OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 23 March 2000 *

1. By order received at the Court on 14 December 1998, the Tampereen Käräjäoikeus (Tampere District Court), Finland, referred to the Court — in the context of civil proceedings between the Finnish Tullihallitus (Customs Administration) and certain persons convicted of criminal proceedings for smuggling ethyl alcohol — for a preliminary ruling on customs and excise duties and value added tax (hereinafter 'VAT') on the contraband importation into Finnish territory (into Community territory, therefore) of batches of ethyl alcohol from non-member countries.

Relevant Community legislation

2. I shall first summarise the relevant provisions of Community law applicable to the matters at issue concerning respectively: (a) customs duties; (b) excise duties; (c) VAT.

3. As regards customs duties, reference should be made to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1] (hereinafter 'the Code'). Under Articles 202(1)(a) and 212 of the Code, customs debts are incurred through 'the unlawful introduction into the Customs territory of the Community of goods liable to import duties', even though 'no customs debt shall be incurred on the unlawful introduction [...] of counterfeit currency or of narcotic drugs and psychotropic substances which do not enter into the economic circuit strictly supervised by the competent authorities with a view to their use for medical or scientific purposes'. The provisions cited apply to ethyl alcohol which has not been denatured in accordance with the Common Customs Tariff. [2]

4. As regards excise duties, Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty [3] (hereinafter 'Directive 92/12') which applies to alcohol and alcoholic beverages pursuant to Article 3(1), second indent, provides in Article 6(1)(c) that '[E]xcise duty shall become chargeable at the time of release for consumption' of the relevant products, and covers by the

* Original language: Italian.

1 — OJ 1992 L 302, p. 1.
2 — Codes CN 2207 and CN 2208.
3 — OJ 1992 L 76, p. 1.

expression 'release for consumption' also the 'unlawful' importation of the products in question. For its part, Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages [4] (hereinafter 'Directive 92/83') requires Member States, under Article 19, to apply excise duty on ethyl alcohol in accordance with harmonised rates, and, on the basis of Article 27(1)(a) and (b), allows denatured alcohol only to be exempt from the harmonised excise duty.

5. Finally, as regards VAT, Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment [5] (hereinafter 'the Sixth Directive') provides in Article 2 that 'the importation of goods' of any kind is subject to VAT.

Relevant national legislation

6. Under Finnish Law No 1143 of 8 December 1994 concerning alcohol ('Alkoholilaki'), alcohol is defined as "ethyl alcohol or an aqueous solution thereof in which ethyl alcohol is more than 60% by volume and which is not denatured" (Paragraph 3(2.4)), and may be imported by a trader to whom an import licence has been granted, and by a person who has been granted a user licence, for his own use (Paragraph 8(2)).

7. Under the Finnish Laws No 1469 of 29 December 1994 on Excise Duties ('Valmisteverotuslaki') and No 1471 of 29 December 1994 on Tax on Alcohol and Alcoholic Beverages ('Laki alkoholi ja alkoholi-juomaverosta'), ethyl alcohol and alcoholic beverages produced in Finland, coming from another Member State or imported from non-member countries are subject to excise duty, unless the alcohol is strongly denatured or, if slightly denatured, not intended for human consumption. Additionally, under the Finnish Law No 1501 of 30 December 1995 on VAT ('Arvonlisäverolaki'), goods — including ethyl alcohol — imported from non-member countries are subject to payment of VAT on importation.

Facts in the main proceedings

8. Between the summer of 1996 and November 1997 Mr Kaupo Salumets, together with other persons, smuggled

4 — OJ 1992 L 316, p. 21.
5 — OJ 1992 L 145, p. 1.

around 100 000 litres of ethyl alcohol of Chinese and American origin from Estonia into Finland. Part of the imported alcohol was ready bottled for immediate sale; the rest was brought into Finland in containers and bottled there using makeshift equipment in a former stable in unhygienic conditions.

9. After being identified, the persons who took part in the smuggling were convicted on 31 March 1998 by a Finnish criminal court and sentenced to imprisonment and fines. Part of the smuggled ethyl alcohol (around 9 500 litres) was confiscated. The Finnish Customs Board later brought a civil action for damages before the Tampereen Käräjäoikeus against Mr Salumets and the others involved, claiming reimbursement of customs duties, excise duties and VAT not paid on the batches of ethyl imported illegally into Finland, a total sum of about FMK 38 million. The action was based on the relevant national legislation, which reflected the provisions of the Community legislation cited above.

Question referred for preliminary ruling

10. In the context of these proceedings, the Tampereen Karäjäoikeus, by order of 8 December 1998, asked the Court to clarify by way of a preliminary ruling whether the Code, Directives 92/12 and 92/83, and the Sixth Directive should be interpreted as meaning that the contraband importation of ethyl alcohol is subject to payment of customs duties, excise duties and VAT.

11. The national court stated in that order that its difficulties on this point, which gave rise to the reference for a preliminary ruling, lay in the fact that ethyl alcohol in its pure state ('pirtu'), which is not usually intended for immediate consumption, would not be in direct competition with other alcoholic beverages and would have a considerably restricted market because of the system of authorisation in force in Finland. As a result ethyl alcohol in its pure state has strong similarities to narcotic drugs and psychotropic substances, the sale of which is not subject to customs duties, excise duties and VAT. Furthermore, in this case, the imported alcohol involved health risks to consumers because of its low quality and the impurities in it, so that it would not have been possible to market it even in diluted form in aqueous solutions or as a base for other beverages.

Answer to the question

12. I would recall that the ethyl alcohol at issue in the main proceedings was smuggled

from a non-member country (Estonia) into Community customs territory (Finland) without having been released into free circulation or made subject to customs procedures in accordance with the Code. Under those circumstances, any other goods would be subject to payment of customs duties, excise duties and VAT, in accordance with the relevant Community legislation and, consequently, the national legislation which transposes it. Why then should smuggled ethyl alcohol not be subject to the same duties?

13. The submission made by the defendants in the main proceedings — a submission to which the national court appears not to have been insensitive — is based on the premiss that ethyl alcohol in its pure state should not be considered as a beverage intended for normal consumption, but a kind of narcotic drug used by alcoholics, from which the national court infers that it cannot compete with other alcoholic beverages marketed freely. Furthermore, in this case, the alcohol imported from Estonia was of uncertain origin, of poor quality and questionable purity: all told, a product dangerous to the health of anyone consuming it, unsuitable as a base for the preparation of other beverages of a lower alcoholic content and, therefore, not in any way marketable. Finally, the market for alcohol is highly restricted in Finland because of the system of authorisation applicable there concerning the manufacture, marketing, import or export of that product. Therefore, since, in the case of alcohol in its pure state, there cannot be said to be a free commercial channel, that product, according to the defendants, does not constitute a genuine economic activity for the purposes of the EC Treaty and therefore falls outside the scope of the Community legislation that makes the import of goods from non-member countries liable to customs duties, excise duties and VAT.

14. The Finnish, Italian and Greek Governments, as well as the Commission, maintain that ethyl alcohol in its pure state cannot in any way be considered as a narcotic drug. Instead, it constitutes a product, like any others, whose importation into Community territory from non-member countries is subject to the duties placed on products in general. In this respect, the principle of fiscal neutrality and the necessity to harmonise the levying of customs duties, excise duties and VAT preclude any distinction between legally imported goods and goods — such as those in point here — which have been smuggled. Because of their lower selling price, the latter are in competition with products imported in full compliance with the law, which bear the corresponding fiscal charges.

15. To equate ethyl alcohol in its pure state with narcotic drugs and other psychotropic

substances is unconvincing. Admittedly, ethyl alcohol is not usually consumed in its pure state, and if consumed in excessive quantities may cause damage to health, especially if consumed by persons suffering from chronic alcoholism. However, there can be no denying that ethyl alcohol, unlike narcotic drugs, constitutes a product which is lawfully present on the market, and whose manufacture, marketing, import and export, while regulated or limited by law in some Member States, cannot be considered as prohibited by reason of the intrinsic illicit nature of the product. Ethyl alcohol is therefore not affected by the Single Convention on Narcotic Drugs signed in New York on 30 May 1961 [6] and ratified by all Member States of the Community. It is instead considered in the context of commercial transactions as one product among others and included — as mentioned — in the Common Customs Tariff (Combined Nomenclature). Ethyl alcohol in its pure state presents analogies not so much with narcotic drugs as with tobacco and derived products: a product recognised as dangerous to health, but which (at present) it is not unlawful to market and which (at present) is not treated as a drug.

16. The same applies where — as in this case — the imported alcohol is of uncertain origin, of poor quality or of questionable purity. Such factors may contribute to making consumption of such a product even more dangerous, but do not change its nature as an intrinsically lawful product. A *lawful* product cannot be transformed into a narcotic drug for reasons connected with its origin, quality or purity.

17. In my opinion, the derogations laid down for narcotic drugs as regards payment of customs duties, excise duties and VAT, derogations all based on the idea that narcotic drugs are goods which, because of their unlawful nature, it is prohibited to market, are therefore not applicable to the contraband importation of ethyl alcohol. I feel it is appropriate to examine these derogations separately in order to explain, given the specificity of each one, the reasons which lead me to find that they are not applicable in this case.

18. As far as customs duties are concerned, since 1981 [7] the Court's case-law has made it clear that they cannot be applied to narcotic drugs because these are 'goods which are of such a kind that they may not be put into circulation in any Member State but must on the contrary be seized and taken out of circulation by the competent authorities as soon as they are discovered', [8] except in the case of 'trade which is strictly controlled and limited to author-

6 — *United Nations Treaty Series*, 520, No 7515.

7 — Case 50/80 *Horvath* v *Hauptzollamt Hamburg-Jonas* [1981] ECR 385. The narcotic drug in question in this judgment was heroin.

8 — Ibid., paragraph 11.

ised use for pharmaceutical and medical purposes'.[9] Narcotic drugs (and, in general, psychotropic substances) may not — according to the reasoning of the Court — be classified as products 'put on the market and absorbed into commercial circulation',[10] and, for this reason are not subject to customs regulations. This interpretation, confirmed in 1982,[11] was in 1990[12] extended to the importation of counterfeit currency. I would point out that, on the basis of these interpretations of the customs rules, the Code, adopted in 1992, expressly provides in Article 212 that 'no customs debt shall be incurred on the unlawful introduction [...] of counterfeit currency or of narcotic drugs and psychotropic substances which do not enter into the economic circuit strictly supervised by the competent authorities with a view to their use for medical and scientific purposes'. Ethyl alcohol is, however, without doubt a product which is marketed in the Member States and therefore part of the ordinary economic circuit, for which reason the system under which narcotic drugs and counterfeit currency are exempted from customs duties cannot be applied to this product.

19. As regards VAT, Community case-law has since 1984[13] made it clear that the interpretation employed to remove narcotic drugs from the sphere of customs duties also applied to the levying of VAT: '[T]he two charges display comparable essential features since they arise from the fact of importation of goods into the Community and the subsequent distribution thereof through the economic channels of the Member States, and since each constitutes a component of the sale price calculated by a similar method by successive traders'.[14] This parallelism, confirmed in later developments of the case-law on the subject,[15] is also reflected in the wording of Article 10(3) of the Sixth Directive which authorises Member States to link the chargeable event and the charging of VAT on imports with the similar criteria employed for the levying of customs duties. The reasons set out above regarding customs duties therefore lead me to consider that ethyl alcohol, which cannot be assimilated to a narcotic drug, cannot be made the subject of any exceptional regime as regards its liability to VAT.

20. The reasoning set out with regard to customs duties and VAT can also apply to excise duties, under which the tax on manufacture and the tax on alcohol, both in point in this case, fall. In the absence of

9 — Ibid., paragraph 10.

10 — Ibid., paragraph 12.

11 — Case 221/81 *Wolf* v *Hauptzollamt Düsseldorf* [1982] ECR 3681, and Case 240/81 *Einberger* v *Hauptzollamt Freiburg* [1982] ECR 3699. The narcotic drugs under consideration here were cocaine and morphine.

12 — Case C-343/89 *Witzemann* v *Hauptzollamt München-Mitte* [1990] ECR I-4477.

13 — Case 294/82 *Einberger* v *Hauptzollamt Freiburg* [1984] ECR 1177. The judgment was concerned with the import of a number of batches of morphine into Germany.

14 — Ibid., paragraph 18.

15 — Case 269/86 *Mol* v *Inspecteur der Invoerrechten en Accijnzen* [1988] ECR 3627 concerning the distribution of amphetamines and Case 289/86 *Happy Family* v *Inspecteur der Omzetbelasting* [1988] which concerns the sale of hashish; Case C-158/98 *Staatssecretaris van Financiën* v *Coffeeshop Siberië* [1999] ECR I-3971, concerning the provision of a counter for the sale of soft drugs.

any specific case-law relating to the applicability of excise duties to narcotic drugs, the orientatations developed in the case-law with regard to customs duties and VAT can also apply to excise duties. It is true that Member States must exempt denatured alcohol from harmonised excise duty under Directive 92/83 as well as alcohol imported for medical purposes or for scientific research. In the present case, however, the ethyl alcohol imported from Estonia was not subjected to a denaturing process to make it unfit for consumption, but simply had blue food-colouring added to it intended to make it look like anti-freeze, and was not intended for use for any medical or scientific purpose.

21. In conclusion, I consider that ethyl alcohol imported unlawfully from a non-member country into Community territory must be subject to payment of customs duties, excise duties and VAT, in accordance with the system in force at the time of the unlawful importation. The principle of fiscal neutrality does not permit any distinction to be made between lawful and unlawful operations, [16] for which reason the obligation to pay customs duties, excise duties and VAT applies even if the goods subject to the fiscal charges in question were introduced unlawfully into the Community customs territory. [17] An interpretation to this effect is also valid where — as in this case — ethyl alcohol in its pure state is subject in one Member State to a special system of authorisation concerning production, marketing, importation and export. The Court's case-law has already made it clear that any prohibition on the export of particular goods 'cannot, therefore, be sufficient to remove those products from the scope of the Sixth Directive' [18] and there is no reason not to extend this reasoning also to the importation, subject to any administrative restrictions, of goods on which not only VAT, but also customs duties and excise duties, are chargeable. Furthermore, subsequent Community case-law has taken this direction with regard to the sale of counterfeit perfumes [19] and the unlawful operation of games of chance. [20]

16 — See *Mol* cited above, paragraph 18.

17 — For customs duties see Article 202(1)(a) of the Code. For excise duties see Article 6(1)(c) of Directive 92/12.

18 — Case C-111/92 *Lange* [1993] ECR I-4677, paragraph 17, which concerns the export to certain countries of eastern Europe of computer systems considered as sensitive.

19 — Case C-3/97 *Goodwin and Unstead* [1998] ECR I-3257.

20 — Case C-283/95 *Fischer* [1998] ECR I-3369.

Conclusions

22. On the basis of the foregoing considerations, I propose that the Court should answer the question put by the national court as follows:

Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, 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, Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages and the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis for assessment, must be interpreted as meaning that the contraband importation into the Community customs territory of ethyl alcohol from non-member countries is subject to customs duties, excise duties and value added tax, in accordance with the provisions in force at the time of the unlawful importation.