OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 11 June 1991 *

Mr President,
Members of the Court,

1. Law No 20/85 of 25 July 1985 enacted by the Parliament of the Autonomous Community of Catalonia on prevention and assistance in relation to substances likely to lead to dependency [1] provides in Article 19:

'1. In communications media controlled by the Generalitat and by the local authority of Catalonia all forms of advertising of alcoholic beverages with a strength of more than 23 degrees shall be prohibited. That prohibition shall not apply to indirect advertising by sponsors or to fixed advertising hoardings in programmes not specifically intended for advertising purposes, such as sports broadcasts.

2. The advertising of beverages with an alcohol content greater than 23 degrees shall not be permitted:

(a) in streets, in squares, in parks, on roads and other public thoroughfares, on walls, hoardings and other means of external advertising, except signs indicating production and sales centres;

(b) in cinemas;

(c) on public transport.'

Article 25 of the abovementioned law provides for a largely similar prohibition on the advertising of tobacco products.

By virtue of the advertising prohibition provided for in those provisions and in the detailed rules for their application approved in Decree No 9 of 16 January 1986, [2] the Directorate-General for Public Health of the Catalonian public authority, the defendant in the main proceedings, in Summer 1988 imposed on Aragonesa de Publicidad Exterior SA (hereinafter referred to as 'Aragonesa') and on Publivía SAE, the applicants in the main proceedings, fines amounting to PTA 75 000 and PTA 225 000 respectively, after it had been established that external advertising hoardings, operated by those companies, carried advertising for tobacco products and alcoholic beverages having an alcoholic strength of more than 23 degrees (hereinafter referred to as 'beverages with a high alcohol content').

2. Neither Aragonesa nor Publivía contested the facts alleged against them, but

* Original language: Dutch.

1 — Law No 20/85 of 25 July 1985 on prevention and assistance with regard to substances likely to lead to dependency (DOG. Num. 572, de 7-VIII-1985, p. 465).

2 — DOG No 646, of 7 November 1986, p. 380.

they both lodged appeals against the decisions imposing fines on them. Before the Tribunal Superior de Justicia de Cataluña (High Court of Catalonia), they claimed that Law No 20/85 and especially Article 19 mentioned above (on the prohibition of the advertising of beverages with a high alcohol content) and Article 25 (on the prohibition of the advertising of tobacco products) of that law together with the detailed rules for its application approved in Decree No 9/86, by virtue of which the fines were imposed, are incompatible with Article 30 of the EEC Treaty and may therefore not be applied.

In the framework of those appeal proceedings, the Tribunal Superior de Justicia de Cataluña, by orders for reference of 9 November 1989 (Aragonesa de Publicidad Exterior SA/Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña) and of 29 November 1989 (Publivía SAE/Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña), referred the following questions to the Court for a preliminary ruling:

'(1) Does a law of a Member State (or, in this case, of the Parliament of an autonomous community of a Member State with powers, under domestic legislation, to legislate on particular matters) which prohibits, within the territory under its jurisdiction, the advertising of beverages of an alcoholic strength of more than 23 degrees in (a) the mass media (b) streets and highways, with the exception of signs indicating centres of production and sale (c) cinemas (d) public transport, constitute a measure having an effect equivalent to a quantitative restriction on exports within the meaning of Article 30 of the EEC Treaty?

(2) If the answer is in the affirmative, must the first sentence of Article 36 of the EEC Treaty be interpreted as meaning that a Member State may lawfully impose a partial prohibition on the advertising of beverages with an alcoholic strength of more than 23 degrees for the protection of the health of humans in accordance with domestic law?

(3) May a prohibition on grounds of public health as described above constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States?' [3]

Given the similarity in terms and, *mutatis mutandis*, in the factual, legal and procedural context of the questions submitted for a preliminary ruling, the Court decided to join Cases C-1/90 and C-176/90.

3. A prohibition on advertising such as that provided for in Article 19 of Law No 20/85 undoubtedly constitutes trading rules capable, within the meaning of the *Dassonville* judgment of impeding directly or indirectly, actually or potentially, intra-Community trade. [4] The prohibition on advertising may in fact make the sale of imported products more difficult and/or less attractive and thus constitute a measure

3 — It should be observed that the questions submitted for a preliminary ruling solely concern the advertising ban in respect of drinks with a high alcoholic content (Article 19 of Law No 20/85) and not the prohibition also mentioned above concerning the advertising of tobacco products (Article 25 of Law No 20/85), although it is clear from the Orders for Reference that the applicants in the main proceedings raise the question of the compatibility of both products with Article 30 of the EEC Treaty (in the Aragonesa case, see the Order for Reference, at p. 2, and in the Publivía case, the Order for Reference, at p. 3).

4 — Judgment in Case 8/74 *Dassonville* [1974] ECR 837, para. 5.

having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty. The Court expressly so held in its judgment in Case 152/78 *Commission* v *France* [1980] ECR 2299, which also involved a prohibition on the advertising of alcoholic beverages. [5]

The defendant in the main proceedings and the Commission claim that the prohibition of advertising seeks to protect public health and therefore, in spite of the (potential) obstacles which it constitutes for intra-Community trade, is none the less compatible with Article 30 of the EEC Treaty. The applicants in the main proceedings do not share that point of view.

Applicability of Article 36 of the EEC Treaty

4. The applicants in the main proceedings are proceeding on the principle that the prohibition on advertising under examination constitutes a discriminatory trading rule. I do not share that opinion (see paragraph 10 below). If the national court were nevertheless to consider the present case to involve discriminatory rules, the prohibition of advertising may nevertheless be compatible with Article 30 of the EEC Treaty by virtue of Article 36. Under the terms of the first sentence of that article, 'the provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports . . . justified on grounds of . . . the protection of health and life of humans . . .'. Even discriminatory trading rules whose objective is to protect public health may therefore be accepted if the conditions laid down in the second sentence of Article 36 and developed in the Court's case-law are satisfied. As I shall explain in the following paragraphs, I consider, contrary to the assertions of the applicants in the main proceedings, that those conditions have indeed been met.

5. The Court has consistently held that the Member States may no longer rely on Article 36 of the EEC Treaty in order to justify rules restrictive of trade, when Community directives provide for the complete harmonization of all measures necessary to ensure the protection of the interests enumerated in that article. [6] With regard to the advertising of alcoholic beverages, Community rules exist currently only with regard to television advertising and those rules, contained in Directive 89/552/EEC, provide for the Member States to bring into force the legislation, regulations and administrative provisions necessary to comply with the directive with effect from 3 October 1991. [7] Currently, it is not therefore appropriate to speak of complete harmonization, so that recourse may be had to Article 36 of the EEC Treaty. Nor is that contested by the applicants in the main proceedings.

6. It is also clear from the Court's settled case-law that recourse to Article 36 of the

5 — At paragraph 11.

6 — Judgment in Case 227/82 *Van Bennekom* [1983] ECR 3883, para 35, and more recently the judgment in Case C-347/89 *Freistaat Bayern* v *Eurim-Pharm GmbH* [1991] ECR I-1747, paragraph 26.

7 — See Article 15 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23). That article imposes certain restrictions on television advertising for alcoholic drinks. That advertising may not be aimed specifically at minors or depict minors consuming these drinks (a), it may not create the impression that the consumption of alcohol contributes towards social or sexual success (c), or it may not place emphasis on high alcoholic content as being a positive quality of the beverages (f).

EEC Treaty in order to justify trading rules such as the prohibition on advertising in issue is possible only if the trading rules in question satisfy the requirements of necessity and proportionality contained in the article in question.

7. With regard to *necessity*, it must be determined whether the prohibition of advertising is in fact appropriate for protecting public health and combating alcoholism, in other words, whether the prohibition of advertising is likely to attain that objective and whether there are any alternative rules which protect public health as effectively whilst being less restrictive of trade. It should be observed straightaway that the Court has already expressly acknowledged in its *Commission* v *France* judgment, cited above, that the advertising of alcoholic beverages undeniably constitutes an incitement to consumption and that it may therefore be asserted that requirements laid down with regard to the advertising of alcoholic beverages fall within the sphere of the fight against alcoholism and the protection of public health. [8] Aragonesa and Publivía point out, however, that the prohibition of advertising is aimed in the present case solely at beverages with a high alcohol content, whilst beverages of low alcoholic strength, which account for 94.7% of alcohol consumption, are not affected. They maintain that if the authorities really wish to combat alcoholism, they must also prohibit the advertising of low-alcohol beverages. Beverages which are low in alcohol, such as wine and beer, may cause addiction just as easily as a result of their relatively low price and the quantities consumed, and young people may be able to obtain them more easily.

Even if beverages with a high alcohol content were *in themselves* not considered more dangerous in themselves for public health because of their high alcohol content than beverages with a low alcohol content, [9] that does not mean that only a prohibition of the advertising of *all* alcoholic beverages is appropriate for protecting public health. It is evident that consumption habits and economic operators generally differ according to whether beverages with a high or low alcohol content are involved and, for that reason, it does not appear to me to be unjustified to adopt a step-by-step approach in the fight against alcoholism and to tackle the abuse of beverages with a high alcohol content separately and more severely than the abuse of beverages with a low alcohol content. [10] It is, moreover, for the Member States to determine the level at which they wish to ensure the protection of public health in a given sector. [11]

Moreover, there are in my view, no alternative rules which would be less restrictive of trade. Since the intention is to prevent the population from being exposed against its will in public places or through the media controlled by the public authorities, [12] to

8 — See the judgment cited above, paragraph 17.

9 — That line of thinking is put forward by the applicants in the main proceedings and the United Kingdom and they point out in that connection that drinks with a high alcohol content are habitually consumed in much larger quantities.

10 — On the question whether it is justified to set the limit between beverages with a high alcohol content and those with a low alcohol content at 23 degrees, see point 9 above.

11 — See for example the recent *Freistaat Bayern* v *Eurim-Pharm* judgment, cited above, at paragraph 26.

12 — As the Commission observes (see the observations submitted by it to the Court in the *Publivía* case, at pp. 4 and 10), the advertising ban contained in Article 19 of Law No 20/85, contrary to what might be inferred from the first question submitted for a preliminary ruling, concerns solely media controlled by the public authorities and therefore not commercial television for example.

direct incitement to consume a product harmful to health, I can imagine no effective alternative to the advertising prohibition in question. [13]

8. In regard to the *proportionality* requirement, the prohibition on advertising under examination and the resulting impediment to the free movement of goods do not appear to me disproportionate in relation to the objective pursued by the prohibition and the result achieved thereby. The advertising ban does not make the importation and sale of beverages with a higher alcohol content impossible but only more difficult. Nor may it be asserted that the advertising ban has as its main objective to govern intra-community channels of trade. [14] Finally, it should be pointed out that the prohibition does not cover all forms of advertising. It is for example still possible to advertise beverages with a high alcohol content in newspapers, on commercial television or at sports grounds. The conclusion may therefore be drawn that the restriction on trade occasioned by the advertising ban is not likely to jeopardize market integration, and that the prohibition is not disproportionate to the objective of public health pursued by it.

9. Finally, it should be examined whether the advertising ban constitutes a means of arbitrary discrimination or a disguised restriction on trade between the Member States, within the meaning of the second sentence of Article 36.

Trading rules constitute a means of *arbitrary discrimination*, whenever they discriminate between national products and imported products on grounds which are neither objective nor justified. [15] The applicants have contended that the criterion of an alcohol content of 23 degrees used in order to distinguish beverages with a high alcohol content from those with a low alcohol content, is not objectively justified. In particular it seeks to remove from the advertising prohibition beverages with a low alcohol content of which Catalonia is a big producer, and to include within it beverages with a high alcohol content which are essentially non-Catalan products. They point out that the Catalan authorities did not mention in the observations which they submitted to the Court scientific studies which show that the 23 degrees limit is not arbitrary but objectively justified. [16] In the absence of Community rules and considering that any criterion contains an element of arbitrariness, I nevertheless consider that an alcohol content of 23 degrees is not an unjustifiable criterion for distinguishing beverages with a low alcohol content from those with a high alcohol content. By all accounts, that limit (more or less) corresponds to the distinction between alcoholic beverages obtained by fermentation and alcoholic beverages obtained by distillation, [17] which is a distinction corresponding to differences in consumption habits and economic operators. The *Blesgen* case in which the Court was faced with an alcohol-content criterion of 22 degrees and to which it made no objection, might also provide evidence of the relevance of the criterion. [18]

13 — A warning accompanying the publicity message, such as 'alcohol damages health' or 'enjoy it but drink it in moderation' is certainly not as effective an alternative to the advertising ban, since the consumer's attention is then also drawn by the publicity message.

14 — The existence of protectionist intentions which the applicants claim to have detected do not seem to me to be proven.

15 — See for example the judgment in Case 4/75 *Rewe-Zentralfinanz* v *Landwirtschaftskammer* [1975] ECR 843, paragraph 8.

16 — At the Hearing it was also pointed out that in a draft law tabled recently the Catalan authorities placed the limit at 20°.

17 — See also the observations submitted to the Court by the Belgian Government in the *Aragonesa* case.

18 — Judgment in Case 75/81 *Blesgen* [1982] ECR 1211.

Trading rules constitute a *disguised restriction* on intra-Community trade when the restrictive effect of the rules on trade is not limited to what is necessary in order to protect the interest referred to by the rules. As I have already stated above (paragraph 7), that is not so in this case.

I thus come to the conclusion that all the preconditions of Article 36 are satisfied and that a trading rule such as the prohibition on advertising in question, which seeks to protect public health — even if it were discriminatory, which is not the case (see below) — is by virtue of Article 36 not incompatible with Article 30 of the EEC Treaty.

Public health: a mandatory requirement?

10. As I have already stated, I consider, along with the Commission and the defendant in the main proceedings, that in the light of the information supplied to the Court the advertising ban examined in this case does not amount to a discriminatory trading rule but on the contrary applies without discrimination to imported and national beverages with a high alcohol content.

According to the applicants in the main proceedings, the advertising ban in reality amounts to a discrimination against imported products. They do not claim that the trading rules are formally discriminatory, given that Article 19 of Law No 20/85 declares the advertising ban to be applicable to all beverages with a high alcohol content irrespective of origin. However, they point out that the Catalan prohibition on the advertising of beverages with a high alcohol content in practice affects mainly beverages with a high alcohol content of a non-Catalan origin, because Catalonia produces those beverages only in limited quantities. They also point out that the wines and 'cavas', beverages with a low alcohol content of which Catalonia is a major producer, do not fall within the advertising ban and are thus indirectly afforded more favourable treatment. They do not deny that the prohibition also affects national, that is to say Spanish,[19] beverages with a high alcohol content but they consider that, since that prohibition was introduced not by Spain but by Catalonia, it cannot be said to constitute disguised discriminatory trading rules because it does not affect specifically Catalan interests and on the contrary indirectly favours them.

Publivía further alleges that, even if the advertising ban also affects domestic beverages with a high alcohol content it has a far greater effect on imported beverages of that kind because unlike Spanish beverages with a high alcohol content, imported beverages are still little known to the Catalan consumer and invariably require advertising for successful commercialization and market penetration. Consequently, the advertising ban cannot be said to be applicable without distinction both to imported and Spanish beverages with a high alcohol content.

19 — The observations submitted by the Catalan authorities to the Court in the *Publivía* case (pp. 15 to 16) moreover cite the conviction of an undertaking for advertising drinks with a high alcohol content of Spanish origin.

11. Ordinarily I would hardly need to examine this point because, even if the trading rules were discriminatory they may — as I have tried to show above — be justified on grounds of public health under Article 36 of the EEC Treaty. However, the reasoning adopted by the Commission and by the Catalan Government (in the observations which it submitted to the Court in the *Publivía* case) raises the question whether the advertising ban, on the assumption that it is not discriminatory, must nevertheless be regarded as compatible with Article 30 of the EEC Treaty under the 'Cassis de Dijon' principle *or* by virtue of Article 36 of the EEC Treaty. I will express a view on these two points in order to supply the national court with all the elements of Community law which may be useful to it in order to assess whether the rules are discriminatory or not, and if they are not, in identifying the specific grounds on which they are compatible with Article 30.

12. With regard to the discriminatory nature or otherwise of the advertising ban, I would first observe that, as the Court expressly stated in its paragraphs 12 and 13 of its judgment in *Du Pont de Nemours Italiana*,[20] even if the restrictive effect on trade occasioned by the rules of a Member State does not benefit all national products but only those of a certain region of a Member State, those rules are nevertheless discriminatory under the Court's case-law.

There are, however, other factors which lead to the conclusion that in the light of the information available the advertising ban is not discriminatory. First of all I would emphasize that — contrary to the assertions made by Aragonesa and Publivía — the Catalan production of beverages with a high alcohol content is certainly not negligible[21] and that the advertising ban thus also actually affects Catalan interests. Secondly, it is not at all certain in my view that the local production of beverages with a low alcohol content enjoys an indirect benefit as a result of the advertising ban on beverages with a high alcohol content. That would presuppose in fact that beverages with a high alcohol content and those with a low alcohol content are competing products. It should also be pointed out that, although Catalonia is without any doubt a major producer of beverages with a low alcohol content (and in particular of wine and 'cavas') (and that those beverages are not covered by the advertising ban, Catalonia also imports many beverages with a low alcohol content which are not affected by the advertising ban. Finally, I am not persuaded that, as argued by Publivía, imported beverages with a high alcohol content, as opposed to such beverages of Spanish origin, are still only little known to the Catalan consumer and that the advertising ban thus affects imported beverages more severely. It is clear from the information available that in 1988 imports from abroad into Catalonia of beverages with a high alcohol content were worth PTA 4.3 billion, whilst the total consumption of such beverages there was worth PTA 7.3 billion. Moreover, the list annexed to the obser-

20 — Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889.

21 — The data produced by the applicants show that during the period 1984 to 1987 7.5% (818 227 hl) of the production of alcoholic drinks was made up of drinks with a high alcohol content whilst the remainder, that is 92.5% (10 085 586 hl) was made up of drinks with a low alcohol content (see for example the observations of the applicant in the *Publivía* case, p. 4). Contrary to the conclusion drawn by the applicants from these statistics, it seems to me that having regard to the nature thereof, the quantity of drinks with a high alcohol content in comparison to the quantity of drinks with a low alcohol content is by no means so negligible. See also the Commission's observations in the *Publivía* case, p. 6.

vations submitted by the Catalan authorities lead to the conclusion that a very extensive range of beverages with a high alcohol content is imported and sold in Catalonia.[22]

In my opinion it is clear from the foregoing observations that the advertising ban in question does not constitute a discriminatory trading rule but on the contrary is applicable without distinction to national and imported products.

13. As to the correct basis on which trading rules such as those in the present case may be justified, I would first of all stress that if the advertising ban is a non-discriminatory trading rule it is in the circumstances of the case compatible with the Treaty. If, as I have demonstrated above (paragraphs 4 to 9), a Member State may in certain circumstances in order to protect public health impose a discriminatory advertising ban in respect of beverages with a high alcohol content, it may certainly impose a non-discriminatory advertising ban under the same circumstances. The problem is thus whether, as I have already pointed out, the (non-discriminatory) rules in question in such a case fall under Article 30 as a result of a mandatory requirement as recognized in the 'Cassis de Dijon' case *or* whether they in principle fall under that provision but escape the application thereof on the justificatory ground mentioned in Article 36. The question has arisen because in the 'Cassis de Dijon' judgment itself the Court held that the protection of public health was a mandatory requirement and it has never gone back on that in subsequent judgments.[23] During the last 10 years the Court on each occasion when it has had to determine whether non-discriminatory rules impeding trade pursuing the objective of protecting public health were compatible with Article 30 of the EEC Treaty, has examined whether Article 36 of the EEC Treaty was applicable or not.[24]

14. The question raised has little if any practical import, since the conditions governing the applicability of the 'Cassis de Dijon' doctrine and of Article 36 are the same (absence of harmonization, examination of the criteria of necessity and proportionality, prohibition of arbitrary discrimination or disguised restriction on trade).[25] Theoretically, however, the view

22 — It should also be pointed out that, in spite of the advertising ban, there has been in Catalonia over the years a major increase in the consumption of imported beverages with a high alcohol content. It is however possible that in the absence of the advertising ban, that increase would have been even more considerable. The applicants in the main proceedings also underline that in relation to 1988 there was in 1989 a reduction in imports of beverages with a high alcohol content (1988, 22 417 982 l; in 1989, 18 222 180 l).

23 — Judgments in Case 120/78 *REWE Zentral* [1979] ECR 649; in Case 788/79 *Gilli et Andres* [1980] ECR 2071; in Case 130/80 *Kelderman* [1981] ECR 527, at paragraph 8.

24 — See for example the judgments in *Van Bennekom*, cited above, at paragraphs 34 et seq.; in Case 94/83 *Heijn* [1984] ECR 3263, at paragraphs 14 et seq.; in Case 247/84 *Motte* [1985] ECR 3887, at paragraphs 17 et seq.; in Case 304/84 *Ministère Public* v *Muller* [1986] ECR 1511, at paragraph 16; in Case 178/84, the *Reinheitsgebot* case, *Commission* v *Germany* [1987] ECR 1227, at paragraphs 40 et seq.; in Case 407/85 *3 Glocken and Another* v *USL Centro-Sud and Another* [1988] ECR 4233, at paragraphs 11 et seq.; in Case 125/88 *Nijman* [1989] ECR 3533, at paragraphs 12 et seq.; in Case C-42/90 *Bellon* [1990] ECR I-4863, at paragraph 10 et seq.;
By way of example, reference may be made here to the *3 Glocken* judgment, paragraph 11, in which the Court held that:
'It should be observed that a prohibition on the sale of pasta products made from common wheat or from a mixture of common wheat and durum wheat is an obstacle to the importation of pasta products lawfully made in other Member States from common wheat or from a mixture of common wheat and durum wheat. It therefore remains to be determined whether that obstacle may be justified on the grounds of the protection of public health under Article 36 of the Treaty or by virtue of imperative requirements such as those referred to above.'

25 — See the *Dassonville* judgment, mentioned above, at paragraph 7.

might be taken that Article 36 operates only once it is established, with the aid of the 'Cassis de Dijon' doctrine, that the Article 30 prohibition is indeed applicable.

Notwithstanding that theoretical reservation I am of the opinion that under its current case-law, the Court is correct to have direct recourse to Article 36 where one of the grounds of justification mentioned in that article is raised. Indeed it seems to me curious to rely on an unwritten 'imperative requirement' of public health when the public health justification is expressly provided for in a provision of written law. Moreover, the theoretical objection may be overcome by stating that the principle of the 'protection of health' mentioned in Article 36 operates as a justificatory ground in the case of a discriminatory measure whereas, in the case of a non-discriminatory measure, it takes the form of an imperative requirement within the meaning of the 'Cassis de Dijon' doctrine.

Although that is, as I have stated above, a question of no great practical importance, it would nevertheless be desirable if the Court were to use the opportunity afforded to it in this case to clarify this point.

15. In the light of the foregoing I propose that the Court should give the following answer to the questions referred to it for a preliminary ruling:

'1. Article 30 must be interpreted as meaning that in principle it precludes rules which make it an offence under certain circumstances, though not absolutely, to advertise beverages with an alcoholic strength of more than 23 degrees;

2. In the absence of Community rules, Articles 30 and 36 do not preclude rules such as those mentioned in the reply to the first question, provided that such rules are necessary in order to protect public health and their restrictive effect on intra-Community trade is not disproportionate in relation to that objective, and that, moreover, they do not turn out to constitute arbitrary discrimination or a disguised restriction on trade between the Member States.'