REPORT FOR THE HEARING
in Joined Cases C-13/91 and C-113/91 *

I — Facts and procedure

1. Article 4(c) of Italian Law No 1354/62 of 16 August 1962 (GURI No 234 of 17 September 1962) provides that the sulphur dioxide content of beer may not exceed 20 milligrammes per litre (20 mg/l). That limit also applies to imported beers by virtue of the first paragraph of Article 19 of that law, which provides that imported beer must have the characteristics and fulfil the conditions laid down by the law in question.

2. Michel Debus is the legal representative of Brasserie Fischer SA, a French company. That company produces a special beer containing natural plant extracts called '36.15 Pêcheur — La bière amoureuse' which contains as an additive 36.8 mg/l of sulphur dioxide, this being in conformity with the relevant French legislation. The beer was imported into Italy, where it is sold as an 'alcoholic beverage based on beer'.

NAS — Nucleo Antisofisticazioni e Sanità (food purity and hygiene unit) — took a sample of that beverage at a public establishment in Azzano Decimo. When the sample was analysed it proved to contain sulphur dioxide in excess of the Italian statutory limit for similar products and the Procuratore della Repubblica (State Prosecutor) brought criminal proceedings for fraud against Mr Debus.

3. On the ground that the proceedings raised a problem concerning the interpretation of Community law, the Pretura Circondariale (District Magistrates' Court), Pordenone, and the Pretura Circondariale, Vigevano, by orders of 9 January 1991 and 25 March 1991, respectively, stayed the proceedings and referred the following questions, which are the same in both cases, to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

'1. Are Articles 30 and 36 of the Treaty establishing the European Economic Community to be interpreted as meaning that the Italian provisions on health rules for the production and marketing of beer (Law No 1354 of 16 August 1962 and Law No 141 of 17 April 1989) are to be regarded as incompatible with those articles in so far as those rules permit the use of not more than 20 mg per litre of sulphur dioxide?

2. Are the Italian provisions to be disregarded by the criminal courts?

* Language of the case: Italian.

3. Must beer containing more than 20 mg per litre of sulphur dioxide be allowed to be in free circulation?'

4. The national courts' orders were received at the Court Registry on 16 January 1991 in Case C-13/91 and on 16 April 1991 in Case C-113/91.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged:

— in Case C-13/91, by the Netherlands Government, represented by B. R. Bot, Secretaris-Generaal in the Ministry of Foreign Affairs, on 16 May 1991;

— in Case C-113/91, by the Italian Government, represented by Ivo M. Braguglia, Avvocato dello Stato, on 8 August 1991;

— in Case C-13/91, on 7 May 1991, and in Case C-113/91, on 14 June 1991, by the Commission of the European Communities, represented by Antonio Aresu, a member of the Legal Service, acting as Agent.

By order of 3 December 1991, the President decided to join the two cases for the purposes of the procedure and the judgment.

Upon 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 and to refer the cases to the Fifth Chamber.

II — Summary of the written observations submitted to the Court

5. As regards the first question, the *Commission* argues that the relevant Community legislation, that is to say, Council Directive 64/54/EEC of 5 November 1963 on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption (OJ, English Special Edition 1963-1964, p. 99) and Council Directive 89/107/EEC of 21 December 1988 on the approximation of the laws of the Member States concerning food additives authorized for use in foodstuffs intended for human consumption (OJ 1989 L 40, p. 37) authorize the use of sulphur dioxide as a preservative, but do not lay down the maximum quantities which may be used. Consequently, in that respect the national rules are still applicable in full, but their compatibility with the general rules of the EEC Treaty on the free movement of goods must be assessed.

In the Commission's view, the Italian rules unquestionably satisfy all the requirements of the definition of a measure having equivalent effect given by the Court in the judgment in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, according to which all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-

-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions. The Italian rules prevent the circulation of beers lawfully produced in other States which do not comply with the Italian standards.

As regards rules which are applicable indiscriminately, it is therefore a question as to whether or not the Italian provisions are legitimized by mandatory requirements relating to the protection of public health and as to whether they are essential in order to achieve that aim. In the Commission's view, the Court has held that, whenever there are uncertainties in the present state of scientific knowledge, it is for the Member States to decide what level of protection of the health and life of humans they intend to ensure, while taking account of the requirements of the free movement of goods within the Community (judgment in Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277).

Sulphur dioxide is an oxide used as an additive in foodstuffs on account of its action as an 'anti-microbial preservative', in particular in beverages which are fermented naturally, such as beers and wines. On the technical level, sulphur dioxide and bisulphites are irreplaceable reducing agents for eliminating the oxydo-reduction phenomena which may detract from the organoleptic qualities of beer. They are regarded as more effective preservatives for beer than ascorbic acid, and are therefore almost indispensable to the brewing industry. In this regard, the Commission argues, on the basis of toxicological data produced by the FAO and the WHO and of the report of the technical consultant commissioned by the Procuratore della Repubblica attached to the Pretura Circondariale of Pordenone in connection with the proceedings brought against Mr Debus, that there is no question that the sulphur dioxide contained in the French beer seized can have toxic effects. Thus, on the basis of jointly produced toxicological data, the FAO and WHO suggest authorizing the absorption of a daily dose not exceeding 0.35 mg per kilogram of body weight, which, in the case of a consumer weighing 60 kg, works out at a maximum of approximately 21 mg per day. That finding was made using statistical methods on the basis of a representative sample of the population, a specific penetration index and a specific rate of average consumption per person. On the basis of those data, the national technical consultant calculated the average daily dose of sulphur dioxide absorbed by an Italian beer drinker. Accordingly, in the case of a beer containing 36.8 mg/l, that dose worked out at 5.5 mg per day per person. The Commission also points out that the Italian legislature authorizes for musts and wines a concentration of sulphur dioxide of 175 mg/l or 200 mg/l depending on the case, and that the maximum values laid down by French legislation are 100 mg/l for beer and 400 mg/l for wine. If the true concern of the Italian legislature is simply to protect the health of the consumer, it is incomprehensible why the limitation on the addition of sulphur dioxide applying to beer does not apply to wine, the consumption of which is much higher than that of beer in Italy. In fact, there is an undisclosed aim, such as the protection of national beer production to the detriment of imports.

The Commission adds, on the basis of the Court's established case-law, that Italy could have taken measures which, while affording the same degree of protection, would have been proportionate to the objective of the protection of human health and therefore more consistent with the principles of the free movement of goods. Such measures might consist of mutual recognition, ad hoc authorization, consumer information and health checks on samples (judgments in Case 247/84 *Motte* [1985] ECR 3887, in Case 227/82 *Van Bennekom* [1983] ECR 3883, in Case 304/84 *Muller* [1986] ECR 1511 and in Case 178/84 *Commission* v *Germany* [1987] ECR 1227). Consequently, the rules at issue constitute without any doubt an interference with the free movement of goods. Although that interference has the laudable objective of protecting health, it is disproportionate since it amounts to a straightforward ban on importation, which is not even attenuated by a possibility of equivalence or authorization for imported products not complying with the rules at issue.

The Commission adds that the fundamental principal arising from *Rewe-Zentral* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 ('Cassis de Dijon') is acceptance by every Member State of products lawfully or fairly produced in any other Member State, a principle which has moreover been recognized in the Commission's interpretative Communication of 24 October 1989 on the free movement of foodstuffs within the Community (OJ 1989 C 271, p. 3). That communication takes up the specific case of products containing additives, and points out that the general rule is that the Member State must authorize their importation where the additive does not represent a danger to public health, taking into account the findings of international scientific research and the eating habits in the importing State, and the use of the additive represents a genuine need of a technological or economic nature. The Commission points out that, on the technical level, the addition of a preservative is absolutely essential for the manufacture of beer and sulphur dioxide is unanimously recognized as being the most effective preservative. The Italian legislation should therefore be provided with a mutual recognition clause coupled, where appropriate, with measures involving sample checks or detailed rules on labelling, which would eliminate any obstacle to the importation of beer.

The Commission leaves it to the judgment of the Court as to whether the Italian Republic may introduce a procedure of prior approval, which should comply strictly with the Court's case-law, in particular the judgment in Case 25/88 *Bouchara, née Wurmser* [1989] ECR 1105, according to which the authorities of the State of importation are not entitled unnecessarily to require technical or chemical analyses or laboratory tests when the same analyses or tests have already been carried out in another Member State and their results are available to those authorities.

Lastly, the Commission expresses doubts about the compatibility of the Italian legislation with Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1). Although that directive authorizes the importer either to use the name customary in the State from which the product came or to utilize the name in use in

the importing Member State, although that Member State cannot compel him to do so, 'bière amoureuse' was marketed in Italy as a 'beverage based on beer', since under Italian law it is not a beer, although it is regarded as such in France.

As for the second question, the Commission argues that it follows from the Court's traditional case-law (judgment in Case 106/77 *Simmenthal* [1978] ECR 629) and from recent cases (judgment in C-213/89 *Factortame* [1990] ECR I-2433) that the direct applicability of Article 30 of the EEC Treaty means that the national court must ignore and not apply legislation incompatible with that article. That principle has been expressly accepted by the Italian Constitutional Court.

As far as the third question is concerned, the Commission considers that it can be understood in two different ways.

If it is considered that the question seeks to establish whether the criminal court has to take measures so as to enable in the case at issue the free movement of the beer seized, the answer must be in the affirmative and 'bière amoureuse' will be able to circulate in Italy without Mr Debus being subject to criminal penalties.

If it is considered that the question aims to establish whether in general measures should be taken to permit the free movement of foreign beers containing more than 20 mg/l of sulphur dioxide, the limits to *res judicata* of a judgment of the Court of Justice delivered under Article 177 of the EEC Treaty must be borne in mind. It follows from the Court's case-law (judgment in Case 61/79 *Denkavit* [1980] ECR 1205; order in Case 69/85 *Wünsche* [1986] ECR 947) that although the applicability and the scope of a judgment of the Court under Article 177 are limited to the judgment to which the question referred for a preliminary ruling relates it nevertheless constitutes a precedent which goes beyond the case at issue. However, on the practical level the conditions are satisfied under Italian law for the free movement of the beer in question no longer to come up against any barriers either from other criminal courts or from the administration. The other courts will have to follow the criminal case-law which will be laid down by the Pretura Circondariale, Pordenone, and the administration will comply with the courts' judgments with regard to this case by virtue of Italian Law No 2248 of 20 March 1865. The Commission concludes therefore the Court does not have to rule on the third question, since it falls outside the limits of Article 177 of the EEC Treaty.

On the procedural level, the Commission stresses that the preliminary question in Case C-113/91 was referred by a court which should be regarded as having no jurisdiction, since the jurisdiction determined by the joinder of the cases is vested in the court having jurisdiction over the first offence committed by Mr Debus in Italy, namely the Pretura Circondariale, Pordenone. The Commission therefore leaves it to the judgment of the Court to decide whether the preliminary question referred to it in Case C-113/91 ought to be declared inadmissible in so far as it was referred by a court which has no jurisdiction with regard to the main proceedings and, under the Italian law of

criminal procedure, has no power to act on the basis of Article 177 of the EEC Treaty.

Consequently, the policy of minimizing the absorption of sulphur dioxide through means other than respiration appears to be a proper health policy.

6. According to the *Italian Government*, the legislation at issue prohibits the addition of preservatives to beer, and the presence of sulphur dioxide is tolerated, up to the maximum amount laid down, as a residue resulting from the sulphuration of hops and/or the treatment of containers.

The Italian Government considers that proof that the measure is justified and proportionate with regard to the objective to be attained can been seen from a comparison with similar measures in force in other Member States. Thus, ten Member States have quantitative limits on the use and/or the presence of sulphur dioxide, which vary between 100 mg/l in France, 30 mg/l in Spain, 20 mg/l in Italy, Denmark, Belgium, Luxembourg and the Netherlands (for strong beers) and 10 mg/l in Germany, Belgium, Luxembourg and the Netherlands (for beers of normal strength). In Greece, the use or the presence of sulphur dioxide in beer is prohibited; such use or presence is permitted in the United Kingdom provided that sound industrial techniques are used. In Germany and Italy, sulphur dioxide may be present only as a residue.

Although, according to well-established case-law of the Court, such a measure is prohibited by Article 30 of the EEC Treaty, it is applicable indiscriminately and justified on grounds of protection of human health and by mandatory requirements relating to consumer protection.

Thus, according to the Court's case-law (judgment in Case 174/82 *Sandoz* [1983] ECR 2445), in absence of harmonization, it is for the Member States to decide what degree of protection of the health and life of humans they intend to assure.

Consequently, the Italian Government considers that those laws indicate to what extent the limitation of the absorption of sulphur dioxide is widespread for the purposes of the protection of human health. The Italian measure is among the least restrictive, after the French and the Spanish.

In this case, the extension of the use of sulphur dioxide to the preparation of beer is not required for technological reasons and its (preservative and antioxidant) effect may be obtained by means of treatments such as pasteurization. Moreover, the Joint FAO/WHO Committee on Food Additives and the Scientific Committee for Food have recognized that excessive use of sulphur dioxide is harmful to human health, in particular in the case of drinkers of large amounts of beer.

It therefore proposes that the Court should state in answer to the national courts' first question that the measure in question is justified on grounds of the protection of human health and by mandatory requirements

relating to consumer protection. Consequently, the second and third questions should be answered in the negative.

7. The *Netherlands Government* submits that measures of a public authority such as those at issue match the definition of measures having equivalent effect laid down in the judgment in *Dassonville*, cited above. The question arising is therefore whether the provisions of Article 36 of the EEC Treaty or reasons such as those mentioned in the Court's case-law may be relied on so as to justify measures applicable without discrimination to domestic and imported products.

According to the Netherlands Government, Directive 64/54, cited above, which carried out a measure of harmonization in the field of preservatives, laid down the principle according to which it was left to the Member States to determine the foodstuffs to which the additives listed in the annex to the directive may be added. In addition, the outline Directive 89/107 on the approximation of the laws of the Member States concerning food additives authorized for use in foodstuffs intended for human consumption has not yet been specifically implemented as regards preservatives and food additives. According to the Court's case-law, in so far as there are uncertainties at the present state of scientific research, it is for the Member States to decide what degree of protection of the health and life of humans they intend to assure, having regard however for the requirements of the free movement of goods within the Community. This means that national measures must comply with Article 36 of the Treaty or with the requirements of necessity, fairness and proportionality defined by the Court's case-law. The Netherlands Government therefore considers that it is in principle for each Member State to judge whether or not health protection requirements enable it to authorize the use of a given preservative in foodstuffs. In making that judgment, account has to be taken of eating habits in the particular Member State.

The Netherlands Government adds that, under Dutch law, a maximum of 20 mg of sulphur dioxide may be added to each litre of beer. Since the WHO has fixed a maximum permissible daily dose of 40 mg, it is important to bear in mind that in the Netherlands sulphur dioxide may also be added to fish, vegetables, preserved fruit, wine, confectionery, bakery products and cooked dishes.

Lastly, it points out that section III of the Commission's Communication on the free movement of foodstuffs within the Community, cited above, deals with barriers to the free movement of food intended to protect public health and dwells on the freedom which the Member States still have in that area pending fuller harmonization.

The Netherlands Government therefore asks the Court to state in answer to the national courts that, in the present state of Community law, the provisions of the EEC Treaty on the free movement of goods do not preclude a national measure such as that referred to in the national courts' question.

III — Oral procedure

8. *Mr Debus*, the defendant in the main proceedings, did not submit written observations to the Court, but made the following oral observations at the hearing.

As regards the facts, Mr Debus observes that the procedure with regard to the product in question was extremely strict. On the one hand, the State prosecutor circulated a copy of the indictment to the other prosecutors in Italy and, on the other, the proceedings in question went ahead even though the counter-analysis ordered by the public prosecutor's office at Pordenone concluded that no toxic effect was connected with the addition of sulphur dioxide to the beer which was seized.

According to Mr Debus, this is a further case for the application of the principle of reciprocal recognition enshrined in the 'Cassis de Dijon' case-law, first because 'bière amoureuse' is manufactured in accordance with French legislation and lawfully marketed in its territory and, secondly, because the Community legislation provides for the use of sulphur dioxide, albeit not prescribing a maximal level, and consequently it can be considered that there has been no Community harmonization with regard to this point. The Italian State can rely neither on an exception provided for by Article 36 of the Treaty nor on a mandatory requirement within the meaning of the Court's case-law.

Mr Debus states that in the judgment in Case 174/82 *Sandoz*, cited above, the Court held that in so far as there are uncertainties at the present state of scientific research relating to additives and colouring matters it is for the Member States, in the absence of harmonization, to decide what degree of protection of the health and life of humans they intend to assure, having regard however for the requirements of the free movement of goods within the Community. The procedure introduced by the Member States must be proportionate to the objective of the protection of public health and respect the principle of the free movement of goods.

In the judgment in Case 178/84 *Commission* v *Germany* [1987] ECR 1227, the Court identified the characteristics which that procedure must comply with. In that regard, Mr Debus claims that Italy has not introduced a procedure for applying for authorization to use an unauthorized additive or to utilize an amount of that additive in excess of that authorized by its legislation. The straightforward prohibition on the marketing of a product containing an additive or containing an amount in excess of the amount authorized is lawful only if the Member State in question can show that this is the only means of attaining the objective of the protection of public health, and that more proportionate, less penalizing means do not exist. That is not the case here. In the first place, there is a technological need for the use of sulphur dioxide. Thus, European brewers use two types of preservatives: ascorbic acid, which is less effective and used in countries where there is a high consumption of beer (Germany, United Kingdom, Netherlands), and sulphur dioxide, which is used in countries where less beer is consumed (France, Italy). The Italian legislation of 1962 constituted at the time an alignment on the legislation of other Member States

where such a limitation was justified because consumption was so high that it was not necessary to use a powerful preservative. The use of sulphur dioxide corresponds to a technological need in countries where the consumption of beer is low. Moreover, that preservative is not toxic and, according to the present state of scientific research, involves no risk to consumers' health. The Italian expert reached that conclusion on the basis of WHO data. Moreover, the additive appears on the list of additives authorized by Community legislation, which means that there is no uncertainty about its use. Lastly, French wines and champagnes are marketed generally in Italy despite the fact that they contain about 400 g/l of sulphur dioxide. Since the consumption of wine in Italy is much higher than that of beer, it would be more logical, in view of the eating habits of Italian consumers, to limit the amount of sulphur dioxide in wine.

Accordingly, Mr Debus considers that the Court's answer should be that Articles 30 and 36 of the Treaty should be interpreted as precluding the Italian legislation from extending to imported beers the ceiling of 20 mg/l of sulphur dioxide.

G. C. Rodríguez Iglesias
Judge-Rapporteur