OPINION OF ADVOCATE GENERAL TESAURO

delivered on 19 January 1995 *

1. In the present proceedings, which concern 11 joined cases arising from 11 references for preliminary rulings submitted by the Tariefcommissie (Administrative Court for Customs and Excise), Amsterdam, the Court is once again called upon to rule on the interpretation of Article 95 of the EEC Treaty with regard to the taxation of various alcoholic beverages. More specifically, our task is to provide the national court with the criteria to enable it to test the compatibility with that article of the Netherlands' system of applying differential taxation to wines according to whether they are made from grapes or from fruit other than grapes (hereinafter 'fruit wines').

The national legislation

2. Let us look first at the national legislation which in turn forms part of the Benelux system.

The rates of excise duty and the criteria governing their application in respect of fermented fruit beverages, whether 'still' [1] or sparkling, were harmonized by the Convention relating to the Unification of Excise Duties and of Fees for the Warranty of Articles of Precious Metals, which was signed by the three Benelux countries on 18 February 1950 [2] and later amended by ten successive supplementary protocols. Of particular relevance here is the Sixth Supplementary Protocol of 26 January 1976 which provided for the exemption from wine duty and special duties on wine of still fruit wines produced in or imported by the Benelux countries. At the material time, rates of excise duty were governed by the Seventh Protocol to the Convention, of 14 September 1984. The tariff laid down therein was reproduced in the Netherlands Law of 30 May 1963 concerning excise duty on alcoholic substances, [3] which has been amended several times precisely in order to take account *inter alia* of amendments to the Benelux system.

3. Articles 4 and 5 of the version of the 1963 Law in force at the material time distinguished between still wines, including both

1 — The adjective 'still' is used here to describe wines, and alcoholic beverages in general, which are not sparkling.

2 — For the sake of completeness, it should be noted here that on 29 May 1972 the three countries in question signed a new Benelux Convention on the unification of excise duties which has not yet however entered into force, thereby affecting also the entry into force of the Convention of 10 June 1970 on the Unification of the Benelux Area with respect to Excise Duties.

3 — *Staatsblad* 1963, 240.

* Original language: Italian.

grape wines with an alcoholic strength not exceeding 22% vol. and fruit wines having an alcoholic strength not exceeding 15% vol., and sparkling wines, including both sparkling wines made from grapes and sparkling wines made from fruit other than grapes. However, products falling outside those categories, in particular owing to an alcoholic strength in excess of that specified, are regarded as 'alcoholic substances' and as such are subject to a duty on alcohol, which is set at a higher rate.

In principle, all still wines either produced in the Netherlands or imported are subject to an excise duty on wine and to a special excise duty on wine (Article 2(2) and (3)). Likewise, all sparkling wines are in principle subject to an excise duty on sparkling wines and to a special excise duty on sparkling wines (Article 2(4) and (5)). However, under Articles 85a and 88d of the 1963 Law, still fruit wines were exempted from excise duty provided that they met certain requirements as regards labelling and packaging. Sparkling fruit wines, on the other hand, were made subject to a lower rate of excise duty than sparkling grape wines. Furthermore, imported sparkling grape wines were made subject to excise duty on wine whereas imported sparkling fruit wines were exempted in that respect.

Lastly, for completeness' sake, I should mention that the 1963 Law was replaced by the Law of 31 October 1991 simplifying and harmonizing legislation on excise duties, [4] which was in turn amended by the Law of 24 December 1992 concerning the abolition of tax frontiers. [5] Under the new legislation, which was specifically designed to bring Netherlands law into conformity with Council Directives 92/83/EEC [6] and 92/84/EEC, [7] by means of which the Council took steps at Community level to harmonize the structures of excise duties and approximate the rates of excise duty, fruit wines and grape wines have since 1 January 1993 been treated in the same way, that is to say, they have been subject to the same excise duties.

The facts

4. Let me turn to the facts which gave rise to the present proceedings. The Inspector of Customs and Excise dismissed 11 objections which had been lodged by certain importers against the application of wine duties and special wine duties to products such as madeira, red wine, champagne, vermouth and sherry. The importers concerned brought appeals before the Tariefcommissie against each decision dismissing an objection.

4 — *Staatsblad* 1991, 561.

5 — *Staatsblad* 1992, 711.

6 — Directive of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21).

7 — Directive of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages (OJ 1992 L 316, p. 29).

The Tariefcommissie took the view that a decision from this Court was necessary and therefore submitted 11 references for a preliminary ruling, asking essentially whether the differential taxation applied in the Netherlands according to whether the products concerned are grape wines or fruit wines — taking into account that, at the material time, fruit wines were subject to different rules, and that the Netherlands is a Benelux country and therefore required to comply with the rules adopted under that system — is compatible with Article 95. In each order for reference that is the substance of the first question, the form of which alters only with regard to the name of the product concerned: madeira, with an alcoholic strength of 18% vol. (Case C-367/93); red wine, 12% vol. (Cases C-368/93, C-372/93 and C-375/93); champagne, 12% vol. (Cases C-369/93, C-373/93 and C-377/93); vermouth, 13.5% vol. (Case C-370/93); and sherry, 17% vol. (Cases C-371/93, C-374/93 and C-376/93). By a second question, identical in each case, the Tariefcommissie seeks a ruling from the Court — in the event that the national law is found to be incompatible — on the effect *ratione temporis* of the judgment, having regard in particular to the fact that repayment of the excise duties would have serious financial repercussions for the Netherlands in view of the high number of similar cases currently pending before its courts.

The first question

5. First of all, I would point out that the purpose of Article 95, as the Court itself has stated several times, is 'to ensure the free movement of goods between the Member States under normal conditions of competition, by eliminating all forms of protection which might result from the application of discriminatory internal taxation against products from other Member States, and to guarantee absolute neutrality of internal taxation as regards competition between domestic and imported products'. [8]

It is hardly necessary to add that, under the first paragraph of Article 95, 'no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products' and that, under the second paragraph, 'no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products'. To sum up, whereas the first paragraph involves a comparison between tax levied on domestic products and tax on similar imported products, the second paragraph refers to tax discrimination against products which, although not similar, are nevertheless

8 — See *inter alia* Case 323/87 *Commission* v *Italy* [1989] ECR 2275, paragraph 7.

in competition, even partial, indirect or potential, with domestic products.

6. The questions submitted by the Tariefcommissie refer in a general way to Article 95, without specifying whether the interpretation sought concerns the first or the second paragraph. However, the fact that the orders for reference expressly mention the judgment in Case 106/84 *Commission* v *Denmark* [9] in which the Court ruled specifically on the similarity of fruit wines and grape wines, suggests that the national court considers that the interpretation of the first paragraph of Article 95 is necessary to enable it to give judgment in the cases pending before it. In any case, since the Netherlands legislation in question may even be compatible with the first paragraph of Article 95 but still incompatible with the second paragraph thereof, it would be helpful to provide the national court with the criteria necessary to enable it to assess the legislation in dispute in relation also to the second paragraph of Article 95.

Before addressing those issues it is clearly necessary to establish, in the light of Article 233 of the Treaty, the exact nature of the relationship between Article 95 and the particular Benelux rules which have a bearing on this case.

9 — [1986] ECR 833.

(a) The relationship between Article 95 and the Benelux system

7. Plainly, given that a comparison between domestic products and imported products is essential in applying Article 95, the definition of 'domestic products' will depend precisely on the type of relationship existing between Article 95 and the relevant Benelux rules. Indeed, those rules were relied upon in the proceedings before the national court in order to support the contention that the fiscal territory to be taken into consideration was that of the Benelux and not that of the Netherlands. Otherwise, according to the Inspector of Customs and Excise, the application of Community law would have the effect — contrary to Article 233 of the Treaty — of undermining the integration of the Benelux Union or, at the very least, of hindering its development.

If that argument were to be accepted, the comparison to be drawn for the purposes of Article 95 would have to be between the situation of grape wines and fruit wines produced in the Benelux and that of grape wines and fruit wines originating in other Member States. It would then follow that grape wines produced in Luxembourg would have to be regarded as domestic products, which would clearly result in a different sort of assessment.

8. At this point, it should be noted that, although in principle Member States may not

rely on the provisions of a convention of which they are signatories in order to avoid the application of Community law, [10] Article 233 of the Treaty states that the provisions of Community law 'shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of this Treaty'.

The Court has explained that 'the aim of that provision is to prevent the application of Community law from causing the disintegration of the regional union established between those three Member States or from hindering its development. It therefore enables the three Member States concerned to apply, in derogation from Community rules, the rules in force within their Union in so far as it is further advanced than the common market'. [11] In other words, Article 233 permits derogation from the rules of Community law whenever that proves necessary for the existence or development of the Union and, of course, when the degree of integration in the sector concerned is more advanced within the Union than within the Community.

9. As already mentioned in the description of the relevant national legislation, integration in the sector of excise duty on alcohol is confined for the moment within the Benelux merely to the standardization of the rates of excise duty, which is moreover incomplete in so far as, until 1 January 1993, Luxembourg wines enjoyed preferential tax treatment in that they were exempt from both the special excise duty on wine and from the special excise duty on sparkling wines.

Even if it were accepted that the integration attained by the Benelux countries in relation to excise duties is more advanced than at Community level — given that in the latter case steps have only recently been taken for the approximation of the rates of excise duty — it still remains to be verified whether the derogation from Article 95 is indeed necessary for that integration. In other words, the question to be addressed is whether an 'infringement' of Article 95 is indispensable if the more advanced Benelux system is to function properly.

10. In my opinion, the answer can only be negative since the application of standardized rates of excise duty, as provided for under the Benelux system, can in fact be achieved in full compliance with Article 95. Indeed, it is difficult to imagine in what way compliance with that article might have a negative effect on the proper functioning of the Benelux system, having regard also to the

10 — See, most recently, Case C-3/91 *Exportur* [1992] ECR I-5529, paragraph 8.

11 — Case 105/83 *Pakvries* [1984] ECR 2101, paragraph 11.

fact that the Benelux countries still levy the excise duties in question, albeit on a harmonized basis, each on its own account. [12]

In conclusion, notwithstanding the special status of the Benelux system, the territory of the Netherlands must be regarded as the relevant fiscal territory for the purposes of Article 95.

(b) The first paragraph of Article 95

11. As has already been observed, the application of the first paragraph of Article 95 requires a comparison between the tax borne by domestic products and the tax borne by 'similar' imported products, 'similar' being a concept which, as the Court has confirmed on several occasions, should be interpreted 'with sufficient flexibility'. [13] Consequently, in order to make an assessment for the purposes of the first paragraph of Article 95, it is necessary to take into account (a) the origin of the products, (b) the similarity between them and (c) any factors of a discriminatory nature.

12 — As mentioned earlier, the Convention of 10 June 1970 on the unification of the Benelux area in the matter of excise duties has not yet entered into force.

13 — See, for example, Case 169/78 *Commission* v *Italy* [1980] ECR 385, paragraph 5.

12. It is common ground in this case that the products accorded preferential treatment are essentially of domestic origin, whereas the grape wines are without exception imported from other Member States. Nor is it contested that, on the one hand, still fruit wines are exempt from the excise duty on wine, to which they are still subject in principle, or that, on the other hand, sparkling fruit wines are subject to a lower excise duty than sparkling grape wines or that, moreover, only imported sparkling wines are subject to the excise duty on wine in addition to the excise duty on sparkling wines — a fact which places sparkling grape wines at a singular disadvantage in relation to fruit wines.

In those circumstances, it only remains to consider whether or not the products in question are similar.

13. The Court has permitted a broad interpretation of the concept of similarity. According to settled case-law, similarity should be determined by examining whether the products in question 'have similar characteristics and meet the same needs from the point of view of consumers': [14] the test is, therefore, not whether they are strictly identical but whether their use is similar and comparable.

14 — See Case 106/84, cited above, paragraph 12.

With regard specifically to the question of determining whether fruit wines are similar to grape wines, the Court has already had occasion to point out in Case 106/84 *Commission* v *Denmark* that 'it is necessary first to consider certain objective characteristics of both categories of beverages, such as their origin, the method of manufacture and their organoleptic properties, in particular taste and alcohol content, and secondly to consider whether or not both categories of beverages are capable of meeting the same need from the point of view of consumers'. [15]

14. Furthermore, in the same judgment the Court came to the conclusion that grape wines of the table-wine type and fruit wines of the table-wine type are similar. I take note of that judgment, although I rather suspect that the similarity found between the two types of wine in question may have caused some disappointment to connoisseurs (of grape wines, naturally); on the other hand, nowhere, alas, is it laid down that taste and palate should always be compatible with Community law.

Be that as it may, since one of the issues in the main proceedings is the similarity between fruit wines and no less than five different grape-based alcoholic beverages, including again grape wines of the table-wine type, it is still necessary to verify the similarity between fruit wines and each of the products concerned.

15 — Ibid., paragraph 12.

— Red table wine (Cases C-368/93, C-372/93 and C-375/93)

15. As I have just explained, in the judgment in Case 106/84 *Commission* v *Denmark* the Court answered that question in the affirmative, stating that 'wine made from grapes and wine made from other fruit is manufactured from the same kind of basic product, namely agricultural produce, and by the same process, namely natural fermentation', [16] it being irrelevant, however, that the final alcohol strength of fruit wine is achieved by the addition of ethyl alcohol, since the alcohol strength of wine made from grapes may also be increased by the same method. The Court further pointed out that the two categories of beverage in question possess similar organoleptic properties, in particular their taste and alcohol content, and meet the same needs from the point of view of consumers 'inasmuch as they can be consumed in the same way, namely to quench thirst, as refreshments and at meal times'; [17] the Court also made it clear that 'the fact that the two categories of beverage meet the same needs cannot be called in question by the fact that fruit wine has always been less popular with consumers than wine made from grapes'. [18]

In the light of those findings it is therefore evident that red table wine, at issue in Cases

16 — Ibid., paragraph 14.
17 — Ibid., paragraph 15.
18 — Ibid., paragraph 15.

C-368/93 and C-372/92, must be regarded as similar to fruit wines produced in the Netherlands.

16. It remains to be considered whether, as contended by the Netherlands Government, Case C-375/93, concerning quality red wines produced in specified regions (hereinafter 'quality red wines p. s. r.') merits a different solution. However, application of the criteria laid down by the Court which I have just recapitulated would seem to indicate, at least at first sight, that even these wines must be considered similar, within the meaning of the first paragraph of Article 95, to fruit wines.

The one factor by virtue of which quality red wines might be classified differently from other table wines is the fact that in no circumstances can the alcoholic strength of quality wines p. s. r. be increased through the addition of ethyl alcohol. But is that enough to preclude their being similar to fruit wines? There is a strong temptation to say that it is. However, I have to concede that a fact of that kind cannot be regarded as decisive; otherwise, the conclusion would have to be reached that, contrary to the case-law cited, fruit wines are similar to grape wines only if a measure, however small, of ethyl alcohol has been added to the latter. Consequently, the conclusion reached with regard to red table wines must also apply to quality red wines p. s. r.

— Liqueur wines: sherry (Cases C-371/93, C-374/93 and C-376/93); madeira (Case C-367/93); vermouth (Case C-370/93)

17. The judgment in Case 106/84 *Commission* v *Denmark* also provides guidance for the answer to be given to the question of the similarity between fruit wines and grape wines of the liqueur-wine type such as sherry. In that judgment the Court drew a distinction between table wines (whether fruit wines or grape wines) and liqueur wines which, unlike the former, are consumed 'as apéritifs ... and as dessert wine', which suggests that they meet different needs from the point of view of consumers to those met by table wines.

The difference in alcoholic strength must also be considered here in so far as sherry possesses an alcoholic strength of 17% vol., whereas the alcoholic strength of the fruit wines accorded preferential treatment in the Netherlands does not exceed 15% vol. The same considerations also apply to madeira, particularly since it is a liqueur wine with an alcoholic strength of 18% vol.

18. The case of vermouth is more complex, since it is a beverage with an alcoholic strength of 13.5% vol., which might therefore at first sight be equated with fruit wines. However, regard should be had to the fact that vermouth, unlike grape wines or fruit wines, is not made from the same kind of basic product. Indeed, not only is ethyl alcohol added to the wine used to produce vermouth but also a mixture of herbs which, although in minute quantity, give this type of beverage a flavour which is quite unique.

Subject to a finding on the part of the national court verifying the existence of fruit wines which share those characteristics, it must therefore be accepted that the organoleptic properties of vermouth do not resemble those of fruit wines and that, all things considered, these categories of beverage meet different needs from the point of view of consumers. Consequently vermouth and fruit wines cannot be regarded as similar products within the meaning of the first paragraph of Article 95.

— Champagne (Cases C-369/93, C-373/93 and C-377/93)

19. Champagne, being a sparkling grape wine, is subject in the Netherlands to both excise duty on sparkling wines and special excise duty on sparkling wines. I think that there is no doubt that sparkling wines cannot be considered to be similar to still wines, whether grape wines or fruit wines, essentially because, although they are made from the same basic product, the manufacturing process is completely different. In any case, the organoleptic properties of the two types of beverage are quite different and meet different needs from the point of view of consumers.

That said, let me state straightaway that I am unable to accept that champagne, although classified, naturally enough, amongst sparkling wines, should be regarded as similar to sparkling fruit wines. In particular, unlike the Commission, I do not believe that the criteria laid down by the Court in its judgment in Case 106/84 *Commission* v *Denmark* make such a conclusion unavoidable.

20. It is true that both sparkling fruit wines and sparkling grape wines (including, therefore, champagne) are obtained from the same kind of basic product (fruit) but it cannot be said that their manufacturing processes are identical or even similar. Whereas grape wines are rendered sparkling by means of an entirely natural process consisting of double

fermentation, fruit wines require the addition of carbon dioxide which obviously means that the fermentation process is by no means natural. Consequently, the organoleptic properties of champagne, in particular its taste, are not comparable with those of sparkling fruit wines. Besides, it can hardly be maintained that these two categories of beverage meet the same consumer needs since it must be admitted that the consumption of champagne is usually associated with special occasions and anniversaries.

Consequently, champagne should not be considered similar to sparkling fruit wines for the purposes of the first paragraph of Article 95.

21. Only the red table wines in Cases C-368/93, C-372/93 and C-375/93 are in fact to be regarded as similar to fruit wines for the purposes of the first paragraph of Article 95. On the other hand, liqueur wines such as sherry (Cases C-371/93, C-374/93 and C376/93), madeira (Case C-367/93) and vermouth (Case C-370/93) are not to be regarded as similar to fruit wines; the same conclusion must be drawn in respect of champagne (Cases C-369/93, C-373/93 and C-377/93) in relation to sparkling fruit wines.

(c) The second paragraph of Article 95

22. As has already been observed, the questions submitted by the Tariefcommissie seem to refer only to the first paragraph of Article 95. However, in view of the fact that, although the Netherlands legislation in question might be compatible with the first paragraph of Article 95 in respect of sherry, madeira, vermouth and champagne, it might still conflict with the second paragraph of Article 95, I consider it appropriate to provide the national court with the criteria necessary to enable it to decide whether the legislation in question is also compatible with the second paragraph of Article 95.

The second paragraph of Article 95, unlike the first, refers to discriminatory taxation affecting products which are not similar. More precisely, as the Court itself has explained, the function of the prohibition contained in the second paragraph of Article 95 is 'to cover, in addition, all forms of indirect tax protection in the case of products which, without being similar within the meaning of the first paragraph, are nevertheless in competition, even partial, indirect or potential, with certain products of the importing country'. [19]

23. It should also be made clear that, as the Court has consistently held, any assessment

19 — See, for example, Case 168/78 *Commission* v *France* [1980] ECR 347, paragraph 6, and Case 356/85 *Commission* v *Belgium* [1987] ECR 3299, paragraph 7.

of the compatibility of a given tax with the second paragraph of Article 95 'must take account of the impact of that tax on the competitive relationship between the products concerned. The essential question is therefore whether or not the tax is of such a kind as to have the effect, on the market in question, of reducing potential consumption of imported products to the advantage of competing domestic products'. [20] In particular, the national court must take into account the difference between the respective selling prices of the products in question and its influence on the consumer's choice, as well as changes in the consumption of the products.

The information on such matters provided by the Netherlands Government in the course of the proceedings seems at first sight to exclude the possibility that the legislation at issue conflicts with the second paragraph of Article 95. However, it will be for the national court to make that assessment — on the basis, naturally, of the criteria set forth above.

The second question

24. By the second question the Court is asked to rule on the effect *ratione temporis* of its judgment in the event that the duties at issue are found to be incompatible with Community law. As already explained, the reason for this request is that thousands of similar cases are pending before the national courts, with financial consequences which could be extremely serious for the Netherlands State.

I would remind the Court here that, according to settled case-law, the interpretation which it gives to a rule of Community law in the exercise of the jurisdiction conferred upon it by Article 177 clarifies and defines, where necessary, the meaning and scope of that rule as it must be, or ought to have been, understood and applied at the time of its entry into force. It follows that the rule, as thus interpreted, may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied. [21]

25. In view of those principles, a limitation of the effects of a judgment providing an

20 — See Case 356/85, cited above, paragraph 15.

21 — See Case 61/79 *Denkavit Italiana* [1980] ECR 1205, paragraph 16, and Joined Cases 66/79, 127/79 and 128/79 *Salumi* [1980] ECR 1237, paragraph 9.

interpretation is quite exceptional. [22] The Court has taken this step only in certain specific circumstances, where there has been a risk of serious economic repercussions owing in particular to the high number of legal relationships entered into in good faith on the basis of legislation considered to be validly in force, as well as the consideration that both individuals and national authorities may have been led into practices which did not comply with Community law, on account of an objective and significant uncertainty regarding the implications of Community provisions, to which the behaviour of other Member States or the Commission may even have contributed. [23]

However, even where a situation of that nature has arisen, the Court has in any event protected the rights of those who, before the date of the judgment, had initiated legal proceedings or taken similar steps. For the Court to rule otherwise would in effect mean that, so far as individuals are concerned, whose interest in bringing proceedings resides precisely in the practical use of a favourable decision, the substantive benefit deriving from the right relied on under Community law would be denied them. [24] Since in the case now before us any limitation of the effects of the judgment could not therefore affect proceedings already pending, it would do nothing to meet the concerns of the Netherlands Government, since the catastrophic financial consequences of which it is afraid mainly concern proceedings which have already been brought before the competent national courts.

26. On that basis, I take the view that there are no grounds in the present case to justify departing from the principle that interpretative judgments of the Court have retroactive effect.

The interpretation of Article 95 is both clear and supported by a considerable body of

22 — See the judgments cited in footnote 21, at paragraphs 17 and 10 respectively.

23 — See the following cases: Case C-163/90 *Legros* [1992] ECR I-4625, paragraphs 30 to 35; Case C-200/90 *Dansk Denkavit and Poulsen Trading* [1992] ECR I-2217; Case C-262/88 *Barber* [1990] ECR I-1889, paragraphs 40 to 45; Case 24/86 *Blaizot* [1988] ECR 379, paragraphs 25 to 35; Case 43/75 *Defrenne* [1976] ECR 455, paragraphs 69 to 75.

24 — I am unable, therefore, to concur with the statement of principle according to which it is for the Court, where it makes use of the possibility of limiting the effects of its judgments in time, to decide whether an exception to that limitation 'may be made in favour of the party to the main proceedings which brought the action before the national court against the national measure ... or whether, conversely, a declaration of invalidity applicable only to the future is an adequate remedy even for that party (see the judgment in Case C-228/92 *Roquette* [1994] ECR I-1445, paragraph 25). In my view, there can only be an 'adequate remedy' where the individual is assured not only that a Community rule will, where appropriate, be declared invalid or a national law held inapplicable but also, and above all, that the rights which he is recognized as having will be given effective protection. Otherwise, there is a risk of a real denial of justice, which would lead to a loss of the system's credibility, particularly as regards respect for fundamental principles inherent in a Community based on law. As we know, judgments of national courts contain clear warnings to this effect (see, for example, judgment No 232 of 21 April 1989 of the Italian Constitutional Court in the *Fragd* case, as reported in *Il Foro Italico*, 1990, I, Col. 1855; see also Gaja, 'New Developments in a Continuing Story: the Relationship between EEC Law and Italian Law', *CMLRev.*, 1990, p. 83 et seq.).

consistent case-law. Consequently, there could be no objective uncertainty that the tax was prohibited under that case-law. [25] As regards the financial consequences for the Netherlands Government which might ensue from a declaration that the excise duty is unlawful, it should be pointed out that this factor alone can in no way justify a limitation of the temporal effect of the Court's ruling. If this were not so, there would be a risk of treating more leniently precisely those infringements which are most serious, where they are the ones which may entail significant financial repercussions for Member States — an outcome which would be anomalous and patently unacceptable.

Besides, it is precisely those cases concerning the lawfulness of national taxes under Community law which have significant implications as regards recovery of undue tax payments. So, to impose a limitation of temporal effects on a judgment merely on account of the scale of those implications would not only be contrary to the Court's previous decisions [26] but would also constitute a dangerous precedent in so far as it might considerably diminish the judicial protection of taxpayers' rights under Community fiscal rules.

27. Finally, with regard to the fact, also mentioned in the course of the proceedings, that the importers concerned would thus be able to obtain reimbursement of taxes already passed on to consumers, I shall confine myself — in the absence of a question on this point from the national court — to recalling that, as the Court has consistently held, although Community law does not preclude account from being taken of the fact that unduly levied taxes may have been passed on to other traders or to consumers, Member States must nevertheless 'ensure the repayment of charges levied contrary to Article 95 in accordance with the provisions of their internal law, subject to conditions which must not be less favourable than those relating to similar actions of a domestic nature, and which in any case must not make it impossible in practice to exercise the rights conferred by the Community legal system'. [27]

25 — Furthermore, on 17 October 1990 the Commission had initiated proceedings against the Netherlands under Article 169 claiming, precisely, that the legislation in question was incompatible with Article 95 of the Treaty. Subsequently, no further steps were taken in those proceedings since the Netherlands put an end to the discrimination by adopting a new law which entered into force on 1 January 1993.

26 — See, for example, Case C-200/90, cited above, paragraphs 20 to 23, which concerned a tax whose financial significance was by no means negligible.

27 — See Case 68/79 *Just* [1980] ECR 501, paragraph 27. See also *inter alia* Case 199/82 *San Giorgio* [1983] ECR 3595 and Case 240/87 *Deville* [1988] ECR 3513.

28. In the light of the foregoing considerations I propose that the Court should give the following answers to the questions submitted by the Tariefcommissie:

(1) Bearing in mind the actual state of integration existing in the Benelux countries in relation to excise duties, a Member State may not rely on Article 233 of the EC Treaty in order to avoid the obligations incumbent upon it under Article 95 of that Treaty, so that the relevant fiscal territory for the purposes of Article 95 is the territory of the Member State concerned.

(2) The first paragraph of Article 95 of the EC Treaty must be interpreted as meaning that red table wine and qulaity red wine p. s. r., on the one hand, and still fruit wines with an alcoholic strength not exceeding 15% vol., on the other, are similar products; however, sherry, madeira and vermouth, on the one hand, and still fruit wines having an alcoholic strength not exceeding 15% vol., on the other, are not similar products; likewise, champagne and sparkling fruit wines are not similar products.

(3) The conditions for limiting the effects of this judgment in time are not fulfilled.