On those grounds,

THE COURT

in answer to the questions submitted to it by the Pretura di Bra, by an order of 6 June 1979, hereby rules:

The Court of Justice has no jurisdiction to give a ruling on the questions asked by the national court.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 11 March 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 23 JANUARY 1980

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Pretore of Bra, in Piedmont. The case was presented to us as raising, in the main, questions of a familiar kind as to the interpretation of Article 95 of the EEC Treaty and as to the relationship between that Article and Articles 92 and 93 of the Treaty. In my opinion it raises *in limine* questions of more general importance as to the scope af Article 177 of the Treaty.

The facts are these.

On 1 February 1979 Mrs Mariella Novello, who lives at Magliano Alfieri in Italy, ordered from Mr Pasquale Foglia, who is a wine merchant at Santa Vittoria d'Alba, also in Italy, a number of cases of Italian wine for delivery by way of gift to Mrs Anna Cerutti at Menton in France. The wine was of different kinds but it all came within the definition of "liqueur wine" contained in paragraph 12 of Annex II to Council Regulation (EEC) No 337/79 on the common organization of the market in wine. Broadly speaking that definition covers fortified wines produced in the Community. The contract between Mrs Novello and Mr Foglia contained an express clause to the effect that she would not be liable for any charges imposed by the Italian or French authorities "contrary to the free movement of goods between the two countries or at all events not due." Mr Foglia entrusted the delivery of the wine to a transport undertaking, Danzas S.p.A., which I shall call "Danzas". The contract between Mr Foglia and Danzas contained a clause about undue charges corresponding to that in the contract between Mrs Novello and Mr Foglia. Danzas duly delivered the wine to Mrs Cerutti and on 31 March 1979 sent its bill for carriage and other charges to Mr Foglia. The bill included a sum of Lit 148 300 for taxes that Danzas had been called upon to pay on the importation of the wine into France. Mr Foglia paid the bill in full and, on 7 April 1979, brought the present proceedings before the Pretore against Mrs Novello for recovery of the amount of it. Mrs Novello promptly paid Mr Foglia that amount less the Lit 148 300 which, she contended, had been unlawfully exacted by the French Customs and which therefore, she said, the express clause in her contract relieved her of liability for. Mr Foglia thereupon applied to the Pretore for the joinder of Danzas as a party to the proceedings, contending that either the levying of the French taxes in question had been lawful, in which case Mrs Novello must pay them, or it had been unlawful, in which case Danzas must bear them: in neither case should the burden of them fall on him. The Pretore, however, refused his application and, by order dated 6 June 1979, referred the case to this Court.

As appears from that order the Pretore considered that the crucial question for his decision was whether the French taxes levied on the wine on its importation into France were compatible with Community law. In particular he considered that upon the answer to that question depended the answer to the question whether he should order the joinder of Danzas as a party to the proceedings before him.

The Pretore held that the French taxes in question were not charges having an effect equivalent to customs duties. They were "not imposed by reason of importation but as part of a complex system of internal taxation applicable both to imported products and domestic products."

It seems that the relevant French legislation divides liqueur wines into three categories.

The first category is "vins doux naturels". They are (or at all events were at the material time) subject to an excise duty of FF 22.50 per hectolitre of wine and to a "droit de consommation"

(consumption tax) of FF 1 790 per hectolitre of added spirit. "Vins doux naturels" are defined by Article 406 of the "Code Général des Impôts". They must be made from certain prescribed varieties of grapes, the grapes being grown in such a way that not more than 40 hectolitres of must are produced per hectare. The alcoholic strength of the wine must be at least 14 degrees and the added spirit, the strength of which must be at least 90 degrees, must equal not less than 5 % nor more than 10 % by volume of the must. Lastly a person claiming that his wine should be classified as a "vin doux naturel" must specify the location of the vineyards from which it was harvested and their numbers on the "plan cadastral" (the land register). It is common ground that at present only wines produced in France can qualify as "vins doux naturels", though we were told on behalf of the French Government that it is, and has for a long time been, ready to negotiate arrangements under which wines from other Member States, and in particular Italy, could so qualify. The Commission asserts that almost all liqueur wines produced in France are "vins doux naturels". Figures read out to us at the hearing by Counsel for the French Government seemed to confirm that at least much the greater part of the liqueur wines produced in France are within that category.

The second category is "vins de liqueur à appellation d'origine contrôlée". Assimilated to this category, by virtue of bilateral Conventions between France on the one hand and Portugal and Greece respectively on the other hand, are port, madeira and Samos wines. Such wines attract a "droit de consommation" of FF 4 270 per hectolitre of alcohol, whether the alcohol be natural in the wine or derived from the added spirit. It seems, though the observations of the parties (including those of the Commission and of the French Government) were not altogether clear on the point, that, apart from port, madeira and Samos wines, only French wines (particularly Pineau des Charentes) can qualify for inclusion in this category.

Thirdly there is a residual category, comprising all other liqueur wines and in particular those imported into France from Italy. They are subject, not only to the "droit de consommation" of FF 4 270 per hectolitre of alcohol, but also to a "droit de fabrication" (production tax) of FF 710 per hectolitre of alcohol. Presumably those are the taxes that the French Customs levied on Mrs Novello's gift to Mrs Cerutti.

The questions referred by the Pretore to this Court are these:

"1. Having regard to the provisions of the Treaty of Rome and to the measures adopted in implementation thereof should it be considered that the taxation applied in France to liqueur wines with or without a designation of origin, whether quality wines or not, imported from Member States of the EEC — such as the taxation of sweet wines having a naturally high alcoholic content, with or without a designation of origin, imported from such countries — constitutes serious discrimination within the meaning of Article 95 of the Treaty, given that:

French liqueur wines that are similar, or at all events in direct competition with the said wines, are favoured under that system by much lower taxation than sweet wines having a naturally high alcoholic strength

imported from Member States of the EEC;

Even certain liqueur wines imported from non-member countries in fact benefit in France from lower taxation than that applied to liqueur wines of Community origin.

2. Are such reductions in duty possibly covered by Article 92 of the Treaty, and if so, subject to what limitations and conditions?

3. Should it be considered that a tax which is contrary to Community law is thereby unlawful and accordingly that the collection of the higher duty on the imported products constitutes improper taxation and therefore an undue payment?

4. Should it be considered that such unlawfulness may be relied upon throughout the entire Community before the national courts of all the Member States, even in the course of proceedings between private persons?

5. If the answer to Question 2 is in the affirmative, how are persons who have paid the heavier tax affected by the absence of an authorization under Article 92 of the Treaty?"

In my opinion, it is logical to begin with the Pretore's fourth question.

One can readily understand that the Pretore should have misgivings about a situation in which he is, or at all events conceives himself to be, called upon to rule upon the compatibility with Community law of the laws of another Member State, particularly in view of the fact that the authorities of that Member State are in no way represented before him.

One must however remember that all the courts of all the Member States are called upon to give effect to Community law where it is relevant in cases before them. Where the decision in litigation between private persons brought before a court of a Member State happens to turn on the question whether the laws of another Member State are compatible with Community law, that court is bound to address itself to the question. It cannot escape doing so on the mere ground that the validity of the laws of another Member State is impugned. Its judgment, however, will constitute *res judicata* only as between the parties to the litigation; it cannot bind the Member State whose laws have been impugned. Nor can it bind any other court in the Community under the doctrine of *stare decisis* or under any concept of "jurisprudence".

Thus if, in the present case, the Pretore had acceded to Mr Foglia's application and had ordered that Danzas be joined as a party to the proceedings, and if, upon being joined, Danzas had contended that the French taxes in question were lawful, the question of their lawfulness would have been inescapably raised before him and he would have been bound to decide it. In that situation it would have been proper for him, if he thought fit, to refer questions to this Court under Article 177 of the Treaty, even though his own decision could bind no one other than Mr Foglia, Mrs Novello and Danzas.

What troubles me about this case is that in fact there is no dispute between the only parties to the proceedings before the Pretore, namely Mr Foglia and Mrs Novello, on any question of Community

law. Both contend that the French taxes in question were levied in breach of that law. Mrs Novello does so because, manifestly, it is in her interests to do so. Mr Foglia's attitude was made very clear to us by his Counsel, both in his written observations and at the hearing. It is, essentially, that in the proceedings before the Pretore his position is neutral. He says that either Mrs Novello or Danzas must foot the bill for the Lit 148 300 and that in no way can he be liable for that sum (though in fact, at the moment, it is he who has paid it). As an Italian wine merchant, however, Mr Foglia has a wider interest in contending that the French taxes are unlawful and his Counsel has so contended with great vigour before us.

In those circumstances the question arises in my opinion whether this reference is admissible. Article 177 confers on this Court jurisdiction to give preliminary rulings concerning questions of Community law where "such a question is raised before any court or tribunal of a Member State". This Court thus has no jurisdiction to give a preliminary ruling in a case where the proceedings before the national court or tribunal in fact give rise to no question of Community law.

It is true that the second paragraph of Article 177 goes on to empower the national court or tribunal concerned to refer the case to this Court "if it considers that a decision on the question is necessary to enable it to give judgment". But those words cannot be intended to confer on national courts and tribunals an unlimited power to refer cases to this Court, because they are qualified by the opening words "Where such a question is raised, etc." Moreover the second paragraph must be read in the light of the third, which imposes on a national court of last instance an obligation to make a reference "Where any such question is raised in a case pending before [it]". Clearly the second and the third paragraph must be read as parallel provisions, the one conferring on lower courts a discretion, and the other imposing on final courts an obligation, to refer a case to this Court where, and only where, it actually gives rise to a question of Community law. Indeed I think that a useful way of testing whether a reference made under the second paragraph is admissible is to consider whether, if the case had been pending before a national court of last instance, that court would have been bound to refer it to this Court.

No doubt the question need not be raised by the parties to the proceedings before the national court themselves. It may be raised by that court of its own motion. But, at least in civil proceedings where the interests of the parties alone are at stake, it must in my opinion be a question on which, once it has been raised, the parties are at issue. Otherwise it is not, in the context of those proceedings, really a question at all. I say "where the interests of the parties alone are at stake" because different considerations would apply where, for instance, an order *in rem* was sought or a matter of public policy was involved.

This Court has always interpreted Article 177 as implying that, in general, the national court or tribunal concerned must be the judge of the relevance of the questions referred. That is undoubtedly a

salutary rule and I do not invite Your Lordships to depart from it. But it is a general rule only, not an absolute one. I mentioned recently in Case 22/79 *Greenwich Film Production* v *SACEM* (not yet reported) some of the qualifications to which it is subject. I need not repeat what I there said. I certainly know of no case where the Court has held that a question might be referred to it notwithstanding that the parties to the proceedings in the national court were *ad idem* as to the answer to it and they alone were interested in the answer to it.

One reason why, in my opinion, the Court should not entertain such a case is that it will have had no chance of being adequately presented in the national court and will have no chance of being adequately argued in this Court. In saying that I do not overlook that we had, in the present case, the advantage of both written and oral observations from the French Government. The procedure, however, whereunder Member States are enabled, through their Governments, to submit observations in cases coming before the Court under Article 177 is not intended to put a Member State in the position of being the sole or main protagonist on one side or the other in a case, and it would be most unfair if it were treated as suitable for that purpose. Of course cases may occur where a Member State finds itself in that position fortuitously, but it ought not to be put in that position deliberately.

There are two principal ways in which the question of the compatibility with Community law of a legal rule or administrative practice prevailing in a Member State may be brought before this Court. One is by proceedings taken by the Commission under Article 169 of the Treaty. The other is by a reference under Article 177 made by a court or tribunal of that State in proceedings in which the appropriate authority of that State is a party. Under either procedure the State concerned has the benefit of safeguards that are denied it as a mere intervener in a reference made by a court of another Member State. Firstly the language of the case will be one in which its officials and lawyers are accustomed to work. Secondly it will, at least normally, have had an opportunity fully to prepare its case and to present it (including all the evidence that it considers relevant), either to the Commission or to the national court, before ever the matter comes before this Court.

If I am right in the view that I expressed earlier that it may occasionally happen that a court of a Member State finds itself, in order to decide a case before it, bound to adjudicate upon the compatibility with Community law of a law of another Member State, and that, in such a case, it is proper for that court to refer a question or questions to this Court, one must accept that, then, the latter Member State will be denied the safeguards to which I have referred. But, if there is a genuine dispute between the parties to the proceedings before the national court, that denial must in my opinion be tolerated, first in order to avoid a greater denial of justice to those

parties and secondly because then the Member State concerned should normally become, not the sole or main protagonist on one side, but the ally of one of the parties. The possibility that that party may fail to appear before this Court or that, if he does, his case may be ill-presented, of course exists. But it then exists as one of the inevitable imperfections of the forensic process, and not because there has been a misuse of that process.

The cases to which we were referred by the Commission on this point, namely Case 22/76 *Import Gadgets* v *L.A.M.P.* [1976] 2 ECR 1371 and Case 52/77 *Cayrol* v *Rivoira* [1977] 2 ECR 2261, were cases where there was no reason to think that there was not a genuine dispute between the parties.

Case 244/78 *Union Laitière Normande* v *French Dairy Farmers Ltd* (12 July 1979, not yet reported) was, I think, more on the borderline, because the action there was between a parent company and its subsidiary, and not much fight seems to have been put up by the subsidiary. The question of the admissibility of the reference does not appear to have been argued. It is clear, however, from the judgment of the Court that it approached the case with great caution, ruling on one only of the questions referred by the national court on the footing that the ruling on that question would be sufficient to enable the national court to decide the case. Here, in contrast, the question of the admissibility of the reference is raised, albeit indirectly, by the Pretore's fourth question.

There is a line of authority that may seem irreconcilable with what I have said, or with some of it. That is the line of authority that begins with Case 33/70 *SACE* v *Ministry of Finance of the Italian Republic* [1970] 2 ECR 1213, includes Case 18/71 *Eunomia* v *Ministry of Education of the Italian Republic* [1971] 2 ECR 811, Case 43/71 *Politi* v *Ministry of Finance of the Italian Republic*, ibid. p. 1039, Case 2/73 *Geddo* v *Ente Nazionale Risi* [1973] 2 ECR 865, and Case 162/73 *Birra Dreher* v *Amministrazione delle Finanze dello Stato* [1974] 1 ECR 201, and ends with Case 70/77 *Simmenthal* v *Amministrazione delle Finanze dello Stato* [1978] ECR 1453.

Those cases have in common that they all came to this Court by way of references for preliminary rulings by Italian courts and that in each of them the order for reference was made in *ex parte* proceedings (seemingly under Article 633 *et seq.* of the Italian Code of Civil Procedure) with the result that the defendant was not heard by the Italian court before the order for reference was made. None the less this Court held in each case, either implicitly or expressly, that the reference was admissible. The Court did however observe in the *Simmenthal* case that it might "prove to be in the interests of the proper administration of justice that a question should be referred for a preliminary ruling only after both sides have been heard".

I do not, I confess, find that line of authority very satisfactory, even though I myself accepted it, in the *Simmenthal* case, as representing the law.

In neither of the first two cases does the question of admissibility appear to have been argued. In the first of them, the *SACE* case, there is a brief reference to that question in the opinion of Mr Advocate General Roemer (at p. 1226), where he seems to have assimilated the Italian *ex parte* procedure to the

procedure on an application for an interim injunction in a German court which was in question in Case 29/69 *Stauder* v *City of Ulm* [1969] ECR 419. There is no reference to the question in the judgment of the Court. In the second case, the *Eunomia* case, there is no express reference to the question at all either in the opinion of the Advocate General or in the judgment of the Court, though, as Mr Advocate General Dutheillet de Lamothe pointed out in his opinion in the third case, the *Politi* case, the Court seems to have taken the question into account in the paragraph of its judgment dealing with costs (a point so obscure that it escaped the attention of the English Division of our Translation Service when they came to make the English translation of the judgment). In the *Politi* case, on the scant authority of those first two cases, Mr Advocate General Dutheillet de Lamothe treated the question as settled (see [1971] 2 ECR at pp. 1053 and 1054) and the Court followed him (see ibid. pp. 1047 and 1048). In the *Geddo* case Mr Advocate General Trabucchi returned to it (see [1971] 2 ECR pp. 892 and 893) but the Court, in its judgment, ignored it. Then came the *Birra Dreher* case, in which Mr Advocate General Mayras loyally expressed the opinion that the question had been settled by the earlier authorities, in particular by the judgment of the Court in the *Politi* case and by the opinion of Mr Advocate General Trabucchi in the *Geddo* case (see [1974] 1 ECR pp. 220 and 221). The Court followed him. Finally there was the *Simmenthal* case, in which I, though not bold enough to say — as probably I should have said — that the authorities were unsatisfactory and should be reconsidered, at least pointed out (citing Case 52/76 *Benedetti* v *Munari* [1977] 1 ECR 163) that the *ex parte* procedure adopted by the Italian courts in relation to Article 177, whilst, according to the authorities, valid, was not necessarily desirable (see [1978] ECR at p. 1485). That was echoed by the Court in the passage that I have quoted.

The adoption of that *ex parte* procedure means, not only that the defendant is denied the opportunity of presenting his case to the national court before the reference is made, but also that the reference is made before the national court has had an opportunity of ascertaining whether there is in fact a dispute between the parties on a question of Community law. To that extent those authorities are inconsistent with the opinion I am now putting forward. But it is to be observed that, in every one of the cases in that line of authority, with the exception of the *Eunomia* case, it became clear when the case came before this Court that there was a genuine dispute between the parties on a question of Community law and there was an effective defendant (usually described as the Italian Government) before this Court to argue it. In the *Eunomia* case the problem was simply not considered. Nor, in any of the cases, was the law of any Member State other than Italy involved.

Another troublesome case is *Benedetti* v *Munari*, to which I have already referred. There there were proceedings *inter partes* before an Italian pretore, but, so it seems, no real dispute between the parties. Their real dispute was with the AIMA, an Italian State agency. The Pretore ordered that the AIMA be joined

as a party, but ordered a reference to this Court before hearing the AIMA. So there too he made the reference without first identifying a question of Community law on which parties were at issue. The AIMA was not represented in this Court, but its interests were looked after by the Italian Government. It is clear from the judgment that the Court found the procedure unsatisfactory. As it was to do later in the *Union Laitière Normande* case it declined to answer all the questions put in the order for reference. On the whole it does not seem to me that *Benedetti* v *Munari* is a clear authority one way or the other on the present problem.

Thus I do not think that, on a strict analysis, Your Lordships would be departing from any previous decision of this Court if Your Lordships were to hold that the Court has no jurisdiction under Article 177 to give a ruling in a case where there is no dispute between any of the parties on any question of Community law and no interests other than theirs are at stake; and I think that Your Lordships should so hold.

Taking as I do that view of the case, I do not think that it would be right for me to embark on a discussion of the other questions referred to the Court by the Pretore. I accordingly refrain from doing so.