. The Commission made detailed comments on these drafts pursuant to Article 8(2) of Directive 83/189. By letter of 21 October 1992, which was answered on 18 March 1993, the Commission again criticised what it regarded as failure to comply with Community law through the restriction of the free movement of chocolate lawfully manufactured in other Member States. Despite a number of contacts between the appropriate authorities of the Spanish Government and the Commission an agreement was not subsequently reached. The Commission therefore repeated its criticism by letter of 20 March 1997. This letter remained unanswered. On 29 July 1998 the Commission forwarded to Spain a reasoned opinion, in which it reiterated its accusation that the free movement of goods was being infringed. On 9 November 1998 the Spanish Government replied that, in its view, Royal Decree No 822/1990 was compatible with Directive 73/241 and Spanish legislation therefore complied with Community law. On 14 January 2000 the Commission brought an action against the Kingdom of Spain.

IV — Arguments of the parties and forms of order sought

(1) *The Commission*

4. The Commission contends that Article 28 EC is being infringed. It con-

4 — OJ 1983 L 109, p. 8.

siders that prohibiting products lawfully manufactured in other Member States under the name 'chocolate' from being marketed under the name used in the country of origin is a measure having equivalent effect to a quantitative restriction and that the Spanish legislation obstructs the access of these products to the market.

5. The Commission explicitly criticises only the provision of Royal Decree No 822/1990 which prohibits marketing under the name 'chocolate'. The provision contained in Royal Decree No 823/1990 requiring such products to be designated 'chocolate substitute' is not explicitly criticised.

6. The Commission claims that the Spanish Government's interpretation of Directive 73/241 results in the Member States being divided into those which permit chocolate containing vegetable fats other than cocoa-butter to be marketed under the name 'chocolate' and those, such as Spain, which refuse to allow it.

7. The Commission sees the obligation to change the name of products from 'chocolate' to 'chocolate substitute' as a measure having equivalent effect to a quantitative restriction; it prevents the product from being marketed under the name under which it is lawfully manufactured in another Member State.

8. The Commission is of the opinion that the Spanish rules do not constitute a selling arrangement within the meaning of the judgment in *Keck and Mithouard* [5] and that what is at issue is the name, composition and labelling of the product.

9. The Commission sees the Spanish legislation as restricting the free movement of goods particularly because it prescribes the use of a name with which a less attractive assessment of the product by the consumer is associated. It maintains that the term 'substitute' always designates a product used in place of another, not all of whose qualities it possesses, these qualities accounting for the value of the product it replaces. The obligation to use a term of lesser standing is in itself a restriction of the free movement of goods within the meaning of the judgment in *Dassonville*. [6]

10. According to the Commission, the requirement that the product be renamed also gives rise to repackaging costs, which again leads to a restriction of the free movement of goods. Community law requires only that the product be marketed

5 — Joined Cases C-267/91 and C-268/91 *Keck* and *Mithouard* [1993] ECR I-6097.

6 — Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

in a language that is easily comprehensible in the Member State concerned.

11. Nor, the Commission argues, is the obligation to rename the product justified on consumer protection grounds. The composition of the product does not differ from the product usually marketed under this name to such an extent that it should not be regarded as belonging to the same group of products, since it satisfies the substantive requirements set out in Directive 73/241 concerning the composition of 'chocolate'. The vegetable fats are simply added along with the cocoa-butter: they do not replace it. The product is not denatured as a result of the addition of other vegetable fats. Moreover, the product is accepted in other Member States under the name 'chocolate'. Only Spain and Italy — an action against Italy's legislation having been brought in Case C-14/00 — prohibit the marketing of these products under the name 'chocolate' under which they have been lawfully manufactured.

12. Furthermore, less drastic measures could be taken to ensure the same level of consumer protection, such as labelling, which could guarantee that consumers were informed impartially and objectively about the addition of other vegetable fats without the use of a negative term being necessary.

13. The Commission claims that the Court should:

(1) declare that, by prohibiting chocolate products which contain vegetable fats other than cocoa-butter and which have been lawfully manufactured in Member States in which the use of such substances is permitted from being marketed in Spain under the name under which they are marketed in their country of origin, the Kingdom of Spain has failed to fulfil its obligations under Article 28 EC;

(2) order the Kingdom of Spain to bear the costs of the proceedings.

14. Spain contends that the Court should:

(1) dismiss the application;

(2) order the Commission to bear the costs of the proceedings.

(2) *Spain*

15. The Spanish Government is of the opinion that prohibiting chocolate products containing vegetable fats other than cocoa-butter from being marketed under the name 'chocolate' is compatible with Article 28 EC. It argues that Directive 73/241 does not govern the manufacture of such products and that, in the absence of the harmonisation of Community law, the Member States are empowered to legislate on this question. Spain has done this by adopting the disputed Royal Decrees.

16. Nor, according to the Spanish Government, does the disputed legislation obstruct the access of these products to the market. It merely requires them to be marketed under the name 'chocolate substitute' ('succedáneo de chocolate').

17. In the Spanish Government's opinion, this requirement does not constitute a measure having equivalent effect to a quantitative restriction. It is rather a selling arrangement within the meaning of the judgment in *Keck and Mithouard*.

18. Even if it is seen as restricting the free movement of goods, it is justified on consumer protection grounds. It ensures that the consumer is informed about the composition of the product in traditional language.

19. The Spanish Government contends that 'chocolate substitute' is not a negative term, but is, in fact, a common designation, with which the Spanish consumer has been familiar since 1975. Products thus designated are esteemed no less than products which may be known as 'chocolate'. In the Spanish Government's opinion, 'chocolate substitute' is a neutral term that reflects an objective fact, the fact that, compared to chocolate, the product has been altered in terms of quality, taste, consistence and durability. In this instance, the question is not whether the minimum requirements of Directive 73/241 as regards the composition of chocolate products have been satisfied, but to what extent vegetable fats other than those listed in the Directive may be added. This question is not answered by Directive 73/241.

20. Nor, according to the Spanish Government, is there any less drastic means of ensuring the same level of consumer pro-

tection. A reference to 'vegetable fats other than cocoa-butter' would not mean anything to Spanish consumers. On the other hand, they have been familiar with the term 'chocolate substitute' since 1975.

21. The Spanish Government maintains that the use of the prescribed name does not increase the costs to the marketer. 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 [7] as amended by Directive 97/4/EC of the European Parliament and of the Council of 27 January 1997 amending Directive 79/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs [8] had been transposed into Spanish law in such a way as to require the marketed product to be labelled in Spanish. The same applies to the indication of the composition of the product. Thus, if the term 'chocolate' is replaced with the term 'chocolate substitute' at the time of the repackaging which then becomes necessary, the cost of marketing this product is not increased.

7 — OJ 1979 L 33, p. 1.

8 — OJ 1997 L 43, p. 21.

V — Legal analysis

(1) *Absence of harmonisation of Community law*

22. Both parties take the view that the marketing of chocolate products containing vegetable fats other than cocoa-butter is not governed by Directive 73/241. This view can be endorsed. According to the seventh recital, 'a decision relating to the possibilities and forms of any extension of the use of these fats in the Community as a whole cannot be taken at the present time'. Article 14(2)(a) of the Directive therefore states explicitly that it does not affect the provisions of national laws 'at present authorising or prohibiting the addition of vegetable fats other than cocoa-butter to the chocolate products defined in Annex I'.

23. It was to be 2000 — rather than 1976, as required by Article 14 of Directive 73/241 — before Community law, in the shape of Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption, [9] specified that certain vegetable fats other than cocoa-butter as listed in Annex II of the Directive might account for up to 5% of the finished product. However, as this provision does not have to

9 — OJ 2000 L 197, p. 19.

be transposed into national law until 3 August 2003, it does not apply to the current action.

24. As already pointed out, Directive 73/241 does not govern the question of the use of vegetable fats other than cocoa-butter in chocolate products. This raises the question disputed by the parties as to the legal consequences of this statement. Spain takes the view that, since the adoption of this legal act, the Member States have been free to lay down rules on the use of vegetable fats other than cocoa-butter in chocolate products, possibly prohibiting the marketing of products under the name 'chocolate' if they do not comply with national legislation. The Commission, on the other hand, is of the opinion that under Article 28 EC the Member States are under an obligation to permit products lawfully manufactured in other Member States under the name 'chocolate' to be marketed in their territory under the name 'chocolate' used in the country of origin.

25. Directive 73/241 does not specify the extent to which products containing vegetable fats other than cocoa-butter may be marketed under the name 'chocolate'. It therefore represents no more than partial harmonisation, not a conclusive set of rules on the use of the name 'chocolate'.

26. According to the judgment in the *Cassis de Dijon* case, it is for the Member States to adopt for their territory all legislation concerning the manufacture and marketing of a product in cases where there are no Community rules. 'Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being 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.' However, obstacles to movement are acceptable only if they 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]

27. It follows from this judgment that, although the Member States are empowered to lay down rules in areas in which there is no or no more than partial harmonisation, [11] which is true, as stated above, of the use of the name 'chocolate' for products containing vegetable fats other than cocoa-butter, such rules must be compatible with the Treaty provisions concerning the free movement of goods. In other words, where they lead to a

10 — Case 120/78 *Rewe- Zentral ('Cassis de Dijon')* [1979] ECR 649, paragraphs 8 and 14); Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 12); *Keck and Mithouard* (cited in footnote 5, paragraph 15).

11 — For the imposition of language requirements see Case C-33/97 *Colim* [1999] ECR I-3175, paragraph 35.

restriction of the free movement of goods, it must be considered whether the restriction is necessary for compelling reasons and is therefore justified. The reason for this restriction is that the Member States would otherwise be authorised to partition their national markets in regard to products not covered by the Community rules, contrary to the objective of free movement pursued by the Treaty. [12] Given the case-law cited, it must therefore be accepted that the application of Article 28 et seq. EC is not excluded by Article 14(2)(a) of Directive 73/241. What therefore needs to be considered in the following is the extent to which the Spanish legislation meets the requirements of Article 28 et seq. EC.

(2) *Compatibility of the Spanish legislation with Article 28 EC*

28. Article 28 EC prohibits quantitative import restrictions and all measures having equivalent effect between Member States. According to settled case-law, a measure having equivalent effect to a quantitative restriction is any measure likely to hinder intra-Community trade directly or indirectly, actually or potentially. [13]

29. It thus needs to be considered how far the Spanish prohibition of the marketing of products containing vegetable fats other than cocoa-butter under the name 'chocolate' results in an obstruction of the free movement of goods.

(a) Existence of an obstruction of the free movement of goods

(aa) Distinction from a selling arrangement

30. The Spanish Government denies that the disputed rules give rise to an obstruction of the free movement of goods, arguing that it amounts to no more than a selling arrangement within the meaning of the judgment in *Keck and Mithouard*. It considers this judgment applicable to the present circumstances, since the question is under what name the product in question may be marketed. It claims that, as the

12 — See Case C-3/99 *Ruwet* [2000] ECR I-8749, paragraph 47.

13 — *Dassonville* (cited in footnote 6, point 5); *Keck and Mithouard* (cited in footnote 5, paragraph 11).

disputed rules make no distinction between domestic and foreign producers or the marketing of domestic and imported goods, a selling arrangement that is permissible under the judgment referred to exists. The Commission, on the other hand, does not consider this judgment applicable in the present case, since what is at issue here is the name, composition and labelling of the product, to which the derogation pursuant to the judgment in *Keck and Mithouard* does not apply.

31. In its judgment in *Keck and Mithouard* the Court modified the aforementioned *Dassonville* [14] and *Cassis de Dijon* [15] judgments by ruling that national provisions restricting or prohibiting certain selling arrangements are not such as to hinder directly or indirectly, actually or potentially, trade between Member States, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. [16] In that case the Court considered a rule generally prohibiting the resale of a product at a loss to be a selling arrangement. [17] In the case of *Familiapress*, on the other hand, it ruled that the prohibition of the sale of publications containing competitions was a rule that bore on the content of the product in question and was not therefore a selling arrangement. [18]

32. The disputed Spanish Decrees restrict the use of the name 'chocolate' to products containing as vegetable fat only cocoa-butter. Products containing other vegetable fats must be marketed under the name 'chocolate substitute'. The Decrees consequently govern the composition of products marketed under the name 'chocolate'. Unlike *Keck and Mithouard*, the question here therefore is not how a product is marketed in the importing Member State under the name under which it has been lawfully manufactured in the originating Member State. As in *Familiapress*, the composition of the product itself is at issue. It may not be marketed in Spain, the importing Member State, under the name 'chocolate', under which it has been lawfully manufactured in the originating Member State. This argues against the Spanish rules being regarded as a selling arrangement.

33. The Spanish Government's view that the issue is the name, which does not hinder the free movement of goods, is unconvincing in the light of current case-law. In the

14 — Cited in footnote 6.

15 — Cited in footnote 10.

16 — *Keck and Mithouard* (cited in footnote 5, paragraphs 16 and 17).

17 — *Keck and Mithouard* (cited in footnote 5, paragraph 18).

18 — Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 11.

judgment in the *Colim* case the Court ruled that measures necessitating the alteration of the packaging or the labelling of imported products are not selling arrangements within the meaning of the judgment in *Keck and Mithouard*.[19] An interim conclusion to be drawn, therefore, is that, as the Spanish rules do not constitute a selling arrangement, the application of the rules on the free movement of goods is not ruled out.

(bb) Existence of an obstruction to the free movement of goods

34. The Royal Decrees prohibit a product lawfully manufactured in other Member States under the name 'chocolate' and containing vegetable fats other than cocoa-butter from being marketed in Spain under that name. It forces manufacturers established in other Member States to alter the composition of their products if they want to market them in Spain under the name 'chocolate'. The Decrees therefore restrict the access of products lawfully manufactured in other Member States to the Spanish market and consequently hinder their free movement in the Community.[20] That is a measure having equivalent effect to a quantitative restriction within the meaning of Article 28 EC.

35. It should be borne in mind, however, that the prohibition does not entirely exclude the marketing of these products in Spain. They may be marketed under the name 'chocolate substitute'. The Spanish Government therefore disputes the existence of a measure having equivalent effect to a quantitative restriction.

36. Nor, it argues, does the requirement that such products be renamed give rise to additional costs, since they have in any case to be repackaged and labelled in Spanish and the term 'chocolate' can be replaced with 'chocolate substitute' while this is being done.

37. Although the Court has acknowledged in principle that the obligation to label a product in the language or languages of the country in which it is marketed is a restriction of the free movement of goods

19 — *Colim* (cited in footnote 11, paragraph 37).

20 — For similar cases concerning the composition of products see Case 193/80 *Commission* v *Italy* [1981] ECR 3019, paragraph 26, and Case 286/86 *Deserbais* [1988] ECR 4907, paragraph 12.

that is compatible with Article 28 EC, [21] it has also ruled in a number of judgments that it would not be compatible with Article 28 EC 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. [22]

38. In the present case, the name 'chocolate' is not restricted to Spanish products. It may, indeed, be used for all products containing only cocoa-butter. However, the marketing of products which have been lawfully manufactured in other Member States under the name 'chocolate', but contain vegetable fats other than cocoa-butter is prohibited. Such chocolate products have not traditionally been manufactured in Spain. As Spanish products are not therefore affected by the prohibition, the rules benefit a typically domestic product and discriminate to the same degree against products lawfully manufactured under the name 'chocolate' in other Member States. Such conduct represents, according to the case-law to which reference has been made, a measure having equivalent effect to a quantitative restriction. [23]

39. As regards the option of marketing the products in question under the name 'chocolate substitute', reference must be made to the possibility of negative feelings being aroused in the consumer by the use of this term. 'Substitute' is not an objective, neutral term that imparts a simple piece of information, as does the printed statement 'contains vegetable fats other than cocoa-butter'. The addition of the word 'substitute' implies that the product is not chocolate but merely a replacement. It is thus possible that the consumer will consider this product inferior or esteem it less than a product marketed under the name 'chocolate'. It must therefore be assumed that the option of marketing the product under the name 'chocolate substitute' does not result in the disputed prohibition having no restrictive effect on the free movement of goods.

40. An interim conclusion to be drawn, therefore, is that the Spanish rules obstruct the free movement of goods. This obstruction is compatible with Community law only if it is justified.

(b) Justification of the restriction of the free movement of goods

41. In areas in which there are no Community rules it is settled case-law that

21 — Case C-51/93 *Meyhu* [1994] ECR I-3879, paragraph 21.

22 — Case 182/84 *Miro* [1985] ECR 3731, paragraph 22; *Deserbais* (cited in footnote 20, paragraph 12); *Commission* v *Italy* (cited in footnote 20, paragraph 26); Case 298/87 *Smanor* [1988] ECR 4489, paragraph 12; Case 27/80 *Fietje* [1980] ECR 3839, paragraph 10.

23 — See *Commission* v *Italy* (cited in footnote 20, paragraph 20).

obstacles to intra-Community trade resulting from disparities between provisions of national law must be accepted in so far as such provisions are applicable to domestic and imported products without distinction and may be justified as being necessary in order to satisfy overriding requirements relating *inter alia* to consumer protection. However, in order to be permissible, such provisions must be proportionate to the objective pursued and that objective must not be capable of being achieved by measures which are less restrictive of intra-Community trade. [24]

42. The Spanish legislation applies to domestic and imported products without distinction. The first condition is thus satisfied.

43. The Spanish Government refers to consumer protection in justification of its rules. It claims that to the Spanish consumer 'chocolate' means only products that contain no vegetable fats other than cocoa-butter, that products which do contain other vegetable fats are known in Spain as 'chocolate substitute' and that the disputed measure is necessary to prevent the consumer from becoming confused and making mistakes. The Commission's objection to this argument is that consumer protection is not one of the grounds that may be cited in justification pursuant to Article 30 EC.

44. Although Article 30 EC does not explicitly refer to consumer protection as justifying derogations, the Court has nonetheless acknowledged that consumer protection is an imperative requirement accepted in principle by Community law as justifying measures that restrict the free movement of goods. [25] Thus the second of the conditions referred to above is similarly satisfied.

45. It remains to be determined how far the disputed measure is necessary. The Commission is of the opinion that appropriate labelling of the product in the form of an indication of the contents is a less drastic and equally suitable means of achieving the objective of protecting the consumer against mistakes. The Spanish Government objects that a reference on the label to the fact that the product contains vegetable fats other than cocoa-butter would not mean anything to the Spanish consumer and would not therefore be an equally suitable means of protecting the consumer against mistakes.

24 — *Ruwet* (cited in footnote 12, paragraph 50); Case C-313/94 *Graffione* [1996] ECR I-6039, paragraph 17.

25 — *Ruwet* (cited in footnote 12, paragraph 50); Case 178/84 *Commission* v *Germany* [1987] ECR 1227, paragraph 30; *Smanor* (cited in footnote 22, paragraph 18).

46. The case-law of the Court shows that, in the absence of harmonisation at Community level, national measures which are necessary in order to ensure that products are accurately described are compatible with Article 28 et seq. of the Treaty provided that they avoid any confusion on the part of consumers and ensure fairness in commercial transactions. [26] It must therefore be considered whether the disputed rules requiring that the product be renamed 'chocolate substitute' are necessary to ensure that the consumer is informed.

47. The prohibition of marketing under the name 'chocolate' and the option of marketing the products in question under the name 'chocolate substitute' are likely to protect Spanish consumers against making a mistake. It is ensured that the only vegetable fat contained in products which they can acquire under the name 'chocolate' is cocoa-butter. This protects them against confusing these products with products containing other vegetable fats. These rules are thus likely to ensure consumer protection.

48. To be compatible with Community law, however, the rules must not exceed what is necessary. As a less drastic measure the Commission proposes appropriate labelling of the products that contain other vegetable fats. The Spanish Government objects that such labelling will mean nothing to Spanish consumers, since they are as a rule unfamiliar with the fats in question. They are familiar, on the other hand, with the term 'chocolate substitute'.

49. The Spanish Government's argument is similar to that of the Italian Government in the proceedings concerning the name 'vinegar', where it was argued that the disputed national rules were necessary because the Italian consumer by time-honoured tradition treated all vinegars as wine-vinegar. The Court rejected this objection and ruled that under the Combined Nomenclature of the Common Customs Tariff vinegar is a generic term which national legislation cannot restrict to domestic products. Suitable labelling of types of vinegar manufactured from raw materials other than wine was considered to be generally sufficient to ensure the protection of the consumer. The Italian rules were regarded as a disproportionate restriction of the free movement of goods, given the availability of appropriate labelling as a less drastic means of protecting the consumer. [27] Similarly, the German Government attempted to justify the purity requirement for beer by arguing that the consumer associated the

26 — Case C-51/94 *Commission* v *Germany* [1995] ECR I-3599, paragraph 31; Case 216/84 *Commission* v *France* [1988] ECR 793, paragraph 11.

27 — *Commission* v *Italy* (cited in footnote 20, paragraphs 25 to 27).

designation 'Bier' with a beverage manufactured from only the raw materials listed in Article 9 of the Biersteuergesetz. The restriction of the generic term 'Bier' to products manufactured in accordance with the purity requirement was intended to protect the consumer against confusion about the nature of the product. [28] The Court again rejected this argument on the grounds that consumers' conceptions are likely to vary from one Member State to another and to evolve in the course of time within a Member State, the establishment of the common market playing a major contributory role in this context. 'The legislation of a Member State must not "crystallise given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them".' [29] Here too, appropriate labelling of beers not manufactured in accordance with the purity requirement was considered adequate. In addition, the Court ruled that national legislation which links the appellation 'Jenever' to a minimum alcohol content is not compatible with Article 28 EC and that the requirements of fair trading can also be met with regard for traditional practices by means of appropriate labelling of beverages with a lower alcohol content. [30] In similar cases concerning the composition of a product the Court has also considered labelling sufficient to protect the consumer's interests. [31] Given this settled case-law, the objection that to Spanish consumers 'chocolate' traditionally means products containing as vegetable fat only cocoa-butter does not in principle seem to justify the disputed rules.

50. It should also be pointed out, however, that the Court has defined the limit of what can be achieved with appropriate labelling as being the stage at which the product concerned is altered in a respect that is essential for its composition. [32]

51. The question is therefore whether the addition of vegetable fats other than cocoa-butter leads to a fundamental change in the composition of the product and whether appropriate labelling can consequently no longer be regarded as a sufficient means of informing the consumer adequately and protecting him against mistakes.

52. The first point to be made here is that in what is now very extensive case-law on the use of names of foodstuffs the Court

28 — *Commission* v *Germany* (cited in footnote 25, paragraph 26).

29 — *Commission* v *Germany* (cited in footnote 25, paragraph 32).

30 — *Miro* (cited in footnote 22, paragraphs 20, 24 and 25).

31 — *Commission* v *Italy* (cited in footnote 20, paragraph 23); *Commission* v *Germany* (cited in footnote 25, paragraph 35); *Deserbais* (cited in footnote 20, paragraphs 10, 13 and 19). The judgment in *Smanor* concerned the treatment which the product in question had undergone during its manufacture (cited in footnote 22, paragraph 19 et seq.).

32 — *Deserbais* (cited in footnote 20, paragraph 13).

has always geared its rulings to an intelligent consumer who can reasonably be expected and trusted to inform himself. [33] Thus, according to the case-law, it must be assumed that consumers who are guided in their purchasing decisions by the composition of products first read the list of ingredients. Although the Court has recognised the danger of consumers being misled in specific cases, [34] and to this extent the objections voiced by the Spanish Government are in principle justified, this danger must be regarded as slight, according to present case-law, and cannot justify obstacles to the free movement of goods. [35] There is no obvious reason for deviating from the settled case-law in these proceedings.

53. Prohibiting the use of a name is, moreover, never considered justified unless the product concerned is so different, as regards its composition, from the products generally known by that name in the Community that it cannot be regarded as falling within the same category. [36] The Spanish Government takes the view that the addition of other vegetable fats changes the quality, taste, consistency and durability of the product so fundamentally that to market it under the name 'chocolate' would be to mislead the consumer. The Commission feels, on the other hand, that, compared to chocolate containing only cocoa-butter, the product is not fundamentally changed, since it still contains, in particular, the proportions of cocoa defined in Directive 73/241.

54. Point 1.16 of Annex I to Directive 73/241 defines chocolate as the product obtained from cocoa nib, cocoa mass, cocoa powder or fat-reduced cocoa powder and sucrose, which, though made with or without added cocoa-butter, contains at least 18% cocoa-butter. This indicates that cocoa-butter is to be regarded as an essential ingredient of chocolate within the meaning of Directive 73/241.

55. It must also be emphasised that the other vegetable fats added to chocolate products are designated 'cocoa butter equivalents' by Directive 2000/36. Although, as stated above, this Directive is not applicable in the present case, the rules it sets out can be used to show that the vegetable fats at issue in this case may replace cocoa-butter. As already pointed out, however, cocoa-butter is, according to Directive 73/241, an essential ingredient of

33 — *Ruwet* (cited in footnote 12, paragraph 53).

34 — *Commission* v *Germany* (cited in footnote 26, paragraph 34).

35 — *Commission* v *Germany* (cited in footnote 26, paragraph 34).

36 — *Smanor* (cited in footnote 22, paragraph 21); *Deserbais* (cited in footnote 20, paragraph 13).

chocolate. This might indicate that the products which — in excess of the required minimum content of cocoa-butter — may replace cocoa-butter as equivalents are also to be regarded as essential ingredients, with the result that their addition should lead to a fundamental change in the product.

56. It should be pointed out, however, that the products which may not be marketed in Spain under the name 'chocolate' do comply with Directive 73/241 in respect of the prescribed minimum content of cocoa-butter. If cocoa-butter is regarded as an essential ingredient of chocolate, it must be said that even the products which do not comply with the Spanish rules contain this essential ingredient. To this extent, then, there has been no fundamental change to the product known as 'chocolate'. At best, the question is whether the addition of yet other vegetable fats to a product which complies with Directive 73/241 in respect of the prescribed minimum content of cocoa-butter results in a fundamental change in the composition of this product. This can hardly be assumed, however, since it contains all the minimum ingredients considered essential. Compared to the original product, a fundamental change cannot therefore have occurred as a result of the addition of other vegetable fats to the minimum ingredients because this adds to rather than takes away from this original product.

57. It should be borne in mind, on the other hand, that, according to an undisputed submission by the Commission, the products in question are lawfully manufactured under the name 'chocolate' in six Member States. According to a further undisputed submission by the Commission, the marketing of these products under the name 'chocolate' is prohibited only in Spain and Italy. All the other Member States permit them to be marketed under the name 'chocolate'. These facts indicate that the addition of vegetable fats other than cocoa-butter does not result in so fundamental a change in the composition of the product that it can no longer be regarded as falling within the category of chocolate.

58. It should also be pointed out that the addition of vegetable fats other than cocoa-butter is explicitly permitted by Directive 2000/36 up to a maximum of 5% of the total weight. Although this Directive does not, as explained above, apply to this case, the new rules can be regarded as reflecting the acceptance by the market and thus, in particular, by the consumer of the use of the name 'chocolate' for products that contain vegetable fats other than cocoa-butter. This is not to suppress the public debate on this subject that raged during the consideration of Directive 2000/36. These future rules indicate, however, that the addition of other vegetable fats should not

be seen as so fundamentally changing the product that it can no longer justifiably be deemed to fall within the category of chocolate.

59. This conclusion is endorsed by the Combined Nomenclature (CN) of the Common Customs Tariff. Chocolate is listed under CN Code 1806 with other food preparations containing cocoa. Products containing cocoa-butter are listed under subheadings 1806 20 10, 1806 20 30 and 1806 20 50. All other subheadings, some of which explicitly use the term 'chocolate', such as subheading 1806 90, do not refer to the content in cocoa-butter or other vegetable fats. This indicates that the name 'chocolate' should be regarded as a generic term whose use does not depend on the addition or absence of vegetable fats other than cocoa-butter.

60. The conclusion to be drawn, therefore, is that the addition of other vegetable fats to products having the minimum content of cocoa-butter required by Directive 73/241 does not result in so fundamental a change in the product that it can no longer justifiably be deemed to fall within the category of chocolate. In the light of the case-law to which reference has been made an obligation to rename products lawfully manufactured in other Member States under the name 'chocolate' is not justified.

61. The reservations which the Spanish Government derives from legitimate concern for consumer protection should be taken into account by ensuring that the consumer is informed clearly enough of the addition of such other fats.

62. The final conclusion to be drawn is therefore that prohibiting the use of the name 'chocolate' is not the least drastic means of informing the Spanish consumer of the fact that the product contains vegetable fats other than cocoa-butter. The requirement that the product be appropriately labelled has less of an adverse impact on the free movement of goods. The Spanish Government rules are thus disproportionate and so fail to justify the restriction of the free movement of goods which has been identified. The Commission's action should therefore be upheld.

VI — Costs

63. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for. As the Kingdom of Spain has been unsuccessful and the Commission has made an application, Spain should be ordered to pay the costs.

VII — Conclusion

64. For the foregoing reasons it is proposed that the Court should rule as follows:

(1) The Kingdom of Spain has failed to fulfil its obligations under Article 28 EC by prohibiting chocolate products which contain vegetable fats other than cocoa-butter and which have been lawfully manufactured in Member States where the use of such substances is permitted from being marketed in Spain under the name under which they are marketed in their country of origin.

(2) The Kingdom of Spain shall bear the costs of the proceedings.