JUDGMENT OF THE COURT (Fifth Chamber)
29 January 1985 *

In Case 147/83

Münchener Import-Weinkellerei Herold Binderer GmbH, 66 Lerchenstraße, D-8000 Munich 50, represented by Walter Neumann, Dieter Steichele and Bernd G. Maier, Rechtsanwälte, 1 Schubertstraße, D-8000 Munich 2,

applicant,

v

Commmission of the European Communities, represented by Peter Karpenstein, acting as Agent,

defendant,

and

The Federal Republic of Germany, represented by Joachim Sedemund, Cologne, with an address for service in Luxembourg at the Chancellery of the Embassy of the Federal Republic of Germany, 20 to 22 Avenue Émile-Reuter,

intervener,

APPLICATION

(a) for a declaration that Article 1 (3) (g) of Commission Regulation (EEC) No 1224/83 of 6 May 1983 (Official Journal 1983 L 134, p. 1) amending for the second time Regulation (EEC) No 997/81 laying down detailed rules for the description and presentation of wines and grape musts is void in so far as it prohibits the use of the terms 'spätgelesen' [harvested late] and 'ausgelesen' [selected] in translating into German descriptions indicating the superior quality of wines;

(b) in the alternative, for compensation for the damage sustained by the applicant as a result of the fact that Regulation No 1224/83 prohibits it from using the terms 'spätgelesen' and 'ausgelesen' in the future,

* Language of the Case: German.

THE COURT (Fifth Chamber)

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

Advocate General: P. VerLoren van Themaat
Registrar: D. Louterman, Administrator

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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 application received at the Court Registry on 19 July 1983, Münchener Import-Weinkellerei Herold Binderer GmbH, whose registered office is in Munich in the Federal Republic of Germany, brought an action:

(a) under Article 173 of the EEC Treaty for a declaration that Article 1 (3) (g) of Commission Regulation (EEC) No 1224/83 of 6 May 1983 (Official Journal 1983 L 134, p. 1) amending for the second time Regulation (EEC) No 997/81 laying down detailed rules for the description and presentation of wines and grape musts was void in so far as it prohibited the use of the terms 'spätgelesen' [harvested late] and 'ausgelesen' [selected] in translating into German descriptions indicating the superior quality of wines imported from non-member countries;

* after hearing the Opinion of the Advocate General delivered at the sitting on 11 December 1984,

(b) in the alternative, under Article 215 of the EEC Treaty for a declaration that the Commission was liable for the damage sustained by the applicant as a result of the fact that Article 1 (3) (g) of Regulation No 1224/83 prohibited it from using the terms 'spätgelesen' and 'ausgelesen' in the future.

2 The applicant imports and distributes in the Federal Republic of Germany wines from other Member States and from non-member countries. It specializes particularly in importing wines from Hungary and Yugoslavia, traditionally producers of wines which are designated by terms capable of being rendered in German by 'Spätlese' [late harvest] or 'Auslese' [selected grapes] and which resemble to a certain extent — this being one of the elements of the dispute — 'Spätlese' and 'Auslese' wines produced in the Federal Republic of Germany.

3 Article 30(7) of Council Regulation (EEC) No 355/79 of 5 February 1979 laying down general rules for the description and presentation of wines and grape musts (Official Journal 1979 L 54, p. 99) provides that:

'In the description of imported products on the labelling, the information specified in Articles 27, 28 and 29 shall be given in one or more of the official languages of the Community.

However,

...

references to superior quality, as referred to in Article 28 (2) (c),

...

...

...

shall be given in one of the official languages of the third country of origin. Such information may also be given in an official language of the Community.

The use of certain terms resulting from the translation of the information referred to in the second subparagraph may be governed by implementing rules.'

Article 43 of Regulation No 355/79 stipulates that the description and presentation of wines must not be liable to cause confusion as to their nature, origin and composition.

4 Commission Regulation (EEC) No 997/81 of 26 March 1981 laying down detailed rules for the description and presentation of wines and grape musts (Official Journal 1981 L 106, p. 1) provides in the second subparagraph of Article 2 (4), which was adopted in implementation of Article 30 (7) of Regulation No 355/79, that 'on the labels of wines imported into the Community no expression concerning superior quality . . . may be translated into German by any of the following terms: ..., "Spätlese", "Auslese", ...'.

5 Following the adoption of that regulation, the applicant applied to the responsible Federal authorities and to the Commission proposing, with a view both to complying with the new regulation and to translating the corresponding Hungarian terms as faithfully as possible, that the adjectival forms of the terms 'Spätlese' and 'Auslese', that is to say 'spätgelesen' [harvested late] and 'ausgelesen' [selected], be used. The Commission approved that proposal in a letter of 14 August 1981. The applicant alleges that it was in reliance thereon that it decided to import and market in the Federal Republic of Germany Hungarian and Yugoslavian wines with labels bearing the terms 'spätgelesen' and 'ausgelesen'.

6 That was the position when Commission Regulation No 1224/83 of 6 May 1983 was adopted. Article 1 (3) (g) thereof provides that 'on the labels of imported wines no expression concerning superior quality . . . may be translated into German by any of the following terms: ... "Spätlese", "Auslese", ... *"spätgelesen" or "ausgelesen".*'

7 The prohibition of the use of those adjectival forms is justified as follows in the fifth recital in the preamble to Regulation No 1224/83: 'to prevent the consumer from being misled by the claims of superior quality made for certain wines imported into the Community and subject to less stringent labelling requirements, without thereby discriminating between such wines and those of Community origin in the matter of their description, the special climatic conditions in which the imported wines were produced should be taken into consideration and, consequently, the terms "spätgelesen" and "ausgelesen" should not be permitted to figure on the labelling of such imported wines, even if the terms in question are the translation of terms used in accordance with the provisions of the non-member country of origin'.

8 It is Article 1 (3) (g) of Regulation No 1224/83 which is the subject of this application; the applicant claims that the Court should declare that the provision is void and that the Community is liable for the damage which it has suffered as a result of the prohibition of the future use of the terms 'spätgelesen' and 'ausgelesen'.

Claim for a declaration that Article 1 (3) (g) is void

9 The Commission and the Government of the Federal Republic of Germany, intervening, consider that this claim is inadmissible inasmuch as the contested provision is not of direct and individual concern to the applicant.

10 The applicant, on the other hand, contends that its claim is admissible on the following grounds: the prohibition laid down in the contested provision can concern only the labelling of Hungarian and Yugoslavian wines intended for the German market; only the applicant and two other undertakings import and distribute such wines in the Federal Republic of Germany; in view of the practice adopted by State-trading countries of concluding long-term contracts with sole importers in the importing countries, traders specialize, each importing very different types of wine; lastly, the way in which the contested provision came to be adopted proves that it is in fact directed solely at the applicant.

11 The second paragraph of Article 173 of the EEC Treaty provides that even though the contested decision is in the form of a regulation an individual may institute proceedings for a declaration that it is void, provided that it is in fact of direct and individual concern to him. The purpose of that provision is, in particular, to prevent the Community institutions from being able to deny an individual the right to institute proceedings against a decision which is of direct and individual concern to him simply by choosing to issue that decision in the form of a regulation and, hence, to make it clear that the choice of form cannot alter the nature of a measure.

12 However, as the Court held in its judgment of 6 October 1982 in Case 307/81, *Alusuisse Italia* v *Council and Commission*, [1982] ECR 3463, an action brought by an individual is not admissible in so far as it is directed against a regulation having general application, within the meaning of the second paragraph of Article 189 of

the Treaty, the test for distinguishing between a regulation and a decision, according to the settled case-law of the Court, being whether or not the measure in question has general application. It is therefore necessary to appraise the nature of the contested measure and in particular the legal effects which it is intended to produce or in fact produces.

13 In that connection it should be noted that the purpose of the contested provision is to prohibit the use of certain translations by any undertakings which at present or in the future import wines of the relevant type into the Community from non-member countries. Consequently, *vis-à-vis* importers, that measure is of general application within the meaning of the second paragraph of Article 189 of the Treaty, since it applies to objectively determined situations and entails legal effects for categories of persons regarded generally and in the abstract. Moreover, as the Court has already held, a measure does not cease to be a regulation because it is possible to determine the number or even the identity of the persons to whom it applies at any given time.

14 Finally, as the Court has already held, the distinction between a regulation and a decision may be based only on the nature of the measure itself and the legal effects which it produces and not on the procedures for its adoption.

15 For the reasons stated above it must be concluded that Article 1 (3) (g) of Regulation No 1224/83 is not of individual concern to the applicant and hence the latter may not challenge it under the second paragraph of Article 173 of the Treaty. Consequently, the claim for a declaration that it is void must be dismissed as inadmissible.

The alternative claim seeking to establish the liability of the Commission

16 The applicant claims that, even if the Court were not to declare Article 1 (3) (g) void, the fact would remain that the provision seriously affects the 'trade which it has established and carries on'. It alleges that the favourable opinion expressed by the Commission on 14 August 1981 with regard to the use of the terms 'spätgelesen' and 'ausgelesen' prompted it to commit considerable funds to importing and marketing Hungarian and Yugoslavian wines in the Federal Republic of Germany. It claims that the Community is therefore obliged to compensate it for that damage. It considers that, given that it is impossible accurately to estimate the exact amount of the damage, it has a sufficient legal interest to justify an immediate finding by the Court that the Community is obliged to compensate it.

17 The Commission and the Federal Republic of Germany contend first of all that this claim must be dismissed as inadmissible because the alleged damage is of a purely potential nature and because the applicant has failed to establish a causal connection between the Commission's action and the changes in the possibilities of importation open to it.

18 In addition, the Commission and the Federal Republic of Germany contend that the claim is in any event unfounded, since there has not been a sufficiently serious breach of a superior rule of law for the protection of individuals. The purpose and effect of the Commission's letter of 14 August 1981 was merely to specify the legal position at a particular time and the applicant cannot claim to have acquired a right to the maintenance of that position. Finally, Regulation No 1224/83 contains very flexible transitional provisions which are specifically designed to prevent those concerned from suffering abnormal damage.

19 As the Court has already held on several occasions (judgment of 2 June 1976 in Joined Cases 56 to 60/74, *Kampffmeyer* v *Commission and Council*, [1976] ECR 711; judgment of 2 March 1977 in Case 44/76, *Milch-, Fett- und Eier-Kontor* v *Council and Commission*, [1977] ECR 393), Article 215 of the Treaty does not prevent a person from asking the Court to declare the Community liable for damage even where it cannot yet be precisely assessed, provided that it is imminent and foreseeable with sufficient certainty.

20 Those conditions are not fulfilled in this case. The applicant's allegations regarding the damage sustained are both doubtful and imprecise. In its observations on the objection of inadmissibility lodged by the Commission, the applicant merely asks that 'the Communities compensate it for the damage which may ensure in the future' as a result of the prohibition on the use of the translations in question and states that damage 'appears to be possible'. Neither did the questions which the Court put at the hearing enable it to be established that the alleged damage was imminent and foreseeable with sufficient certainty.

21 Consequently, the claim seeking to establish the liability of the Communities must also be dismissed; it is unnecessary to state whether the claim is dismissed on grounds of inadmissibility or substance.

22 It follows therefore that the application must be dismissed in its entirety.

Costs

23 Pursuant to Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the applicant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Due Kakouris

Everling Galmot Joliet

Delivered in Luxembourg on 29 January 1985.

P. Heim
Registrar

O. Due
President of the Fifth Chamber