a higher alcohol content is not in itself sufficient to cause legislation to be regarded as not satisfying the requirements of Article 36.

REPORT FOR THE HEARING
in Joined Cases C-1/90 and C-176/90 *

I — Facts and procedure

1. According to the information provided by the national court, Law No 20 of 25 July 1985 enacted by the parliament of Catalonia, providing for 'prevention and assistance with regard to substances likely to lead to dependency', prohibits the advertising of beverages with an alcoholic strength of more than 23 degrees of alcohol in the media on the roadside and in the streets, save for signs to production centres and sales points, in cinemas and on public transport.

2. Aragonesa de Publicidad Exterior SA and Publivía SAE which operate advertising hoardings were the subject of criminal proceedings brought by the public health department of the autonomous community of Catalonia for infringing the provisions of the abovementioned Law. Following those proceedings, administrative fines of PTA 75 000 and three administrative fines of PTA 75 000 each were imposed on them respectively.

3. Those companies appealed against the decisions imposing the fines to the Tribunal Superior de Justicia de Cataluña (High Court of Catalonia). They submitted in particular that the national legislation was in breach of the provisions of Article 30 of the EEC Treaty.

4. In those circumstances, by order of 7 November 1989, rectified by order of 8 January 1990 and by order of 29 November 1989, rectified by order of 28 June 1990, the Tribunal Superior de Justicia decided to stay the proceedings in order to refer the following questions drafted in the same terms in each case to the Court of Justice for a preliminary ruling:

'(1) Does a law of a Member State (or, in this case, of the parliament of an autonomous community of a Member State with powers, under domestic legislation, to legislate on particular matters) which prohibits, within the territory under its jurisdiction, the advertising of beverages with an alcoholic strength of more than 23 degrees in (a) the mass media (b)

* Language of the case: Spanish.

streets and highways, with the exception of signs indicating centres of production and sale (c) cinemas (d) public transport, constitute a measure having an effect equivalent to a quantitative restriction on exports within the meaning of Article 30 of the EEC Treaty?

(2) If the answer is in the affirmative, must the first sentence of Article 36 of the EEC Treaty be interpreted as meaning that a Member State may lawfully impose a partial prohibition on the advertising of beverages of an alcoholic strength of more than 23 degrees for the protection of the health of humans in accordance with domestic law?

(3) May a prohibition on grounds of public health as described above constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States?'

The orders of the Tribunal Superior de Justicia de Cataluña were received at the Court Registry on 2 January 1990 and 5 February 1990 and 7 June 1990 and 12 July 1990 respectively.

5. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted:

— in Case C-1/90, by the applicant in the main proceedings, represented by Juan Pascual Planas, Joaquin Masramòn Fontanals, of the Barcelona Bar, and Jaime Gassò i Espina, Avoué, Barcelona, acting as Agents, by the defendant in the main proceedings, represented by Marta Moix i Puig, Abogado, in the Litigation Department of the Central Legal Office of the Autonomous Community of Catalonia, acting as Agent, by the Belgian Government, represented by R. van Havere, Chief Inspector, Director at the Ministry for Foreign Affairs, External Trade and Development Cooperation, acting as Agent, and by the Commission of the European Communities, represented by Blanca Rodríguez Galindo, a member of its Legal Service, acting as Agent;

— in Case C-176/90, by the applicant in the main proceedings, represented by Eduardo Vivancos Comes, Enrique Vendrell Santiveri, of the Barcelona Bar, and Araceli García Gómez, Public Prosecutor at the courts of Barcelona, acting as Agents, by the defendant in the main proceedings, represented by Mercè Corretja i Torrens, Abogado in the Litigation Department of the Central Legal Office of the Autonomous Community of Catalonia, acting as Agent, by the United Kingdom, represented by Hussein A. Kaya, of the Treasury Solicitor's Department, acting as Agent, and by the Commission of the European Communities, represented by Blanca Rodríguez Galindo, a member of its Legal Service, acting as Agent.

6. By Order of 16 January 1991, the Court decided to join the two cases for the purposes of the oral procedure and judgment.

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

II — Written observations submitted to the Court

1. Prior to examining the replies to be given to the questions submitted for a preliminary ruling, *Arogonesa de Publicidad Exterior* and *Publivía*, the applicants in the main proceedings, begin with a preliminary observation that, inasmuch as the Law of 25 July 1985 restricts the prohibition on advertising to beverages of an alcoholic strength of more than 23 degrees the law implicitly accepts that the advertising of 'cavas' wines (new wines produced according to the champagne method) and beer is unrestricted. Since the Autonomous Community of Catalonia is a big producer of wine and the only or almost the only producer of sparkling wines or cavas, the prohibition on advertising in issue applies to products foreign to Catalonia, both of Spanish origin and originating in other Member States of the Community. Thus, the prohibition, they say, affects, as regards Spanish products, the brandies of Jerez, and as regards products from other Member States, Scotch whiskies, English gin and French cognac; it also affects spirits of a strength exceeding 23 degrees produced in Spain whose formula and composition originate in one of the Member States.

The applicants in the main proceedings then go on to state the facts on the basis of which, in their view, the matters in dispute must be resolved:

— with regard to consumption, alcoholic beverages of less than 23 degrees represent 94.72% in volume and 80.87% in pesetas of the total consumption of alcoholic beverages in Catalonia for 1988. In relation to Spain as a whole, the consumption of alcoholic beverages in Catalonia is greater in the case of beverages of less than 23 degrees and less significant as regards those whose strength exceeds 23 degrees;

— with regard to production, Catalonia produced during the period from 1984 to 1987 approximately 10 900 000 hl of alcoholic beverages (except beer) almost 93% of which was accounted for by beverages of less than 23 degrees. In the same period, total Spanish production was of the order of 130 million hectolitres of which approximately 80% was accounted for by beverages of less than 23 degrees;

— with regard to trade from or to Catalonia, 'exports' of alcoholic beverages of less than 23 degrees accounted in 1988 for 99.06% in volume and 79.89% in value of total 'exports' of alcoholic beverages; for 'imports', the corresponding percentages were 44.49% and 39.98% respectively.

2. In Case C-1/90, the *Kingdom of Belgium* prefaces its observations with some considerations of a general nature. It observes that the excessive consumption of alcohol is a constant preoccupation of the Belgian authorities which, like the authorities of the majority of Member States, have adopted various measures in order to check the abuse of alcoholic beverages and the incitement to consumption of such beverages. Amongst other measures, a law was enacted on 22 March 1989 giving the King the power to regulate and prohibit the

advertising of alcohol and alcoholic beverages in the interests of public health.

The first question

1. According to *Aragonesa de Publicidad Exterior* and *Publivía*, the question raised is not essentially different from another more complex question resolved by the Court in its judgment in Case 152/78 *Commission* v *France* [1980] ECR 2299, in which a ruling had to be given on national provisions concerning the advertising of alcoholic beverages which applied equally to national and imported products.

However, the applicants in the main proceedings add that, irrespective of the fact that the rationale of the contested legislation may be public health and that the prohibition on advertising covers all beverages of a strength greater than 23 degrees whatever may be their origin, it is nevertheless the case that, although the legislation affects the marketing of those products at national level, the same is not true if one considers the situation on the territory under the jurisdiction of the Catalan legislature, since the economic decline which may be entailed by the prohibition on advertising will affect the interests of other communities. In other words, although applicable without distinction and appearing to subordinate commercial interests to an overriding interest, namely public health, the legislation in issue cannot be deemed to be in the national interest, owing to the fact that the Spanish State is organized, from a legal and political point of view, into 17 distinct autonomous communities with very different characteristics. The situation in Spain is therefore not the same as in a centralized State which must be regarded as being affected by any factor having an effect on any of its component parts. In the present cases, the prohibition on advertising is a measure equivalent to a restriction on imports and on the sale of national products originating in other autonomous communities; however, that fact cannot conceal or alter the fact that the Catalan law very appreciably affects alcoholic beverages imported from other Member States, whereas the specific interests of the Autonomous Community of Catalonia do not suffer from those restrictive measures. In that connection, Publivía recalls the abovementioned statistics on 'imports' and 'exports', pointing out that in all likelihood half of the 'imports' is made up of products originating in other Member States.

Thus, according to Aragonesa de Publicidad Exterior and Publivía, inasmuch as the prohibition is applicable without distinction to imported and Spanish products but not to imported and Catalan products, it is a directly discriminatory measure. In support of that assertion, the applicants in the main proceedings point out that in 1987 the production of alcoholic beverages in Catalonia was made up as to 93% of beverages of less than 23 degrees in strength.

Publivía adds that it is necessary to dwell on the specific situation. One cannot merely say that in determining the alcoholic strength of 23 degrees the Catalan law does not make any distinction between beverages originating in other autonomous communities of Spain and imported beverages. There is no doubt that the former are affected by restrictions on advertising. But it is necessary to have regard to the fact that the Spanish Constitution has

reallocated State powers between 17 autonomous communities. Historical and political circumstances specific to Catalonia account for the fact that the legislation in question also affects products from other autonomous communities whose potential commercial losses do not affect the specific interests of Catalonia. Thus, in the end, the situation is identical to that underlying the judgment in *Commission* v *France* cited above, inasmuch as the restrictions on advertising indirectly promote the consumption of locally produced beverages.

Beverages from other parts of Spain are therefore affected by the measure. Nevertheless, beverages imported from other Member States are the most affected for the following reasons:

— Catalonia is the autonomous community which consumes the most imported alcoholic beverages; moreover, Spanish-produced beverages other than Catalan ones are reputed on account of tradition and custom, whereas imported beverages require publicity in order to establish their reputation;

— imports of alcoholic beverages were frozen at the beginning of the Civil War and subsequently limited. Restrictions on imports were not entirely lifted prior to Spain's accession to the EEC;

— only a very negligible proportion of the population has hitherto been able to consume imported products and to show preference for them. Since they are less well-known and generally more expensive such beverages are affected by advertising restrictions. Moreover, the average consumer attaches no importance to the make of the beverages consumed. Only a small segment of the population appreciates imported beverages for reasons of authenticity and attaches importance to the choice of the brand name;

— generally speaking, each make of a foreign beverage with a high alcohol content has only one importer in Spain. The importer is inclined to reduce his imports, since the advertising restriction in question slows market penetration in Catalonia with its 6 million inhabitants whose level of consumption is one of the highest in Spain. If there were various importers for the same make exclusive distribution rights for the territory of Catalonia would reduce their imports to a greater extent.

Publivía concludes by pointing out that the application of the legislation in issue has an appreciable effect on imports and that, consequently, the interest harmed by that provision is intra-Community trade.

Aragonesa de Publicidad Exterior and Publivía finally suggest that the reply to the first question should be as follows:

'Law No 20 of 25 July 1985, adopted by the Parliament of the Autonomous Community

of Catalonia, constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the EEC Treaty, inasmuch as it prohibits on the territory within its jurisdiction the advertising of beverages having an alcoholic strength of more than 23 degrees (a) in the mass media (b) on streets and highways and in squares (c) in cinemas and (d) on public transport.'

2. *The Autonomous Community of Catalonia* begins by emphasizing that the legislation in issue has a slightly more restricted scope than may be suggested by the terms of the question referred to the Court, inasmuch as the prohibition on advertising concerns media which are dependent on the public authorities or the local authorities of Catalonia but not the other media, such as private television channels.

It also points out that, in Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33(7) on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (Official Journal, English Special Edition 1970(I), p. 17), the Commission adopted a restrictive formula of the concept of a measure having equivalent effect including only to a certain extent measures applicable without distinction to national production and imports.

For its part the Court has adopted a broad interpretation of that concept beginning with the judgment in Case 8/74 *Dassonville* [1974] ECR 837 and in subsequent judgments. In the *Commission* v *France* judgment, cited above, the Court, following the opinion of Mr Advocate General Reischl, affirmed that interpretation, considering that national legislation partly prohibiting advertising in favour of alcoholic beverages restricted marketing opportunities for imported products and could therefore constitute a measure having equivalent effect within the meaning of Article 30 of the Treaty.

Accordingly, the autonomous community of Catalonia suggests that the reply to the first question should be in the affirmative. The matter does not however end there because it is necessary to distinguish two features:

— since the entry into force of the Catalan legislation in issue, imports of alcoholic beverages have increased; the legislation does not therefore in practice produce the effects of a measure of having equivalent effect;

— the broad definition of the concept of a measure having equivalent effect allows for two types of exception: those contained in Article 36 of the Treaty and that entailed by the restrictive interpretation given by the Court for the first time in the judgment in Case 120/78 *REWE Zentral* [1979] ECR 649.

3. According to the *Kingdom of Belgium* (Case C-1/90), the view may be taken that by limiting the consumption of beverages with an alcoholic strength of more than 23 degrees, the prohibition on advertising in question constitutes a measure having equivalent effect to quantitative restrictions both as regards imported beverages and domestic beverages.

However, where all the Member States implement, in one way or another, policies to prevent alcoholism and where the concept of restriction on trade entails a manifest difference in the degree of freedom depending on the Member States, the question to be asked is whether Article 30 may still be applicable where the majority of the Member States applies measures having similar effects.

Finally, the Kingdom of Belgium recalls that the Court held in its judgment in Case 75/81 (*Blesgen* [1982] ECR 1211), that a national measure for the prevention of alcoholism prohibiting the consumption of spirits on the premises in places accessible to the public, whether national or imported, having a certain alcohol content, does not fall within the terms of Article 30 of the Treaty.

The reply to the first question must therefore be in the negative.

4. The *United Kingdom of Great Britain and Northern Ireland* (Case C-176/90) recalls the terms of the Dassonville judgment, cited above, which indicate the scope and importance of Article 30 in guaranteeing free trade between Member States even where restrictions are not simply straightforward prohibitions on imports but take the form of 'potential' or 'indirect' hindrances to trade. A restriction that applies equally to home-produced and imported goods may amount to a potential or indirect hindrance to trade where its precise terms in practice apply only or mainly to imported goods and may therefore have the consequence not only of discriminating against imported products but also of preventing a new market from developing.

In the United Kingdom's view, the power of advertising and its influence as an adjunct to the processes of trade were acknowledged by the Court in Case 249/81 *Commission* v *Ireland* [1982] ECR 4005. It was logical that the Court should equally recognize that prohibitions on advertising could be important factors in restricting trade (*Commission* v *France* judgment, cited above).

Thus, an advertising restriction may, by affecting imported products, breach Article 30 of the Treaty. Whether it in facts does so is for the national court to decide on the basis of a detailed examination of the Spanish market in alcoholic beverages. Nevertheless, the United Kingdom observes that the evidence available to it would suggest that the contested provision of the Catalan legislation does affect imported spirits, at least indirectly or potentially, since the beverages affected by the measure originate either in other parts of Spain or in other Member States and since Catalonia consumes and produces in large quantities table wines which are not affected by the advertising restrictions.

The United Kingdom proposes that the following reply should be given to the question submitted for a preliminary ruling:

'A law of a Member State (or the parliament of an autonomous community of

a Member State) which prohibits the advertising of alcoholic beverages of a strength exceeding 23 degrees in certain public places may constitute a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty; it is for the national court to decide on the basis of the evidence before it whether the law in fact has such an effect.'

5. The *Commission of the European Communities* prefaces its remarks by observing that it is of little importance whether the legislation in issue emanates from the State or from the parliament of an autonomous community since in any event it is a State measure in regard to which the interpretation of Article 30 is relevant.

With regard to that interpretation the Commission recalls that in the Dassonville judgment, cited above, the Court defined as measures having equivalent effect 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. According to that definition, a national measure restricting advertising opportunities for certain products could constitute a measure having equivalent effect because it is likely to restrict the volume of imports by affecting the marketing opportunities of the imported products (judgment in *Commission* v *France*, cited above).

In the present case it is therefore necessary to ascertain whether the preconditions enabling such a measure to be held to be contrary to Article 30 of the Treaty are fulfilled.

The Commission emphasizes that, from the evidence in its possession, the measure in question cannot be regarded as discriminating against imported products. In fact, the criterion based on the alcohol content of the beverages is a purely objective one which does not specifically affect imported beverages in relation to national beverages of the same type. Moreover, although the autonomous community of Catalonia produces a large quantity of wine and 'cavas', whose strength is less than 23 degrees, it is nevertheless the case that it also produces beverages of a greater alcohol strength (in that connection the Commission cites the appreciable qualities of brandy and gin produced in 1989 in the four Catalan provinces) and that in any event the production of those beverages — such as brandy — is abundant in the rest of Spanish territory. Finally, there are many imported products, such as French wine and champagne for example (see the amount of champagne imports in 1988), which are not affected by the advertising prohibition in question. Consequently, the Catalan legislation is non-discriminatory in the way in which the French legislation was found to be in the *Commission* v *France* judgment, cited above.

Thus, in the Commission's view, the contested national measure is applicable without distinction to national and imported products. It is therefore necessary to assess whether it is pursuing a legitimate objective in relation to Community law and whether it is appropriate and not excessive in the light of that objective, as required by both the case-law (the Cassis de Dijon judgment cited above) and Article 3 of Commission Directive 70/50/EEC of 22 December 1969, cited above.

With regard to the objective pursued, the Commission points out that the preamble to the Catalan law and the Orders for Reference refer to the protection of public health, which constitutes one of the mandatory requirements recognized by the Court in the Cassis de Dijon judgment. As the Court acknowledged in the *Commission* v *France* judgment the advertising of alcoholic beverages constitutes an incitement to the consumption of such beverages and, consequently, the regulation of such advertising is tied to the fight against alcoholism which is in the last analysis a public health objective.

As far as the principle of proportionality is concerned, it is necessary to assess whether the effects of the Catalan law do not go beyond the effects inherent in any trading rules, which would be the case if:

— the restrictive effects on trade were disproportionate in relation to the aims sought;

— the same result could be attained by means less restrictive of trade.

In the Commission's view, it is difficult to lay down general criteria for determining the conditions under which a prohibition on the advertising of alcoholic beverages is excessive or not. The Court has stated that, in ruling on questions of public health, it is necessary to take into account the habits of the citizens of the State in question (judgments in Case 97/83 *Criminal proceedings against Melkunie* [1984] ECR 2367; in Case 304/84 *Ministère public* v *Muller* [1986] ECR 1511). Those habits may vary depending on the cultural, climatic, sociological factors inherent in each Member State. In analysing the law in issue, the national court should carefully examine the characteristic features of the consumption of alcoholic beverages in its own country.

Subject to that reservation, the Commission points out that in its opinion, and having regard to the information in its possession, that national measure does not appear to be disproportionate in relation to the objective pursued. On the one hand, the legislation restricts the advertising of beverages whose alcoholic content is relatively high; as a result of insistent and repetitious advertising such beverages are made to appear banal to the point where they are equated with ordinary beverages with a low alcohol content; moreover, it would be paradoxical to authorize such advertising on hoardings lining the roads, whereas motorists exceeding a certain level of alcohol are prosecuted owing to the dangerous nature of their conduct at the wheel. On the other hand, advertising is not absolutely prohibited because it continues to be allowed, for example, in periodicals and reviews, on private television and at sports grounds.

Thus, in the Commission's view, all aspects of the question raised in the orders for reference may be answered within the framework of Article 30 of the Treaty, since the advertising restriction imposed by the Catalan law does not constitute a measure having equivalent effect prohibited by that Article.

The Commission therefore proposes that the Court should reply as follows:

'Article 30 of the EEC Treaty must be interpreted as meaning that it does not preclude national legislation prohibiting within its jurisdiction the advertising of beverages with an alcoholic strength of more than 23 degrees, in the media, in streets and on the roadside, except to indicate the existence of production and sales centres, in cinemas and on public transport.'

The second and third question

1. *Aragonesa de Publicidad Exterior* and *Publivía* consider that the Catalan law in issue does not come within the terms of the exception provided for in Article 36 of the Treaty.

In view of the fact that in 1988, the consumption of alcoholic beverages of less than 23 degrees represented in Catalonia 94.72% of the total consumption of alcoholic beverages, it is impossible to maintain that public health is better protected because the advertising, and not the consumption, of beverages of more than 23 degrees accounting for 5.28% of the market have been prohibited. The prohibition on the advertising of those beverages is thus disproportionate in relation to public health requirements. Moreover, the alcoholic strength of beverages is not the right criterion to use in the fight against alcoholism, since the quantities of low-strength beverages habitually imbibed are greater than those of beverages with a high alcohol content. It is incorrect to say that beverages with a high alcoholic content are alone capable of giving rise to dependency. As a result of their low prices and the quantities consumed, wine and beer give rise to greater dependency and are, moreover, more accessible to young people. If one really wished to reduce alcoholism it would be necessary to take action against those low alcohol beverages, and to take steps to combat the consumption of all alcoholic beverages by more energetic means than by discriminatory advertising restrictions. Thus, the degree of alcohol considered in isolation is not informative in terms of alcoholism; it is necessary also to take into account quantities consumed, as was pointed out by the Court in the *Commission* v *France* judgment, cited above.

According to the applicants in the main proceedings, there is another reason for refuting the applicability in this case of Article 36 of the Treaty: it is that the apparent contradiction between the two sentences of that Article can only be overcome by considering that the second sentence must take precedence and that the first sentence is subordinate to it. In other words, the rule is the absence of any disguised restriction on trade between the Member States by arbitrary discriminatory measures, whilst the exception is the right of Member States to impose prohibitions or restrictions on the grounds set out in Article 36. Moreover, that right must be objectively justified so that there is a relation of cause and effect between the prohibition or restriction and the objective pursued. That justification is to be assessed by the yardstick of the principle of proportionality since, as the Court held in Case 13/78 (*Eggers* v *Freie Hansestadt Bremen* [1978] ECR 1935), Article 36 must be interpreted

'in such a way that its scope is not extended any further than is necessary for the protection of those interests which it is intended to secure'.

The applicants in the main proceedings add that in the light of the 'Cassis de Dijon' judgment, the first sentence of Article 36 could not apply, were there not an inescapable need to satisfy certain mandatory requirements. However, whilst a prohibition on the advertising of all alcoholic beverages whatever their alcoholic strength may be justified in the name of public health, on the other hand the prohibition on advertising in respect only of beverages of more than 23 degrees cannot be regarded as corresponding to an essential requirement imposed in the interests of the protection of public health.

Moreover, it is clear from the preamble to the Catalan Law of 25 July 1985 that the legislature was driven to take action by the growth recorded over the last twenty years in the consumption of beverages with a high alcohol content. That growth is due to measures taken for the progressive liberalization of imports of those beverages. Thus, it is clear that the legislation in question refers to imported beverages and, consequently, comes within the definition of a measure having equivalent effect because it makes the sale of imported products more difficult or more uncertain. As is pointed out in each of the orders for reference, 'it must be borne in mind that the penalty was imposed on the undertaking in question for advertising imported alcoholic beverages, ... and the advertising legislation does not affect the bulk of nationally produced beverages (wines and sparkling wines) by virtue of their lower alcoholic content'.

Finally, Aragonesa de Publicidad Exterior and Publivía propose that the following replies should be given to the second and third questions:

'Article 36 of the Treaty authorizes the Member States to prohibit within the context of their domestic legislation the advertising of alcoholic beverages on the grounds of the protection of the health of persons, where the prohibition or restriction thereof does not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States.

The prohibition on grounds of the protection of public health of the advertising of alcoholic beverages of more than 23 degrees constitutes a means of arbitrary discrimination and a disguised restriction on trade between the Member States.'

2. (a) With regard to the second question, the *Autonomous Community of Catalonia* submits that the measure in issue corresponds to one of the situations provided for in Article 36 of the Treaty, namely the protection of public health, since it introduces as a means of prevention against a substance causing dependency a partial restriction on a form of advertising which quite evidently provides an incitement to consumption of the contested product. The Autonomous Community of Catalonia adds that, although the question of the need for a directive harmonizing the legislation of Member States on the advertising of alcoholic beverages has arisen on a number of occasions and in different ways, the only positive step in the matter has been Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain

laws, regulations and administrative provisions of the Member States concerning the pursuit of television broadcasting activities (Official Journal 1989 L 298, p. 23). But although that directive lays down, particularly in Article 15, strict criteria with regard to the television advertising of alcoholic beverages, it cannot be deemed to constitute a set of harmonized rules for the advertising of alcoholic beverages. The Member States are therefore entitled to legislate in the matter which, moreover, by virtue of Article 100a(4) of the Treaty, they would be entitled to do even in the event of Community harmonization.

For its part, the Court accepted in *Commission* v *France*, cited above, that legislation restricting the advertising of alcoholic beverages is justified in principle by preoccupations concerning the safeguard of public health. Certainly, in that judgment the Court found the French legislation to be arbitrary. But in the present case, in order to restrict advertising, an objective criterion was adopted, namely alcoholic strength. It is therefore undeniable that a Member State may adopt measures to combat alcoholism and to promote healthy living habits. The State concerned is entitled to adopt the measures which it considers necessary in order to protect public health in accordance with the actual nature of the problem to be resolved (increased consumption of beverages with a high alcoholic content or the protection of a given social group, for example).

Thus, according to the autonomous community of Catalonia, the second question must be answered in the affirmative.

(b) In its reply to the third question, the defendant in the main proceedings first of all turns its attention to the principle of proportionality, then to the absence of arbitrary discrimination or disguised restriction on trade between the Member States.

With regard to the principle of proportionality which any national provision must satisfy in order to be justified under the Treaty, two questions need to be answered:

— is the benefit to be derived from the measure proportionate to the restriction affecting the free movement of goods?

According to the Autonomous Community of Catalonia, the measure in issue in the main proceedings is justified on grounds of the protection of health, particularly the health of young people. It relates to beverages with a high alcoholic

content whose health consequences are evidently more damaging; it prohibits the advertising of such beverages in certain advertising media; it is in conformity with the duty incumbent on the public authorities to take responsibility for and supervise public health; it is of benefit to society in general which is no longer exposed to incitements to consume products with a high alcohol content.

The Autonomous Community of Catalonia maintains that the reply to this question should be in the negative. The national measure in question is specifically necessary in order to attain the objective pursued, given, in particular, the fact that it is a preventive measure justified on grounds of public health imposing restrictions on advertising in places under the responsibility of the authorities (public highway, public transport etc.), in order to prevent advertising from reaching the public against its will and indiscriminately.

The restrictions imposed on freedom of movement by that national provision should be analysed in the light of the fact that that provision has no direct impact on imports, is applicable without distinction to national and imported products and is limited as regards the beverages concerned and the means of advertising prohibited. The autonomous community of Catalonia observes, moreover, that the applicants in the main proceedings are not importers of alcoholic beverages seeking to circumvent a measure having equivalent effect to a restriction on imports, but undertakings which hire out external advertising hoardings and wish to avoid a loss of clientele.

With regard to the absence of arbitrary discrimination or disguised restriction in trade between the Member States, the autonomous community of Catalonia points out that the partial prohibition on the advertising of alcoholic beverages is based on an objective criterion, namely the pure alcohol content of the beverages. Referring to the *Commission* v *France* judgment, cited above, and to the conclusions of Mr Advocate General Reischl in that case, the autonomous community of Catalonia maintains that, since the legislation at issue is equally applicable to all beverages of more than 23 degrees, irrespective of their national or imported origin, there is neither any form of arbitrary discrimination nor any disguised restriction on trade between the Member States.

— In order to ensure the protection of public health, is there any other means with a less serious effect on the free movement of goods?

The fact that that legislation is not protectionist in intent and in no way discriminatory is borne out by the fact that advertising undertakings had been successfully prosecuted for advertising in favour of beverages with an alcoholic strength of more than 23 degrees of Spanish origin. The autonomous community of Catalonia cites by way of example a decision of the Tribunal Superior de Justicia de Cataluña dated 15 June 1990.

It adds that, far from being protectionist in its intent, the legislation at issue seeks only to protect public health, as is shown by the fact that it is based on an objective criterion of harmfulness, namely the alcohol content. The harmfulness of a beverage depends on its alcohol content. It may also depend on other criteria (amount ingested, time of ingestion, person ingesting etc.) but those criteria are not objective. The fact that the level of harmfulness was fixed at 23 degrees is not open to criticism since there are no Community rules and one is in an area in which scientific knowledge is not decisive. Therefore, it is for the States, according to the Court's case-law, to decide on the level of protection of public health which they intend to seek.

The partial prohibition on the advertising of alcoholic beverages of more than 23 degrees cannot be regarded as a measure encouraging the consumption of wines or 'cavas'. There is in fact no competitive relationship between these two groups of products which do not belong to the same category of beverages, which do not ferment in the same manner and are not consumed in the same circumstances of social life (on competition between wine and beer, see the judgment in Case 170/78 *Commission* v *United Kingdom* [1983] ECR 2265). Finally, the autonomous community of Catalonia emphasizes that there are national alcoholic beverages with an alcohol content greater than 23 degrees which are therefore also affected by the restriction on advertising opportunities.

Thus the reply to the third question submitted for a preliminary ruling should be in the negative.

(c) In addition to all the matters which it has set forth in response to the questions submitted for a preliminary ruling, the autonomous community of Catalonia considers it necessary to mention the following matters in connection with Case C-176/90.

It follows from the reference in the 'Cassis de Dijon' judgment, cited above, to 'mandatory requirements' that other situations distinct from those contemplated in Article 36 of

the Treaty might justify certain national rules with a restrictive effect on imports. Those situations which come under the notion of the rule of reason must satisfy the following conditions:

— there must not be any Community rules in the matter;

— the national rule must be applicable without distinction to national and imported product;

— the conditions for the applicability of the grounds set out in Article 36 must also be met.

The Autonomous Community of Catalonia declares that it has shown the first and third conditions to be satisfied.

With regard to the second condition it refers to the matters contained in the abovementioned decision of the Tribunal Superior de Justicia de Cataluña, dated 15 May 1990 and to the objective nature of the criterion used in establishing the restriction on advertising. It adds that in order to be compatible with Article 30 of the Treaty the measures applicable without distinction must also satisfy the criteria of proportionality and substitutability.

The Autonomous Community of Catalonia recalls the following matters: the measure at issue in the main proceedings is justified on grounds of the protection of health, in particular of a given section of society. It relates to beverages having a high alcohol content whose consequences with regard to health are clearly more damaging. It prohibits the advertising of such beverages on certain advertising media. It is in keeping with the duty incumbent on the public authorities to take responsibility for and to supervise public health. As has already been stated in regard to Article 36, the restrictions on freedom of movement which might be entailed by that national measure must be analysed in the light of the fact that that measure has no direct impact on imports, is applicable without distinction to national and imported products and is limited as to the beverages in question and the prohibited forms of advertising.

With regard to the criterion of substitutability, the Autonomous Community of Catalonia contends that the reply must be in the negative for analogous reasons to those given in regard to Article 36. The national measure at issue is specifically necessary in order to attain the objective pursued, regard being had in particular to the fact that it is a preventive measure justified on grounds of public health imposing restrictions on advertising in public places coming under the responsibility of the authorities (public highway, public transport etc.), in order to prevent the advertising from reaching the public against its will and indiscriminately. Such an indirect and partial restrictive measure should take precedence over the principle of the free movement of goods. No other measure could take its place.

Finally, it is not necessary to rely on the derogation provided for in Article 36 of the Treaty in order to legitimize the contested measure. It is sufficient to invoke Article 30 of the Treaty as a mandatory requirement determined by the legitimate objective of the protection of public health.

3. The *Kingdom of Belgium* (Case C-1/90) observes that, if the reply to the first question were to be in the affirmative, the reply to the second question should be also. In that connection it refers to well-settled case-law and, in particular, to the *Commission* v *France* judgment, cited above.

On the third question the Kingdom of Belgium emphasizes that, like all limits, the 23 degrees limit may appear relatively arbitrary. It should however be borne in mind that it is justified, on the one hand, by the difficulty facing national legislatures in proceeding by stages in this matter (the 23 degrees limit in practice corresponds to the border line between beverages obtained by fermentation and those obtained by distillation) and, on the other hand, by the concern not to direct young people towards beverages with a high alcohol content.

As regards whether the limit chosen by the Catalan legislature constitutes a disguised restriction on imports of alcoholic beverages from other Member States, the Kingdom of Belgium states that it has no firm evidence to make an assessment, but considers that in likelihood it is not, regard being had to the scale of Spanish beverages production affected by the advertising prohibition at issue. Moreover, even if the record of consumption of imported and national alcoholic beverages covered by that measure were to show that imported beverages are preponderant, that finding alone is not sufficient to support the inference that the measure constitutes a disguised restriction; if it did, a State whose production is nil or minimal would, unlike producer States, be prohibited from taking any preventive measures against alcoholism.

4. With a view to the reply to be given to the second question, the *United Kingdom of Great Britain and Northern Ireland* (Case C-176/90) points out that the many serious medical and social consequences of excessive alcohol consumption are well established and that the control of alcoholism is a question of public health. It therefore considers that a measure intended to restrict the advertising of alcoholic beverages might, even if it infringes Article 30 of the Treaty, be justified under Article 36.

It is nevertheless the case that such a measure must be based on objective factors relating to the nature of the risk in question and must be proportionate to the objective pursued. It is for the national court to make a decision on that in the light of detailed information on the specific problems posed by alcohol in the Catalan region. In determining the relevant factors to be taken into consideration, it should be borne in mind that beverages described as 'strong' are not in themselves more dangerous than beverages having a lower alcohol content and that the alcohol contained in imported beverages is not different from alcohol produced locally. The harmful factor is the quantity of alcohol consumed and not the nature of the drink. Thus is it necessary to examine the modes of consumption of the whole range of alcoholic beverages, at the same time preventing one or other sector

from being penalized; in particular, spirits are often consumed in smaller quantities than other forms of alcohol and should not be subject to disproportionate and unjustified restrictions because they are perceived by the public as being particularly dangerous. As the Court confirmed in the *Commission* v *France* judgment, cited above, advertising restrictions must apply equally to all products having the same level of harmfulness.

With regard to the third question submitted for a preliminary ruling, the United Kingdom observes that a measure restricting the advertising of alcohol, which is ostensibly justified on grounds of public health, may in fact be intended to discriminate or restrict trade between Member States. That specific question is more appropriately dealt with by the national court on the basis of information enabling replies to be given to the two preceding questions.

Finally, the United Kingdom proposes the following replies to the second and third questions submitted for a preliminary ruling:

'A prohibition on advertising drinks of a strength exceeding 23 degrees which would otherwise be in breach of Article 30 may be justified by the first sentence of Article 36 of the Treaty where the prohibition is designed for the protection of public health, but only where the risk to public health can be shown to have been assessed according to objective factors which take into account the risks posed by all alcoholic beverages.

A prohibition on advertising of alcoholic drinks of a strength exceeding 23 degrees which would otherwise be justified on grounds of public health may nevertheless constitute a means of arbitrary discrimination or a disguised restriction on trade but whether it in fact does so will depend on an assessment of the relevant drinks market and all of the facts of the case in question which is for the national court to undertake.'

5. In the light of the reply to the first question which it proposes, the *Commission* considers it unnecessary to analyse Article 36 of the Treaty or, consequently to reply to the second and third questions submitted for a preliminary ruling.

F. Grévisse
Judge-Rapporteur