In Case 193/80

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Rolf Wägenbaur, acting as Agent, assisted by Guido Berardis, a member of the Legal Department, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser to the Commission, Jean Monnet Building, Kirchberg,

applicant,

v

ITALIAN REPUBLIC, represented by Arnaldo Squillante, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

defendant,

supported by

THE GOVERNMENT OF THE FRENCH REPUBLIC, represented by G. Guillaume, head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by A. Carnelutti, Secretary for Foreign Affairs, acting as Deputy Agent, with an address for service in Luxembourg at the French Embassy,

intervener,

APPLICATION for a declaration that the Italian Republic, by prohibiting the importation and marketing under the designation "vinegar" of vinegar which is not based on wine, has failed to fulfil its obligations under Articles 30 and 36 of the EEC Treaty,

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, A. O'Keeffe, T. Koopmans, U. Everling and A. Chloros, Judges,

Advocate General: Sir Gordon Slynn
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

1. The legislation at issue

The production and marketing of vinegar are governed in Italy by Enabling Law No 991 of 9 October 1964 (Gazzetta Ufficiale No 265 of 28 October 1964). In accordance with that Law, in particular Article 2 (b) thereof, Article 51 of Decree No 162 of the President of the Republic of 12 February 1965 (Gazzetta Ufficiale No 73 of 23 March 1965) provides that:

"It shall be prohibited to transport, hold for sale, market or deal with in any manner whatsoever for use, directly or indirectly, for human consumption synthetic ethyl alcohol and products containing acetic acid not originating in the acetic fermentation of wine or piquette and products derived from the acetic fermentation of wine or piquette which cannot be classified as vinegar in accordance with Article 41".

Article 41 of Decree No 162 restricts use of the designation "vinegar" to "products obtained from the acetic fermentation of wine or piquette".

Articles 41 and 51 of Decree No 162 were amended by Law No 739 of 9 October 1970 (Gazzetta Ufficiale No 270 of 24 October 1970) which suppressed the words "or piquette".

By virtue of Articles 94 and 106 of Decree No 162 persons infringing Articles 41 and 51 of the decree may be fined, committed to prison, have their authorization or licence revoked or their business premises closed.

Finally, Article 60 of Decree No 162 provides that:

"The provisions of this decree shall apply in a similar manner to products imported from abroad".

As a result of these rules it is therefore not possible to import into Italy and market in that country vinegar which is not derived from the acetic fermentation of wine or food preparations containing any other kind of vinegar.

That situation has already given rise to a judgment of the Court of Justice given on 26 June 1980 in Case 788/79 *Criminal proceedings against Herbert Gilli and Paul Andres* in which the Court held:

"The concept of 'measures having equivalent effect' to 'quantitative restrictions on imports', occurring in Article 30 of the EEC 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."

2. *The Community legislation*

Regulation No 7a of the Council of 18 December 1959 adding certain products to the list in Annex II to the Treaty establishing the European Economic Community (Official Journal, English Special Edition 1959-62, p. 68) added "vinegar and substitutes for vinegar" (heading 22.10 of the Customs Cooperation Council Nomenclature) to the list of agricultural products contained in Annex II to the Treaty and vinegars are therefore considered to be agricultural products.

Council Regulation No 377/79 of 5 February 1979 on the common organization of the market in wine (Official Journal L 54, p. 1), which also applies to wine-vinegar, does not contain any express provision on the matter.

The creation of a common organization of the market in vinegar has been studied but the Commission has still not made any proposal to the Council on this subject.

3. *The procedure*

By letter of 14 December 1978 the Commission stated that the Italian rules prohibiting the marketing of vinegar not obtained from the acetic fermentation of wine "is a form of measure having an effect equivalent to quantitative restrictions on imports which is contrary to Article 30 of the EEC Treaty and which does not appear to be justified under Article 36 of the Treaty". It asked the Italian Government "within two months of receipt of this letter to let it have its own observations on the opinion which it has submitted". It further stated in the letter that its finding "concerns only alcohol vinegar obtained from the acetic fermentation of agricultural products, therefore excluding synthetic acetic acid".

The Commission did not receive any reply from the Italian Government and on 19 November 1979 the Commission sent to it a reasoned opinion repeating the essential aspects of the arguments set out in its letter of 14 December 1978.

By letter of 8 November 1979 the Italian Government sent its observations to the Commission. It expressed surprise at the Commission's decision to institute such a procedure when the matter in question, in its view, came under Article 100 of the EEC Treaty. Accordingly, it stated that it was prepared to accept a Community scheme regulating vinegar but in the absence of such a scheme there were "good reasons for not amending its laws before a harmonized and coordinated operational framework is established" especially as the contested measures were not discriminatory because they applied to imported and national products alike.

Following that letter, on 28 July 1980 the Commission sent a second reasoned opinion to the Italian Government supplementing the first. It reiterated the main complaint formulated in its first reasoned opinion and expressed its belief that its assessment of the situation had been "confirmed" by the Court's judgment in the *Gilli* case. It added that

the restriction of the use of the designation "vinegar" to wine-vinegar also constituted a failure to fulfil an obligation under the Treaty.

The Italian Government did not adopt the measures needed to comply with the two reasoned opinions and the Commission decided to make this application to the Court which was received at the Court Registry on 29 September 1980.

By a document lodged on 3 December 1980 the French Government sought leave to intervene in support of the conclusions of the Italian Republic in this case. Leave to intervene was granted by order of 17 December 1980.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *Commission* claims that the Court should:

"1. Declare that the Italian Republic, by prohibiting the importation and marketing under the designation of 'vinegar' of vinegar which is not based on wine, has failed to fulfil its obligations under Article 30 *et seq.* of the EEC Treaty;

2. Order the Italian Republic to pay the costs".

The *Italian Government* "expresses the hope that in its judgment the Court will reject the conclusions of the Commission".

III — Summary of the submissions and arguments of the parties

The *Commission* maintains that the Italian rules in question under which only wine-vinegar and food preparations based on wine-vinegar may be imported and marketed in Italy and which restrict the designation "vinegar" to wine-vinegar, infringe the principle of the free movement of goods within the Community. In support of this submission it refers to the consistent case-law of the Court according to which "all rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions" (judgment of 11 July 1974 in Case 8/74 *Dassonville* [1974] ECR 837 at p. 852).

The Italian rules have no justification under the Treaty because they are not "necessary in order to satisfy mandatory requirements relating in particular to the ... protection of public health, fair trading and consumer protection" (judgment of 20 February 1979 in Case 120/78 *Rewe* [1979] ECR 649 at p. 662). It is common knowledge that vinegars which are not based on wine are not harmful to human health. Moreover, consumer protection is not in question as that requirement is satisfied if consumers are provided with sufficient information about the composition of the product which they buy, for example by means of a suitable label. That view is confirmed by the judgment in Case 788/79, cited above.

In the Commission's view the only possible explanation for the Italian rules, which moreover the Italian Government acknowledges, at least implicitly, is that they were adopted to provide an outlet for excess production of Italian wine. However, under no circumstances may such a reason justify the prohibition imposed on vinegar other than wine-vinegar.

Therefore the Italian rules in question constitute an obstacle to intra-Community trade and work mainly to the advantage of national producers of wine-vinegar without being justified under the Treaty by "a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods" (judgment in Case 120/78 cited above, paragraph 14 of the decision). Therefore the measures infringe Article 30 of the EEC Treaty without being justified under Article 36.

In the view of the *Italian Government*, the judgment given by the Court in Case 788/79 in the context of Article 177 of the EEC Treaty may not decide in advance on content and conclusions appropriate to proceedings under Article 169 to establish a failure to fulfil an obligation under the Treaty. Under the legal system of the Community these two spheres of action of the Court are different and separate, each having its own specific and different functions. The function of the procedure under Article 177 of the Treaty is confined to the interpretation of rules of Community law. On the other hand the correct and uniform application of those rules is a matter for national courts alone. Therefore, although it is a rule of national law which has given rise to the question of Community law raised pursuant to Article 177 of the Treaty, the national rule is in no way the subject of that procedure.

What is more, in the context of that procedure of interpretation, the national rule becomes a "theoretical hypothesis" which is considered from an objective and extrinsic angle, that is to say, without a thorough examination of the situation peculiar to the Member State which promulgated it. Thus, in Case 788/79 the Court examined only Article 51 of Decree No 162 which is just one detail of a complex and homogeneous body of rules. That is not sufficient "to sustain definitive conclusions on the complex subject-matter at issue in this case".

Such an analysis is moreover borne out by the case-law of the Court on Article 36 of the EEC Treaty. It follows from Cases 788/79 and 120/78 that "certain values of a social nature which are the inalienable heritage of the civilization of Member States must prevail over strictly commercial interests" and that the fulfilment of those fundamental requirements is still entrusted to the Member States which are thus responsible for protecting the needs arising from the specific situation of each State. Those needs, which reflect different traditions, customs and morals, are not necessarily the same in each region of the EEC and they form "incontrovertible historical facts which, moreover, the process of European integration is not meant to ignore or eliminate".

In these circumstances, if the solutions adopted in the interpretative judgment in Case 788/79 should automatically apply to this dispute "they may be justifiably criticized for having entirely disregarded those essential values to which Article 36 of the Treaty alludes", since in that judgment no consideration was given to the rules applying to vinegar in the light of the given facts arising from the situation in the country in question.

The Italian Government goes on to state that wine-vinegar is an agricultural product and with products of that kind the propensities and habits of consumers are conditioned by local agricultural production. Hence, in Mediterranean countries, where wine is produced on a large scale, "by established custom wine-vinegar is described, by antonomasia, as "vinegar", whereas the position is entirely different in other non-Mediterranean countries in which vinegar is produced from various sources (malt, cider, mead, synthetic vinegar).

Consequently, according to the Italian Government, the objectives of the Community are not therefore to be achieved through "the stringent and formal application of rigid rules like Article 30 of the Treaty prohibiting national rules" but they should be achieved in the more appropriate and flexible context of Article 100 of the Treaty. Moreover, Community action fits into that perspective as in its resolution of 28 May 1969 (Journal Officiel No C 76 of 17 June 1969) and of 17 December 1973 (Official Journal C 117) the Council included vinegar among the food products on which the Commission was to submit harmonization proposals but the Commission has not submitted a harmonization proposal on vinegar.

For those reasons the Italian Government maintains that the rules in question find justification under Article 36 of the EEC Treaty.

In this regard it points out first of all that the provisions at issue apply to all products containing vinegar not made from wine "without any discrimination between national and imported products".

The Italian Government goes on to state that in this case the Commission has failed thoroughly to investigate whether the prohibition on imports is merely a necessary consequence of the rules enacted by the State in the exercise of its legislative powers in the sphere of product marketing and for that reason is legitimate. The Italian legislature must not only take account of the habits of Italian consumers, as earlier described, but must protect them against the possibility of fraud.

As a result, it may not be said that the provisions at issue constitute a "means of arbitrary discrimination" or a "disguised restriction on trade between Member States" simply because "the trade rules, as so defined, have been found to be apt to create a situation favourable to agricultural producers in the same socio-economic area from which consumer practices originate".

Still dwelling on the subject of Article 36 of the EEC Treaty, the Italian Government emphasizes that, contrary to what the Commission says, its obser-

vations of 8 November 1979 do not constitute an admission that the provisions of Decree No 162 were inspired by a protectionist motive of any kind.

As regards Article 41, by virtue of which the designation "vinegar" may be used only for products obtained from the acetic fermentation of wine, that provision simply "transposed into law a reality already forming part of proper trade customs meeting the needs created by demand for the product". It thus did not constitute the creation by way of legal enactment of any trade preference in favour of wine-vinegar, since its aim was simply to regulate the conduct of vinegar producers and traders "so as to ensure that products are introduced and sold in accordance with their identity as known to consumers who, in Italy, when they ask for a bottle of vinegar, expect to receive wine-vinegar".

Turning next to the prohibitions imposed by Article 51 of Decree No 162, the Italian Government maintains that they have their origin in and draw their justification from the same factors. These prohibitions constitute an indispensable complement for the protection of consumers against "abusive or at any rate harmful forms of marketing vinegar not derived from the acetic fermentation of wine". The Italian Government further states that freedom of trade is not seriously affected since "consideration and regard for consumer confidence and the rules governing them are not really liable to restrict the volume of trade" because, even before Decree No 162 was adopted, the sale of vinegar not derived from wine was virtually unknown in Italy.

The Italian Government points out that the importation of apple-vinegar which gave rise to Case 788/79 occurred "in a province inhabited by an ethnic minority whose traditions and customs distinguish them from the national situation as a whole".

Nevertheless, the Italian Government says that it is prepared to reconsider the prohibitions laid down in Article 51 of Decree No 161 "in view of the fact that the legal obstacles to which that provision gives rise in intra-Community trade in vinegar might appear to be out of proportion to the needs to be satisfied". However, it insists that it is entitled to maintain in force Article 41 of Decree No 162 which restricts the designation "vinegar" to wine-vinegar alone "because, first, it cannot be said to have effects equivalent to a quantitative restriction on imports and, secondly, where such effects do occur they will still be justified by Article 36 of the Treaty".

The Italian Government then states that whereas it was not possible for Article 36 to apply in Case 120/78 *Rewe* the situation in this case is different since the Italian provision complained of finds its justification solely in a problem of designation and of how to ensure that the designation is correctly used. As for the Commission's argument that the use of the term "vinegar' might be accepted in Italy, even for vinegars not derived from wine, provided that, for the purpose of protecting consumers, a requirement is imposed whereby suitable labels indicating the origin of the product are to be used, the Italian Government believes that the Commission "does not escape the charge of seeking to create at Community level, by distorting the real situations which differ from one Member State to another, a commercial terminology for vinegar common to and exactly the same in all the Member States, in other words

strictly equivalent in every language, by assigning to a judgment of the Court the thankless task of resisting the social phenomenon which is perhaps the most unyielding to any form of authoritarian imposition: the use of language".

Such an objective is not part of the traditions of the Community, as was found in a wholly analogous situation, namely that of wine, since under Regulation No 337/79 the designation "wine" may be used in Italy only to refer to the product obtained from the fermentation of grape must.

Therefore proper regard for the protection of the Italian consumer and for the linguistic usages upon which he places reliance "may not be regarded as being an unjustified obstacle to trade in Italy in vinegar not derived from wine".

In its observations the *French Government* states that it was led to believe by the statement of the applicant's conclusions published in the Official Journal of the European Communities that the Commission was criticizing the Italian legislation for prohibiting the marketing and importation of vinegar made not only from the fermentation of agricultural products other than wine but also from synthetic acetic acid.

After receiving the documents on the case the French Government, finding that the Commission is permitting Italy to continue lawfully to prohibit the marketing of vinegar made from synthetic acetic acid, considers that, in that case, it can withdraw its intervention since such a view accords with its own. Nevertheless, "in the converse case, it stands by its view in partial support of the submissions of the Italian Government at the hearing".

IV — Oral procedure

At the hearing on 17 June 1981 the Commission of the European Communities represented by G. Berardis, acting as Agent, the Italian Republic represented by P. G. Ferri, acting as Agent, and the French Republic represented by A. Carnelutti, acting as Agent, presented oral argument and answered questions put to them by the Court.

Some of the argument at the hearing centred on the determination of the scope of the application for a declaration of a failure to fulfil an obligation under the Treaty in the light of the two reasoned opinions which preceded it.

Various questions from the Members of the Court were concerned with establishing whether or not the application covered vinegar produced from diluted acetic acid or whether it extended only to vinegar derived from agricultural products.

After a brief adjournment the President made a statement on behalf of the Court indicating that if the Court were to decide that the extension of the application to so-called synthetic vinegar were admissible it would give the parties to the proceedings a fresh opportunity to

submit any observations which they might have on that point.

The representative of the Commission then stated that, alternatively, the Commission was prepared to restrict the application to vinegar made by fermentation if the Court thought that appropriate. The Court took note of that statement.

The Advocate General delivered his opinion at the sitting on 15 December 1981.

Decision

1 By application lodged at the Court Registry on 29 September 1980 the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that "by prohibiting the importation and marketing under the designation of 'vinegar' of vinegar not based on wine" the Italian Republic had failed to fulfil its obligations under Articles 30 and 36 of the EEC Treaty.

2 Under Article 51 of Decree No 162 of the President of the Italian Republic of 12 February 1965 (Gazzetta Ufficiale No 73 of 23 March 1975), amongst other products, those containing acetic acid not originating in the acetic fermentation of wine may not be transported, held for sale, marketed or utilized, directly or indirectly, for human consumption upon penalty of a fine or imprisonment. Under Article 41 of the same decree the designation "vinegar" may be used only for the product obtained from the acetic fermentation of wine. Those provisions also apply to products imported from abroad.

3 The Commission took the view that those rules contravened the principle of the free movement of goods within the Community and sent the Government of the Italian Republic two consecutive reasoned opinions which were issued in the following circumstances.

4 The first opinion was preceded by a letter pursuant to Article 169 of the Treaty and dated 14 December 1978 in which the Commission pointed out to the Italian Government that the aforementioned rules amounted to a

measure having an effect equivalent to quantitative restrictions on imports which was contrary to Article 30 of the Treaty and did not appear to be justified under Article 36 because it was difficult to maintain and in any event it was not proved that vinegar made from alcohol of agricultural origin was more harmful to health than wine-vinegar.

5 In that letter the Commission stated that its finding applied "only to vinegar made from alcohol obtained from the acetic fermentation of agricultural products, excluding synthetic acetic acid" which could continue to be excluded from the market in vinegar. It added that, as regards vinegar made from alcohol of agricultural origin, which it ought to be possible to use for direct consumption in the same way as wine-vinegar and in competition with it, it saw no objection to the Italian authorities' adopting the provisions necessary to enable consumers to make their choice on the basis *inter alia* of appropriate labelling in particular.

6 The Commission did not receive any reply within the prescribed period of two months and on 19 November 1979 it sent the Italian Republic a reasoned opinion on the prohibition of the use of vinegar made from alcohol other than wine. In that opinion it referred to its letter of 14 December 1978 and found that "pursuant to the first paragraph of Article 169 of the EEC Treaty the Italian Republic, by prohibiting the use of fermented vinegar obtained from a product other than wine and piquette, has failed to fulfil its obligations under the Treaty". The reasons which it gave for its opinion were these: "vinegar, other than wine-vinegar, obtained from fermentation, and particularly vinegar made from alcohol, cider or malt, is produced and consumed in large quantities in several Member States and such consumption demonstrably represents no danger to health. To prohibit the use for food purposes of fermented vinegar other than wine-vinegar therefore amounts to erecting trade barriers between Italy and the other Member States".

7 In the meantime, however, the Italian Government had submitted its observations by letter of 8 November 1979 in which, while maintaining its view that as a whole its national laws were compatible with Community law, it concentrated on the respective designations "vinegar" and "wine-vinegar".

8 In view of those observations on 28 July 1980 the Commission sent the Italian Government a second reasoned opinion "on the prohibition of the use of the designation 'vinegar' for any product other than that obtained from the acetic fermentation of wine". It indicated therein that it was continuing the procedure which it had initiated and after twice referring to the letter of 14 December 1978 it found that, by prohibiting the use of the designation "vinegar" in respect of any product other than that obtained from the acetic fermentation of wine, the Italian Republic had failed to fulfil its obligations under the Treaty. In the same opinion the Commission referred to the judgment which had been given in the meantime on 26 June 1980 in Case 788/79 *Gilli and Andres* [1980] ECR 2071 concerning the importation into Italy of apple-vinegar.

9 It appears from the wording of the reasoned opinion of 28 July 1980 that the Commission expressly intended it to complement the first and that, taken together, the two opinions apply both to the prohibition of describing as vinegar any product other than that obtained from the acetic fermentation of wine and the prohibition of marketing or importing fermented vinegar obtained from a product other than wine. The object of the two reasoned opinions is set out in the conclusions of the originating application which asks the Court to "declare that the Italian Republic by prohibiting the importation and marketing, under the designation 'vinegar', of vinegar not based on wine, has failed to fulfil its obligations under Article 30 *et seq.* of the EEC Treaty".

10 Following the publication of an extract from the application in the Official Journal of the Communities, which might have given the impression that the application extended to the marketing of synthetic vinegar, the French Government sought leave to intervene. It argued that in its view Italy could lawfully continue to prohibit the marketing of synthetic acetic acid and, should the Commission intend to include the marketing of synthetic vinegar in its application, the French Government would to that extent intervene in support of the conclusions of the Italian Government.

11 In reply to a question raised in the course of the oral procedure the Agent for the Commission indicated that the Commission's conclusions were general in nature and covered the importation and marketing of all types of vinegar but for the purposes of this action the Commission might agree to restrict the subject-matter of the application to vinegar of agricultural origin, thus excluding synthetic vinegar.

12 Having regard to that background the Court considers that the description and marketing of synthetic vinegar is not at issue in this case. The Commission had clearly excluded that type of vinegar in its formal letter of 14 December 1978, which was expressly mentioned in the first as well as in the second reasoned opinion, and had only examined the question of the designation and importation of various types of vinegar derived from agricultural products. It therefore appears that the uncertainty pointed out by the French Government is the result of the ambiguous wording of the application which does not reflect the limited scope of the formal letter and the two reasoned opinions. In those circumstances the Commission cannot be permitted to widen the scope of this action to include an issue which was expressly excluded from the very beginning of the procedure instituted under Article 169 and which was not considered by the parties, either before or during the written procedure before the Court.

13 It must therefore be held that this dispute concerns only the importation, marketing and designation in Italy of vinegar derived from agricultural products, to the exclusion of synthetic vinegar.

14 According to the Commission's originating application, as just defined as to its subject-matter, the Italian rules give rise to two distinct infringements of Article 30 of the Treaty in so far as they prohibit, first, the importation and marketing of vinegars of agricultural origin other than those deriving from the fermentation of wine and, secondly, the use of the designation "vinegar" for vinegars of agricultural origin other than wine-vinegar.

(a) The prohibition of the importation and marketing of vinegars of agricultural origin other than wine-vinegar

15 The Italian Government denies that the maintenance of this prohibition constitutes a failure to fulfil the obligation to ensure freedom of movement of goods. It pleads, first, the lack of harmonization of the laws of the Member States on "vinegar", then the grounds of absence of discrimination, public health, and the campaign against frauds.

16 The Italian Government points out in the first place that in its resolutions of 28 May 1969 (Journal Officiel No C 67, p. 1) and 17 December 1972 (Official Journal C 117, p. 1) the Council considered "vinegar" among the food-products on which the Commission had to submit harmonization proposals which could be adopted by the Council no later than 1 July 1970, later extended by the second resolution to 1 January 1977. In so far as that programme remains in being the Commission ought at least to have made an attempt at harmonization by submitting a proposal under Article 100 before resorting to Articles 30 to 36 of the Treaty.

17 That argument must be rejected. The fundamental principle of a unified market and its corollary, the free movement of goods, may not under any circumstances be made subject to the condition that there should first be an approximation of national laws for if that condition had to be fulfilled the principle would be reduced to a mere cipher. Moreover, it is apparent that the purposes of Articles 30 and 100 are different. The purpose of Article 30 is, save for certain specific exceptions, to abolish in the immediate future all quantitative restrictions on the imports of goods and all measures having an equivalent effect, whereas the general purpose of Article 100 is, by approximating the laws, regulations and administrative provisions of the Member States, to enable obstacles of whatever kind arising from disparities between them to be reduced. The elimination of quantitative restrictions and measures having an equivalent effect, which is unreservedly affirmed in Article 3 (a) of the Treaty and carried into effect by Article 30, may not therefore be made dependent on measures which, although capable of promoting the free movement of goods, cannot be considered to be a necessary condition for the application of that fundamental principle.

18 It follows that the fact that there are no common rules or harmonization directives on the production and marketing of specific goods is not sufficient to remove those goods from the scope of the prohibition enacted in Article 30 of the Treaty. The prohibition of measures having an effect equivalent to quantitative restrictions covers all trading rules of the Member States which are capable, directly or indirectly, actually or potentially, of impeding intra-Community trade.

19 The Italian Government contends in the second place that the rules in question are not discriminatory because they apply to national and imported products alike. In addition it criticizes the Commission for not thoroughly investigating the question whether the prohibition of imports is not a necessary and legitimate consequence of rules enacted by the State in the exercise of its legislative powers as regards the marketing of products.

20 The answer to that argument must be that, first, even if the system established by the Italian legislation applies to national and imported products alike, its effects are still protective in nature. It has been drafted in such a way that it allows only wine-vinegar to enter Italy, closing the frontier to all other categories of vinegar of agricultural origin. It therefore favours a typically national product and to the same extent puts various categories of natural vinegars produced in the other Member States at a disadvantage.

21 Secondly, whereas it is true, as is confirmed by a consistent line of decisions of the Court (judgment of 20 April 1979 in Case 120/78 *Rewe* [1979] ECR 649), 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, the fact remains that those requirements must still be acknowledged to be necessary in order to satisfy mandatory requirements such as the protection of public health, referred to in Article 36, consumer protection or fair trading, which does not appear to be the case here.

22 The argument based on the protection of public health used by the Italian Government as justification for its national legislation is not acceptable because it has no justification in the case of vinegars of agricultural origin which it is not denied contain no harmful substances and are normally consumed in other Member States and which must therefore be regarded as harmless to health, as the Court moreover held in the specific case of apple-vinegar in the *Gilli* judgment cited above.

23 As far as fair trading and consumer protection are concerned, those needs, as is observed below with regard to the question of designations, may be fulfilled by means less restrictive to free movement than a prohibition of the marketing of all kinds of natural vinegars other than wine-vinegar.

(b) The restriction of the designation "vinegar" to wine-vinegar

24 The Commission contends that the second way in which the Italian rules infringe the EEC Treaty is that the designation "vinegar" is restricted to wine-vinegar. It points out that in the eyes of Italian consumers that requirement lowers the value of natural vinegars produced from the fermentation of substances other than wine which may be offered to prospective buyers only under a brand name which lowers their value and as a result makes them "virtually unsaleable". The measure is therefore likely directly or indirectly to impede intra-Community trade.

25 As justification for its rules on this matter the Italian Government claims that it is necessary to protect consumers who in Italy "by time-honoured tradition" treat all "vinegars" as wine-vinegar owing to the semantic value of the word "aceto" (vinegar). Consumers thus run the risk of being misled as to the essential nature of the raw material used and of the end-product.

26 That argument cannot be accepted. It may be seen from the relevant Community provisions and in particular from heading 22.10 of the Common

Customs Tariff, which is also used in Annex II to the Treaty for which Article 38 of the Treaty makes provision, that the term vinegar does not cover wine-vinegar alone which, moreover, is the subject of a specific sub-heading. It follows that vinegar is a generic term and it would not be compatible with the objectives of the Common Market and 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.

27 However, it is not to be ruled out that following the implementation of the rules at issue Italian consumers have become accustomed to the term "aceto" being used in commerce for wine-vinegar alone. If that is the case then the concern of the Italian Government to protect consumers may be justified. Such protection may however be provided by other means enabling national and imported products to be treated alike, in particular by the compulsory affixing of 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. Such a course would enable the consumer to make his choice in full knowledge of the facts and would guarantee transparency in trading and in offers to the public by providing an indication of the raw material used to make the vinegar.

28 It must therefore be concluded that by prohibiting the marketing and importation of vinegars of agricultural origin 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.

Costs

29 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions it must be ordered to pay the costs. The French Government, which made no submissions on costs, must bear its own costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by prohibiting the marketing and importation of vinegars of agricultural origin 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;**

2. **Orders the defendant to pay the costs;**

3. **Orders the French Government to bear its own costs.**

Mertens de Wilmars Bosco Touffait Due Pescatore

O'Keeffe Koopmans Everling Chloros

Delivered in open court in Luxembourg on 9 December 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President