OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 15 July 2010[1]

I — Introduction

1. The use of wine in cooking is a tradition going back thousands of years in Europe. It is said that even the Roman gourmet Marcus Gavius Apicius, [2] to whom one of the earliest cookery books is attributed, [3] used wine in his sauces. [4]

2. In this case, indeed, the dispute is not so much about the correct use of wine in cooking. The parties to the main proceedings even expressly agree that, with the correct use of wine according to a traditional recipe — such as for the preparation of a *Bœuf Bourgignon* — not more than 5 % volume of alcohol is contained in the end product.

3. The subject-matter of these preliminary ruling proceedings is, rather, the question whether a wine, port or cognac intended exclusively for cooking is subject to the excise duty on alcohol and alcoholic beverages that is harmonised under European Union law, and under what conditions any exemption from that excise duty must be granted. There does not seem to be a standard practice among the Member States in this regard.

4. The cooking wine, cooking port and cooking cognac at issue in these proceedings are spirits to which salt and pepper have been added by the manufacturer, so that they can be used — in accordance with their purpose — only in the preparation of foods and are unfit for consumption as beverages. The United Kingdom tax authorities [5] nevertheless take the view that those products are subject to excise duty on alcohol. They therefore seized, on importation into the United Kingdom from France, a lorry load of cooking wine, cooking port and cooking cognac (hereinafter

1 — Original language: German.

2 — Marcus Gavius Apicius is said to have lived in ancient Rome in the first century AD. Pliny the Elder describes him in his 'Natural History' as the greatest of all spendthrifts and gluttons (*nepotum omnium altissimus gurges*; see Plin. nat. hist. 10, 133), who was born into every kind of luxury (*ad omne luxus ingenium natus*; see Plin. nat. hist. 9, 66).

3 — *De re coquinaria* (On the Subject of Cooking). In the version handed down to us, however, that collection of recipes probably dates from the third or fourth century AD and Apicius was therefore probably not its author.

4 — See, for example, the recipe attributed to Apicius for a *ius in elixam omnem* (sauce for all boiled dishes), in: *De re coquinaria*, Book VII, Chapter VI.

5 — The Commissioners for Her Majesty's Revenue and Customs (Excise Duties).

also 'cooking liquors') on which no duty had been paid and which was destined for the London wholesaler Répertoire Culinaire Ltd. Répertoire Culinaire is now in dispute with the United Kingdom authorities over the restoration of those goods.

5. The outcome of this case would actually seem obvious, as the Court has affirmed the liability to excise duty of cooking wine once already in *Gourmet Classic*.[6] However, here the Court is expressly being requested to reconsider its legal assessment in that case and to expand on it in some respects.

II — Legal framework

A — *European Union law*

6. The framework for this case in European Union law is determined by Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products[7] and by Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages.[8] In addition, parts of what is known as the Combined Nomenclature are also relevant to the outcome of this case.

1. Directive 92/12

7. The general provisions of Directive 92/12 determine inter alia the Member State in which and the point in time at which excise duty becomes chargeable on products subject to excise duty. In that regard, Article 6(1) of Directive 92/12 provides:

'Excise duty shall become chargeable at the time of release for consumption …'

8. The relevant parts of Article 7 of Directive 92/12 are worded as follows:

'1. In the event of products subject to excise duty and already released for consumption in one Member State being held for commercial purposes in another Member State, the excise duty shall be levied in the Member State in which those products are held.

6 — Case C-458/06 [2008] ECR I-4207.

7 — OJ 1992 L 76, p. 1.

8 — OJ 1992 L 316, p. 21.

2. To that end, without prejudice to Article 6, where products already released for consumption as defined in Article 6 in one Member State are delivered, intended for delivery or used in another Member State for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, excise duty shall become chargeable in that other Member State.

…'

2. Directive 92/83

9. Section V of Directive 92/83 contains, in Articles 19 to 23, provisions on the taxation of ethyl alcohol. Article 19(1) of the Directive states in regard to that:

'Member States shall apply an excise duty to ethyl alcohol in accordance with this Directive.'

10. Article 20 of Directive 92/83 has the following wording:

'For the purposes of this Directive the term "ethyl alcohol" covers:

— all products with an actual alcoholic strength by volume exceeding 1.2 % volume which fall within CN codes 2207 and 2208, even when those products form part of a product which falls within another chapter of the CN;

— products of CN codes 2204, 2205 and 2206 which have an actual alcoholic strength by volume exceeding 22 % vol.;

— potable spirits containing products, whether in solution or not.'

11. Article 27 of Directive 92/83 is one of the provisions in Section VII concerning exemptions, and the relevant parts of it read as follows:

'1. Member States shall exempt the products covered by this Directive from the

harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

…

(e) when used for the production of flavours for the preparation of foodstuffs and non-alcoholic beverages with an alcohol strength not exceeding 1.2 % vol.;

(f) when used directly or as a constituent of semi-finished products for the production of foodstuffs, filled or otherwise, provided that in each case the alcoholic content does not exceed 8.5 litres of pure alcohol per 100 kg of the product for chocolates, and 5 litres of pure alcohol per 100 kg of the product for other products.

…

6. Member States shall be free to give effect to the exemptions mentioned above by means of a refund of excise duty paid.'

3. The Combined Nomenclature

12. Headings Nos 2204 to 2208 of the Combined Nomenclature (CN),[9] to which reference is made in Article 20 of Directive 92/83, form part of Chapter 22 of the CN ('Beverages, Spirits and Vinegar') and cover the following products:

'2204	Wine of fresh grapes …
2204 10	– Sparkling wine
…	
2204 2	– Other wine … in containers holding 2 litres or less
…	
	– – – – – Of an actual alcoholic strength not exceeding 15 % vol
…	
	– – – – – – – White

9 — The CN is set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1). The relevant version of the CN is that which was in force at the date of the adoption of Directive 92/83, that is, on 19 October 1992 (see the fourth recital in the preamble to Directive 92/83); that version is based on Commission Regulation (EEC) No 2587/91 of 26 July 1991 (OJ 1991 L 259, p. 1) and entered into force on 1 January 1992.

…		2207	Undenatured ethyl alcohol of an alcoholic strength by volume of 80 % vol. or higher; ethyl alcohol and other spirits, denatured, of any strength:
	– – – – – – – Other		
…		2207 10 00	– Undenatured ethyl alcohol of an alcoholic strength by volume of 80 % vol. or higher
	– – – – – Of an actual alcoholic strength by volume exceeding 15 % but not exceeding 22 % vol.:	2207 20 00	– Ethyl alcohol and other spirits, denatured, of any strength
2204 21 89	– – – – – – – Port	2208	Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 % vol.; spirits, liqueurs and other spirituous beverages; compound alcoholic preparations of a kind used for the manufacture of beverages:
…			
2205	Vermouth and other wine of fresh grapes flavoured with plants or aromatic substances …	2208 20	– Spirits obtained by distilling grape wine or grape marc
…			– – in containers holding 2 litres or less:
2206	Other fermented beverages (for example, cider, perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included …	2208 20 12	– – – Cognac
		…	
…			– – Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 % vol., in containers holding:

	– – – 2 litres or less	2103 90	– Other
…		…	
2209	Vinegar	2103 90 90	– – Other
…’		…’	

13. The introduction to Chapter 22 of the CN contains inter alia the following under the heading ‘Notes’:

‘1. This chapter does not cover:

(a) products of this chapter (other than those of heading No 2209) prepared for culinary purposes and thereby rendered unsuitable for consumption as beverages (generally heading No 2103) …’

14. Reference should additionally be made to CN heading No 2103, which is in Chapter 21 of the CN (‘Miscellaneous Edible Preparations’) and covers the following goods:

‘2103	Sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard:
…	

B — *National law*

15. The relevant provision of United Kingdom law is section 4 of Chapter 4 of the Finance Act 1995 (‘the FA 1995’). [10] That provision, which, according to the parties to the proceedings, was enacted in order to implement Directive 92/83, creates a procedure for the refund of excise duty on alcoholic liquor. It is worded as follows:

‘Alcoholic ingredients relief

(1) Subject to the following provisions of this section, where any person proves to the satisfaction of the Commissioners that any dutiable alcoholic liquor on which duty has been paid has been —

10 — [Not applicable in the English text].

(a) used as an ingredient in the production or manufacture of a product falling within subsection (2) below …

…

he shall be entitled to obtain from the Commissioners the repayment of the duty paid thereon.

(2) The products falling within this subsection are —

…

(c) … food for human consumption which contains alcohol such that 100 kilograms of the food would not contain more than 5 litres of alcohol.

(3) A repayment of duty shall not be made under this section in respect of any liquor except to a person who —

(a) is the person who used the liquor as an ingredient in a product falling within subsection (2) above or, as the case may be, who converted it into vinegar;

(b) carries on a business as a wholesale supplier of products of the applicable description falling within that subsection or, as the case may be, of vinegar;

(c) produced or manufactured the product or vinegar for the purposes of that business;

(d) makes a claim for the repayment in accordance with the following provisions of this section; and

(e) satisfies the Commissioners as to the matters mentioned in paragraphs (a) to (c) above and that the repayment claimed does not relate to any duty which has been repaid or drawn back prior to the making of the claim.

(4) A claim for repayment under this section shall take such form and be made in such manner, and shall contain such particulars, as the Commissioners may direct, either generally or in a particular case.

(5) Except so far as the Commissioners otherwise allow, a person shall not make a claim for a repayment under this section unless —

(a) the claim relates to duty paid on liquor used as an ingredient or, as the case may be, converted into vinegar in the course of a period of three months ending not more than one month before the making of the claim; and

(b) the amount of the repayment which is claimed is not less than [GBP] 250.

(6) The Commissioners may by order made by statutory instrument increase the amount for the time being specified in subsection (5) (b) above …

…'

III — Facts and main proceedings

16. Répertoire Culinaire Ltd. carries on a food wholesale business in London.

17. On 10 July 2002, a vehicle and its trailer were intercepted by officers of the United Kingdom customs authorities in their customs control zone [11] in Coquelles (France). An inspection of the vehicle showed that it was loaded with a number of pallets of white wine, red wine, port and cognac which were destined for Répertoire Culinaire. In detail, the following were found:

— five pallets each containing 70 boxes of white wine (alcoholic strength 11% volume), each box containing eight litres of wine, amounting to 2 800 litres of white wine in total,

— five pallets containing the same quantity of red wine (alcoholic strength 11% volume),

— one pallet containing 20 boxes of port (alcoholic strength 19% volume), each box containing eight litres of port, amounting to a total of 160 litres of port, and

— 10 boxes each containing eight litres of cognac (alcoholic strength 40% volume), that is, a total of 80 litres of cognac.

18. Further enquiries established the following: the packaging on the cognac stated 'undrinkable', and had 'ingredients' of 1%. The wine had ingredients of 2%. The port did not

11 — United Kingdom Customs Control Zone.

have a label showing ingredients. In addition, for each individual product, the invoice from the French supplier, addressed to Répertoire Culinaire, included the words 'salé — poivré' [12] and the customs code 2103 90 90 89. [13]

19. There is agreement between the parties to the main proceedings that the goods loaded were 'cooking wine', 'cooking port' and 'cooking cognac', that is to say, wine, port and cognac to which, in each case, salt and pepper had been added during manufacture. Through the addition of salt and pepper, the products become unfit for consumption as beverages, [14] although they can be used for culinary purposes. It is not possible, as a matter of economic practicality, either to reverse the mixing process to separate the pepper and salt or to isolate the alcoholic content of the products in its entirety.

20. The cooking wine consists of wine formed exclusively from a process of fermentation. According to the shared view of the parties, cooking wine, when used as an ingredient in accordance with a recognised recipe, always yields a final product with an alcoholic content of less than 5 % volume.

21. All the goods were detained by the United Kingdom customs authorities on the grounds that there was no accompanying administrative document [15] and no evidence that United Kingdom excise duty had been accounted for. On 16 July 2002 they were seized as liable to forfeiture. Restoration of the goods, requested by Répertoire Culinaire, was refused. Upon an objection by Répertoire Culinaire, the decision refusing restoration was upheld, following a review of the facts, by decision on that objection of 17 October 2002. The ground stated for the latter decision was that the goods were liable, as alcohol, to United Kingdom excise duty. [16]

22. By document dated 4 November 2002, Répertoire Culinaire lodged an appeal against the decision on the objection. The proceedings are now pending before the First-Tier Tribunal (Tax), [17] the referring court.

IV — Reference for a preliminary ruling and proceedings before the Court of Justice

23. By order of 24 April 2009, received at the Court on 8 May 2009, the First-Tier Tribunal

12 — 'salt and pepper added'.

13 — A different customs code, '2103 90 90 59', was provided by an employee of the freight forwarder, but that was probably a mistake, because no such code exists.

14 — According to the order for reference, the documents produced during the administrative proceedings show that the wine was rendered undrinkable by the addition of 10 grams of salt and 10 grams of pepper per litre.

15 — Accompanying Administrative Document (AAD).

16 — On 18 July 2002, two assessments for excise duty were issued: one for GBP 53 853 for stock sold and another for GBP 5 884 for stock on hand. Those assessments were upheld by the London Appeals and Reconsiderations Team on 27 September 2002.

17 — [Not applicable in the English text].

(Tax) stayed its proceedings and referred the following four questions to the Court for a preliminary ruling:

'(1) Are cooking wine and cooking port subject to excise duty under Directive 92/83/EEC in the Member State of importation on the grounds that they are within the definition of "ethyl alcohol" under the first indent of Article 20 of that directive?

(2) Is it consistent with the Member State's obligation to give effect to the exemption contained in Article 27(1)(f) of Directive 92/83, when read with Article 27(6), and/or with Article 28 EC and/or with the direct effect of those obligations and/or with the principles of equal treatment and proportionality to restrict the exemption for cooking wine, cooking port and cooking cognac to cases where alcoholic beverages have been used as an ingredient and to restrict the applicants for exemption to those persons who have used the alcoholic beverages as an ingredient in products and/or those persons who carry on business as wholesalers of such products and/or they produced or manufactured such products for the purposes of that business and subject to the further conditions that claims be made within an overall period of four months from the payment of duty and that the amount of the repayment be not less than [GBP] 250?

(3) Should the cooking wine and cooking port, if liable to duty under the first indent of Article 20 of Directive 92/83, and/or the cooking cognac, subject to the present appeal, be treated as exempt from excise duty at the point of manufacture under Article 27(1)(f) [of Directive 92/83 and, alternatively, Article 27(1)(e) of Directive 92/83]?

(4) In the light of Articles 10 [EC] and 28 EC, what effect, if any, does it have on Member States' obligations under [Articles 20 and 27(1)(f) or, alternatively, Article 27(1)(e) of] Directive 92/83 if cooking wine, cooking port and cooking cognac have been released by the Member State of manufacture from the excise movement system under … Directive 92/12/EEC … into free movement within the European Union?'

24. In the proceedings before the Court, Répertoire Culinaire and the European Commission made written and oral submissions. In addition, the Polish and Portuguese Governments took part in the written procedure; the French Government made oral observations at the hearing on 10 June 2006. [18]

18 — On that occasion, the French Government expressed a view only on the first question referred.

V — Assessment

25. As part of the general arrangements for products subject to excise duty, as introduced by Directive 92/12, Directive 92/83 obliges the Member States to levy an excise duty harmonised under European law on alcohol and alcoholic beverages. The following are to be taxed: beer (Section I of Directive 92/83), wine (Section II of Directive 92/83), 'fermented beverages other than wine and beer' (Section III of Directive 92/83), 'intermediate products' (Section IV of Directive 92/83) and 'ethyl alcohol' (Section V of Directive 92/83).

A — *First question: 'ethyl alcohol' within the meaning of Directive 92/83*

26. At first sight, it may be tempting to assume that 'cooking wine' is subject, like any other wine, to the duty on wine under Section II of Directive 92/83. That assumption is indeed correct where the product in question is ordinary, commercially available wine which has perhaps not found favour with the consumer in terms of taste and is therefore referred to colloquially as 'cooking wine'. Such a wine is and remains a beverage; it is merely regarded as inferior in the subjective judgement of the consumer and is therefore put to another use.

27. However, that does not apply to the cooking liquors at issue here. According to the national court, which alone has jurisdiction to establish and assess the facts, [19] those liquors are, owing to the addition of salt and pepper, *unfit for consumption as beverages*. That is the factual position which must form the basis of the reply to the national court's request for a preliminary ruling, however much the Polish Government may regard the products in question as drinkable. There is also agreement among the parties to the main proceedings in this instance that the cooking liquors at issue may, at most, fall within the scope of Section V ('ethyl alcohol'), but not within the scope of any of the other sections of Directive 92/83.

28. By its first question, the referring court wishes in essence to know whether cooking wine and cooking port which have been mixed with salt and pepper and are therefore unfit for consumption as beverages can be included under the concept of ethyl alcohol within the meaning of Article 20 of Directive 92/83, with the result that they are subject to the harmonised excise duty on alcohol. Cooking cognac is not covered by this first question.

19 — Settled case-law; see, for example, Case 36/79 *Denkavit Futtermittel* [1979] ECR 3439, paragraph 12; Case C-265/04 *Bouanich* [2006] ECR I-923, paragraph 54; and Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273, paragraph 41.

1. Preliminary remark

29. The colloquial synonyms sometimes used for the term 'ethyl alcohol' are 'ethanol', 'spirit' or simply 'alcohol'. However, the question whether a product is 'ethyl alcohol' within the meaning of the legislation on excise duty is governed, not by the colloquial meaning of that term, but only by the definition laid down by the European Union legislature in Article 20 of Directive 92/83, which makes precisely three categories of products subject, as ethyl alcohol, to the harmonised excise duty. Each of those categories is covered by an indent in that provision.

30. From the very start, 'ethyl alcohol' in the form of *potable spirits* (Article 20, third indent, of Directive 92/83) cannot be taken to include preparations such as the cooking wine and cooking port at issue in this case, because they are not suitable for drinking, on account of the addition of salt and pepper.

31. Nor can cooking wine or cooking port be classified as products of CN codes 2204, 2205 and 2206 — put in simplified terms: *wine of fresh grapes, vermouth* and *other fermented beverages* — (Article 20, second indent, of Directive 92/83), because those products too have in common the fact that they are beverages. Apart from that, the alcoholic strength by volume of cooking wine, at 11% volume, and that of cooking port, at 19% volume, is in each case below the required minimum alcoholic strength ('exceeding 22% vol.') which would be necessary under the second indent of Article 20 of Directive 92/83 for them to be considered ethyl alcohol for excise purposes.

32. It remains to be examined, of course, whether cooking wine and cooking port such as those seized in this case may fall within the first indent of Article 20 of Directive 92/83. The following observations deal with this question.

2. Ethyl alcohol within the meaning of Article 20, first indent, of Directive 92/83

33. Under Article 20, first indent, of Directive 92/83 the term 'ethyl alcohol' covers 'all products with an actual alcoholic strength by volume exceeding 1.2% volume which fall within CN codes 2207 and 2208, even when those products form part of a product which falls within another chapter of the CN'.

34. In *Gourmet Classic*, the Court held that that provision is applicable in relation to cooking wine. [20] However, the referring court

20 — Cited in footnote 6, paragraph 39.

is asking the Court to reconsider its assessment in that case. I agree with that.

35. It is undoubtedly true that both cooking wine, at 11 % volume, and cooking port, at 19 % volume, reach the minimum alcoholic strength exceeding 1.2 % volume required in Article 20, first indent, of Directive 92/83. However, the question whether those two cooking liquors can be classified within either CN heading No 2207 or CN heading No 2208 referred to by the Union legislature requires more detailed examination.

— CN heading No 2207

36. CN heading No 2207 covers, firstly, undenatured ethyl alcohol of an alcoholic strength by volume of 80 % volume or higher (subheading No 2207 10 00) and, secondly, ethyl alcohol and other spirits, denatured, of any strength (subheading No 2207 20 00). The cooking liquors at issue here cannot be classified within either of those subheadings.

37. By definition, subheading No 2207 10 00 cannot apply in this case because the alcoholic strength of the seized cooking liquors is far below the minimum alcoholic strength of 80 % volume required for that purpose.

38. Subheading No 2207 20 00 must also be ruled out, since the cooking liquors do not consist of denatured ethyl alcohol or other spirits. Denaturing is a process designed to render alcohol toxic so that it cannot be drunk or re-converted for use in food products. [21] It is true that, although, in this case, the cooking liquors were rendered *unfit for consumption as beverages*, they remain usable for the production of foodstuffs. Moreover, the salt and pepper added for that purpose are not denaturants as recognised within the European Union for the denaturing of alcohol. [22]

— CN heading No 2208

39. Next, so far as CN heading No 2208 is concerned, at the material time [23] it covered three types of spirituous beverages or spirits: 'undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 % vol.; spirits, liqueurs and other spirituous

21 — Case C-482/98 *Italy* v *Commission* [2000] ECR I-10861, paragraphs 21 and 22.

22 — See, in that regard, Commission Regulation (EC) No 3199/93 of 22 November 1993 on the mutual recognition of procedures for the complete denaturing of alcohol for the purposes of exemption from excise duty (OJ 1993 L 288, p. 12). Under that regulation, denaturing in France, the country of origin of the cooking liquors, requires the addition of methylene and isopropyl alcohol. In the United Kingdom, the country of destination of the cooking liquors, 'wood naphta' and crude pyridine are used. Under that regulation, salt and pepper are not recognised as denaturants anywhere in the European Union.

23 — The relevant version of the CN is that which was in force at the date of the adoption of Directive 92/83, that is, on 19 October 1992 (see the fourth recital in the preamble to Directive 92/83).

beverages; compound alcoholic preparations of a kind used for the manufacture of beverages.' [24]

40. The cooking liquors covered by the first question (cooking wine and cooking port) are neither spirits (CN subheading No 2208 20) nor liqueurs (CN subheading No 2208 70). Nor can cooking wine and cooking port be regarded as 'other spirituous beverages' if, owing to the addition of salt and pepper, they are unsuitable for consumption as beverages.

41. Nor can cooking wine and cooking port be included within the category of 'compound alcoholic preparations of a kind used for the manufacture of beverages'. That is because these cooking liquors are clearly intended to be used only in the preparation of foods and not to be used to manufacture beverages.

42. At most, classification of the cooking wine and cooking port at issue within CN subheading 2208 90 91 'undenatured ethyl alcohol, of an alcoholic strength by volume of less than 80% vol., in containers holding 2 litres or less' could be considered.

43. However, the classification of goods in the CN must not be based solely on the wordings of the individual CN headings. It must also be determined according to the section and chapter notes. [25]

44. It follows from Note 1(a), set out by way of introduction to Chapter 22 of the CN, that products prepared for culinary purposes and therefore unsuitable for consumption as beverages are not covered by Chapter 22, [26] but must be classified as Miscellaneous Edible Preparations within CN heading No 2103. [27]

45. The Court itself expressly acknowledges in *Gourmet Classic* that cooking wine is an

24 — The current wording of CN heading No 2208 no longer includes the reference to 'compound alcoholic preparations of a kind used for the manufacture of beverages'. That change in the wording of CN heading No 2208 goes back to Commission Regulation (EC) No 2448/95 of 10 October 1995 (OJ 1995 L 259, p. 1); see, most recently, the CN in the version contained in Annex I to Commission Regulation (EC) No 948/2009 of 30 September 2009 (OJ 2009 L 287, p. 1).

25 — See the second sentence of point A(1) of the General Rules set out in Part One, Section I of the CN.

26 — The only exception to this, as stated in Note 1(a), is vinegar, for which a specific heading is included in Chapter 22 of the CN (CN heading No 2209).

27 — The Explanatory Notes of the World Customs Organisation (WCO) to Chapters 21 and 22 of the Harmonised System (HS), to which the CN Headings correspond, are even clearer. In the WCO's Explanatory Notes to heading No 2103, cooking wines and cooking cognac are expressly referred to as examples of products covered, whereas the Explanatory Notes to heading No 2208 expressly mention cooking wines and cooking cognac as examples of the products excluded from it. Those Explanatory Notes are available on the Internet at http://harmonizedsystem.wcoomdpublications.org (last visited on 6 May 2010). According to settled case-law, they are an important aid to the interpretation of the scope of the various tariff headings of the CN but do not have legally binding force (Case C-370/08 *Data I/O* [2010] ECR I-4401, paragraph 30, with further references).

edible preparation which, as such, falls not within Chapter 22, but within Chapter 21 of the CN. [28]

46. Cooking wine and cooking port can therefore, as Répertoire Culinaire correctly notes, be regarded neither as products within the meaning of CN code 2207 nor as products within the meaning of CN code 2208.

— The 'product within the product'

47. Nevertheless, in *Gourmet Classic* the Court held that the fact that cooking wine is regarded as an edible preparation falling within Chapter 21 of the CN 'does not affect' the assessment of liability to excise duty. It pointed out that Article 20, first indent, of Directive 92/83 applies even when the products covered by that provision form *part of a product* which falls within another chapter of the Combined Nomenclature.

48. Based on that consideration, the Court held that 'the alcohol contained in cooking wine, if it has an alcoholic strength exceeding 1.2 % by volume, constitutes ethyl alcohol within the meaning of the first indent of Article 20 of Directive 92/83, which is, without prejudice to the exemption provided for in Article 27(1)(f) of that directive, subject to the harmonised excise duty'. [29]

49. In other words, the Court treats the pure alcohol component of the cooking wine as an excisable 'product within the product' as referred to in the second phrase of Article 20, first indent, of Directive 92/83.

50. The Commission has also put forward the same view. It argues that Article 20 of Directive 92/83 is a general residual category which, in quite general terms, makes products containing alcohol subject to the harmonised excise duty if they are not already otherwise covered by the directive.

51. I am not convinced by that approach. It has no basis either in the wording of

28 — *Gourmet Classic*, cited in footnote 6, paragraph 35; to the same effect, see the Commission's guidelines, which the Excise Committee accepted almost unanimously at its meeting of 26 and 27 November 2001 (document CED No 372 Final of 11 November 2002).

29 — *Gourmet Classic*, cited in footnote 6, paragraph 39; to the same effect, see the Commission's guidelines, to which the Committee on Excise Duties agreed almost unanimously at its meeting on 26 and 27 November 2001 (CED document No 372 final of 11 November 2002).

Article 20 or in the aims and overall context of Directive 92/83.

52. If the European Union legislature had wanted to regard as excisable ethyl alcohol *all products* in which certain quantities of alcohol can be detected, a complex body of rules such as Directive 92/83 would not have been needed. Clearly, however, the intention was to define only certain alcoholic beverages and certain products containing alcohol on which all the Member States are required to levy the harmonised excise duty. [30] Nowhere in Directive 92/83 is there any basis for the assumption that products which are not covered by any other provision of the directive should in any event always fall within Article 20. Article 20 itself is also clearly based on the premise that *not all alcohol* is to be taxed as ethyl alcohol, but only the three groups of products containing alcohol which are specified in that article. [31]

53. Under Article 20, first indent, of Directive 92/83, the mere fact that a product such as cooking wine or cooking port contains alcohol is a necessary ('alcoholic strength by volume … 1.2% volume') but not sufficient condition for the application of excise duty. Under that provision, it is also necessary for the alcohol to be present in the form of a particular product or part-product falling within CN codes 2207 and 2208.

54. Considered on its own, however, the alcohol component of cooking wine or cooking port is simply not a self-contained (part-) product. According to all the information available to us, cooking wine and cooking port are not manufactured synthetically according to the formula '(pure) alcohol plus water plus flavouring ingredients'. On the contrary, they are ordinary wine and port which have been produced in a fermentation process and to which only salt and pepper have been added. Moreover, this was confirmed by all the parties in response to a question at the hearing.

55. The 'product within the product', if there be one, is thus not simply alcohol, but wine or port. Wine or port are the starting point for the manufacture of cooking wine or cooking port. Consequently, only wine or port can be regarded as (part-) products which form 'part of a[nother] product which falls within another chapter of the CN' within the meaning of Article 20, first indent, second phrase,

30 — See also the third recital ('to determine common definitions *for all the products concerned*') and the fourth recital ('to base such definitions on those set out in the combined nomenclature in force …') in the preamble to Directive 92/83; emphasis added.

31 — See also the 15th recital in the preamble to Directive 92/83 ('all ethyl alcohol *as defined in this Directive*'); emphasis added.

of Directive 92/83, namely cooking wine or cooking port.

56. Wine and port for their part are not products falling within CN heading 2207 or 2208. On the contrary, they must both be classified within CN heading 2204. [32] Even if it were wished to regard wine or port as the 'product within the product', Article 20, first indent, of Directive 92/83 would not apply, because the 'product within the product' cannot be assigned to either of the CN codes 2207 and 2208 listed exhaustively in that provision. [33]

57. Whether and under what conditions products falling within CN heading 2204 (wine and port) are subject to excise duty as ethyl alcohol follows only from the *second indent*, not from the *first indent*, of Article 20 of Directive 92/83.

58. It is inconsistent with the principle of legal certainty to apply Article 20, first indent, of Directive 92/83, contrary to its wording, to products falling within CN heading No 2204, such as wine and port, as well. The principle of legal certainty, which is one of the fundamental principles of European Union law, [34] requires that rules of law be clear and precise and that their application be foreseeable by the individual. That requirement must be observed all the more strictly in the case of rules with an adverse effect for the individual, not least where they are liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them. [35]

59. All in all, I therefore conclude that the Court erred when, in *Gourmet Classic*, it classified the 'alcohol contained in cooking wine' as 'ethyl alcohol within the meaning of the first indent of Article 20 of Directive 92/83.' [36] It should not maintain that assessment in the present case.

32 — Still wine in containers holding two litres or less, produced in the European Union, of an alcoholic strength not exceeding 15 % vol., falls within CN subheadings Nos 2204 21 11 to 2204 21 84, port of an actual alcoholic strength exceeding 15 % vol. but not exceeding 22 % vol. within CN subheading No 2204 21 89.

33 — At best, cognac, which is the starting point for the manufacture of cooking cognac, may, as spirits, fall within CN code 2208 20 12. However, as already mentioned at the beginning, cooking cognac is not covered by this first question.

34 — Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 30, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 68.

35 — See, in that regard, in general, Case C-158/07 *Förster* [2008] ECR I-8507, paragraph 67, and Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, paragraph 45, and, specifically as regards rules entailing financial consequences, Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 24; Case C-288/07 *Isle of Wight Council and Others* [2008] ECR I-7203, paragraph 47; and Case C-201/08 *Plantanol* [2009] ECR I-8343, paragraph 46.

36 — Cited in footnote 6, paragraph 39.

60. As it is, the significance of the judgment in *Gourmet Classic* is qualified anyway by the fact that, on that occasion, the admissibility of the question referred was the focus of interest; the Advocate General's Opinion was even concerned exclusively with the question of admissibility. [37] On the substance, numerous arguments with which the national court and the parties, in particular Répertoire Culinaire, have dealt in great detail *in the present proceedings*, were not discussed before the Court in that case. That fact alone should be a reason not to attach too much significance to the judgment in *Gourmet Classic*. [38]

61. Moreover, in European Union law, the Court's judgments do not constitute binding precedents. [39] Although the Court is naturally hesitant to depart from previous judgments, [40] it has had occasion in the past, in a number of important cases, to re-examine its earlier case-law and, if necessary, amend or clarify it. [41] I recommend that such a course be followed in this case also.

62. Should the Court decide, in the present case, in accordance with my suggestion, to depart from its judgment in *Gourmet Classic*, I would not consider it necessary for it to restrict the effects of its judgment to the future. According to settled case-law, such a restriction of the effects of a judgment constitutes the absolute exception; it is justified only if it appears absolutely necessary for reasons of legal certainty and the protection of legitimate expectations. [42] That does not apply here. Any claims for recovery of excise duty on cooking wine or cooking port paid in the past should remain within very manageable limits. Moreover, it was already possible, even after the judgment in *Classic Gourmet*, to apply for an exemption or refund of duty under Article 27(1)(f) of Directive 92/83. Thus, even before now, the tax authorities of the Member States have already in many cases had to be prepared for the fact that ultimately they would not be able to collect, or would have to refund, the excise duty accruing on cooking wine and cooking port.

3. Interim conclusion

63. In summary, I propose the following answer to the first question: Wine and port

37 — Opinion of Advocate General Bot in *Gourmet Classic*, cited in footnote 6.

38 — See, to that effect, Case C-388/95 *Belgium* v *Spain* [2000] ECR I-3123, '*Rioja*', in particular, paragraphs 51 and 52.

39 — Opinion of Advocate General Trstenjak in Case C-331/05 P *Internationaler Hilfsfonds* v *Commission* [2007] ECR I-5475, point 85.

40 — Opinions of Advocates General Lagrange in Joined Cases 28/62 to 30/62 *Da Costa and Others* [1963] ECR 31, at p. 42, and Poiares Maduro in Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, points 28 and 29.

41 — Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 14, and Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 58.

42 — Case 24/86 *Blaizot and Others* [1988] ECR 379, paragraph 28; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 67; and Case C-73/08 *Bressol and Others and Chaverot and Others* [2010] ECR I-2735, paragraph 91.

which, for the purpose of being used as cooking wine or cooking port, have been mixed with so much salt and pepper that they are unfit for consumption as beverages do not fall within the definition of ethyl alcohol under Article 20, first indent, of Directive 92/83.

B — *The second, third and fourth questions: the possible exemptions for cooking liquors and the form of those exemptions*

64. The second, third and fourth questions concern the possible exemptions for cooking liquors and their form.

65. According to my suggested answer to the first question,[43] the seized cooking wine and cooking port are not subject to excise duty, so that in that respect the problem of any exemption does not arise. However, the second, third and fourth questions are in any event still relevant in relation to the seized cooking cognac because it is subject to excise duty under Article 20, first indent, of Directive 92/83.[44]

1. The possible exemptions (third question)

66. First of all, in the third question, the referring court asks on what legal basis an exemption of cooking liquors from the harmonised excise duty should be granted under Directive 92/83.[45]

67. There are two possible exemptions. Firstly, under Article 27(1)(e) of Directive 92/83, an exemption from excise duty is to be granted in respect of alcohol and alcoholic beverages which are used for the production of flavours for the preparation of foodstuffs and non-alcoholic beverages with an alcoholic strength not exceeding 1.2 % volume. Secondly, under Article 27(1)(f) of Directive 92/83, an exemption from excise duty arises inter alia when alcohol or alcoholic products are used for the production of foodstuffs, provided that the alcoholic content does not exceed 5 litres of pure alcohol per 100 kg of the product.

43 — See above, points 28 to 63 of this Opinion.

44 — Cooking cognac contains cognac, that is, spirits falling within CN heading No 2208, with the result that it is subject, as ethyl alcohol, pursuant to Article 20, first indent, of Directive 92/83, to the harmonised excise duty on alcohol.

45 — In so far as the third question is predicated on the point in time at which exemption from excise duty exists ('be treated as exempt from excise duty at the point of manufacture'), it overlaps with the fourth question and is discussed together with it in that context (points 81 to 93 of this Opinion).

68. First, as regards Article 27(1)(e) of Directive 92/83, it is certainly not inconceivable from the outset that cooking liquors may be used for the production of flavours for the preparation of foodstuffs. According to all the information before the Court, however, that is not the purpose for which the cooking liquors are used in this case, and in any event not the primary purpose.

69. The cooking liquors at issue in these proceedings are in fact intended to be used directly in the production of foodstuffs, not in a process prior to cooking, in which only flavours are generated. Even sauces which are prepared using cooking liquors are not flavours within the meaning of Article 27(1)(e) of Directive 92/83. On the contrary, such sauces are themselves foodstuffs which are either consumed as an ingredient of meals or served with them.

70. Consequently, the relevant provision for the exemption of cooking liquors such as those at issue here is not Article 27(1)(e) but Article 27(1)(f) of Directive 92/83. This is also supported by the fact that wine, port and cognac are not used in cooking exclusively as flavouring ingredients, but perform a wider function, such as in simmering meat dishes or in flambés. The Commission correctly drew attention to this. [46]

46 — The Commission mentions that cooking liquors are used for tenderising meat.

71. The Court itself acknowledged in its judgment in *Gourmet Classic* that an exemption of cooking liquors from excise duty may apply under Article 27(1)(f) of Directive 92/83. [47] That exemption depends on three conditions.

72. Firstly, the product in question must be alcohol or an alcoholic product within the meaning of Directive 92/83. That applies in any event to the cooking cognac at issue here because, as already mentioned, it must be regarded as ethyl alcohol liable to excise duty under Article 20, first indent, of Directive 92/83. [48]

73. Secondly, the cooking liquors must be used for the production of foodstuffs. That is also indisputably the case here. The production of foodstuffs is even the only purpose for which the seized cooking liquors are used, since they are unfit for consumption as beverages.

74. Thirdly, the alcoholic content must not exceed '5 litres of pure alcohol per 100 kg of the product'.

47 — Cited in footnote 6, paragraph 39; the judgment related to cooking wine.

48 — See footnote 44 above. By contrast, this assumption applies to the cooking wine and cooking port at issue only if the Court, contrary to my suggestion, stands by its case-law in *Gourmet Classic*, cited in footnote 6.

75. In that respect, the wording of Article 27(1)(f) of Directive 92/83 may give rise to misunderstandings, because it is not clear whether it refers to an upper limit for the alcoholic content *of the cooking liquor used* or for the alcoholic content *of the foodstuff produced*. The latter approach is preferable.

76. The objective of Article 27(1)(f) of Directive 92/83 is not to favour particular methods of production of foodstuffs, by providing that only ingredients with a relatively low alcoholic content give rise to exemption from excise duty. On the contrary, the intention is to neutralise the impact of excise duties on alcohol used as an intermediate product in other commercial or industrial products. [49]

77. In addition, the intention is to ensure that excise duty is levied on the actual consumption of alcohol irrespective of the form in which it is presented. An exemption should be granted only when the residual alcohol in food products which is consumed by the end-user is below a *de minimis* threshold laid down by the Union legislature, namely 5 litres of pure alcohol per 100 kg *of the final product*.

49 — Case C-63/06 *Profisa* [2007] ECR I-3239, paragraph 17.

78. The decisive criterion for exemption is thus the alcoholic content of the foodstuff produced using a cooking liquor, but not the alcoholic content of the cooking liquor itself. [50]

79. In this case, there is agreement between the parties to the main proceedings that, when cooking wine is used as an ingredient according to a recognised recipe, a finished product with an alcoholic content of less than 5 % volume always results, so that an application of Article 27(1)(f) of Directive 92/83 is possible.

80. It must therefore be stated as an interim conclusion that:

Cooking liquors which are subject to the harmonised excise duty on alcohol and alcoholic beverages are to be exempted from that duty in accordance with Article 27(1)(f) of Directive 92/83.

50 — The alcoholic content of the ingredient is relevant only as a preliminary question in the context of the first condition under Article 27(1)(f) of Directive 92/83 (see above, point 72 of this Opinion), and when it is necessary to determine whether a liquor subject to excise duty is present at all (see, for example, Article 20, first or second indent, of Directive 92/83).

2. The consequences of the release into free movement of a product exempt from excise duty in the country of manufacture (fourth question)

81. By its fourth question, the referring court wishes in essence to know what obligations arise for the Member State of importation from the fact that cooking liquors have already been released from the excise movement system into free movement in the Member State of manufacture. This issue has also, incidentally, already been touched upon in the third question. [51]

82. In order to discuss this subject, it is necessary to differentiate according to why a product had been released into free movement in the Member State of manufacture.

83. Normally, release of a product into free movement takes place when the excise duty payable in the Member State of manufacture is paid (first subparagraph of Article 6(1) of Directive 92/12). If the product concerned is subsequently imported for commercial purposes into another Member State, excise duty becomes chargeable again in that other Member State (Article 7(1) and (2) of Directive 92/12), whereas the excise duty already paid in the Member State of origin is reimbursed. [52] In that way it is ensured that the duty on a product which is subject to the harmonised excise duty is always paid in the Member State in which its consumption actually occurs, and at the rate of duty applicable in that State. [53]

84. The cooking liquors at issue here, however, are goods which the tax authorities of the Member State of manufacture (France) do not regard as liable to excise duty at all. That was confirmed by Répertoire Culinaire and the French Government in response to a question during the hearing before the Court. The cooking liquors had thus been released into free movement in the State of manufacture from the beginning precisely because, in the view of the authorities in that State, no excise duty at all was payable on them.

85. In such a case, as the Commission correctly points out, there is no interest in ensuring that duty is paid on the goods in the Member State of consumption (in this case the United Kingdom). On the contrary, no duty should be paid on them at all.

86. Conversely, there is a specific interest under European Union law in ensuring that both the liability to excise duty and the

51 — In the third question, the referring court wishes to know whether cooking liquors subject to excise duty should 'be treated as exempt from excise duty at the point of manufacture' on account of their intended use for the preparation of foodstuffs.

52 — Article 22 in conjunction with Article 7 of Directive 92/12; see also the 18th recital in the preamble to that directive and Case C-5/05 *Joustra* [2006] ECR I-11075, paragraph 30.

53 — Those rates of duty may vary considerably from Member State to Member State.

exemption from excise duty of alcohol and alcoholic beverages are administered uniformly in all Member States and thus throughout the internal market, [54] in order to ensure the proper functioning of the internal market. [55]

87. The functioning of the internal market requires the free movement of all goods (Article 26(2) TFEU and Articles 28 TFEU to 37 TFEU [56]), including those subject to excise duties. [57] Under the principle of mutual recognition, [58] this means that the tax authorities of the country of destination recognise the classification of a product by the competent authorities of the country of origin as subject to excise duty, as not subject to excise duty or as exempt from excise duty. [59]

The reason for this is that, even though the national rates of duty on alcohol and alcoholic beverages may vary greatly, chargeability as such is nevertheless harmonised and subject to the same conditions in all the Member States. [60]

88. The free movement of goods in the internal market would be made unnecessarily difficult if the United Kingdom authorities, in a case such as this, under the repayment model practised by them (see section 4(1)(a) of the FA 1995), [61] first insisted on payment of the excise duty on the cooking liquors imported from France, only to refund it immediately.

89. Member States are certainly permitted to adopt appropriate measures to combat evasion, avoidance and abuse in the field of exemptions. [62] However, such measures presuppose concrete, objectively verifiable evidence of a serious risk of evasion, avoidance

54 — Fourth recital in the preamble to Directive 92/12 ('Whereas, in order to ensure the establishment and functioning of the internal market, chargeability of excise duties should be identical in all the Member States.'); see also, to that effect, Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 22; Case C-325/99 *Van de Water* [2001] ECR I-2729, paragraph 39; and *Joustra*, cited in footnote 52, paragraph 27.

55 — First recital in the preamble to Directive 92/12 and third recital in the preamble to Directive 92/83.

56 — Formerly Article 14(2) EC and Articles 23 EC to 31 EC.

57 — First recital in the preamble to Directive 92/12.

58 — That principle has been firmly established in the case-law on the free movement of goods since the judgment in Case 120/78 *Rewe-Zentral* [1979] ECR 649, '*Cassis de Dijon*', paragraph 14; see, for example, Case C-184/96 *Commission* v *France* [1998] ECR I-6197, '*Goose foie gras*', paragraph 28.

59 — Mutual recognition was also in the background in *Italy* v *Commission*, cited in footnote 21. That case concerned the question of the conditions under which one Member State may exceptionally refuse recognition — required in principle — of the exemptions granted by other Member States.

60 — See again the fourth recital in the preamble to Directive 92/12.

61 — That repayment model is based on the option made available in Article 27(6) of Directive 92/83 and provides that the excise duty on alcohol must first be paid and then, under certain conditions, repaid. In the case of cooking liquors, repayment takes place only when the liquors have actually been converted in the preparation of foodstuffs.

62 — See, in that regard, the introductory wording of Article 27(1) of, and the 22nd recital in the preamble to, Directive 92/83.

or abuse,[63] particularly since, within the field of application of Article 27 of Directive 92/83, exemption is the rule and refusal is the exception.[64]

90. General assertions that evasion, avoidance or abuse could arise in relation to a particular product do not entitle the Member State of importation to refuse from the outset to recognise an exemption from excise duty granted in the Member State of manufacture.[65] That would conflict with the free movement of goods and also, moreover, with the principle of cooperation in good faith between the Member States.

91. In the present case, it is clear from the facts established by the referring court that the seized cooking liquors are undrinkable owing to the addition of salt and pepper. It is not possible, as a matter of economic practicality, either to reverse the mixing process to separate the alcoholic beverage from the salt and pepper or to isolate the alcoholic content of the wine in its entirety. Moreover, as the referring court observes, there is no history whatsoever of cases of abuse in connection with cooking liquors such as those at issue here. It can therefore be assumed with virtual certainty that the seized cooking liquors will in fact be used for the production of foodstuffs as referred to in Article 27(1)(f) of Directive 92/83.

92. There is thus no concrete and objectively verifiable evidence in a case such as this that the products in question were wrongly regarded as free of excise duty and/or exempt from excise duty or that the product in question could be used in ways contrary to the spirit and purpose of an exemption. In such circumstances, the United Kingdom tax authorities' insistence on payment of the excise duty on the cooking liquors at issue turns out to be pure formalism which cannot be objectively justified.

93. Overall, therefore, the fourth question should be answered as follows: Products which have been released into free movement as not subject to excise duty or exempt from excise duty in the Member State of manufacture must not be subjected in another Member State, into which they are imported for commercial purposes, to the provisions on

63 — *Italy* v *Commission*, cited in footnote 21, paragraph 52; to the same effect, albeit in a different context, see Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 75; and Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 68.

64 — See, to that effect, in relation to Article 27(1)(a) and (b) of Directive 92/83, *Italy* v *Commission*, cited in footnote 21, paragraph 50, and *Profisa*, cited in footnote 49, paragraph 18.

65 — According to settled case-law, merely taking advantage of legislation or scope for tax arrangements must not be deemed to constitute abuse; see, for example, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraphs 36 and 37; Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 61; and Case C-150/04 *Commission* v *Denmark* [2007] ECR I-1163, paragraph 58.

the harmonised excise duty unless there is concrete and objectively verifiable evidence

— that they were wrongly considered to be not subject to or exempt from duty in the Member State of manufacture

— or

— that products which were exempt from duty in the Member State of manufacture in accordance with Article 27(1)(f) of Directive 92/83 could be used for purposes other than those specified in that provision.

3. The requirements of European Union law in respect of exemption from excise duty by means of a refund (second question)

94. By its second question, the referring court seeks in essence information concerning the requirements which European Union law imposes in respect of the formulation of the exemption from excise duty under Article 27(1)(f) of Directive 92/83 in national law if the Member State concerned opts for the refund model as provided for in Article 27(6) of Directive 92/83.

95. The background to this question is the fact that a refund of excise duty on cooking liquors under United Kingdom law is possible only under very narrow conditions laid down in section 4 of the FA 1995, of which the referring court emphasises the following in relation to its second question:

— The cooking liquors must actually have been used as ingredients in the production of foodstuffs (section 4(1)(a) in conjunction with (2)(c) of the FA 1995).

— The application can be made only by persons who themselves have used the cooking liquors as ingredients in foodstuffs or who carry on business as wholesalers of such foodstuffs (section 4(3)(a) and (b) of the FA 1995).

— There is a maximum period of four months from the time of conversion of the cooking liquors for making a claim for a refund (section 4(5)(a) of the FA 1995).

— The amount of the refund must be at least GBP 250 (section 4(5)(b) of the FA 1995).

96. First, it must be pointed out that, under Article 27(6) of Directive 92/83, Member States are free to give effect to exemption from the harmonised excise duty by means of a refund of excise duty paid. [66]

97. It is for the Member States to lay down the detailed arrangements for the refunding of excise duty paid. This follows, firstly, from the principle of procedural autonomy and, secondly, from the introductory words of Article 27(1) of Directive 92/83 ('Member States shall exempt … under conditions which they shall lay down …'). However, as always, the principles of equivalence and effectiveness must be observed in this regard. [67]

98. There is no evidence in this case of less favourable treatment being applied to the refunding of excise duty in the cases harmonised under European Union law as compared with the refunding of other excise duties governed solely by domestic law. No problems therefore arise as regards the *principle of equivalence*.

99. However, more detailed discussion is required as to whether the conditions for repayment laid down in section 4 of the FA 1995 are compatible with the *principle of effectiveness*. That principle requires that the repayment of excise duty be not rendered virtually impossible or excessively difficult. [68] In addition, under Article 27(1) of Directive 92/83, the conditions for repayment must serve the purpose of 'ensuring the correct and straightforward application' of the exemptions from excise duty and of 'preventing any evasion, avoidance or abuse'.

100. The fact that, pursuant to section 4 of the FA 1995, cooking liquors must actually have been used in the preparation of foodstuffs does not, on its own, infringe the requirements of European Union law. In a refund model as provided for in Article 27(6) of Directive 92/83, it is even in the nature of things that the excise duty to be refunded pertains to alcohol which has already been used as an ingredient in cooking.

66 — See also the 18th recital in the preamble to Directive 92/83.

67 — Settled case-law; see, for example, the judgments delivered in the most diverse contexts in Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraphs 22 to 25; Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12; Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 34; Case C-291/03 *MyTravel* [2005] ECR I-8477, paragraph 17; and Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-635, paragraph 31.

68 — See again the judgments cited in footnote 67: *San Giorgio* (paragraph 12), *Edis* (paragraph 34) and *MyTravel* (paragraph 17); to the same effect, see Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 46, and Case C-63/08 *Pontin* [2009] ECR I-10467, paragraph 43.

101. Only in the case of imported cooking liquors are the authorities of the Member State of importation required, as mentioned, [69] to recognise an exemption already granted in the Member State of manufacture. In that respect, they are not free to demand that the excise duty be first paid and then — after cooking — application be made for its repayment.

102. However, the problematic feature of a provision such as section 4 of the FA 1995 is that it precludes refunds of excise duty where the amount of the refund is below GBP 250. That minimum amount may even be increased still further by the tax authorities (section 4(5)(b) and (6) of the FA 1995).

103. Admittedly, under European Union law, a Member State is not in principle precluded from excepting insignificant amounts from repayment. Unlike in the field of VAT, [70] however, Directive 92/83 does not provide for any such possibility. Even assuming that, in the absence of express authorisation in the Directive, it is permissible to introduce minimum amounts in national law, the amount of GBP 250 cannot, on any view, be regarded as appropriate. [71] On the contrary, it is an amount which is clearly above any conceivable *de minimis* threshold.

104. There is also the fact that the minimum amount in a provision such as section 4 of the FA 1995 is coupled with a limitation of the category of persons entitled to apply and with a comparatively short application period. Those constituent elements of the provision — minimum amount, application period and limited category of persons entitled to apply — are mutually reinforcing in their effect

105. As Répertoire Culinaire demonstrated in the proceedings before the Court, based on the rate of excise duty in force in the United Kingdom in 2002, [72] the consumption of at least 215 bottles of cooking wine over a three-month period would have been necessary in order to achieve the minimum amount of GBP 250 for a refund of excise duty under section 4 of the FA 1995. None of the parties contradicted those figures.

69 — See my observations on the fourth question (points 81 to 93 of this Opinion).

70 — See the second paragraph of Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), concerning the refunding or carrying forward of input VAT.

71 — On 16 July 2002, the date on which the cooking liquors at issue were seized, that amount was equivalent to around EUR 388; on 10 June 2010, the date of the hearing in these preliminary ruling proceedings, that equivalent was around EUR 302.

72 — Répertoire Culinaire refers to the period prior to 27 April 2002, from which, according to the figures stated by that undertaking, the majority of its claims for refunds of excise duty arises.

106. Subject to verification of their accuracy by the referring court, it is easy to see from those figures that at best, in the United Kingdom, it is bulk users of cooking liquors who are able to benefit from the exemption from excise duty provided for in Article 27(1)(f) of Directive 92/83. In view of the stringency of the United Kingdom rule concerning refunds, a large number of restaurants and other establishments which use cooking liquors only occasionally and, in any event, in smaller quantities in the preparation of foods are in practice excluded from claiming the exemption from excise duty.

107. Added to that is the fact that section 4(3) of the FA 1995 grants the right to apply for a refund of excise duty only to persons who have themselves used the cooking liquors as ingredients in foodstuffs or who carry on a business as wholesale suppliers of such foodstuffs. A wholesaler such as Répertoire Culinaire, which supplies only the cooking liquors as such, but not the foodstuffs made from them, therefore has no right to apply at all.

108. Overall, a provision such as section 4 of the FA 1995 ultimately has the effect of rendering the exemption from excise duty under Article 27(1)(f) of Directive 92/83 — which is obligatory — largely meaningless. That conflicts with the requirement under European Union law that the conditions laid down by Member States are to enable correct and straightforward application of the exemptions (Article 27(1) of Directive 92/83). The principle that, within the field of application of Article 27 of Directive 92/83, exemption is the rule and refusal is the exception [73] is thereby also reversed.

109. It is certainly true that Member States, when framing their national rules on exemption from or refunding of excise duty, are also entitled to take into account the requirement of prevention of any evasion, avoidance or abuse. [74] However, as already noted, in the case of a refusal of exemption from or refund of excise duty, there must be concrete and objectively verifiable evidence of abuse. Accord-

73 — See again, in relation to Article 27(1)(a) and (b) of Directive 92/83, *Italy* v *Commission*, cited in footnote 21, paragraph 50, and *Profisa*, cited in footnote 49, paragraph 18.

74 — See, in that regard, the introductory wording of Article 27(1) of Directive 92/83 and the 22nd recital in the preamble to that directive.

ing to all the information before the Court, that is not the case with the cooking liquors at issue. A provision which imposes a comparatively short preclusive period for applications for refunds, excepts amounts below GBP 250 from any refund and, in addition, withholds the right to apply for a refund of excise duty from wholesale suppliers of cooking liquors in general clearly goes beyond the legitimate objective of combating abuse.

110. All in all, therefore, the second question should be answered as follows: A national provision which imposes a preclusive period of four months and a minimum amount of GBP 250 for a refund of excise duty on cooking liquors and excludes wholesale suppliers of cooking liquors from the category of persons entitled to apply infringes Article 27(1) of Directive 92/83 and the principle of effectiveness.

VI — Conclusion

111. In the light of the foregoing considerations, I propose that the Court should reply to the request for a preliminary ruling from the United Kingdom First-Tier Tribunal (Tax) as follows:

'(1) Wine and port which, for the purpose of being used as cooking wine or cooking port, have been mixed with so much salt and pepper that they are not fit for consumption as beverages do not fall within the definition of ethyl alcohol under Article 20, first indent, of Directive 92/83.

(2) Cooking liquors which are subject to the harmonised excise duty on alcohol and alcoholic beverages are to be exempted from that duty in accordance with Article 27(1)(f) of Directive 92/83.

(3) Products which have been released into free movement as not subject to excise duty or exempt from excise duty in the Member State of manufacture must not be subjected in another Member State, into which they are imported for commercial purposes, to the provisions on the harmonised excise duty unless there is concrete and objectively verifiable evidence

— that they were wrongly considered to be not subject to or exempt from duty in the Member State of manufacture

— or

— that products which were exempt from duty in the Member State of manufacture in accordance with Article 27(1)(f) of Directive 92/83 could be used for purposes other than those specified in that provision.

(4) A national provision which imposes a preclusive period of four months and a minimum amount of GBP 250 for a refund of excise duty on cooking liquors and excludes wholesale suppliers of cooking liquors from the category of persons entitled to apply infringes Article 27(1) of Directive 92/83 and the principle of effectiveness.'