

JUDGMENT OF THE COURT (Sixth Chamber)

16 January 2003 *

In Case C-14/00,

Commission of the European Communities, represented by G. Valero Jordana and G. Bisogni, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by U. Leanza, acting as Agent, assisted by O. Fiumara, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by prohibiting chocolate products containing vegetable fats other than cocoa butter, and which are lawfully manufactured in Member States which authorise the addition of such fats, from being marketed in Italy under the name used in the Member State of origin, and

* Language of the case: Italian.

by requiring that those products may only be marketed under the name 'chocolate substitute', the Italian Republic has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC),

THE COURT (Sixth Chamber),

composed of: J.-P. Puissechet, President of the Chamber, R. Schintgen, V. Skouris (Rapporteur), N. Colneric and J.N. Cunha Rodrigues, Judges,

Advocate General: S. Alber,
Registrar: D. Louterman-Hubeau, Head of Division,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 6 December 2001,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 18 January 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by prohibiting chocolate products containing vegetable fats other than cocoa butter, and which are lawfully manufactured in Member States which authorise the addition of such fats, from being marketed in Italy under the name used in the Member State of origin, and by requiring that those products may only be marketed under the name 'chocolate substitute', the Italian Republic has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

Legal framework

Community legislation

- 2 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, in the fourth recital in the preamble, that 'it is necessary to approximate the provisions relating to these products and to lay down definitions and common rules in respect of the composition, manufacturing specifications, packaging and labelling of these products in order to ensure their free movement'.

3 The fifth recital in the preamble to that directive specifies that ‘it is not possible in this directive to harmonise all those provisions applying to foodstuffs which may impede trade in cocoa and chocolate products, although obstacles that persist because of this are bound to decrease as national provisions relating to foodstuffs are increasingly harmonised’.

4 According to the seventh recital in the preamble to Directive 73/241, ‘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;... the situation will consequently have to be re-examined in the light of future developments’.

5 Article 1 of Directive 73/241 states:

‘For the purposes of this directive, cocoa and chocolate products shall mean the products intended for human consumption defined in Annex I.’

6 Article 10(1) of Directive 73/241 provides:

‘Member States shall adopt all the measures necessary to ensure that trade in the products referred to in Article 1, which comply with the definitions and rules laid

down in this directive and in Annex I thereof, cannot be impeded by the application of national non-harmonised provisions governing the composition, manufacturing specifications, packaging or labelling of these products in particular or of foodstuffs in general.’

7 Article 14(2)(a) of Directive 73/241 is worded as follows:

‘This directive shall not affect the provisions of national laws:

(a) at present authorising or prohibiting the addition of vegetable fats other than cocoa butter to the chocolate products defined in Annex I. At the end of a period of three years from the notification of this directive the Council shall decide, on a proposal from the Commission, on the possibilities and the forms of extending the use of these fats to the whole of the Community.’

8 Annex I to Directive 73/241 defines chocolate in point 1.16 as ‘the product obtained from cocoa nib, cocoa mass, cocoa powder or fat-reduced cocoa powder and sucrose with or without added cocoa butter, having, without prejudice to the definition of chocolate vermicelli, gianduja nut chocolate and couverture chocolate, a minimum total dry cocoa solids content of 35% — at least 14% of dry non-fat cocoa solids and 18% of cocoa butter — these percentages to be calculated after the weight of the additions provided for in paragraphs 5 to 8 has been deducted’.

- 9 The first paragraph of point 7(a) of Annex I to Directive 73/241 is worded as follows:

‘Without prejudice to Article 14(2)(a), edible substances, with the exception of flour and starches and of fats and fat preparations not derived exclusively from milk, may be added to chocolate, plain chocolate, couverture chocolate, milk chocolate, milk chocolate with high milk content, couverture milk chocolate and to white chocolate.’

- 10 Directive 73/241 is repealed with effect from 3 August 2003 by the first paragraph of Article 7 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).

- 11 Directive 2000/36 states, in the fifth to seventh recitals in its preamble:

(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.

- (7) 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.'

12 Article 2(1) and (2) of Directive 2000/36 provides:

'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. 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.'

13 Finally, according to Article 8(1) and (2) of Directive 2000/36:

‘1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive before 3 August 2003. They shall immediately inform the Commission thereof.

2. These measures shall be applied so as to:

- authorise the marketing of the products defined in Annex I if they conform to the definitions and rules laid down in this directive, with effect from 3 August 2003,

- prohibit the marketing of products which fail to conform to this directive, with effect from 3 August 2003.

However, the marketing of products failing to comply with this directive but labelled before 3 August 2003 in accordance with Council Directive 73/241/EEC shall be permitted until stocks are exhausted.’

14 Article 5(1)(b) and (c) of 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), as amended by Directive 97/4/EC of the European Parliament and of the Council of 27 January 1997 (OJ 1997 L 43, p. 21), provides:

‘The name under which a foodstuff is sold shall be the name provided for in the European Community provisions applicable to it.

...

- (b) The use in the Member State of marketing of the sales name under which the product is legally manufactured and marketed in the Member State of production shall also be allowed.

However, where the application of the other provisions of this directive, in particular those set out in Article 3, would not enable consumers in the Member State of marketing to know the true nature of the foodstuff and to distinguish it from foodstuffs with which they could confuse it, the sales name shall be accompanied by other descriptive information which shall appear in proximity to the sales name.

- (c) In exceptional cases, the sales name of the Member State of production shall not be used in the Member State of marketing when the foodstuff which it designates is so different, as regards its composition or manufacture, from the foodstuff known under that name that the provisions of point (b) are not sufficient to ensure, in the Member State of marketing, correct information for consumers.’

National legislation

- 15 The manufacture and marketing in Italy of cocoa and chocolate products intended for human consumption are governed by Law No 351 of 30 April 1976 (GURI No 146 of 4 June 1976, p. 4332, hereinafter ‘Law No 351/76’).
- 16 According to Article 6 of that law, ‘[a]ny food preparation containing cocoa whose texture, consistency, colour and taste are similar to those of chocolate, but whose composition does not correspond to the definition of one of the products listed in the annex to the present law, constitutes a chocolate substitute’. The products referred to in that annex do not contain vegetable fats other than cocoa butter.
- 17 According to a ministerial circular of 28 March 1994, Article 6 of Law No 351/76 did not apply to products containing vegetable fats other than cocoa butter which were lawfully manufactured in other Member States and complied with the requirements as to minimum content and other conditions of composition laid down in that law.
- 18 A subsequent Ministry of Health circular of 15 March 1996 (hereinafter ‘the ministerial circular’) modified the interpretation of Article 6 of Law No 351/76, providing that cocoa and chocolate products containing vegetable fats other than cocoa butter, originating in the United Kingdom, Ireland and Denmark, can be marketed within Italian territory only if their composition satisfies the rules of the State of origin and if their sales name corresponds to that laid down in Article 6 of Law No 351/76 — that is to say, ‘chocolate substitute’.

Pre-litigation procedure

- 19 By letter of 12 February 1997, the Commission informed the Italian authorities that it considered incompatible with Article 30 of the Treaty the prohibition on marketing cocoa and chocolate products containing vegetable fats other than cocoa butter under the name 'chocolate' imposed in accordance with the ministerial circular.
- 20 By letter of 8 July 1997, the Italian authorities denied that it was necessary to amend their national legislation, contending that, since Directive 73/241 fully harmonised the marketing of cocoa and chocolate products, free movement in all the Member States was guaranteed only for the products which complied with it.
- 21 Disagreeing with that interpretation, the Commission sent the Italian Republic a letter of formal notice on 22 December 1997. Since subsequent meetings and correspondence confirmed that difference of opinion, the Commission sent that Member State a reasoned opinion on 29 July 1998, asking it to comply with its obligations under Article 30 of the Treaty within two months of the notification of that opinion.
- 22 In its reply, dated 15 September 1998, the Italian Government stated its intention to retain the prohibition at issue for cocoa and chocolate products which did not comply with the requirements of Law No 351/76, as long as Directive 73/241 was not amended.
- 23 In those circumstances, the Commission decided to bring the present action.

Substance

Arguments of the parties

- 24 The Commission states that chocolate containing vegetable fats other than cocoa butter up to a maximum of 5% of the total weight of the product is manufactured under the name 'chocolate' in six Member States (Denmark, Ireland, Portugal, Sweden, Finland and the United Kingdom), that it is accepted under that name in all the Member States, with the exception of Spain and Italy, and that it is included under that name in Directive 73/241.
- 25 The Commission also points out that, with respect to cocoa-based ingredients, such a product meets the specifications for the composition of 'chocolate' set by Directive 73/241, since the addition of fats other than cocoa butter does not imply any reduction in the minimum content required by that directive.
- 26 It claims that the ministerial circular is based on an interpretation of Directive 73/241 which is inconsistent with the wording of the provisions of that directive. Referring to Article 14(2)(a) of Directive 73/241, in conjunction with point 7(a) of Annex I thereto, the Commission maintains that, since that directive does not definitively regulate the use in the Community as a whole of vegetable fats other than cocoa butter in the manufacture of cocoa and chocolate products, any legislation of a Member State which prohibits or authorises their use in cocoa and chocolate products manufactured within the territory of that State is in compliance with Directive 73/241, as long as it complies with the other provisions of the directive.
- 27 Consequently, the Commission considers that a cocoa or chocolate product which is lawfully manufactured in one of the Member States which authorise the

addition of vegetable fats other than cocoa butter must be able to move freely within the Community, including in Member States which do not authorise the addition of those vegetable fats to products manufactured within their own territory, provided that the requirements as to minimum content in Directive 73/241 are complied with.

- 28 According to the Commission, while Member States may in principle authorise or prohibit the use of such vegetable fats, the fact remains that their national legislation must be compatible with the principles of Community law, such as the principle of the free movement of goods set out in Article 30 of the Treaty.
- 29 It takes the view that the obligation under the Italian legislation to market cocoa and chocolate products containing vegetable fats other than cocoa butter under the name 'chocolate substitute' significantly obstructs their access to the Italian market, thereby constituting a measure having equivalent effect to a quantitative restriction, in breach of Article 30 of the Treaty.
- 30 First, the obligation to alter the sales name involves additional packaging and labelling operations, thus leading to increased marketing costs in Italy. Secondly, the use of a pejorative term such as 'chocolate substitute' serves to devalue the products in question in the minds of consumers.
- 31 Basing its argument on the case-law of the Court, the Commission claims that prohibiting the use of the sales name allowed in the Member State of production can be justified only when the product at issue is so different, as regards its composition or manufacture, from the goods generally known under that name in

the Community that it can no longer be considered as belonging to the same category.

- 32 However, the Commission considers that it is not possible to claim that the addition of vegetable fats other than cocoa butter to a chocolate product which contains the minimum contents required under Directive 73/241 substantially changes the nature of the product, to the point where the use of the name ‘chocolate’ would create confusion as regards its basic characteristics.
- 33 In addition, the Commission maintains that the Italian legislation cannot be justified by an overriding requirement relating to consumer protection, since in the present case measures exist which are less restrictive of the free movement of cocoa and chocolate products and which ensure the protection of consumer interests, such as the inclusion in the label of a neutral and objective indication which informs consumers of the presence in the product of vegetable fats other than cocoa butter.
- 34 The Italian Government states that, while it agrees with the Commission that Directive 73/241 has not fully harmonised the use of vegetable fats other than cocoa butter in the manufacture of cocoa and chocolate products, it considers that the directive in fact provides for full harmonisation as regards the composition of products which can be marketed under the name ‘chocolate’.
- 35 It interprets Article 14(2)(a), in conjunction with point 7(a) of Annex I to Directive 73/241, to mean that, as a general rule, the addition of vegetable fats other than cocoa butter is not allowed, and goes on to infer that the directive

ensures free movement within the Community only for cocoa and chocolate products manufactured according to that rule.

- 36 Furthermore, the Italian Government contends that, as regards the specific question of the use of vegetable fats other than cocoa butter, Article 14(2)(a) of Directive 73/241 consolidates existing national laws, confining itself to allowing differences between those laws subject to a future harmonisation measure. The result of that consolidation is that, while awaiting harmonisation at the Community level, the Member States whose laws prohibit the addition of vegetable fats other than cocoa butter can no longer amend them so as to authorise the addition of those fats.
- 37 At the hearing, the Italian Government added that its interpretation of Directive 73/241 was supported by Article 8 of Directive 2000/36, which precluded it from amending its national legislation before 3 August 2003.
- 38 In those circumstances, Directive 73/241 cannot be interpreted to mean that importing Member States are required to permit cocoa and chocolate products manufactured in other Member States according to methods prohibited by their own legislation to move within their territory under the name 'chocolate', under which they are marketed in the Member State of production, and consequently to discriminate against national manufacturers.
- 39 According to the Italian Government, if the Commission's interpretation of Directive 73/241 were upheld, Italian manufacturers would be at a competitive disadvantage in relation to manufacturers established in other Member States,

who could market in Italy under the name ‘chocolate’ products containing vegetable fats other than cocoa butter.

40 In any event, the Italian Government denies that its national legislation constitutes a measure having equivalent effect to a quantitative restriction, and maintains that the requirement to alter the sales name of the product is based on the need for consumer protection.

41 In particular, relying on both the case-law of the Court and Article 5(1)(c) of Directive 79/112, as amended by Directive 97/4, the Italian Government maintains that the Member State of importation and marketing can legitimately prohibit the use of a sales name allowed in the Member State of production when it designates a foodstuff which is so different, in terms of its composition and its production, from the foodstuff known by that name that it is not possible to ensure that consumers are given correct information as to the true nature of the foodstuff and what distinguishes it from other foodstuffs with which it might be confused by including suitable descriptive information on the product packaging.

42 According to the Italian Government, those conditions are met in the present case, inasmuch as the characteristics of cocoa and chocolate products containing vegetable fats other than cocoa butter are substantially different from those of cocoa and chocolate products which do not contain them. Thus, if products containing such fats are marketed under the name ‘chocolate’, Italian consumers, who traditionally expect only products which do not contain such fats to bear that name, may be misled. For that reason, the marketing of cocoa and chocolate products containing vegetable fats other than cocoa butter is allowed in Italy, but

only under the name 'chocolate substitute', in order to call attention to that difference.

Findings of the Court

Extent of the harmonisation carried out under Directive 73/241

- 43 First of all, it must be held that the Commission's complaint based on the fact that the Italian legislation is not in compliance with Community law, inasmuch as it places restrictions on the free movement of cocoa and chocolate products containing vegetable fats other than cocoa butter, raises the question of the extent of the harmonisation achieved under Directive 73/241.
- 44 While the parties agree that the use of such vegetable fats in cocoa and chocolate products was not harmonised by that directive, they disagree as regards the consequences of that fact for the marketing of products which contain such fats.
- 45 Since it considers that the absence of harmonisation as regards the use of vegetable fats other than cocoa butter in cocoa and chocolate products cannot exclude the marketing of products containing such fats from the application of the principle of the free movement of goods, the Commission claims that any measures restricting the free movement of those products must be considered in the light of Article 30 of the Treaty.

- 46 By contrast, the Italian Government maintains that Directive 73/241 fully regulates the marketing of the cocoa and chocolate products to which it refers, thereby precluding the application of Article 30 of the Treaty in so far as, first, it sets out the principle that the use of vegetable fats other than cocoa butter is prohibited in the manufacture of cocoa and chocolate products and, secondly, it establishes a system of free movement under the name 'chocolate' only for cocoa and chocolate products which do not contain such vegetable fats.
- 47 The Italian Government therefore contends that Directive 73/241 enables Member States whose national law prohibits the addition of vegetable fats other than cocoa butter to products manufactured within their territory also to prohibit the marketing within their territory, under the name 'chocolate', of products whose manufacture does not comply with their national legislation.
- 48 In that regard, it should be noted that the Court has consistently held that, in interpreting a provision of Community law, it is necessary to consider not only its wording but also the context in which it occurs and the aims of the rules of which it forms part (see, *inter alia*, Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 50, and Case C-191/99 *Kvaerner* [2001] ECR I-4447, paragraph 30).
- 49 First, as regards the objectives of the provisions in question and the context in which they occur, it is clear that Directive 73/241 was not intended to regulate definitively the use of vegetable fats other than cocoa butter in the cocoa and chocolate products to which it refers.

- 50 In that regard, it should be recalled that the directive was adopted by the Council unanimously on the basis of Article 100 of the EEC Treaty (after amendment, Article 100 of the EC Treaty, now in turn Article 94 EC) relating to the approximation of the laws, regulations or administrative provisions of the Member States which directly affect the establishment or functioning of the common market.
- 51 In particular, the purpose of the Community legislature in adopting Directive 73/241 was to lay down, as is clear from the fourth recital in its preamble, definitions and common rules in respect of the composition, manufacturing specifications, packaging and labelling of cocoa and chocolate products in order to ensure the free movement of those products within the Community.
- 52 None the less, in the seventh recital in the preamble to Directive 73/241, the Community legislature clearly indicated that, in the light of the disparities between Member States' legislation and the insufficient economic and technical data available, it could not, at the time the directive was adopted, take a final position on the use of vegetable fats other than cocoa butter in cocoa and chocolate products.
- 53 It must also be pointed out that, as is made clear by the case-file, the reference in the same recital to certain Member States where the use of those other vegetable fats was at that time not merely permitted but, moreover, extensive, referred to three Member States which had acceded to the Community shortly before the adoption of Directive 73/241, namely the Kingdom of Denmark, Ireland and the United Kingdom, and which traditionally permitted the addition to cocoa and chocolate products manufactured within their territory of such vegetable fats up to a maximum of 5% of total weight.

- 54 In those circumstances, the Council merely established, for the use of vegetable fats other than cocoa butter, provisional rules which were to be re-examined, in accordance with the second sentence of Article 14(2)(a) of Directive 73/241, at the end of a period of three years from its notification.
- 55 It is in the light of those facts that both the wording and the scheme of the provisions of Directive 73/241 relating to the use of vegetable fats other than cocoa butter in the cocoa and chocolate products to which it refers should be analysed.
- 56 First, the prohibition on the addition to the various cocoa and chocolate products defined in Annex I to Directive 73/241 of fats and fat preparations not derived exclusively from milk, laid down in point 7(a) of Annex I thereto, is ‘without prejudice to Article 14(2)(a)’.
- 57 Article 14(2)(a) for its part expressly provides that Directive 73/241 is not to affect the provisions of national law which authorise or prohibit the addition of vegetable fats other than cocoa butter.
- 58 That provision therefore makes clear that, as regards the use of those other vegetable fats, Directive 73/241 does not seek to establish a fully harmonised system under which common rules completely replace existing national rules in the field, since it explicitly authorises the Member States to lay down national rules which are different from the common rules which it provides for.

- 59 In addition, in the light of its wording, that provision cannot be interpreted as merely providing for a derogation to the principle set out in point 7(a) of Annex I to Directive 73/241 that the addition to the products referred to of vegetable fats other than cocoa butter is prohibited.
- 60 First, Article 14(2)(a) of Directive 73/241 refers not only to national laws which authorise the addition of vegetable fats other than cocoa butter but also to those which prohibit that addition.
- 61 Secondly, that provision states that the Council must subsequently decide on the possibilities and the forms of extending the use of those fats to the whole of the Community, which demonstrates that the Community legislature was contemplating only the possibility of allowing or rejecting such an extension, and not of prohibiting that use throughout the Community.
- 62 Both the wording and the scheme of Directive 73/241 indicate therefore that it lays down a common rule, that is, the prohibition laid down in point 7(a) of Annex I, and establishes in Article 10(1) free movement for products which comply with that rule, while permitting Member States in Article 14(2)(a) to adopt national rules authorising the addition of vegetable fats other than cocoa butter to cocoa and chocolate products manufactured within their territory.
- 63 It also shows that the interpretation put forward by the Italian Government to the effect that Directive 73/241 prohibits Member States from amending their national provisions on the use of vegetable fats other than cocoa butter until that question has been harmonised at the Community level cannot be upheld.

- 64 Such an interpretation finds no support in the wording of the provisions of the directive and misconstrues both the directive's provisional nature and the very purpose of the system which it establishes, as described in paragraphs 48 to 62 of the present judgment.
- 65 Nor can Article 8 of Directive 2000/36 be relied on in support of that interpretation.
- 66 It is sufficient to recall in that regard that, as the Court has consistently held, a rule of secondary legislation, such as Article 8 of Directive 2000/36, cannot be interpreted as authorising the Member States to impose or to maintain conditions contrary to the Treaty rules on the free movement of goods (see, to that effect, *inter alia*, Case C-47/90 *Delhaize et Le Lion* [1992] ECR I-3669, paragraph 26; Case C-315/92 *Verband Sozialer Wettbewerb* [1994] ECR I-317, '*Clinique*', paragraph 12; and Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* [1996] ECR I-3457, paragraph 27).

Applicability of Article 30 of the Treaty

- 67 The preceding analysis makes clear that, in contrast to the argument put forward by the Italian Government, cocoa and chocolate products containing fats not referred to in point 7(a) of Annex I to the directive but whose manufacture and marketing under the name 'chocolate' are authorised in certain Member States, in compliance with that directive, cannot be deprived of the benefit of free movement of goods guaranteed by Article 30 of the Treaty solely on the ground that other Member States require within their territory that cocoa and chocolate

products be manufactured according to the common rule regarding composition provided for in point 7(a) of Annex I to the directive (see, by analogy, Case C-3/99 *Ruwet* [2000] ECR I-8749, paragraph 44).

- 68 The Court has consistently held that Article 30 of the Treaty aims to prohibit all rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).
- 69 In accordance with the judgment in Case 120/78 *Rewe-Zentral* [1979] ECR 649, '*Cassis de Dijon*', Article 30 of the Treaty prohibits obstacles to the free movement of goods, in the absence of harmonisation of national laws, which are the consequence of applying to goods coming from other Member States, where they are lawfully manufactured and marketed, rules that lay down requirements to be met by those goods (such as those relating to their name, form, size, weight, composition, presentation, labelling and packaging), even if those rules apply to national and imported products alike (see, *inter alia*, *Keck and Mithouard*, cited above, paragraph 15; Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 12; and *Ruwet*, cited above, paragraph 46).
- 70 Accordingly, that prohibition also applies to obstacles to the marketing of products whose manufacture is not subject to comprehensive harmonisation but which are manufactured in conformity with national rules which are explicitly permitted by the harmonising directive. In such a case, a contrary interpretation would be tantamount to authorising the Member States to partition their national markets in regard to products not covered by the Community's harmonisation

rules, contrary to the objective of free movement pursued by the Treaty (see, by analogy, *Ruwet*, cited above, paragraph 47).

- 71 Nor can the argument by the Italian Government that Article 30 of the Treaty should not be applied because it would effectively discriminate against national producers be upheld.
- 72 The Court has already held that Article 30 of the Treaty is not designed to ensure that goods of national origin enjoy the same treatment as imported goods in every case, and a difference in treatment as between goods which is not capable of restricting imports or of prejudicing the marketing of imported goods does not fall within the prohibition contained in that article (see, *inter alia*, Case 98/86 *Mathot* [1987] ECR 809, paragraph 7, and Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 15).
- 73 It is thus irrelevant that the obligation laid down in Article 30 of the Treaty for a Member State which prohibits the addition of vegetable fats other than cocoa butter to cocoa and chocolate products manufactured within its territory to authorise the marketing under the name ‘chocolate’ of cocoa and chocolate products containing such fats which are lawfully manufactured in other Member States is capable of placing the national products of that State at a disadvantage.
- 74 It is therefore necessary to consider whether and to what extent Article 30 of the Treaty precludes the Italian legislation, which prohibits the marketing in Italy of cocoa and chocolate products containing vegetable fats other than cocoa butter under the sales name ‘chocolate’, under which they are lawfully manufactured

and marketed in the Member State of production, and which provides that those products may only be marketed under the name 'chocolate substitute'.

75 In that regard, it must be noted that, as the Court has consistently held, while a prohibition such as that under the Italian legislation, which entails the obligation to use a sales name other than that used in the Member State of production, does not absolutely preclude the importation into the Member State concerned of products originating in other Member States, it is nevertheless likely to make their marketing more difficult and thus impede trade between Member States (see, to that effect, *inter alia*, Case 182/84 *Miro* [1985] ECR 3731, paragraph 22; Case 298/87 *Smanor* [1988] ECR 4489, paragraph 12; Case 286/86 *Deserbais* [1988] ECR 4907, paragraph 12; and *Guimont*, cited above, paragraph 26).

76 In the present case, the prohibition on the use of the sales name 'chocolate' under which cocoa and chocolate products containing vegetable fats other than cocoa butter are lawfully manufactured in the Member State of production may compel the traders concerned to adjust the presentation of their products according to the place where they are to be marketed and consequently to incur additional packaging costs. It is therefore liable to obstruct intra-Community trade (see, to that effect, *Mars*, paragraph 13, and *Ruwet*, paragraph 48, both cited above).

77 That is all the more so in view of the fact that the name 'chocolate substitute', which the Italian law requires the traders concerned to use, may adversely affect the consumer's perception of the products in question, inasmuch as it denotes

substitute, and therefore inferior, products (see, to that effect, *Miro*, paragraph 22; *Smanor*, paragraphs 12 and 13; and *Guimont*, paragraph 26).

- 78 As to whether such legislation may nevertheless comply with Community law, it is settled case-law that obstacles to intra-Community trade resulting from disparities between provisions of national law must be accepted in so far as such provisions are applicable to domestic and imported products alike and may be justified as being necessary in order to satisfy overriding requirements relating *inter alia* to consumer protection. However, in order to be permissible, such provisions must be proportionate to the objective pursued and that objective must not be capable of being achieved by measures which are less restrictive of intra-Community trade (see, *inter alia*, *Mars*, paragraph 15; Case C-313/94 *Graffione* [1996] ECR I-6039, paragraph 17; *Ruwet*, paragraph 50; and *Guimont*, paragraph 27).
- 79 In that context, the Court has already held that it is legitimate for a Member State to ensure that consumers are properly informed about the products which are offered to them, thus giving them the possibility of making their choice on the basis of that information (see, *inter alia*, Case 216/84 *Commission v France* [1988] ECR 793, paragraph 11, and *Smanor*, paragraph 18).
- 80 In particular, the Court has consistently held that Member States may, for the purpose of protecting consumers, require those concerned to alter the description of a foodstuff where a product offered for sale under a particular name is so different, in terms of its composition or production, from the products generally understood as falling within that description within the Community that it

cannot be regarded as falling within the same category (see, *inter alia*, *Deserbais*, paragraph 13, Case C-366/98 *Geffroy* [2000] ECR I-6579, paragraph 22, and *Guimont*, paragraph 30).

81 However, where the difference is of minor importance, appropriate labelling should be sufficient to provide the purchaser or consumer with the necessary information (see, *inter alia*, Case C-269/89 *Bonfait* [1990] ECR I-4169, paragraph 15; Case C-383/97 *van der Laan* [1999] ECR I-731, paragraph 24; *Geffroy*, paragraph 23; and *Guimont*, paragraph 31).

82 It is therefore important to ascertain whether the addition to cocoa and chocolate products of vegetable fats other than cocoa butter substantially alters their composition, so that they no longer present the characteristics expected by consumers buying products bearing the name 'chocolate' and that a label providing appropriate information as to their composition cannot be considered sufficient to avoid confusion in the minds of consumers.

83 The characteristic element of cocoa and chocolate products within the meaning of Directive 73/241 is the presence of a certain minimum cocoa and cocoa butter content.

84 In particular, it should be recalled that, in accordance with point 1.16 of Annex I to Directive 73/241, products meeting the definition of chocolate within the meaning of the directive must contain a minimum total dry cocoa solids content of 35%, with at least 14% of dry non-fat cocoa solids and 18% of cocoa butter.

- 85 The percentages set by Directive 73/241 are minimum contents which must be complied with by all chocolate products manufactured and marketed under the name 'chocolate' in the Community, independently of whether the legislation of the Member State of production authorises the addition of vegetable fats other than cocoa butter.
- 86 In addition, it must be pointed out that, since Directive 73/241 explicitly permits Member States to authorise the use, in the manufacture of cocoa and chocolate products, of vegetable fats other than cocoa butter, it cannot be claimed that the products to which those fats have been added, in compliance with that directive, are altered to the point where they no longer fall into the same category as those which do not contain such fats.
- 87 Therefore, the addition of vegetable fats other than cocoa butter to cocoa and chocolate products which satisfy the minimum contents required by Directive 73/241 cannot substantially alter the nature of those products to the point where they are transformed into different products.
- 88 It follows that the inclusion in the label of a neutral and objective statement informing consumers of the presence in the product of vegetable fats other than cocoa butter would be sufficient to ensure that consumers are given correct information.
- 89 In those circumstances, the obligation to change the sales name of those products which is imposed by the Italian legislation does not appear to be necessary to satisfy the overriding requirement of consumer protection.

- 90 It follows that that legislation, to the extent that it requires the name of products which are lawfully manufactured and marketed in other Member States under the sales name 'chocolate' to be altered for the sole reason that they contain vegetable fats other than cocoa butter, is incompatible with Article 30 of the Treaty.
- 91 In the light of all the foregoing considerations, it must be held that, by prohibiting cocoa and chocolate products which comply with the requirements as to minimum content laid down in point 1.16 of Annex I to Directive 73/241 to which vegetable fats other than cocoa butter have been added, and which are lawfully manufactured in Member States which authorise the addition of such fats, from being marketed in Italy under the name used in the Member State of production, and by requiring that those products may only be marketed under the name 'chocolate substitute', the Italian Republic has failed to fulfil its obligations under Article 30 of the Treaty.

Costs

- 92 Article 69(2) of the Rules of Procedure provides that 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, the Italian Republic must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. Declares that, by prohibiting cocoa and chocolate products which comply with the requirements as to minimum content laid down in point 1.16 of Annex I 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 to which vegetable fats other than cocoa butter have been added, and which are lawfully manufactured in Member States which authorise the addition of such fats, from being marketed in Italy under the name used in the Member State of production, and by requiring that those products may only be marketed under the name ‘chocolate substitute’, the Italian Republic has failed to fulfil its obligations under Article 30 of the Treaty (now, after amendment, Article 28 EC);
2. Orders the Italian Republic to pay the costs.

Puissochet

Schintgen

Skouris

Colneric

Cunha Rodrigues

Delivered in open court in Luxembourg on 16 January 2003.

R. Grass

J.-P. Puissochet

Registrar

President of the Sixth Chamber