

JUDGMENT OF THE COURT (First Chamber)

25 November 2010*

In Case C-47/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 30 January 2009,

European Commission, represented by F. Clotuche-Duvieusart and D. Nardi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by G. Palmieri, acting as Agent, assisted by P. Gentili, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (First Chamber),

composed of A. Tizzano, President of Chamber, J.-J. Kasel, M. Ilešič, E. Levits and M. Berger (Rapporteur), Judges,

Advocate General: Y. Bot,
Registrar: L. Hewlett, Administrator,

having regard to the written procedure and further to the hearing on 10 June 2010,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities claims that the Court should declare that, by making it possible to add the adjective 'pure' or the phrase 'pure chocolate' to the labelling of chocolate products which do not contain

vegetable fat other than cocoa butter, the Italian Republic has failed to fulfil its obligations under Article 3(5) of Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption (OJ 2000 L 197, p. 19) and Article 3 of Directive 2000/36, read in conjunction with Article 2(1)(a) of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ 2000 L 109, p. 29).

Legal context

European Union law

- ² The labelling of cocoa and chocolate products is governed by a ‘horizontal’ directive, Directive 2000/13, and by a ‘vertical’ or ‘sectoral’ directive, Directive 2000/36, which constitutes a *lex specialis* in relation to Directive 2000/13.

Directive 2000/36

- ³ Directive 2000/36 is intended to lay down common rules regarding the addition to cocoa and chocolate products of vegetable fats other than cocoa butter and to harmonise sales names.
- ⁴ With regard to the use of vegetable fats other than cocoa butter, recitals 5, 6, 9 and 10 in the preamble to Directive 2000/36 read as follows:
- ‘(5) The addition to chocolate products of vegetable fats other than cocoa butter, up to a maximum of 5 %, is permitted in certain Member States.
- (6) The addition of certain vegetable fats other than cocoa butter to chocolate products, up to a maximum of 5 %, should be permitted in all Member States; those vegetable fats should be cocoa butter equivalents and therefore be defined according to technical and scientific criteria.

...

(9) In the case of chocolate products to which vegetable fats other than cocoa butter have been added, consumers should be guaranteed correct, neutral and objective information in addition to the list of ingredients.

(10) On the other hand, Directive 79/112/EEC does not preclude the labelling of chocolate products to indicate that vegetable fats other than cocoa butter have not been added, provided the information is correct, neutral, objective, and does not mislead the consumer.'

5 With regard to sales names, recital 7 in the preamble to Directive 2000/36 reads as follows:

'In order to guarantee the single nature of the internal market, all chocolate products covered by this directive must be able to move within the Community under the sales names set out in the provisions of Annex I to this directive.'

6 Under Article 2(1) and (2) of that directive:

'1. The vegetable fats other than cocoa butter as defined in Annex II and listed therein may be added to those chocolate products defined in Annex I(A)(3), (4), (5), (6), (8) and (9). That addition may not exceed 5 % of the finished product, after deduction of

the total weight of any other edible matter used in accordance with Annex I(B), without reducing the minimum content of cocoa butter or total dry cocoa solids.

2. The chocolate products which, pursuant to paragraph 1, contain vegetable fats other than cocoa butter may be marketed in all of the Member States, provided that their labelling, as provided for in Article 3, is supplemented by a conspicuous and clearly legible statement: “contains vegetable fats in addition to cocoa butter”. This statement shall be in the same field of vision as the list of ingredients, clearly separated from that list, in lettering at least as large and in bold with the sales name nearby; notwithstanding this requirement, the sales name may also appear elsewhere.’

7 Article 3 of Directive 2000/36 provides:

‘Directive 79/112/EEC shall apply to the products defined in Annex I, subject to the following conditions:

(1) The sales names listed in Annex I shall apply only to the products referred to therein and must be used in trade to designate them.

...

(5) The sales names “chocolate”, “milk chocolate” and “couverture chocolate” specified in Annex I may be supplemented by information or descriptions relating to quality criteria provided that the products contain:

- in the case of chocolate, not less than 43 % total dry cocoa solids, including not less than 26 % cocoa butter,
- in the case of milk chocolate, not less than 30 % total dry cocoa solids and not less than 18 % dry milk solids obtained by partly or wholly dehydrating whole milk, semi- or full-skimmed milk, cream, or from partly or wholly dehydrated cream, butter or milk fat, including not less than 4.5 % milk fat,
- in the case of couverture chocolate, not less than 16 % of dry non-fat cocoa solids.’

8 Article 4 of Directive 2000/36 provides:

‘For the products defined in Annex I, Member States shall not adopt national provisions not provided for by this Directive.’

Directive 2000/13

- 9 Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1), was repealed and replaced by Directive 2000/13. References to the repealed directive must therefore be taken to be references to Directive 2000/13.

- 10 Article 2(1) of Directive 2000/13 provides:

‘1. The labelling and methods used must not:

(a) be such as could mislead the purchaser to a material degree, particularly:

(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production;

(ii) by attributing to the foodstuff effects or properties which it does not possess;

(iii) by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics;

(b) subject to Community provisions applicable to natural mineral waters and foodstuffs for particular nutritional uses, attribute to any foodstuff the property of preventing, treating or curing a human disease, or refer to such properties.’

National law

- ¹¹ Article 28(1) of Law No 39 of 1 March 2002 laying down provisions concerning compliance with obligations arising from Italy’s membership of the European Communities — Community Law 2001 (Ordinary Supplement to GURI No 72 of 26 March 2002; ‘Law No 39/2002’) provides:

‘Implementation of Directive 2000/36 relating to cocoa and chocolate products intended for human consumption

1. Directive 2000/36/EC relating to cocoa and chocolate products intended for human consumption shall be implemented in accordance with the following principles and criteria:

- (a) to guarantee that the labelling of cocoa and chocolate products not only ensures transparency, but displays a different statement depending on whether the product has been produced with the addition of vegetable fats other than cocoa butter or using exclusively cocoa butter; in the former case, the label must contain the word “chocolate” whilst, in the latter, the phrase “pure chocolate” may be used;
- (b) to establish quality certification procedures for typical products which use exclusively cocoa butter for the production of chocolate.’

¹² Article 6(1) of Legislative Decree No 178 of 12 June 2003 implementing Directive 2000/36/EC relating to cocoa and chocolate products intended for human consumption (GURI No 165 of 18 July 2003; ‘Legislative Decree No 178/2003’), provides:

‘Use of the phrase “pure chocolate”

Chocolate products listed in Annex I, points 3, 4, 5, 6, 7, 8, 9 and 10, which do not contain vegetable fats other than cocoa butter, with the exception of the filling where

it is not made of cocoa or chocolate products, may bear on the label the word “pure” paired with the word “chocolate”, added to or incorporated in the sales names listed in Annex I, or the phrase “pure chocolate” elsewhere on the label.’

¹³ Article 7(8) of the Legislative Decree provides:

‘Fines...

Any person using the word “pure” paired with the word “chocolate” on the label of products listed in Annex I, points 3, 4, 5, 6, 7, 8, 9 and 10, which contain vegetable fats other than cocoa butter, with the exception of the filling where it is not made of cocoa or chocolate products, shall be liable to an administrative fine of between EUR 3 000 and EUR 8 000.’

Pre-litigation procedure

¹⁴ By letter of 22 March 2004, the Commission drew the attention of the Italian authorities to the incompatibility of Law No 39/2002 and Legislative Decree No 178/2003 with Directives 2000/13 and 2000/36. The Italian authorities replied by note of 23 April 2004 from the Ministry for Production.

- ¹⁵ Dissatisfied with that reply, the Commission initiated the infringement procedure provided for in Article 226 EC and, accordingly, sent a letter of formal notice to the Italian Republic on 13 October 2004.
- ¹⁶ In the absence of a response from the Italian authorities, the Commission issued a reasoned opinion by letter of 5 July 2005, requesting the Italian Republic to adopt the measures necessary to comply with that opinion within a period of two months from its receipt.
- ¹⁷ In response, the Italian authorities, by letters of 21 October and 4 November 2005, indicated their intention to amend Articles 6 and 7 of Legislative Decree No 178/2003 and, on that basis, requested that the infringement procedure be terminated.
- ¹⁸ Finding that, despite subsequent exchanges of correspondence, the situation remained unchanged, the Commission decided to bring the present action.

The action

Arguments of the parties

¹⁹ The Commission claims that, by introducing the possibility, under Article 28(1) of Law No 39/2002 and Article 6 of Legislative Decree No 178/2003, of adding the adjective ‘pure’ or the phrase ‘pure chocolate’ to the labelling of chocolate products and, more specifically, to the sales names listed in Annex I to that decree for products not containing vegetable fats other than cocoa butter, the Italian legislation has introduced an additional name for chocolate products according to whether they can be regarded as ‘pure’ or ‘not pure’. That distinction constitutes, in essence, an infringement of Article 3(1) and (5) of Directive 2000/36 and conflicts with the case-law of the Court, which has held that chocolate products containing up to a maximum of 5 % of certain vegetable fats are to be regarded as being the same (Case C-14/00 *Commission v Italy* [2003] ECR I-513, paragraph 87).

²⁰ The Commission points out that the use of vegetable fats other than cocoa butter is strictly regulated. Not only is such use restricted to the six substances on the exhaustive list in Annex II to Directive 2000/36, but the addition of such fats may not exceed 5 % of the finished product. Moreover, as recital 9 in the preamble to that directive states, the information concerning the presence of vegetable fats must be correct, neutral, objective and such that it does not mislead the consumer. Article 2(2) of that directive therefore provides that the statement ‘contains vegetable fats in addition to cocoa butter’ must appear ‘nearby’ the sales name, and not in that name. The Community legislature made provision for consumers to be informed whether or not

vegetable fats other than cocoa butter are present in the chocolate product through the labelling and not through the use of a separate sales name.

- 21 The Commission notes that the distinction created by the Italian legislation is doubly misleading for the average consumer. It claims that the use of the adjective 'pure' is not correct, neutral, or objective and that it is therefore misleading per se.
- 22 First of all, the word 'pure' automatically implies negative connotations for any product not bearing that description.
- 23 Secondly, the fact of having created two categories of chocolate products when the law provides for only one is likely to mislead consumers into thinking that there are two categories of chocolate.
- 24 Lastly, the phrase 'pure chocolate' is not sufficiently explicit to inform the consumer of the fact that the chocolate in question contains only cocoa butter, without the addition of other vegetable fats.
- 25 The Italian Republic does not dispute the fact that the sales names listed in Annex I to Directive 2000/36 are compulsory and exhaustively listed. It contends, however, that the sales name is not the only information on the label. It is clear that Member States may add other statements to the label, in particular in order to indicate to consumers

that no fat other than cocoa butter has been used. It is therefore possible to display on the label any information that does not create confusion with the sales name, which must remain the name listed in Annex I.

- ²⁶ The Italian legislature did not want to introduce a new sales name or an indication of a quality criterion that is based not on a cocoa content higher than the minimum required, but on the exclusive use of cocoa butter. The adjective 'pure' does not have a qualitative connotation but is purely descriptive. Thus, it serves only to indicate the composition of the product in question, without prejudice to whether or not the product is of a higher quality. Article 6 of Legislative Decree No 178/2003, in the opinion of the Italian Republic, therefore complies with Article 3(1) and (5) of Directive 2000/36.
- ²⁷ The Italian Republic contends that the addition of the adjective 'pure' serves to indicate that the vegetable fat used is exclusively cocoa butter and no other. That explains why the addition of the adjective 'pure' to the sales name does not interfere with that name, which remains unchanged. For that reason, it cannot be argued that a new name, not listed in Annex I to Directive 2000/36, has been introduced.
- ²⁸ The Italian Republic contends that the expression 'pure chocolate' is merely descriptive, in that it simply gives information for the consumer, information to which the consumer is entitled in accordance with recital 10 in the preamble to Directive 2000/36 and to Directive 2000/13. On the basis of that information, the consumer is then free to decide which product he prefers to buy. In a context in which the consumer is fully informed that vegetable fats other than cocoa butter may enter into the

composition of chocolate products, statements of this type are indeed perceived as being information as to whether or not such vegetable fats are present.

Findings of the Court

The complaint alleging failure to fulfil the obligations under Article 3(1) of Directive 2000/36 and Article 2(1)(a) of Directive 2000/13

- ²⁹ As regards failure to fulfil the obligations under Article 3(1) of Directive 2000/36 and Article (2)(1)(a) of Directive 2000/13, it should be stated first of all that, as the Commission has observed, Article 3 of Directive 2000/36 introduced full harmonisation of sales names for cocoa and chocolate products intended for human consumption, in order to guarantee the single nature of the internal market. The sales names listed in Annex I to Directive 2000/36 are, in accordance with Article 3(1) of that directive, both compulsory and reserved for the products listed in that annex. The addition of adjectives denoting quality is subject to compliance with the specific conditions laid down in Article 3(5) of Directive 2000/36. Furthermore, Article 4 of that directive provides that Member States must not adopt, for the products listed in Annex I, national provisions not provided for by Directive 2000/36 itself. Therefore, Article 3 of that directive carried out full harmonisation of the sales names of chocolate products, and the Italian Republic has not, moreover, disputed the binding nature of that harmonisation.

³⁰ That interpretation is corroborated, moreover, by the background to that directive. The seventh recital in the preamble to Council Directive 73/241/EEC of 24 July 1973 on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption (OJ 1973 L 228, p. 23) states that ‘the use of vegetable fats other than cocoa butter in chocolate products is permitted in certain Member States, and extensive use is made of this facility; ... however, a decision relating to the possibilities and forms of any extension of the use of these fats in the Community as a whole cannot be taken at the present time, as the economic and technical data currently available are not sufficient to enable a final position to be adopted; [and] the situation will consequently have to be re-examined in the light of future developments.’

³¹ Thus, by Directive 73/241, the Community legislature, given the disparities between the legislation of the various Member States, could not, at the time the directive was adopted, take a final position on the question of the consequences as regards names or labelling of the use of vegetable fats other than cocoa butter in chocolate products. Accordingly, the Council of the European Union merely introduced, with regard to the use of vegetable fats other than cocoa butter, a provisional arrangement which was to be reviewed, in accordance with Article 14(2)(a) of that directive, at the end of a period of three years.

³² By Directive 2000/36, the Community legislature provided that the addition of substitute vegetable fats is not to entail the use of different names for such products but the presence of additional information on the label. In the case of chocolate products to which vegetable fats other than cocoa butter have been added, Article 2 of Directive 2000/36, read in the light of recital 9 in the preamble to that directive, ensures that the consumer is provided with correct, neutral and objective information on the product

concerned, in addition to the list of its ingredients, through use of the set phrase ‘contains vegetable fats in addition to cocoa butter’.

- ³³ In that regard, but without requiring the use of any specific statement, recital 10 in the preamble to Directive 2000/36 states that the labelling may indicate that vegetable fats other than cocoa butter have not been added, provided the information is correct, neutral, objective, and does not mislead the consumer.
- ³⁴ As regards an assessment of the compatibility of the Italian legislation with the provisions of Directive 2000/36, as summarised and placed in context above, it should be noted in the first place that Article 6 of Legislative Decree No 178/2003 provides that certain chocolate products which do not contain vegetable fats other than cocoa butter may display on the label the word ‘pure’ paired with the word ‘chocolate’, added to or incorporated in the sales name. If the addition of the words ‘milk’ or ‘white’ or ‘filled’ to the word ‘chocolate’ is to be regarded as producing an equivalent number of new sales names, so must the addition of the word ‘pure’.
- ³⁵ The fact remains, however, that Directive 2000/36 makes no provision either for the sales name ‘pure chocolate’ or for the introduction of such a name by a national legislature.
- ³⁶ In those circumstances, by permitting such an alteration of sales names, Article 6 of Legislative Decree No 178/2003 runs counter to the compulsory and complete

system of sales names created under Article 3(1) of Directive 2000/36, as delimited by Article 4 of that directive.

- 37 In the second place, it should also be noted that, as the Commission argues, the system of double names introduced by the Italian legislature does not comply with the requirements of Article 2(1)(a) of Directive 2000/13, which provides that the consumer must have information that is correct, neutral and objective, and that does not mislead him.
- 38 Even though the Italian Republic, rightly, stated that consumers are entitled to correct information, the alteration of sales names, as in the present case, is not an appropriate method for achieving that objective.
- 39 It should be borne in mind that the Court has held that the addition of vegetable fats other than cocoa butter to cocoa and chocolate products which satisfy the minimum contents required by Directive 73/241, now replaced by Directive 2000/36, cannot substantially alter the nature of those products to the point where they are transformed into different products (see Case C-12/00 *Commission v Spain* [2003] ECR I-459, paragraph 92, and *Commission v Italy*, paragraph 87).
- 40 It is apparent from that case-law that the use of vegetable fats other than cocoa butter, within the limits set by Article 2(1) of Directive 2000/36, does not per se bring about sufficient alteration of those products to justify a difference in their sales names.

- 41 However, the inclusion in another part of the labelling of a neutral and objective statement informing consumers of the absence from the product of vegetable fats other than cocoa butter would be sufficient to ensure that consumers are given correct information (see, to that effect, *Commission v Spain*, paragraph 93, and *Commission v Italy*, paragraph 88).
- 42 Therefore, even though, according to the Italian legislation, use of the adjective ‘pure’ is not compulsory, authorisation to introduce sales names that are different from those provided for by Directive 2000/36 would suggest the existence of a difference between the essential characteristics of the products concerned.
- 43 That being so, inasmuch as it enables the coexistence of two categories of sales names essentially designating the same product, Article 6 of Legislative Decree No 178/2003 is likely to mislead consumers and thus interfere with their right to obtain correct, neutral and objective information.
- 44 It follows from the foregoing that Article 6 disregards the requirements of Article 3(1) of Directive 2000/36 and Article 2(1)(a) of Directive 2000/13. The first complaint is therefore well founded.

The complaint alleging failure to fulfil the obligations under Article 3(5) of Directive 2000/36

- ⁴⁵ In order to address this complaint raised by the Commission, it should be noted, as was stated in paragraphs 29 to 36 above, that Article 3 of Directive 2000/36, as delimited by Article 4 thereof, introduced full harmonisation of the sales names of chocolate products. As part of that compulsory and complete system, the addition of adjectives denoting quality is subject to compliance with the specific conditions laid down in Article 3(5) of that directive.
- ⁴⁶ The fact remains that, far from complying with those conditions, Article 6 of Legislative Decree No 178/2003 provides that for certain chocolate products, including those referred to in Article 3(5) of Directive 2000/36, the word 'pure' may be added to or incorporated with the word 'chocolate' in sales names where those products do not contain vegetable fats other than cocoa butter.
- ⁴⁷ It follows that, by permitting the addition of such a word, relating to a quality criterion, to the sales names of products listed in Article 3(5) of Directive 2000/36, Article 6 of Legislative Decree No 178/2003 appears not to comply with the requirements laid down in that provision.
- ⁴⁸ The second complaint must therefore be upheld.

49 In the light of all the above considerations, it must be held that, by providing that the adjective ‘pure’ may be added to the sales name of chocolate products which do not contain vegetable fats other than cocoa butter, the Italian Republic has failed to fulfil its obligations under Article 3(5) of Directive 2000/36 and under Article 3(1) of that directive, read in conjunction with Article 2(1)(a) of Directive 2000/13.

Costs

50 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful in its pleadings, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by providing that the adjective ‘pure’ may be added to the sales name of chocolate products which do not contain vegetable fats other than cocoa butter, the Italian Republic has failed to fulfil its obligations under Article 3(5) of Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption and under Article 3(1) of that directive, read in**

conjunction with Article 2(1)(a) of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs;

2. Orders the Italian Republic to pay the costs.

[Signatures]