OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 9 JULY 1981

My Lords,

On 11 March 1980 the Court decided in Case 104/79 (*Foglia* v *Novello* [1980] ECR 745) that it had no jurisdiction to give a ruling on questions referred under Article 177 of the EEC Treaty by the Pretore of Bra arising out of proceedings pending before him. In those proceedings the plaintiff, an Italian wine merchant, claimed from the defendant, who refused to pay them, the amount of taxes on a consignment of Italian liqueur wine sold to the defendant for delivery to a third person in France, which were charged by the French authorities and paid by carriers engaged by the plaintiff. The full details are set out in the report of the earlier judgment and I do not think that it is of assistance to repeat them further here. The Court refused jurisdiction, as I read it, on the basis that it was satisfied that as between the parties there was no real issue as to Community law. The proceedings in the Italian court, indeed maybe the whole transaction, had been set up in order to obtain a ruling on a matter as to which the parties were agreed. Since there was no question between them, the Court was neither obliged nor empowered to rule on the matter. The Pretore has now asked five further questions. Four are designed to investigate the effect and extent of the Court's decision; the last seeks guidance as to the application of Article 95 of the EEC Treaty to the facts of the case.

A preliminary objection to the present reference is taken by the French Government on the basis that the Court has already decided that it does not have jurisdiction and that the matter cannot be re-opened. I do not consider that this objection is well founded. The Court has already accepted in Case 29/68 (*Milch-, Fett- und Eier-Kontor GmbH* v *Hauptzollamt Saarbrücken* [1969] ECR 165) that questions may be put by a national court to clarify the answer given on an earlier reference. The first four questions in the present reference can be looked at on that basis. Moreover it seems to me that, if the Court has been asked to answer questions on the basis of incomplete information, or if circumstances have changed in a material way so as to render the initial answers no longer applicable, the Court may in a proper case entertain further questions even on the same point. As he himself stresses, the Pretore has now given a fuller explanation, and it seems to me clearly open to the Court to consider whether this is sufficient to enable the Court to decide that it has jurisdiction to deal with the questions raised, in particular the fifth question.

The *first* question raises in general terms the respective functions of the Court of Justice and the national court in a reference under Article 177, and asks in particular what are their powers, "having regard above all to the powers possessed by" the national court under its national legal system "in relation to the evaluation of all the matters of fact and of law relevant to the disputes as to the substance and of the questions raised therein, above all when the claim in the main action is for a declaratory judgment". This question appears to spring from submissions made to the judge that the effect of the Court's judgment was that it had arrogated to itself the power to decide issues of fact, and to make a judgment as to the subjective intentions and attitudes of the parties.

Article 177 confers upon the Court jurisdiction to give preliminary rulings concerning respectively the interpretation or validity of the Treaty, and the acts and statutes specified. It goes on "Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon".

The Court has, it seems to me, regarded this provision as involving a form of cooperation or dialogue between itself and the national court, the two courts having different functions. On the one hand it is a matter of Community law, and therefore ultimately for the Court to determine, whether a question posed does fall within the categories described in the first paragraph of Article 177 (Cases 105/79 and 68/80, *Preliminary rulings requested by the Acting Judge at Hayange* [1979] ECR 2257 and [1980] ECR 771 and Case 175/78 *Regina* v *Saunders* [1979] ECR 1129); whether the body in which the question was raised constitutes a "court or tribunal" (Case 61/65 *Vaasen-Gobbels* [1966] ECR 261; Case 17/76 *Brack* v *Insurance Officer* [1976] ECR 1429; and Case 65/77 *Razanatsimba* [1965] ECR 2229); and what constitutes the raising of a question. On the other hand the Court has frequently recognized that the facts are essentially for the national judge to establish: it is for him also, and not for the Court, to consider whether the decision on "such a question" raised before him is necessary to enable him to give judgment. The Court does not examine the reasons behind the questions or the relevance of the questions to the case (Case 26/62 *Van Gend en Loos* [1963] ECR 1 at p. 15; Case 13/67 *Becher* v *Hauptzollamt München* [1968] ECR 187 at p. 197 and Case 117/77 *Algemene Ziekenfonds Drenthe Platteland* v *Pierik* [1978] ECR 825 at pp. 834-5). Those are the functions of the national judge.

The national judge must, however, be satisfied that a question of the kind is raised and that it is necessary for him to determine it. If it does not appear to the Court that the judge has considered whether it is necessary to answer the question in order to give a judgment in the case or if *ex facie* the judge has merely thought that it would be convenient to have an answer, without it

being necessary, for the purposes of his judgment, then it seems to me that the Court may refuse to deal with the questions. It is, of course, only in exceptional cases that the Court will find that the national judge has failed in that respect. As the Court observed in Case 13/68 (*Salgoil* v *Italy* [1968] ECR 453 at p. 459), and in Case 5/77 (*Tedeschi* v *Denkavit* [1977] ECR 1555 at p. 1574) "when a national court or tribunal refers a provision of Community law for interpretation, it is to be supposed that the said court or tribunal considers this interpretation necessary to enable it to give judgment in the case". Nevertheless exceptional cases may occur in which it appears in the order for reference, or from the file, that the national court failed to consider the correct test for the purposes of Article 177. It may be that circumstances could arise in which the Court could refuse to deal with questions which were quite clearly an abuse of the procedure of the Court, or where the Court might find it necessary to refer questions back to the judge for clarification or where, as was suggested in oral argument, the Court might find it right to refer the matter back to the national court for that court to consider, in the light of the Court's observations, whether it really was necessary for the question to be referred.

The crucial question in the present case, it seems to me, is whether the national judge is satisfied that it is necessary for a question of Community law falling within Article 177 to be determined to enable him to give judgment.

It is clearly possible in some jurisdictions for an order to be made by consent, for example where a claim is made for a debt which is admitted. The judge may be able in such a case to proceed on the basis of the parties' agreement without himself determining specific points of law. On the other hand the judge may have to satisfy himself as to a matter of law whatever the attitude of the parties.

If, in a case before a national court, a question of Community law falling within Article 177 arises, but the judge can give judgment without determining it, he should not in my opinion refer the question to the Court even if the parties wish the question to be referred. The choice and the decision is his, not theirs. Equally, if the national judge considers that a decision on such a question is necessary for the giving of the judgment, then, in my opinion, he is entitled to refer it under Article 177. It does not, in my view, matter for this purpose that the parties adopt the same position on the point of Community law. The crucial matter is not whether the parties are agreed: it is whether the judge considers that the question has to be determined for the purposes of giving judgment. In a case where some form of declaratory judgment is sought which raises clearly and directly a question of law falling within Article 177, then it seems to me that the judge must be entitled to refer it whatever the position taken by the

parties. Unless, which seems improbable, the judge is bound by the parties' agreed contentions on the law (where no decision on that will be necessary for the judgment) the judge must decide any question of law which arises and which is necessary for the determination of the case. If that question concerns one of the matters specified in the first paragraph of Article 177, then, in my view, the judge can refer the question to the Court.

As the Pretore readily accepts, the background to the case before him, which was given in the first reference, was brief. He has now amplified the material which was previously before the Court. The position, as I see it now, is that the plaintiff claims a sum of money, not finding it necessary to refer to Community law for his claim. The defendant denies liability on the basis of the agreement between them, which excludes responsibility for payments which cannot lawfully be demanded. The taxes are said not to be due because they are incompatible with Community law. The defendant resists the claim and claims a declaration on that basis. The judge has concluded that a question of Community law has to be decided for him to give judgment on the claim, and on the cross claim for a declaration. In my opinion, against this background, he is, subject to the points which remain to be considered, entitled to refer a question to the Court pursuant to Article 177. It does not seem to me that he is barred from doing so because of the absence of a contention in the case, from e.g. Danzas, the carriers, that the taxes were lawfully charged by the French authoriries.

The Pretore's *second* question reads as follows:

"If the Court of Justice in connection with a reference for a preliminary ruling declares for any reason whatever that it does not have jurisdiction to give a ruling on the questions submitted to it, may the court referring the questions, which is bound under its own national legal system to administer justice to the parties, also undertake the interpretation of Community law, and if so within what limits and according to what criteria, or must it instead give a ruling exclusively in terms of national law?"

If the Court rules that the question, framed by the national court, is not one relating to the interpretation of the Treaty or as to the validity or interpretation of legislation made thereunder (and therefore not one falling within Article 177) it will be for the national judge to accept that conclusion and to determine the case in accordance with the system of law applied by him. Should the Court decline to answer a question because it is not satisfied that the national court or tribunal has considered whether a decision on the question is necessary in order to enable it to give judgment, the national judge must then consider that issue. If he concludes that a decision upon the question is necessary, then the matter may no doubt be referred back to the Court but, as in the present case, the judge should furnish the Court with material sufficient to satisfy

the Court that the national judge has addressed his mind to the correct issue.

By his *third* question the Pretore asks:

"Within the framework of the criteria for interpretation of Article 177 of the EEC Treaty is there within the legal order of the Community a general principle which requires or permits the national courts before which proceedings are instituted wherein questions of interpretation of Community law arise also involving national provisions, which may pertain to legal systems other than that of the court in question, to order the joinder in the proceedings of the authorities of the Member State concerned before submitting a reference for a preliminary ruling to the Court of Justice?"

It does not seem to me that there is any such general principle of Community law either requiring or permitting the joinder of the authorities of the Member State whose legislation is being considered in the courts of another Member State. Indeed, it may be that there exists a general principle, common to the laws of the Member States, whereby national courts may not implead the acts of a foreign sovereign, at least when they are done in the exercise of sovereign power (see Rousseau, *Droit International Public*, 1980, Vol. IV, pp. 14-15; O'Connell, *International Law*, 1970, Vol. II. p. 847). I find it unnecessary to decide the issue in the present case, for even in the absence of any such principle, it would remain a matter for domestic law to determine whether another State may be joined in such proceedings, and whether a Member State can plead sovereign immunity to prevent it being joined. The reference procedure under Article 177 (unlike the direct action procedure under Article 169) does not itself permit Member States to be joined as parties for that purpose, but gives power to them to intervene. Even less can there be a rule of Community law that such Member States must, or may, be joined in the national proceedings before a reference is made. Moreover, Article 177 does not itself authorize the Court or national tribunals to rule upon the validity of legislation of a Member State. As the Court observed in Case 20/64 (*Albatros* v *Sopéco* [1965] ECR 29 at p. 34) "on the basis of this provision this Court can neither apply the Treaty to a particular case nor give a judgment on the validity of a measure of national law with regard to it, as it is required to do under Articles 169 and 170". The Court's function in such cases, is limited to giving interpretative rulings on the questions set out in the first paragraph of Article 177.

By his *fourth* question the Pretore asks:

"At all events, wherever a question of interpretation is raised before or by the national courts in proceedings between private persons which directly concerns the individual rights of nationals or traders of one of the Member States, do such individual rights under substantive Community law obtain a degree of protection which is different from and at all events lesser than that which the same individual rights might obtain if the

administrations of the Member States whose laws form the subject-matter of the requests for interpretation in relation to their compatibility with the EEC Treaty were represented and entered an appearance before either the national court or the Court of Justice?"

I am not clear as to the real purpose of this question and have doubts as to whether it falls within the scope of Article 177. Giving it the benefit of the doubt, it may be that it raises the question, discussed in the previous proceedings before the Court, as to whether an individual can resist a claim against him by contending that the claim arises only because of a provision of the law of a Member State, other than that in which the proceedings are brought, and which is not a party to the proceedings which is incompatible with the EEC Treaty. Leaving aside aspects of public policy which may preclude the law of another Member State from being enforced, it seems to me that if such a question arises, it must be decided whether or not the Member State whose legislation is in issue is a party before the Court. National courts are accustomed to deciding issues of foreign law where no Community law problem arises. The more so are they likely to have to do so in commercial transactions where the compatibility of the law of another Member State with Community law is involved. There are difficulties of language and presentation of the Member State's point of view, but they do not, in my opinion, preclude a decision on such matters by the court of another Member State, especially where the decision is binding only *inter partes* and not on the Member State itself. Procedures may be available which enable the national court to give an opportunity to the Member State to put its arguments or evidence before that court, and which reduce the risk of an inadvertently erroneous decision. On a reference to the Court under Article 177 there will be a chance to intervene, which, even if it does not put the Member State in the same position as a party before the national court, does enable the Court of Justice to know the attitude of the Member State concerned.

By his *fifth* question the Pretore asks whether Article 95 of the EEC Treaty must be interpreted as meaning that the prohibition on the imposition of internal taxation, differentiated according to the origin and provenance of a product, encompasses situations such as that of the French provisions on the taxation of liqueur wines, described in detail in the first Foglia case. For the reasons already given, it is not for the Court in the course of a reference for preliminary ruling under Article 177, to give judgment upon the validity of a measure of national law, as it is required to do in cases instituted under Article 169. "It may nevertheless extract from the wording of the reference submitted to it by a national court or tribunal the question arising as a preliminary matter concerning the interpretation of the Treaty" (*Albatros* v *Sopéco*, loc. cit.). The fifth question posed by the Pretore di Bra it seems must therefore be understood as asking whether upon its proper construction Article 95 of the EEC Treaty prohibits Member States from classifying liqueur wines for fiscal purposes according to criteria which, by

referring to the objective characteristics of a product or to designations of origin, have the effect of placing an import from another Member State into a category attracting a higher rate of duty than that levied upon a domestic product.

For the purposes of applying Article 95 of the EEC Treaty it is well established that any difference in the treatment between the domestic and the imported product need not be drawn expressly by reference to origin. In this context the national court must have regard to substance and not merely to form. The decisive criterion is the actual effect of each tax on national production on the one hand and on imported products on the other: see Case 55/79, *Commission* v *Ireland,* [1980] ECR 481 at p. 491. Thus a distinction drawn for fiscal purposes between products having different physical properties is capable of entailing a breach of Article 95 where its actual effect is to accord preferential treatment to national production.

In order for Article 95 to come into play, however, it is necessary to establish that the tax imposed on the imported product exceeds that imposed on "similar domestic products" or that the tax imposed upon the import is "of such a nature as to afford indirect protection to other products". Products are similar, within the meaning of the phrase appearing in the first paragraph of Article 95, if they "have similar characteristics and meet the same needs from the point of view of consumers". The criterion is not that the two products must be of a strictly identical nature, but merely that they must have a similar and comparable use: see Case 168/78, *Commission* v *France,* [1980] ECR 347 at pp. 359-60. A tax may be said to afford indirect protection to other products, within the meaning of the second paragraph of Article 95, when those other products are in competition, even partial, indirect or potential, with certain products of the importing country which are subjected in that country to taxation at a lower rate or on a more favourable basis: see Case 27/67, *Firma Fink Frucht GmbH* v *Hauptzollamt München-Landberger Straße,* [1968] ECR 223 at p. 232.

The questions whether two products have similar characteristics and meet similar needs from the point of view of the consumer, and whether they are in competition with each other are essentially questions of fact; and as such they must be resolved by the national court when the proceedings have been initiated before such a court. For the purposes of resolving the first of those questions, it is not in my view conclusive that the imported and the domestic product are embraced within a common definition in a Council Regulation on the common organization of a market, such as Regulation No 337/79 of 5 February 1979, OJ 1979, L 54/1, Annex II, or in the Common Customs Tariff, such as is found in OJ 1979, L 335/105, heading 22.05C. The standards applied by the legislator in drafting a definition encompassing two or more products may, but will not necessarily, correspond with those which must be applied by the judge in determining whether those product are "similar" or whether they are "in competition". In *Firma Fink*

Frucht v *Hauptzollamt München-Landberger Straße* at p. 232 the Court stated that "similarity between products within the meaning of the first paragraph of Article 95 exists when the products in question are normally to be considered as coming within the same fiscal, customs or statistical classification, as the case may be". The Court was, however, there speaking of classifications found in the contested national law, and not those found in Community legislation invoked for the purpose of proving the similarity of the domestic and the imported product.

In the present case, it may be necessary to consider separately whether an imported product, classified as a liqueur wine without a registered designation of origin, is similar to or in competition with a liqueur wine with a registered designation of origin or a natural sweet wine. It is conceivable that a different answer to this question might be given in the two cases, in view of the fact that the French Government in the first Foglia case distinguished between the two species of liqueur wines on the ground that the relief granted to those with registered designations of origin was justified by a desire to maintain fair conditions of competition between those products which were subject to very few rules and those which were subject to strict requirements as to production, and distinguished between natural sweet wines and others on the ground that the former were produced from wines having a limited yield per hectare and were therefore different from products of an industrial nature. Should the national judge find that the domestic and imported product are "similar" or are "in competition", it will remain for consideration whether Community law permits any difference in their treatment for fiscal purposes.

In Case 148/77 *Hansen* v *Hauptzollamt Flensburg*, [1978] ECR 1787 at pp. 1806-7, the Court observed that

"At the present stage of its development and in the absence of any unification or harmonization of the relevant provisions, Community law does not prohibit Member States from granting tax advantages, in the form of exemption from or reduction of duties, to certain types of spirits or to certain classes of producers".

It is to be recalled, however, that quite apart from any limitations upon the taxing power of a Member State implied by the common organization of the market by Regulation No 337/79, of the kind examined in Joined Cases 36 and 71/80 (*Irish Creamery Milk Suppliers' Association*, [1981] ECR 735) there remains the qualification made by the Court itself in Case 148/77 (*Hansen* v *Hauptzollamt Flensburg*) in the following words:

"according to the requirements of Article 95, such preferential systems must be extended without discrimination to (products) coming from other Member States".

A preferential system extended to products specified geographical origins, none of which encompasses regions in other Member States, cannot be said to meet that criterion. It is for the national

court to decide these issues on the basis of the judgments referred to above and in Joined Cases 142 and 143/80 *Amministrazione delle Finanze dello Stato* v *Essevi* and *Salengo*, [1981] ECR 1413.

In the event, I am of the opinion that the Pretore of Bra's questions should be answered as follows:

1. In the application of Article 177 of the EEC Treaty it is the duty of the national court or tribunal to consider whether a decision on a question is necessary to enable it to give judgment before requesting the Court of Justice to give a ruling thereon; and it is within the power of the Court of Justice to decline to answer a question posed by a national court or tribunal where it does not appear from the order for reference that the national court or tribunal has properly considered that matter.

2. Wherever a court or tribunal of a Member State is bound to determine a question of the kind described in the first paragraph of Article 177 of the EEC Treaty, that question may be referred to the Court of Justice, provided that the national judge considers the matters set out in the second paragraph of that Article.

3. European Community law neither requires nor permits a national court, when called upon to interpret a question of Community law involving the national provisions of another Member State, to order the joinder of the authorities of that State as parties to the action.

4. Questions as to the compatibility of the law of one Member State with Community law may have to be decided by the courts of another Member State in litigation between private persons whether or not the latter Member State is a party to the proceedings.

5. Upon its proper construction Article 95 of the EEC Treaty prohibits Member States from adopting for fiscal purposes a classification of liqueur wines the effect of which is to secure the imposition of a higher rate of tax on imported than on domestic wines, even though the classification is made by reference to the objective characteristics of the products, provided that the domestic and imported products have similar characteristics and meet the same needs from the point of view of consumers, or provided that both are in competition, even partial, indirect or potential.