OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 10 MARCH 1983 [1]

Mr President,
Members of the Court,

1. In the present reference for a preliminary ruling the Court is once again asked to interpret the concept of a "measure having an effect equivalent to a quantitative restriction" which is used in Article 30 of the EEC Treaty. It is necessary today to determine whether the said concept applies to a marketing ban relating only to imported products. More precisely, it must be determined whether a ban on marketing a certain product (vermouth with an alcoholic content below a certain minimum) imposed in the country of manufacture may be imposed in the country of import by way of a reference to the law of the country of manufacture, even though the country of import itself has no such ban.

Let me summarize the facts. The Schutzverband gegen Unwesen in der Wirtschaft [League for protection against unfair trading] made an application to the Landgericht München I for an injunction restraining the limited liability company Weinvertriebs from marketing in the territory of the Federal Republic of Germany vermouth made in Italy with an alcoholic content of less than 16 %. In support of its claim it relies on the German Law on wine of 14 July 1971. That Law imposes no minimum for the alcoholic content of vermouth made in Germany but paragraph 32 (1) thereof provides: "Wine-based beverages produced abroad ... may be imported only if the whole production has taken place in one and the same State according to the provisions applicable there and the product may be marketed there for the purpose of being consumed in an unaltered state." It is apparent from that provision that if in the country of production the vermouth may be marketed only if it has a minimum alcoholic content, it must have the same alcoholic content to be marketed in the territory of the Federal Republic.

That is so in the present case. According to Italian law (Article 7 of Decree-Law No 3 of 11 January 1956, which became Law No 108 of 16 March 1956) the alcoholic content of vermouth marketed in Italy must be at least 16%. The reference contained in paragraph 32 of the German Law means that the same limit applies to the marketing of Italian vermouth in Germany. On the other hand, as I have said, it imposes no such condition on the corresponding national product.

In order to resolve the case the Landgericht München I considered it necessary to determine whether the said limit was compatible with Article 30 of the EEC Treaty. It stayed the proceedings and referred the following questions to this Court:

"1. Is the interpretation of a statutory provision in Member State A, whereby vermouth produced in

1 — Translated from the Italian.

Member State B is not marketable in Member State A because it has slightly less than the minimum alcoholic content prescribed by law in Member State B, compatible with Article 30 et seq. of the EEC Treaty even though no minimum content for domestic vermouth is prescribed in Member State A and accordingly had the vermouth been produced in Member State A it would have been freely marketable there?

If Question 1 is answered in the affirmative:

2. Is it still compatible with Article 30 et seq. of the EEC Treaty if the national provisions in Member State B provide that the vermouth need not comply with the national provisions of Member State B on minimum alcoholic content if the vermouth is produced for export to Member State A?"

2. The defendant in the main action pointed out that the problem of compatibility with the Treaty had arisen not so much by reason of the hypothetical law of "Member State A" but by reason of the very specific provisions in force in relation to vermouth in the Federal Republic of Germany. Naturally, answer may be given that there as elsewhere the national rules are merely to be used as an abstract parameter against which the scope of the Community rule may be measured. But that would really be no answer. As I said on 10 February in my Opinion in Case 94/82, *De Kikvorsch*, this is really a "device". National courts, indeed, "frequently have recourse to a reference for a preliminary ruling in cases which would be more satisfactorily dealt with by means of a direct action against a Member State for failing to fulfil the obligations imposed by the Treaties or by secondary legislation"; and thus "by involving this Court in their surrogate activities may usurp powers and initiatives which are in principle those of the Commission".

Although it has the merit of opening areas to intervention by the Court and thus favours the development of the law, the replacement of the Commission in legal proceedings presents more than one inconvenience. In the first place it produces decisions given in exercise of the special jurisdiction referred to in Article 177, which are less effective than those which are given in direct actions pursuant to Articles 169, 170 and 171. Furthermore, it prevents the Court, which in a reference for a preliminary ruling is bound by the question put to it, from considering the whole system of which the provisions at issue are part. Finally, it restricts the opportunity for defence of the State whose laws, be it only indirectly, are the subject of criticism and review. As the report delivered on 10 January 1981 by Mr Hellmut Sieglerschmidt on behalf of the Legal Affairs Committee of the Parliament observes, "the adversary proceedings provided for in Article 169 of the EEC Treaty in the formal preliminary procedure place" Member States "in a more favourable position from the point of view of procedure than do proceedings for obtaining a preliminary ruling" (Document 1-1052/82 EP 77.275, p. 11).

That said, it must nevertheless be remembered that in this case the

Commission, according to what it has stated, " has decided to initiate against the Federal Republic of Germany the proceedings provided for in Article 169 ... for a breach of the Treaty" (statement of 1 April 1982, p. 5, paragraph 5).

3. I think it cannot seriously be doubted that rules such as those whose essential features I have stressed are capable of creating an obstacle to intra-Community trade. They prevent the importation of a product when quite fortuitously it happens that its marketing is banned in the place of origin and at the same time — and this is the decisive issue — it places no restriction on the marketing of the similar domestic product. The discrimination between domestic and imported products is patent and therefore Article 30 applies automatically. The Commission rightly points out that in its Directive 70/50/EEC of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 17) measures which "prescribe that imported products are to conform, totally or partially, to rules other than those of the importing country" are to be regarded as measures having an effect equivalent to quantitative restrictions (Article 2 (3) (p)).

In stating that rules such as the German ones are discriminatory and impede imports I obviously do not wish to deny that the Member States are free to regulate the production and marketing of vermouth in their respective territories. The absence of Community rules leaves them that freedom. The matter, it is true, is in the process of being remedied. On 22 June 1982 the Commission submitted to the Council a proposal for a regulation laying down "general rules on the definition, description and presentation of spirituous beverages and of vermouths and other wines of fresh grapes flavoured with plants and other aromatic substances" (Official Journal C 189, 23. 7. 1982, p. 7). Article 4 of the proposal defines the category of aromatized wines, which includes vermouth, and that in turn is defined in Article 4 (1) (f) as "aromatized wine with a characteristic taste obtained by the use of appropriate substances always including wormwoods". Article 6 (2) of the proposal then provides that "to be released for human consumption in the Community" under the name of vermouth "the aromatized wines in question must ... have a minimum actual alcoholic strength of 15 % vol." and "a minimum total alcoholic strength of 20.5 % vol. ...".

In any event, today we are still far from harmonization in the sector. However, as I have said, although that fact may allow the States to legislate it does not release them from the obligations imposed by Article 30 of the Treaty. The Court has ruled that that is so, and repeated as much on several occasions. Thus it declared in the judgment of 26 June 1980 in Case 788/79, *Gilli and Andres* ([1980] ECR 2071, at paragraph 5 on p. 2078): "In the absence of common rules relating to the production and marketing of the product in question it is for Member States to regulate all matters relating to its production, distribution

and consumption on their own territory subject, however, to the condition that those rules do not present an obstacle, directly or indirectly, actually or potentially, to intra-Community trade." The Court said something similar in the judgment of 19 February 1981 in Case 130/80, *Kelderman* ([1981] ECR 527, paragraph 5 at p. 535).

The escape the prohibition in Article 30 rules such as the German rules in issue ought to satisfy either the conditions of Article 36, and in particular that in relation to the protection of health, or the two mandatory requirements, fairness in commercial matters and protection of consumers, to which the Court gives priority over the said prohibition (cf. *REWE* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649; the judgment of 26 June 1980 in the aforesaid Case 788/79, *Gilli;* the judgment of 19 February 1981 in the aforesaid Case 130/80, *Kelderman;* and the judgment of 17 June 1981 in Case 113/80, *Commission* v *Ireland* [1981] ECR 1625).

4. The plaintiff in the main action claims that the ban on marketing in Germany Italian vermouth with an alcoholic content of less than 16% escapes the prohibition in Article 30 because it is intended to protect the German consumer. Thus the plaintiff does not deny (and how could it?) that the rules impedes intra-Community trade, but it claims that its protective function has a socially important value which according to the case-law of the Court limits or reduces the scope of the Community prohibition. The Schutzverband maintains that "the German consumer, and in particular the millions of tourists . . . who visit Italy every year, expect Italian vermouth marketed in the Federal Republic of Germany . . . to be identical to the Italian vermouth sold or served in Italy"; it infers that if vermouth produced in Italy and sold in Germany does not correspond to that marketed in Italy "the consumer is being misled" (see statement of 14 April 1982, paragraph 3).

The argument is weak, however. It takes no account of a preliminary and vital matter: the reference to the marketing conditions in the country of origin by which the German legal system discriminates between domestic and imported products (and between products imported from different Community countries, assuming that the respective domestic marketing conditions are also different). It is true, as I have said, that the Court considers that national rules may derogate from the prohibition in Article 30 when it is a question of satisfying "mandatory requirements relating in particular to . . . the fairness of commercial transactions and the defence of the consumer" (cf. the judgments cited of 20 February 1979 in *REWE,* paragraph 8; 26 June 1980 in *Gilli;* 19 February 1981 in *Kelderman;* 17 June 1981 in *Commission* v *Ireland);* but it makes that derogation subject to the condition that the national rules

apply to domestic and imported products *without distinction.* If the rules concern only imported products, therefore, and thus are discriminatory, the derogation does not apply. That principle emerges clearly from the judgment in *Commission* v *Ireland.* The Court stated there that only "provisions that regulate *in a uniform manner*" (the italics are mine) "the marketing of domestic products and imported products" (paragraph 11) may be regarded as capable of derogating from the prohibition in Article 30.

Quite apart from that objection, however, there is no substance in the argument put forward by the Schutzverband. Let me say first of all that the difference between the alcoholic content of Italian vermouth sold in Italy and that of the same product marketed in the Federal Republic of Germany is minimal: the first has 16% and the second some 15.4%. To maintain, as does the plaintiff in the main action, that they are two different products thus appears to me at the very least bold. Moreover, the view that the German consumer derives his opinion of Italian vermouth only from his holidays in Italy is not supported by evidence. Finally, even making all allowances, it is a fact that consumer protection is attainable by simple and inexpensive measures. As the representative of the Italian Government has observed, it is sufficient to require (without, of course, discriminating between imported and domestic products) an indication of the alcoholic content on the label. To go so far as to prohibit marketing altogether, by contrast, is to adopt a means manifestly disproportionate to the end in view (or which is said to be in view).

5. During the written procedure and again during the oral procedure the argument was put forward that the requirement of protecting human health suffices, as stated in the first sentence of Article 36 of the EEC Treaty, to render the ban imposed by the German legislation lawful. But that argument does not hold up, either. The same cogent argument which prevents consumer protection from being pleaded to exempt from the prohibition of Article 30 militates against it.

According to the last sentence of Article 36 the exemptions referred to in the first part of that article may not be relied upon when the national measure in question constitutes "a means of arbitrary discrimination" or "a disguised restriction on trade between Member States". I am reminded of the well-known judgment of 10 July 1980 in Case 152/78, *Commission* v *France* ([1980] ECR 2299). The Court was there asked to determine whether a ban on advertising alcohol, contained in national legislation involving different and more onerous forms in respect of imported products than for domestic products, could be justified on grounds of protection of public health. The Court held that rules restricting the advertising of alcoholic beverages comply with Article 36 only in so far as they apply in a similar way to all the alcoholic

beverages in question *whatever their origin.* The present case falls precisely within the provision of the last part of Article 36 and is in no way different, on the surface, from that which was considered in the judgment which I have just mentioned. The answer must therefore be the same: on the basis of the principle laid down by the Court, and the fact that under German law the ban on marketing vermouth of an alcoholic content lower than 16% applies to products of Italian origin and not likewise to domestic products, it must be concluded that the first sentence of Article 36 does not apply.

As regards the merits it is rash and absurd to claim that legislation such as the German legislation is intended to protect health. Its rules amount ultimately to banning the marketing of imported aromatized wines which do not have a minimum alcoholic content. We all know that the higher the degree of alcohol in a beverage the more harmful it is. Are we therefore to infer that if there is a philosophy behind the German rules it is to encourage the more harmful product, the shorter road to inebriation? I am aware that the question is paradoxical, but the paradox shows that to plead Article 36 in the present case is mere pretext.

6. One last aspect of the case remains to be considered. As I have said, the prohibition in paragraph 32 of the Law of 14 July 1971 arises because of the reference to the law of the country where the vermouth is produced. Can that fact affect the issue? I do not think so. In my opinion the fact that domestic and imported products are treated differently is decisive.

The fact that the imported products are subject to the conditions for marketing the product in the country of origin is irrelevant. I have already made it clear that in the absence of common rules every State remains free to regulate in its own way the production and marketing of vermouth in its territory; it is therefore free to allow certain vermouths to be produced only for export and to subject them to different rules. Such differentiation has already been held to be lawful in the judgment of 5 February 1981 in Case 53/80, *Officer van Justitie* v *Kaasfabriek Eyssen* ([1981] ECR 409). The Court had to decide whether the rules of the EEC Treaty in relation to the free movement of goods prevent the application of national measures which prohibit the addition of nisin to processed cheese sold on the domestic market whilst allowing it for cheese intended for export to other Member States; the Court held that a prohibition of that kind, although confined to products marketed domestically, was not contrary to Articles 30 and 36 of the Treaty.

One final and obvious remark: products intended solely for export must also comply with the national laws governing them.

7. For all the aforesaid considerations I propose the following answer to the questions referred to the Court for a preliminary ruling by the Landgericht München I by order of 26 January 1982 in the case brought by the Schutzverband gegen Unwesen in der Wirtschaft against the limited liability company Weinvertriebs:

Article 30 of the EEC Treaty must be interpreted as meaning that a national measure which (a) provides that wine-based vermouth produced in another Member State is not marketable because its alcoholic content is lower than the minimum prescribed for its marketing in the State of origin and (b) does not impose any similar ban on the corresponding national product constitutes "a measure having an equivalent effect to quantitative restrictions on import". For the purposes of marketing it is in any event necessary for the imported product to have been manufactured in accordance with the law of the country of origin.