OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 15 SEPTEMBER 1981

My Lords,

In these proceedings, instituted under Article 169 of the EEC Treaty, the Commission maintains that, in prohibiting the importation and marketing under the description "vinegar" (in Italian "aceto") of vinegar other than that made from wine, the Italian Republic has failed to fulfil its obligations under the Treaty and in particular under Articles 30 to 36.

The production and marketing of vinegar are governed in Italy by Law No 991 of 9 October 1964 (Gazzetta Ufficiale No 265 of 28 October 1964) and Decrees made thereunder. That Law authorizes the government to adopt legislation for the suppression of fraud in the preparation and marketing of musts, wines and vinegars. Article 2 (6) stipulates that the legislation made thereunder shall prohibit the direct or indirect use for the purposes of food of synthetic alcohols and products containing acetic acid not arising from the fermentation of wine or piquette.

Pursuant to that Law the President of the Republic issued Decree No 162 of 12 February 1965 (Gazzetta Ufficiale No 73 of 23 March 1965). Article 41 of Decree No 162 reserves the word "aceto" (vinegar) for "products obtained from the acetic fermentation of wine" having specific physical properties. Article 51 (as amended by Law No 739 of 9 October 1970, Gazzetta Ufficiale No 270 of 24 October 1970) provides that synthetic ethyl alcohol and products containing acetic acid not originating in the acetic fermentation of wine and products derived from the acetic fermentation of wine which cannot be classified as vinegar in accordance with Article 41 shall not be transported, held for sale, marketed or dealt with in any manner whatsoever for use, directly or indirectly, for human consumption.

Article 60 provides that "the provisions of this Decree shall apply in a similar manner to products imported from abroad".

Penal sanctions are prescribed for a breach of Articles 41 and 51.

The Commission took the view that Decree No 162 was inconsistent with Article 30 of the EEC Treaty. The Decree was capable of hindering, directly or indirectly, actually or potentially, intra-Community trade in vinegar and food preparations containing vinegar. On 14 December 1978 Viscount Davignon, on behalf of the Commission, addressed to the Italian Minister for Foreign Affairs a letter expressing the Commission's view on the subject and giving its reasons. The letter stated that the opinion there set out applied only to vinegar with an alcohol content obtained from the acetic fermentation of agricultural products. It was expressly and clearly stated that this opinion did not apply to synthetic acetic acid. The

Commission requested the Italian Government, in accordance with Article 169 of the EEC Treaty, to submit its observations within two months on the opinion expressed by the Commission in that letter, and reserved the right thereafter to give a reasoned opinion under that Article.

The Italian Government did not submit its observations until 8 November 1979, when it addressed to the Commission a communication maintaining that it had good and sufficient reasons for preserving Decree No 162.

On 19 November the Commission delivered an opinion giving reasons why it considered that the Italian Republic had failed to fulfil its obligations under the Treaty. The reasoned opinion was not expressly confined to vinegar derived from agricultural products; but it referred to the letter of 14 December 1978 without deleting the exclusion of synthetic acetic acid from the scope of the enquiry. Moreover, it spoke in more than one passage of vinegars produced by fermentation.

On 26 June 1980 in Case 788/79, arising out of criminal proceedings against *Herbert Gilli and Paul Andres* [1980] ECR 2071, the Court (Second Chamber) in a reference for a preliminary ruling under Article 177 of the EEC Treaty ruled that the concept of measures having an equivalent effect to quantitative restrictions on imports, occurring in Article 30 of that Treaty, is to 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.

Thereafter on 28 July 1980 the Commission addressed to the Italian Government a further reasoned opinion drawing attention to a passage in the decision in Case 788/79 which refers to apple vinegar. Moreover the Commission treated the letter of 14 December 1978 as opening the procedure contemplated by Article 169 without in any way modifying the exclusion of synthetic acetic acid.

In its application to the Court dated 26 September 1980, the Commission did not expressly indicate that it sought to withdraw this exclusion.

The French Government, in brief written observations, indicated that its principal concern in the case was to defend the proposition that Member States may prohibit the marketing of synthetic acetic acid.

At a late stage in the hearing, counsel for the Commission contended that these proceedings must be taken to refer to synthetic vinegars no less than to vinegars produced from the fermentation of agricultural products. He argued that any limitation expressed in the Commission's application did not limit the compass of the subsequent proceedings.

I do not accept the width of this latter submission. Before bringing proceedings against a Member State under Article 169 of the EEC Treaty the Commission is required to take two steps: first, it must give the State concerned an opportunity to submit its observations and next, it must deliver a reasoned opinion. These are not mere formalities but are essential safeguards to enable Member

States to defend or alter their positions so as to avoid being exposed to legal proceedings. It follows that the Commission ought not in principle to be permitted to pursue, in an action under Article 169, a matter which it has expressly excluded from its letter inviting the State to submit its observations. If it is wished to expand the scope of the inquiry, the Commission should expressly give the State concerned the opportunity to submit its observations.

Even if the Commission may, in its reasoned opinion, extend the failure alleged (on the basis that the Commission's letter and opinion together determine the compass of the subsequent proceedings (Case 45/64 *Commission* v *Italy* [1865] ECR 857)), it must do so expressly and unequivocally in a case where it has originally limited the failure alleged by specific exclusion. Neither of the two reasoned opinions in the present case satisfies this test. On the contrary the reference in the opinion of 19 November 1979 to vinegars produced by fermentation points in the opposite direction, if, as counsel for the Commission explained at the hearing, some vinegars ("totally synthetic vinegars") are produced by a chemical process in which no fermentation takes place.

Moreover, if it is to be taken that the application to the Court governs the scope of the proceedings (Case 232/78 *Commission* v *France* [1979] ECR 2729) it seems to me that where, in the preliminary procedures an express exclusion has been made then the matter should be spelt out clearly in the application to the Court if the Commission intends to change its ground. That does not seem to me to have been done in the present case.

Neither the Commission's argument that the Italian Government's replies are the same in respect of synthetic acetic acid, nor the fact that the Italian Government did refer to synthetic acetic acid in its defence, in my opinion affect the position in the present case.

I do not accept the argument, advanced on behalf of the Commission, that on an application to the Court under Article 169 the Commission is freed from any constraints imposed by its own letter and opinion by reason of what was said by the Court in Joined Cases 142/80 and 143/80, *Essevi* and *Salengo*, 28 May 1981 (not yet reported). On the contrary, the Court stated in that case (at paragraph 15) that the reasoned opinion had the function of defining the scope of the legal proceedings. The Court's subsequent observation that the Commission's communications and reasoned opinions under Article 169 cannot determine Member States' rights or obligations under the Treaty, is in no way inconsistent with what was said in paragraph 15, nor with the view which I have expressed.

In my opinion the present application should be held not to include synthetic acetic acid.

Counsel for the Commission conceded, in my view rightly if reluctantly, that the Commission is prepared, if the Court considers it opportune, to restrict its

application to vinegars derived from fermentation. I understand that he meant by this that the Commission was prepared to confine the present application to vinegars based on the fermentation of agricultural products to the exclusion of all others. For the reasons already given, I am of the opinion that the Court should at the least rule that it is opportune to restrict the case to vinegars produced by the fermentation of agricultural products.

If the Court takes the view that synthetic vinegars are covered by the application then the Court has already indicated, and it is independently my view, that the parties including the French Government should have the opportunity to present further submissions on that aspect of the matter.

I deal with the Commission's claims on the basis that synthetic vinegars are not included in the present application.

It has been contended that Decree No 162 gives rise to two distinct infringements of the EEC Treaty. The first of these is the infringement said to arise from the prohibition on the import and marketing of vinegars other than those produced from the fermentation of wine, contained in Article 51 of that Decree. It seems to me clear that the Court has already dealt with this aspect of the matter in Case 788/79 *Gilli and Andres,* by declaring that such a prohibition is incompatible with Article 30 of the EEC Treaty, when applied to products lawfully produced and marketed in another Member State. I do not accept the argument that that judgment should be limited because it was a reference under Article 177, whereas the present case comes before the Court under Article 169. What was decided in that case seems to me to be applicable in the present case. No arguments have been addressed which should persuade the Court to depart from its earlier decision. In my opinion it would be right for the Court to declare in the present case also that Article 51 of Decree No 162 and its enforcement are incompatible with Article 30 of the EEC Treaty when applied to vinegars (other than synthetic vinegars) which are lawfully produced and marketed in another Member State.

The second respect in which Decree No 162 was said to infringe the EEC Treaty was that it prohibited the marketing under the name of "aceto" of vinegars other than those produced from wine — a prohibition contained in Article 41 of that Decree. It was argued that this prohibition makes the sale in Italy of natural vinegars produced by fermentation from substances other than wine unattractive to customers. At one point, indeed, the Commission's counsel stated that it made such vinegars "almost unsaleable" in that country. Therefore, it was said, the prohibition amounted to one of the trading rules, enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade, and must be considered as a measure having equivalent effect to a quantitative restriction, in accordance with the Court's decision in Case 8/74, *Procureur du Roi* v *Dassonville* [1974] ECR 837.

On the other hand it is argued that "aceto" in Italy means to the consumer vinegar made from wine, since that is

what he has always and exclusively been accustomed to buy and to use. Accordingly, this restriction is justified.

This difficulty arises largely because despite Council Resolutions dated 28 May 1969, OJ 1969 C 76, p. 75, and 17 December 1973, OJ 1973 C 117, p. 1, no measures for the harmonization of national laws on the labelling of vinegar have been adopted.

From earlier decisions of the Court it seems that two different principles have to be taken into account.

On the one hand a restriction on the use of a generic term by which goods are marketed is capable of constituting a restriction of the kind prohibited by Article 30. This may be so, for example, when national law reserves the use of a particular appellation to national production, thereby compelling the producers of other Member States to employ descriptions which are unknown to, or less esteemed by, the consumer. See Case 12/74, *Commission* v *Germany* [1975] ECR 181 at 198. Such a restriction may fall foul of Article 30 even if it is not discriminatory, in the sense of reserving a particular appellation for domestic production. When, on the contrary, the national law imposes an obligation to use a particular appellation, in a specified language, for all products of a certain kind, it may amount to a restriction upon trade between Member States since it imposes upon the importer the inconvenience and expense of placing new labels on his products. See Case 27/80, *Anton Adriaan Fietje* [1980] ECR 3839, paragraph 10, in which the disputed law required the importer to employ a special label using the marketing term adopted in the country of importation. Moreover it is not open to a Member State to place reliance upon Article 36 of the EEC Treaty as a legal basis for contending that such a restriction, being designed for the protection of consumers and for the fairness of commercial transactions, is lawful. Neither the protection of consumers nor the fairness of commercial transactions is included amongst the exceptions set out in Article 36. It follows that those grounds cannot be relied upon as such under Article 36. See Case 113/80, *Commission* v *Ireland*, 17 June 1981 at ground 8 (not yet reported).

On the other hand a prohibition on the use of a particular term for the marketing of goods, when applied indiscriminately to domestic and imported goods does not necessarily entail a breach of Article 30 of the EEC Treaty. As the Court stated in Case 27/80 *Anton Adriaan Fietje* at paragraph 11:

"If national rules relating to a given product include the obligation to use a description that is sufficiently precise to inform the purchaser of the nature of the product and to enable it to be distinguished from products with which it might be confused, it may well be necessary, in order to give consumers effective protection, to extend this obligation to imported products also . . ."

It may be justified to safeguard the interests of producers against unfair competition and to protect consumers against information which may mislead them. *Commission* v *Germany, supra.*, at p. 194). Such a prohibition may, in words used by the Court, be "justified as being necessary in order to satisfy imperative requirements relating in particular to ... the fairness of commercial transactions and the defence of the consumer": see Case 120/78, *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 at 662; Case 788/79, *Gilli and Andres* at 2078; Case 130/80, *Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV,* 19 February 1981, at ground 6 (not yet reported). Any other result would be inconsistent not only with decisions of this Court but also with the principle articulated in Article 5 of 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 (OJ 1979, L 33, p. 1). This provides, in paragraph 1, that the name under which a foodstuff is sold shall be the name laid down by whatever laws, regulations or administrative provisions apply to the foodstuff in question or, in the absence of any such name, the name customary in the Member State where the product is sold to the ultimate consumer.

It is of course well-established that the fact that a similar restriction is imposed upon the State's domestic producers is not an answer *per se* to a claim that a State is in breach of its obligations under the EEC Treaty.

Applying these principles to the facts of the present case, it seems to me to have been accepted by counsel for the Italian Government that "aceto" is the appropriate generic word for "vinegar" both as a matter of language and in the Common Customs Tariff. On the other hand, the only vinegar known to most consumers in Italy is vinegar made from wine. Accordingly, to prevent importers using the word "aceto" at all means that purchasers will not know that the product offered for sale is vinegar. This seems clearly capable of hindering, directly or indirectly, actually or potentially, intra-Community trade in vinegar. On the other hand, for producers to call their product which is not derived from wine simply "aceto" is misleading, because it will be assumed by purchasers in Italy that it is wine-vinegar and, on the basis of the passage from the Court's judgment in the *Fietje* case (Case 27/80) which I have referred to previously, this can be restrained by the national authority.

Accordingly it seems to me that in the present state of the legislation, the Italian Republic is not failing in its obligations under the Treaty when it prohibits the use of the word "aceto" used alone as a description of vinegar not derived from wine. On the other hand it is failing in its obligations to the extent that it prohibits the use of the word "aceto", in its generic sense, coupled with another word or words which indicate that the product is derived from a substance other than wine such as cider or malt.

The possibility, or it may be the fact, that Italian purchasers might initially find this combination of words unusual or strange does not seem to me to be sufficient to make this result invalid.

If, contrary to my understanding of what was accepted at the hearing, the Court was not satisfied that "aceto" has the generic meaning to which I have referred, then it seems to me that the Italian Republic should not be declared to be in breach of its obligations under the Treaty as the legislation now stands.

Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs, if they have been asked for. The Italian Republic has not asked for its costs. Accordingly, I would not make an order in its favour.

In my opinion, therefore, the appropriate declaration is that the Italian Republic:

(1) has failed to fulfil its obligations under the EEC Treaty to the extent that it prohibits the importation and subsequent dealing with products for use directly or indirectly for human consumption which contain acetic acid (other than synthetic acetic acid) not originating in the acetic fermentation of wine and products derived from the acetic fermentation of wine which cannot be classified as vinegar in accordance with Article 41 of Decree No 162 of 12 February 1965 issued by the President of the Republic of Italy;

(2) has not failed to fulfil such obligations by prohibiting the use of the word "aceto" when used alone to describe products not obtained from the acetic fermentation of wine;

(3) has failed to fulfil such obligations by prohibiting the use of the word "aceto" when combined with other words indicating sufficiently the source from which the product is derived, being a source other than wine.