OPINION OF ADVOCATE GENERAL MISCHO

delivered on 19 March 1998 *

1. To what extent may a producer, without breaching the rules of Community law, turn to account the prestige attaching to the term whisky in order to promote the sale of a spirit drink which, although prepared from whisky, he does not dispute is not whisky as defined in the applicable legislation? That is the essence of the action brought before the Tribunal de Grande Instance (Regional Court), Paris, by The Scotch Whisky Association ('SWA'), a company incorporated under the law of Scotland, with the objects of safeguarding and promoting the interests of the Scotch whisky trade throughout the world and of bringing or defending actions before the courts to protect those interests, against La Martiniquaise LM, now Compagnie Financière Européene de Prises de Participations ('La Martiniquaise'), a company producing and marketing, under the trade mark 'Gold River' and the sales description 'spiritueux au whisky' (whisky-based spirit), a spirit drink with an alcoholic strength by volume of 30%, prepared by mixing Scotch, Canadian and American whiskies together with water, and against Centrale d'Achats et de Services Alimentaires, the central purchasing agency of the Prisunic stores, and the company Prisunic, whose stores retail that drink.

2. The plaintiff claims that the defendants have engaged in unfair competition by marketing Gold River under a sales description including the term 'whisky', whereas Council Regulation (EEC) No 1576/89 of 29 May 1989 laying down general rules on the definition, description and presentation of spirit drinks [1] ('the Regulation') fixes the minimum alcoholic strength of whisky at 40%.

3. The defendants contend that in using not the name whisky, but the sales description 'spiritueux au whisky', for a drink which, although diluted with water, contains no other alcohol but whisky, they fully comply both with the Regulation and with Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer [2] ('the Directive').

4. Faced with a question of interpretation of Community law affecting the appraisal of the merits of the case on both sides, the national court is asking the Court whether, under Community legislation and, in particular,

* Original language: French.

1 — OJ 1989 L 160, p. 1.

2 — OJ 1979 L 33, p. 1.

under Article 5 of the Regulation, the generic term whisky may be included in the sales description of a spirit drink consisting entirely of whisky diluted with water so that the alcoholic strength by volume is less than 40%.

5. Before proceeding to examine the substantive provisions of the Regulation, I consider it useful to review the recitals in its preamble which set out the objectives pursued in establishing the names applicable to the various spirit drinks. The first, second and fourth recitals are particularly revealing. They read as follows:

'Whereas at the moment there are no specific Community provisions governing spirit drinks, in particular as concerns the definition of these products and the requirements relating to their description and presentation; whereas, given the economic importance of these products, it is necessary, in order to assist the functioning of the common market, to lay down common provisions on this subject;

Whereas spirit drinks constitute a major outlet for Community agriculture; whereas this outlet is largely the result of the reputation which these products have acquired throughout the Community and on the world market; whereas this reputation can be attributed to the quality of traditional products, whereas a certain quality standard should therefore be maintained for the products in question if this outlet is to be preserved; whereas the appropriate means of maintaining this quality standard is to define the products in question taking into account the traditional practices on which their reputation is based; whereas, moreover, the terms thus defined should be used only for products of the same quality as traditional products so as to prevent their being devalued;

Whereas the normal and customary means of informing the consumer is to include certain information on the label; whereas the labelling of spirit drinks is subject to the general rules laid down in [the Directive]; whereas, in view of the nature of the products in question and so that the consumer may have fuller information, specific provisions additional to these general rules should be adopted and whereas, in particular, there should be incorporated, in the definition of products, concepts relating to maturation and minimum alcoholic strength for release for human consumption'.

6. It is clear that the Community legislature intended to preserve the reputation which a certain number of traditional spirit drinks derive from their high quality and to ensure that consumers of spirits receive more adequate and more precise information than

that required by the Directive. In adopting the Regulation it was sought to put order in an area where fanciful names prevailed to the general detriment.

7. Whisky is one of the traditional spirit drinks which the Regulation seeks to protect.

8. It is a category of spirit drink defined by Article 1(4)(b) in the following terms:

'a spirit drink produced by the distillation of a mash of cereals

— saccharified by the diastase of the malt contained therein, with or without other natural enzymes,

— fermented by the action of yeast,

— distilled at less than 94.8% vol. so that the distillate has an aroma and taste derived from the raw materials used,

and matured for at least three years in wooden casks not exceeding 700 litres capacity'.

9. For a drink to be eligible to use the name 'whisky', it must further have a minimum alcoholic strength. Article 3(1) of the Regulation provides:

'With the exception of juniper-flavoured spirit drinks ... the minimum alcoholic strength by volume for release for human consumption in the Community under one of the names listed in Article 4(1) ... shall be as follows:

— 40% whisky'.

10. Taken together, Article 1(4) and Article 3(1) show unequivocally that, because it has an alcoholic strength of only 30%, Gold River is not whisky within the meaning of the Regulation, despite the fact that it

contains no other alcohol but whisky. This point is, moreover, undisputed.

11. What is in dispute, however, is whether or not it is contrary to the Regulation for Gold River to bear the sales description 'spiritueux au whisky' and how Article 5 of the Regulation should be properly interpreted. Article 5(1) stipulates:

'Without prejudice to measures adopted pursuant to Article 6, use of the names referred to in Article 1(4) shall be restricted to the spirit drinks defined therein, account being taken of the requirements laid down in Articles 2, 3, 4 and 12. These names must be used to describe the said drinks.

Spirit drinks which do not meet the specifications laid down for the products defined in Article 1(4) may not bear the names assigned therein to those products. They must be described as: "spirit drinks" or "spirits".'

12. La Martiniquaise acknowledges, having regard to the wording of these provisions, that since Gold River may not bear the name 'whisky', it must be described as a 'spirit drink' or 'spirit'. It claims, however, to be entitled to add the term 'whisky' to the description 'spirit drink' or 'spirit'.

13. The French Government shares this point of view. The Commission and the Governments of Germany, Spain, Ireland, Italy and the United Kingdom have submitted observations arguing the contrary.

14. For my part, I too find the argument of La Martiniquaise difficult to uphold. Were it to be founded, there would be legitimate ground for questioning the suitability of the means chosen by the Community legislature to attain the objectives set out in the recitals cited above. What would be the point of prohibiting the misleading term only to allow it to reappear in direct conjunction with the mandatory sales description? Would the reputation of whisky be effectively protected and consumer information truly guaranteed if the result of prohibiting the use of the term 'whisky' for Gold River were, in practice, only that the description 'spiritueux au whisky', which manifestly contains only one evocative term, 'whisky', must be used?

15. Informing the consumer can become even more problematical when the producer elects, as does La Martiniquaise, in accordance with Article 7(4) of the Regulation, to

use an official Community language which is not that of the place of sale, with the result that the Gold River label bears the English description 'whisky spirit', which is ambiguous, to say the least, for the average French-speaking consumer.

16. Even assuming that the interpretation of Article 5 cannot be determined only by the aims pursued by the Regulation in which it is incorporated, the interpretation put forward by La Martiniquaise would still be precluded for reasons pertaining to the very wording of that article. That wording clearly shows that the producer has no choice. The nature alone of the product determines the name which must be used. The producer must use the description 'spirit' or 'spirit drink' for products which do not satisfy the specifications laid down in the articles listed in the first subparagraph. The reserved name 'whisky' is, conversely, mandatory for products satisfying those specifications. Its use is not a privilege which the producer is at liberty to renounce.

17. Again as a matter of wording, there can be no doubt that according to the first subparagraph of Article 5(1) of the Regulation the term 'whisky' is a name. Consequently, the second subparagraph, which provides that spirit drinks not meeting the specifications laid down for the products defined in Article 1(4) 'may not bear the names assigned therein to those products', necessarily precludes the use of the term 'whisky' in the sales description of a product such as Gold River.

18. Even assuming, for a moment, that one shared La Martiniquaise's point of view, the sentence 'they must be described as: "spirit drinks" or "spirits"' would then have to mean 'the terms "spirit drink" or "spirit" must be included in their sales description', which is quite different from the actual wording of the Regulation. However, it is a fundamental principle of statutory interpretation that words which do not require interpretation, because they are perfectly clear, should not be distorted under pretence of interpretation.

19. For those various reasons, I consider the very wording of Article 5(1) of the Regulation to preclude the use of the sales description 'spiritueux au whisky' for Gold River. That is, moreover, why both La Martiniquaise and the French Government seek arguments, either in the Resolution itself and in its implementing texts, or in the Directive, capable of reversing the conclusions to which an examination of that article leads. There can be no question of denying them that right, particularly as Article 5 contains the reservation 'without prejudice to measures adopted pursuant to Article 6'. But such arguments can only be accepted if they are sufficiently convincing to make Article 5 say what it does not, at first sight, say.

20. The first of those arguments — and perhaps the strongest, in that it is based on the actual wording of Article 5 — is drawn from Article 6 of the Regulation. According to that article:

'1. Special provisions may govern indications used in addition to the sales description, i. e.:

— the use of terms, acronyms or signs,

— the use of compound terms including any of the generic terms defined in Article 1(2) and (4).

2. Special provisions may govern the names of mixtures of spirit drinks and those of mixtures of drinks and spirit drinks.

3. The provisions referred to in paragraphs 1 and 2 shall be adopted in accordance with the procedure laid down in Article 15. They shall be designed in particular to prevent the creation of confusion by the names referred to in those paragraphs, especially regarding products in existence when this Regulation comes into force.'

21. For La Martiniquaise, the mere fact that 'special provisions may govern indications used in addition to the sales description' proves that it is not prohibited and even that it is perfectly natural, to add indications to the sales description, which is what it did by adding the indication 'whisky' to the description 'spirit', which is mandatory under Article 5. Following that interpretation, indications may be freely added to the sales description unless and until their use is expressly precluded by measures adopted pursuant to Article 6 and unless, or so it may be assumed, they contradict reality, which is not the case of Gold River as it effectively contains whisky. A similar line of reasoning could apply to Article 6(2).

22. I must admit that the argument is not unappealing, but I consider that it must be dismissed for at least two reasons.

23. According to the interpretation put forward, there is no need for a special provision to govern indications used in addition to the sales description required under Article 5, such special provisions only being necessary where too unrestrained a use is made of the authorisation under which additional indications may, in principle, be included. However, that is not exactly how the Court interpreted that article in its judgment of

7 July 1993. [3] In that case, the Spanish Government argued that the Commission was wrong in using Article 6 as a basis for authorising the use of compound terms including the name 'brandy', such as 'orange-brandy', to designate liqueurs produced from ethyl alcohol which do not contain 'brandy' within the meaning of Article 1(4)(e) of the Regulation. It submitted that Article 6 may only be used to clarify the principles laid down in the Regulation, itself specifying detailed rules, and may not be used to authorise what is prohibited under Articles 1 and 5. The Court held, however, as Advocate General Gulmann had suggested, that the reservation 'without prejudice to measures adopted pursuant to Article 6' set out in Article 5 shows that the Council intended to permit the Commission to derogate from Article 5 in the context of the powers conferred on it by Article 6(1).

24. It is therefore, legitimate to conclude that, far from being admitted in principle, the adding of indications to the sales description requires, on the contrary, the prior authorisation of the Commission under the power of derogation conferred on it by Article 6, and that, in the same manner, mixtures of spirit drinks, or of spirit drinks with other drinks, may not, in the absence of any derogation accorded by the Commission, be designated by any other name than 'spirit' or 'spirit drink'.

25. The second reason lies in the fact that, although Article 6 grants extended powers to the Commission, paragraph 3 of that article clearly emphasises the need to prevent the creation of confusion by the use of certain names, and thus places a clear-cut limit on that power. It would be paradoxical, to say the least, to claim that Article 6, which permits derogations only if they do not lead to confusion, should permit the names protected under Article 1(4) to be used practically at liberty when they are classified as indications used in addition to the sales description. Article 6 permits derogations, within well-defined limits, from Article 5. On no account does it have the purpose of voiding it of content or depriving it of effect in regard to the objectives of the Regulation.

26. The second argument put forward by La Martiniquaise, in reliance upon another article of the Regulation in clarification of Article 5, is based on Article 9(1).

27. According to that article:

'The spirit drinks listed below:

...

— *whisky* and *whiskey*

...

3 — Case C-217/91 *Spain* v *Commission* [1993] ECR I-3923.

may not bear in any form whatsoever in their presentation the generic name reserved for the above drinks if they contain added ethyl alcohol of agricultural origin.'

28. La Martiniquaise argues that it would have been entirely pointless to include that provision in the Regulation if its purpose were to reiterate in different terms the prohibition already laid down in Article 5. Therefore, according to La Martiniquaise, it must be deduced that it introduces a prohibition not provided in that article, thus only confirming its own interpretation of Article 5. Thus it is only where whisky contains added ethyl alcohol — which Gold River, consisting entirely of whisky and water, does not — that it is prohibited to include the term 'whisky' in the sales description. I cannot agree with that interpretation.

29. In the first place, I cannot accept the view that Article 9(1) adds nothing to Article 5, because there is a difference between prohibiting the use of a term in the sales description, as in Article 5, and prohibiting any use whatsoever of this term in the presentation, as in Article 9. Article 9 lays down a prohibition which goes further than that laid down in Article 5; it is consequently incorrect to regard it as simply an apparently repetitive provision.

30. Secondly, the Court has consistently held that *a contrario* reasoning, such as that put forward by La Martiniquaise, always demands extreme caution because it can readily lead to a specious argument. In fact, the reasoning put forward by La Martiniquaise has as little credibility as would an argument to the effect that, if a penal code contains a general provision classifying theft by an employee against an employer as aggravated theft giving rise to a severer penalty, and a specific provision concerning theft by farm servants, then theft by a maid from her employer's house (which is clearly theft by an employee) does not attract the severer penalty on the ground that there is no specific provision for that particular case.

31. Finally on the guidance which other provisions may offer for a proper interpretation of Article 5, let us turn to Article 8, which La Martiniquaise considers irrelevant, but which SWA seeks to use in support of its case. That article states:

'In order to be marketed for human consumption, spirit drinks produced in the Community may not be described by associating word[s] or phrases such as "like", "type", "style", "made", "flavour", or any other similar indications with any of the sales descriptions mentioned in this Regulation.'

32. There is no doubt that Article 8 does not in itself prohibit a sales description such as 'spiritueux au whisky', used by Gold River, and that it cannot be taken as the basis for ascertaining whether that description is permissible. Nevertheless, Article 8 is not, I believe, entirely without relevance in that, like the other provisions examined above, it evidences the clear intent of the Community legislature to ban all terms which are ambiguous and thus such as to permit producers to derive an unjustified advantage from the reputation attaching to traditional drinks and to mislead the consumer. In fact, 'spiritueux au whisky' might well create the same type of confusion as 'whisky-style'.

33. As I have mentioned above, La Martiniquaise also relies on the Directive, more particularly on Articles 5 and 7 thereof, to support its interpretation of Article 5. In principle, there is no objection, in my opinion, to such an approach, given that, as stated in the fourth recital in its preamble, the Regulation lays down rules that are additional to those set out in the Directive. However, it must be borne in mind that those rules are also described as 'specific', with the inevitable consequence that, in the event of conflict between the Directive and the Regulation, the principle *lex specialis generalibus derogat* will apply.

34. La Martiniquaise submits that its interpretation of Article 5 of the Regulation and its right to use the sales description at issue are supported in all respects by the definition of the term 'sales description' in Article 5 of the Directive. According to Article 5(1) '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, or a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused'.

35. La Martiniquaise evidently bases its defence of the term 'spiritueux au whisky' on the requirement that a name be descriptive: that argument would carry some weight were it not for the presence of the words 'in the absence of any such name'. Clearly, it is only where no name is imposed by a binding provision — and Article 5 is just such a provision — that either a customary or a descriptive name must be used.

36. The argument based on Article 7(1) of the Directive seems to me equally unconvincing. Under that provision:

'Where the labelling of a foodstuff places emphasis on the presence or low content of one or more ingredients which are essential to the specific properties of the foodstuff, or where the description of the foodstuff has the same effect, the minimum or maximum percentage, as the case may be, used in the manufacture thereof shall be stated.

This information shall appear either immediately next to the name under which the foodstuff is sold or in the list of ingredients in connection with the ingredient in question.

...'

37. There is clearly nothing to be found in that text permitting the addition of the term 'whisky' to the sales description of Gold River, because the provision clearly does not regulate sales descriptions but rather assumes that they already exist.

38. However, while on the subject of Article 7(1), I consider it necessary to settle one point with regard to one of SWA's arguments. SWA maintains, and alone argued at the hearing, that the term whisky should not appear at all, in any form whatsoever, on the Gold River label, even in a list of ingredients. This seems to me quite excessive. A the hearing, the Commission referred to the answer given by Commissioner Fischler to a Parliamentary question concerning diluted whisky. He stated that, although the rules envisaged by Article 6(3) of the Directive had not yet been laid down, the exact composition of Gold River, and consequently its 75% whisky content, should be allowed to appear on the label, even immediately next to the trade name, in accordance with Article 7(1) of the Directive, provided that it did not create confusion.

39. That seems to be elementary common sense, because the consumer must be able to know if he is buying a spirit drink made from gin, rum or whisky, in that it may be assumed that he is seeking a given flavour rather than just a given alcoholic strength.

40. It remains to examine the arguments La Martiniquaise draws from Commission Regulation (EEC) No 1014/90 of 24 April 1990 laying down detailed implementing rules on the definition, description and

presentation of spirit drinks, [4] adopted on the basis of Article 6 of the Regulation.

41. Article 7b of Regulation No 1014/90, which was introduced by Commission Regulation (EEC) No 1781/91 of 19 June 1991, [5] provides:

'1. Pursuant to Article 6(1), second indent, of Regulation (EEC) No 1576/89, the use of a generic term in a compound term shall be prohibited in the presentation of a spirit drink unless the alcohol in the drink originates exclusively from the spirit drink cited.'

42. La Martiniquaise argues, once again *a contrario*, that it may be deduced from Article 7b that Gold River is fully entitled to bear the sales description 'spiritueux au whisky' as it contains no alcohol other than whisky.

43. That provision might raise some doubt were it to apply in the case at hand. But, in fact, it does not. Even assuming, as was suggested at the hearing, that it does not apply exclusively to liqueurs, contrary to what the preamble to Regulation No 1781/91 seems to indicate, the term 'spiritueux au whisky' could still not be considered a compound term. One need only refer to the list of compound terms indicated under Article 7b(2) — 'plum-brandy', 'orange-brandy', 'apricot-brandy' and so on. By 'compound term', the legislature meant a combination of the names of two distinct drinks, and not the combination of 'spirit' and 'whisky', whisky being itself a spirit. Thus, 'whisky-soda' or 'whisky-orange' would be compound terms within the meaning of Article 7b.

44. La Martiniquaise, still following the same method of reasoning, believes it can also rely on Article 7c of Regulation No 1014/90, introduced by Commission Regulation (EEC) No 2675/94 of 3 November 1994, [6] in support of its arguments. That article provides that:

'Where a spirit drink listed in Article 9 of Regulation (EEC) No 1576/89 is mixed with:

— one or more spirit drinks, whether or not defined in Article 1(4) of Regulation (EEC) No 1576/89,

4 — OJ 1990 L 105, p. 9.
5 — OJ 1991 L 160, p. 5.
6 — OJ 1994 L 285, p. 5.

and/or

— one or more distillates of agricultural origin,

the sales description "spirit" or "spirit drink" must be shown clearly and visibly, without any other qualifying term, in a prominent position on the label.

...'

45. That provision concerns spirit drinks which bear no relation to a mixture of whisky and water, and clarifies, sometimes in considerable detail, what is permissible and what is not permissible in their labelling, but in all events its purpose remains, as indicated in the preamble to Regulation No 2675/94, that of ensuring fair competition between protected traditional spirit drinks and other drinks and of avoiding confusion for the consumer.

46. That rules out, as I have already indicated in respect of other provisions relied upon by La Martiniquaise, taking that provision as a basis for an *a contrario* reasoning which, by opening a breach in the simple and coherent structure of Article 5 of Regulation No 1576/89, would lead to a result in total contradiction with its objectives.

47. Finally on Regulation No 1014/90, I would add that, if it were indeed to say what La Martiniquaise seeks to make it say, but in fact does not say, as I believe I have shown, its validity could be called into question, thereby bringing us back to the starting-point, that is to say Article 5 of Regulation No 1576/89.

48. Lastly, I have one further point to add. Throughout my reasoning, I have sought only to establish whether or not the description 'spiritueux au whisky' complies with Community legislation. I could also have considered, and it would have been easy as they constitute far more blatant infringements of that legislation, other indications included on the Gold River label, in particular the terms 'assemblage de whisky ayant vieilli plus de 8 ans en fût de chêne' ('blend of whisky aged over eight years in oak casks'), subsequently replaced by 'assemblage de whisky ayant vieilli plus de 8 ans en fût de chêne et d'eau' ('blend of whisky, aged over eight years in oak casks, and water') and, in English, 'Blend of whisky aged in oak casks', which are manifestly misrepresentations in regard to the definition of blending provided under Article 1(3)(d) of the Regulation. It would also be interesting to examine the overall presentation of Gold River in regard to the requirements laid down in Article 2 of the Directive on labelling. But we are bound to remain within the limits of the question referred by the national court.

49. That question, I propose, should be answered as suggested by the Commission:

Article 5 of Council Regulation (EEC) No 1576/89 of 29 May 1989 laying down general rules on the definition, description and presentation of spirit drinks must be interpreted as prohibiting the inclusion of the term 'whisky' in the sales description of a spirit drink consisting of whisky diluted with water, having an alcoholic strength by volume of less than 40%, or the addition of the term 'whisky' to the name 'spirit drink' or 'spirit' applied to such a drink.