OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 21 March 1990 *

Mr President,
Members of the Court,

1. By an application of 26 May 1988 based on Article 169 of the EEC Treaty the Commission has asked the Court to declare that by limiting the exemptions from turnover tax and excise duties on imports in international travel below the amounts stipulated in Articles 1, 2 and 4 of Council Directive 69/169/EEC of 28 May 1969,[1] Ireland has failed to fulfil its obligations under the EEC Treaty.

2. The origin of the dispute between the Commission and Ireland resides in the continuing increase in the number of short trips made to Northern Ireland by persons from Ireland for the purpose of purchasing goods bearing United Kingdom domestic taxes, which are generally lower than in Ireland, and bringing them back to Ireland free of its own internal taxes as goods in 'travellers' personal luggage' within the meaning of Directive 69/169.

3. The Community exemption rules in question here should be briefly recalled.

According to Article 1 of the directive, exemption from turnover tax and excise duty on imports is to apply, as regards travel between non-member countries and the Community, to goods in travellers' personal luggage, if such imports have no commercial character and the total value of the goods does not exceed ECU 45;[2] Member States may reduce this exemption to ECU 23 for travellers under 15 years of age.[3] In addition, in the case of travel between Member States, Article 2 of the directive provides that exemption from turnover tax and excise duty is to apply to goods in travellers' personal luggage if they were acquired subject to the general conditions governing taxation on the domestic market of one of the Member States and if such imports have no commercial character and the total value of the goods does not exceed an amount which, at the material time, was ECU 350;[4] Member States may reduce this exemption

* Original language: French.

1 — Council Directive 69/169/EEC of 28 May 1969 on the harmonization of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (OJ, English Special Edition 1969 (I), p. 232).

2 — According to Article 1 of Council Directive 81/933/EEC of 17 November 1981 amending Directives 69/169/EEC and 78/1035/EEC as regards tax reliefs applicable in international travel and to imports of small consignments of goods of a non-commercial character from third countries (OJ L 338, 25.11.1981, p. 24).

3 — According to the provision cited above.

4 — According to Article 1 of Council Directive 85/348/EEC of 8 July 1985 amending Directive 69/169/EEC on the harmonization of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (OJ L 183, 16.7.1985, p. 24), that amount having since been fixed at ECU 390 by Article 1 of Directive 88/664/EEC of 21 December 1988 amending for the ninth time Directive 69/169/EEC on the harmonization of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (OJ L 382, 31.12.1988, p. 41).

to ECU 90 for travellers under 15 years of age.[5] Finally, in the case of both travellers covered by Article 1 and those covered by Article 2, Article 4 provides that the Member States are to apply quantitative limits to certain products such as tobacco, alcoholic beverages, perfumes, coffee and tea, with no exemptions being granted for the goods in question to travellers aged under 15 years or, depending on the case, 17 years.

For the moment, I shall adhere to that general outline of the tax exemption rules, as defined by Articles 1, 2 and 4 of the directive; more precise aspects will have to be considered later. The burden of the Commission's charge against Ireland is that it adopted and implemented as from 1 April 1987 a statutory instrument expressly relating to the aforesaid provisions of Directive 69/169. More particularly, Section 4 of that statutory instrument provides that, for the purposes of the exemptions referred to in Articles 1, 2 and 4 of the directive, a traveller is to mean a person who for the period of 48 hours immediately preceding the time of his arrival in Irish territory was outside that territory and can show this upon the demand of a competent official. So, in order to draw a distinction between what it calls 'genuine travellers' and 'fiscal travellers', Ireland considers that the tax exemptions defined by the directive may be granted only to persons whose journey outside its territory has lasted at least 48 hours.

5. The Commission's case may be summed up by the view that on the pretext of clarifying the directive Ireland has in fact added additional conditions to its provisions and made the tax exemptions for which it provides subject to such conditions. The allegation is, therefore, that no clarifying provisions have been added to the directive in accordance with its spirit but that internal measures have been adopted which are incompatible with it and which will defeat the directive's purpose. That viewpoint is shared by the United Kingdom which has intervened in support of the application.

6. Ireland puts forward a number of considerations in the light of which it considers the Commission's position unfounded. It contends that its attitude was in effect dictated by circumstances, namely the enormous number of travellers going from Ireland to Northern Ireland in order to make fiscally advantageous purchases by using the tax exemptions. Certain significant details have been given, whose relevance has not been denied. For example, in a single day in December 1986 more than 18 500 people crossed a frontier post after spending the day shopping in Northern Ireland, and before Christmas 1986 queues of up to 12 km in length of cars as well as many public transport vehicles stretched from the frontier all the way back to a large shopping centre in Northern Ireland. Customs officers counted 220 coaches in a single day. In 1986, the Irish Government estimates that 3.6 million trips were made by Irish residents for the purpose of making fiscally advantageous purchases, which represents one shopping trip per inhabitant of Ireland, and that goods valued in excess of IRL 300 million were imported in the baggage of those travellers, which is said to represent 1.9% of the gross national product, 12.9% of imports of consumption

5 — This amount was increased to ECU 100 by Article 1 of Directive 88/664/EEC, cited above.

goods ready for use and 91.2% of the deficit on current account of the balance of international payments. In the same year 1986, Ireland believes that the revenue lost to the Irish exchequer as a result of such purchases was IRL 40 million, equal to 0.6% of all exchequer resources, 1.4% of indirect taxes and 2.9% of the current budget deficit.

7. In Ireland's view, such a situation reveals the scale of the abuse of the rights under Directive 69/169 inasmuch as it was not in accordance with the provisions and spirit of that directive to grant the tax exemptions for which it provides to persons travelling from Ireland to Northern Ireland for the sole purpose of making purchases. Therefore, in order to cut short an abusive use of the concessions available under the directive, it appeared necessary to define a criterion distinguishing between 'genuine' travellers and 'fiscal' travellers by holding that a person who upon his return to Ireland had left its territory less than 48 hours earlier was not a genuine traveller who might enjoy the tax exemption. In order to define the concept of abuse with regard to Directive 69/169, Ireland refers in particular to the judgments of the Court in the 'butter-cruise' cases. It also contends that the abuses have been aggravated by the fact that the United Kingdom does not participate in the European Monetary System and that 'almost unique in the Communities a full EMS currency with great stability encounters a floating currency at the land frontier between Ireland and the United Kingdom',[6] the volatility of the punt/sterling exchange rate having tended periodically to enhance the attractiveness of 'fiscal' trips to Northern Ireland.

8. Ireland also points out that the distinction between genuine travellers and fiscal travellers is justified in view of the fact that the directive on tax allowances must be regarded as defining certain exceptions to the rule that, in the absence of harmonization of turnover taxes and excise duties, such taxes and duties are to be charged on imported products, whereas granting the exemptions to persons making trips for purely fiscal reasons, following a broad interpretation of the directive, would turn the rule into the exception, which is inconceivable.

9. Finally, the defendant State observes that the initiative it has taken must be judged in the light of the Commission's inaction towards the abuses of the tax exemptions. In particular, it contends that the Commission failed to act upon the declaration inscribed in the Minutes of the meeting of the Council held on 8 July 1985, according to which the Commission was asked to 'look into the feasibility and desirability of making a distinction between "genuine" journeys and those made purely for fiscal purposes and to submit a report to it before the end of 1987 accompanied by a proposal if the problem still exists at that time'.[7]

10. There is certainly no doubt that because of the possibilities which the directive affords owing to the existence of a land frontier with the United Kingdom, Ireland found itself in a special, indeed even uncomfortable, situation. The resulting economic disadvantages are unquestionable. However, even if one considers that the

6 — Defence, p. 16.

7 — Wording of the declaration as cited in the defence, p. 18.

draughtsmen of the EEC Treaty probably envisaged progress towards the 'internal market' without the extraordinary sight of 12-km long queues of vehicles, including many coaches, full of travellers from one Member State ready to storm the hypermarkets of the neighbouring Member State, the measures taken by Ireland seem to me to be at odds with Community law. In this regard, I share the view taken by the Commission and the United Kingdom. It is based on a number of considerations which should now be explained.

11. First of all, I consider the statutory instrument to be at odds with the actual wording of the directive.

12. According to the recitals in the preamble to the directive, whilst 'it is necessary, until harmonization of indirect taxes has reached an advanced stage, to retain the imposition of tax on importation and the remission of tax on exportation' [8] in trade between Member States, it is also 'desirable that, even before such harmonization, the populations of the Member States should become more strongly conscious of the reality of the common market and that to this end measures should be adopted for the greater liberalization of the system of taxes on imports in travel between Member States' [9] such reductions constituting 'a further step in the direction of the reciprocal opening of the markets of the Member States and the creation of conditions similar to those of a domestic market'. [10] Those reductions 'must be limited to non-commercial importations of goods by travellers; ... as a general rule, such goods can only be obtained in the country from which they come (country of exit) already taxed, so that if the country of entry foregoes, within the prescribed limits, charging turnover tax and excise duty on imports, this avoids double taxation without leading to an absence of taxation'. [11]

13. The policies thus outlined have resulted in the provisions of the directive relating to the exemption rules themselves. I have already stated what Articles 1, 2 and 4 provide. The tax exemptions which they lay down are expressed in maximum values for the imported goods, expressed in ecus, with specific values applicable to travellers under 15 years of age and in the case of specific products in the indication of maximum quantities, which, however, in the case of some of the products, are granted only to travellers of at least 15 or 17 years of age, depending on the case. The articles in question do not specify any condition relating to a minimum journey duration. As I have said, the only limits they define are in terms of monetary value or quantity.

14. Certain limits to the application of the tax exemptions provided for in Articles 1, 2 and 4 may also arise from other provisions of the directive. Thus Article 5 [12] provides that Member States may reduce the value and/or quantity of the goods which may be admitted duty free where goods are imported from another Member States or from a non-member country by persons resident in the frontierzone, by

8 — First recital.

9 — Second recital.

10 — Third recital.

11 — Fourth recital.

12 — As amended by Council Directive 72/230/EEC of 12 June 1972 on the harmonization of provisions laid down by law, regulation or administrative action relating to the rules governing turnover tax and excise duty applicable in international travel (OJ, English Special Edition 1972 (II), p. 565).

frontier-zone workers, or by the crew of the means of transport used in international travel. It permits similar reductions in the case of imports by members of a Member State's armed forces. Those restrictions are not applicable, however, where the persons concerned produce evidence to show that they are going beyond the frontier zone of the neighbouring Member State or neighbouring non-member country. As can be seen, none of the exemption reductions provided for in Article 5 of the directive refers to any taking into account of the purpose or duration of the journey. Only the place of residence or the place or nature of the occupation matters for the purposes of those reductions.

15. Moreover, where reductions specifically applicable to Ireland are concerned, that Member State is authorized, by way of derogation from Article 2 of the directive, to exclude from exemption goods the unit value of which exceeds ECU 77.[13] The power thus given to Ireland makes no reference to the purpose or duration of the journey.

16. Finally, it must be pointed out that express provision for reducing the exemptions on account of the duration of the journey has been made in the case of Denmark by an article contained in one of the directives amending Directive 69/169.[14] According to that provision, Denmark has been authorized to apply quantitative limits to duty-free imports of cigarettes, tobacco and certain alcoholic beverages where such goods are imported by travellers resident in Denmark after a stay in another country:

(i) until 31 December 1985, when the stay is less than 48 hours, and

(ii) from 1 January 1986 to 31 December 1989, when the stay is less than 24 hours.

The authority given to Denmark is thus based on an express provision of the directive.

17. This analysis of the actual wording of Directive 69/169 therefore leads me to observe that none of the provisions applicable to all the Member States, or specifically to Ireland, refers to exemption reductions connected with the purpose or the minimum duration of the journey and that the possibility of applying reductions of that kind is provided for in express provisions in the case of Denmark. So far, it would therefore appear that Ireland may not relate the measures it has taken, purportedly in order to 'clarify' Directive 69/169, to any express provision contained in the directive or to any of the aims stated in its preamble.

18. If we now go on to examine not only the letter of the directive but also the interpretation which the Court has found it necessary to give to it, the arguments put forward by Ireland do not appear to gain any strength. On the contrary, as the Commission and the United Kingdom have pointed out, the judgments in the 'buttercruise' cases, which Ireland has cited in support of its case, would rather appear to weaken it.

13 — Pursuant to Article 1 of Directive 85/348/EEC, cited above.

14 — Council Directive 84/231/EEC of 30 April 1984 amending Directives 69/169/EEC and 83/2/EEC on the harmonization of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (OJ L 117, 3.5.1984, p. 42).

19. First of all, as far as the general scope of the directive is concerned in relation to the powers retained by the Member States to apply exemptions other than those for which it provides, the case-law of the court is very clear. In its judgment of 7 July 1981 in the first *Rewe* case (*Rewe I*[15]), for example, the Court stated that both the recitals to and the provisions of Directive 69/169 and of the directives supplementing it showed that

'the Council intended gradually to establish a complete system of exemptions from turnover tax and excise duty for goods contained in travellers' personal luggage and that consequently in this field the Member States are left with only the restricted power given to them in the directives to grant exemptions other than those specified in the directives'.[16]

Referring to that ruling in its judgment in the second *Rewe* case (*Rewe II*[17]) the Court added that it followed that

'the Community rules are exhaustive in the matter and that the Member States retain only the restricted power given to them by the provisions of the aforementioned directives themselves'.[18]

One cannot fail to compare those dicta of the Court with the observed fact that the provisions of Directive 69/169 do not expressly confer any power on the Member States, either in general or on Ireland in particular, to grant exemptions based on criteria other than those which it defines, particularly criteria based on the duration of travellers' journeys. It would therefore appear from those dicta that Ireland is precluded a priori from falling back on such criteria when applying the tax exemptions.

20. Next, considering the guidance to be obtained from the Court's rulings on the interpretation of Directive 69/169 on more precise points, there would appear to me to be no room for uncertainty. The Court clarified the meaning of the directive in its judgment in *Rewe II*, when it stated that it was clear both from its aims and from the terms of Article 2(1) of the directive itself that

'the concessions provided for in that directive in relation to tax exemptions for goods contained in the personal luggage of persons travelling within the Community, are limited to travellers "coming from Member States of the Community", that is to say, travellers who go from one Member State to another after having in fact had an opportunity to make purchases in the Member State of departure'.[19]

The Court went on to state that it followed that

'a person who, during a cruise departing from a port of a Member State, does not call at another Member State or makes only a token call there and does not remain there for a period during which he in fact has an opportunity of making purchases cannot be regarded as a traveller within the meaning of that provision'.[20]

15 — Judgment of 7 July 1981 in Case 158/80 *Rewe-Handelsgesellschaft Nord mbH and Another* v *Hauptzollamt Kiel* [1981] ECR 1805.

16 — Paragraph 36.

17 — Judgment of 14 February 1984 in Case 278/82 *Rewe-Handelsgesellschaft Nord mbH and Another* v *Hauptzollämter Flensburg, Itzehoe and Lübeck-West* [1984] ECR 721.

18 — Paragraph 31.

19 — Paragraph 45.

20 — Paragraph 46.

Consequently, the Court held that

'if, as is generally the case, intra-Community travel by combined ship and coach services, is organized in such a manner that travellers may actually make purchases in the Member State where they disembark prior to returning by land, it is possible to regard the passengers as travellers within the meaning of Directive 69/169 ("véritables voyageurs au sens de la directive 69/169"), as amended'. [21]

At this point it must be emphasized that in its ruling the Court refers to 'véritables voyageurs au sens de la directive 69/169'. But the distinction drawn by Ireland in the statutory instrument in question still does not appear in my view compatible with the meaning which the Court gave to the expression 'véritables voyageurs'. The Court made it very clear that the factor in the second *Rewe* case distinguishing the genuine traveller entitled to the exemptions provided for by the directive was that the person in question went from one Member State to another 'after having in fact had an opportunity to make purchases in the Member State of departure'. It would not therefore appear to be consistent with the case-law of the Court to take the view, as Ireland does, on the basis of a minimum journey duration, that persons who return to Ireland after having in fact made purchases in another Member State and who also satisfy all the conditions expressly laid down by the directive are not genuine travellers within the meaning of the directive. It is true that not every traveller is a genuine traveller for the purposes of the directive and that journeys such as those considered in the judgment in *Rewe II* during which the call in the Member State travelled to is a purely token call were abusive. But that established fact gave Ireland no authority to categorize persons who have incontestably stayed in another Member State and made purchases there as 'abusive' travellers, in disregard of the Court's ruling cited above. A judicial precedent establishing an abuse expressly characterized by the lack of any possibility of making purchases in a Member State clearly provides no justification for drawing a distinction whereby a journey allowing such purchases to be made is treated as an abuse.

22. Moreover, it will be observed that in its judgment in *Rewe II* the Court did not refer in any manner to the purpose of the journey in order to define a genuine traveller. It kept to an objective criterion and explicitly accepted that a traveller was 'genuine' if it was physically possible for him to make purchases in another Member State even though the questions submitted to the Court concerned journeys the purpose of which lay essentially, if not exclusively, in the possibility of making advantageous purchases. Ireland's endeavour to treat as abusive journeys whose purpose consists essentially or exclusively in obtaining the possibility of making advantageous purchases in another Member State and to distinguish them by means of a criterion based on their duration therefore finds no justification in the judgment in *Rewe II*. On the contrary, that judgment, by adhering to an objective criterion, excludes such a distinction.

23. The Court's judgment in *Paul* v *Hauptzollamt Emmerich* [22] also illustrates the strict interpretation which it gives to provisions of the directive expressly conferring on the Member States the power to reduce the tax exemptions. As regards the possibility given to the Member States to reduce the ordinary exemptions in respect of goods imported in frontier-zone travel, the Court

21 — Paragraph 47.

22 — Judgment of 21 March 1985 in Case 54/84 *Paul* v *Hauptzollamt Emmerich* [1985] ECR 915.

stated that it 'must be construed strictly in view of the general objectives of Directive 69/169 as amended'. It therefore considered that a zone constituted by a radius of 15 km, having its centre at the customs crossing, best defined the concept of 'frontier zone' in Article 5(5) of Directive 69/169 and that

'concern to protect local trade against any abuse by frontier-zone residents can justify a limitation on exemptions only in respect of purchases facilitated by the particular situation of their residence',

which, in the Court's view, meant that

'only purchases made by frontier-zone residents in the immediate vicinity of their home ... are subject to the limitations on exemptions'.

However, the Court stated that that consideration cannot

'justify a limitation on exemptions for purchases made in a place far from the frontier-zone resident's home even if that place is close to the frontier',

pointing out that such purchases are

'comparable to those made without reduction of exemption by persons resident outside a frontier zone'.[23]

23 — Paragraph 19.

24. It must be observed, in the light of that judgment, that the strict interpretation which the Court applies where a reduction is expressly provided for is not based on a subjective criterion relating to the purpose of a journey to another Member State and that the exemptions must accordingly be applied to purchases made in a place far from the frontier-zone resident's home without there being any question at all of making a distinction depending on whether or not the journey to the Member State other than that of residence was made essentially or exclusively for the purpose of making purchases there.

25. Finally, Ireland's reference to the Court's judgment in the *Irish Grain Board* case[24] concerning monetary compensatory amounts (MCAs), in which the Court stated that

'the exporting Member State which has to pay the monetary compensatory amounts that must be granted by the importing Member State is entitled to refuse payment where the product in question has not entered the importing Member State for home use owing to fraud on the part of the purchasers of the said product, even where the customs formalities have been completed',[25]

does not appear to me to support its point of view. I do not consider that a comparison is possible between the inferences to be drawn from, on the one hand, the manifestly fraudulent character, in the MCA system, of the absence of a genuine importation since imports and exports are obviously part and parcel of that system, and, on the other hand, from the fact that journeys are made from one Member State

24 — Judgment of 11 November 1986 in Case 254/85 *Irish Grain Board (Trading) Limited* v *Minister for Agriculture* [1986] ECR 3309.

25 — Paragraph 13.

to another with the essential or exclusive purpose of making advantageous purchases there in view of the tax exemptions, when none of the provisions laying down the exemption rules mentions any distinction based on the purpose of the journey.

26. The aforementioned judgments in *Rewe II* and *Irish Grain Board* revealed abuses or fraud which were clearly established from a comparison of the facts with the actual terms of the provisions applicable. In the first case, a journey during which the possibility of making purchases in another Member State had not physically existed could not afford entitlement to exemptions expressed to be applicable to 'travellers from Member States of the Community'.[26] In the second case, the absence of imports was a very negation of the MCA system. In my view, a comparison of those decided cases with the situation now under consideration would rather appear to show that no analogies are possible. As I have said, the abusive character, with regard to the exemption rules, of journeys made to a Member State in order to make purchases there does not emerge clearly or even implicitly from the provisions of the directive bearing the meaning given to them by the Court.

27. I therefore consider that upon legal analysis the distinction made by Ireland in the statutory instrument in question between genuine travellers and fiscal travellers according to the duration of a traveller's journey can find no foundation in the actual provisions of the directive or in the interpretation which the Court has given to them. The measure in question does not therefore appear to have the character of a measure intended to make the directive more precise or clear that Ireland attributes to it. A distinction is being drawn which is extraneous to the directive and which seems contrary to both its letter and spirit since purchases made in accordance with the conditions expressly laid down in the directive are excluded from the exemptions by the statutory instrument in question.

28. The particular circumstances relied on by the defendant State are not of such a nature as to provide the initiative it has taken with the legal underpinning which it lacks a priori. Neither the fact that the United Kingdom does not participate in the European Monetary System, with the consequential fluctuations in the exchange rate, nor the enormous numbers of people travelling to Northern Ireland to make fiscally advantageous purchases can give Ireland the power unilaterally to make changes to the exemption rules laid down in the directive whereby certain persons fulfilling the conditions contained in the rules may not take advantage of them. There is no need, I believe, to labour the point that a Member State cannot, on its own initiative, amend Community law by partially preventing its application. In certain of its provisions the EEC Treaty provides for the possibility of adopting protective measures, albeit subject to specific procedures. Apart from those cases, economic and monetary circumstances such as those mentioned above naturally cannot entitle a Member State to avoid the application of a particular provision of Community law.

29. Furthermore, the fact that the Commission has not drawn up the report requested following the aforementioned declaration of the Council is not, in my view, of the slightest relevance. However constrained the Commission was by such a request, it need only be pointed out that

26 — Article 2(1) of Directive 69/169, as amended.

Ireland adopted the statutory instrument on 31 March 1987 and brought it into force on the following day, whereas the Commission had until 31 December 1987 to produce its report. Ireland cannot therefore purport to justify its measure on the basis of an attitude of the Commission which it largely forestalled.

30. I would add one observation, however. Everyone agrees that the problems with which Ireland is specifically confronted under the exemption arrangements are serious. The Commission itself indicated at the hearing that temporary rules of derogation, like those adopted for Denmark which I mentioned earlier, could have been considered in Ireland's case through amendment of the directive. It thus acknowledged that even before attaining the harmonization of taxes and excise duties in the Community — an essential aim for the establishment of the 'internal market' — certain remedies could be envisaged in the case of critical situations. It is regrettable, to say the least, that an agreement could not have been reached through goodwill. Did the Commission's refusal to consider the question of possible adjustments to the exemption arrangements following the approach suggested in the Council's declaration prevent solutions from being found which could have forestalled these proceedings? They have nevertheless been brought and the Court must provide the ruling for which they call and about which there can, in my view, be no doubt.

31. To conclude, I would mention that the distinction drawn in the Irish Statutory Instrument in question applies to the exemptions provided for in Articles 1, 2 and 4 of the directive and that consequently it also covers travellers between non-member countries and the Community to which the reduced exemptions provided for in Article 1 apply. Ireland has therefore failed to fulfil its obligations in that regard, too.

32. To sum up, I propose that the Court should:

(i) declare that by limiting the exemptions from turnover tax and excise duties on imports in international travel below the amounts stipulated in Articles 1, 2 and 4 of Council Directive 69/169 of 28 May 1989, as amended, Ireland has failed to fulfil its obligations under the Treaty;

(ii) order Ireland to pay the costs.