OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 14 June 2007 [1]

1. By the present reference, the Landgericht (Regional Court) Wiesbaden (Germany) seeks an interpretation of Article 5(3)(b), in conjunction with Article 5(3)(d) and Annex III, section 4, of Council Directive 75/106/EEC of 19 December 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids ('Directive 75/106' or 'the Directive'). [2] In particular, this case relates to the marketing in Germany of the beverage Baileys as so-called 'Baileys Minis' in small bottles with a volume of 0.071 litre.

I — Legal framework

Community legislation

2. Directive 75/106 has been amended on several occasions. [3] Article 1 stipulates that the directive relates to prepackages containing the liquid products listed in Annex III measured by volume for the purpose of sale in individual quantities of between 5 ml and 10 litres inclusive.

1 — Original language: English.

2 — OJ 1975 L 42, p. 1.

3 — Amended by Commission Directive 78/891/EEC of 28 September 1978 adapting to technical progress the Annexes to Council Directives 75/106/EEC and 76/211/EEC on prepackaging (OJ 1978 L 311, p. 21), Council Directive 79/1005/EEC of 23 November 1979 (OJ 1979 L 308, p. 25), Council Directive 85/10/EEC of 18 December 1984 (OJ 1985 L 4, p. 20), Council Directive 88/316/EEC of 7 June 1988 (OJ 1988 L 143, p. 26), Council Directive 89/676/EEC of 21 December 1989 (OJ 1989 L 398, p. 18), and the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33).

3. The first recital in the preamble to Directive 75/106 states the following: 'in most of the Member States the conditions of presentation for sale of liquids in prepackages are the subject of mandatory regulations which differ from one Member State to another, thereby hindering trade in such prepackages; ... such provisions must therefore be approximated'.

4. The fourth recital in the preamble to the Directive provides: 'it is necessary to reduce as far as possible the number of volumes of contents that are too close to others of the same product and which consequently are liable to mislead the consumer; ... however, in view of the extremely high stocks of prepackages in the Community such a reduction can only be undertaken gradually'.

5. The sixth recital in the preamble to Directive 75/106 reads as follows: 'since too quick a change in the means of determining quantity laid down by their national legislation and the organisation of new systems of control as well as the adoption of a new measurement system would present difficulties for certain Member States, a transitional period should be provided for these Member States; ... such provision should not, however, further inhibit intra-Community trade in the products concerned and should not prejudice implementation of the Directive in the other Member States'.

6. Article 5 of Directive 75/106 as amended and as relevant for the present case provides the following:

'1. Member States may not refuse, prohibit or restrict the placing on the market of prepackages which satisfy the requirements of this Directive on grounds related to the determination of their volumes, the methods by which they have been checked or the nominal volumes where these are set out in Annex III, column I.

...

3. ...

(b) ... Those prepackages which appear in Annex III, section 4, may be marketed after 31 December 1991 only if they have the nominal volumes set out in the said column I. ...

(d) Without prejudice to subparagraph (b), products listed in Annex III, section 4, and having the volume of 0.071 litre may be marketed in Ireland and the United Kingdom.' [4]

7. Lastly, section 4 of Annex III to Directive 75/106 provides, for products listed under 'Spirits, other than those of CCT headings No 22.08: liqueurs and other spirituous beverages; compound alcoholic preparations (known as "concentrated extracts") for the manufacture of beverages (CCT heading No 22.09)', the following nominal volumes of contents in litres, in column I, as definitively allowed: '0.02 — 0.03 — 0.04 — 0.05 — 0.10 — 0.20 — 0.35 — 0.50 — 0.70 — 1 — 1.125 — 1.5 — 2 — 2.5 — 3 — 4.5 — 5 — 10'.

II — Factual and procedural background and the questions referred

8. The questions referred for a preliminary ruling have arisen in the context of unfair competition proceedings before the Landgericht Wiesbaden between Schutzverband der Spirituosen-Industrie e.V. ('Schutzverband') and Diageo Deutschland GmbH ('Diageo').

9. Schutzverband is an incorporated association of undertakings and associations within the spirits industry whose purpose is to monitor and, where applicable, ensure compliance with the appropriate legal framework within the spirits industry in Germany.

10. Diageo is the German subsidiary of Diageo North America Inc., a drinks manufacturer. In Germany it markets inter alia beer, whiskey, gin and vodka under a variety of brand names.

11. Since October 2004 Diageo has been marketing the beverage Baileys in Germany as so-called 'Baileys Minis' in small bottles with a volume of 0.071 litre ('the product'). Baileys is made from whiskey, grain spirit, sugar and cream and has an alcohol content

4 — As to the various amendments of Directive 75/106, Article 5(1) thereof is as amended by Directive 85/10, whereas Article 5(3)(b) and 5(3)(d) were subsequently amended by Directive 88/316.

of 17%. Diageo's Baileys products are manufactured and bottled in Ireland. [5]

12. The referring court notes that Baileys Minis have also been sold, without any ascertainable complaint, in France and the Netherlands since September 2003, and in Belgium since June 2004. [6]

13. The parties are in dispute as to whether the sale of the product (that is to say, in 0.071 litre bottles) is permissible in Germany.

14. The referring court takes the view that the Baileys Minis product falls under Annex III, section 4, to Directive 75/106. It considers that, given that all products listed in Annex III, section 4, with a nominal volume between 0.05 litre and 10 litres, [7] may be marketed only in the volume sizes stated in column I of Annex III, the packaging size of 0.071 litre is in principle not permitted.

15. However, the exception laid down in Article 5(3)(d) of Directive 75/106 provides that the products listed in Annex III, section 4, may be marketed in Ireland and the United Kingdom in volumes of 0.071 litre.

16. Therefore, by order of 23 November 2005, the Landgericht Wiesbaden (Wiesbaden Regional Court, 10th Civil Chamber) stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is the second sentence of the second subparagraph of Article 5(3)(b), in conjunction with Article 5(3)(d) and Annex III, section 4, of Council Directive 75/106/EEC of 19 December 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids ..., as most recently amended by the Act of Accession of 23 September 2003 ..., to be construed as meaning that products in packaging with a volume of 0.071 litre, which are lawfully manufactured and/or marketed in Ireland or the United Kingdom, may also be marketed in all of the other EC Member States?

5 — When marketed in Germany the product is described on the label as 'Original Irish Cream'. The word 'liqueur' is added as a sales description. Diageo explained that since 2002/2003 the product has been manufactured and bottled in the United Kingdom.

6 — In addition, the Greek Government indicated at the hearing that Baileys Minis have also been sold in Greece since September 2003.

7 — Article 1(1) of the Directive.

(2) If Question 1 should be answered in the negative: is the second sentence of the second subparagraph of Article 5(3)(b), in conjunction with Article 5(3)(d) and Annex III, section 4, of Directive 75/106/EEC, compatible with the principle of free movement of goods in Articles 28 EC and 30 EC?'

17. Written observations were submitted by Schutzverband, Diageo, the Greek and Belgian Governments, the Council and the Commission. These parties, apart from the Belgian Government, were joined by the French Government at the oral hearing, which took place on 15 March 2007.

III — Assessment

A — *Main submissions of the parties*

18. *Schutzverband* submits, in essence, that the first question ought to be answered in the negative. This follows from the 'rule/exception' relationship between the second subparagraph of Article 5(3)(b), in fine, and Article 5(3)(d) of Directive 75/106, as well as from the spirit and the purpose of these provisions. The rule is that products appearing in section 4 of Annex III are fully harmonised and the exception is that only Ireland and the United Kingdom are covered by the exemption in Article 5(3)(d). Moreover, the latter exception applies '[w]ithout prejudice to subparagraph (b)'.

19. On the second question, Schutzverband contends that it should be answered in the affirmative, as the marketing ban under Article 5(3)(b) of the Directive is justified by considerations related to the protection of consumers. As to the harmonisation measures, the competent Community institutions are generally recognised as enjoying a broad discretion and are therefore subject to only a limited analysis of proportionality.

20. In Schutzverband's submission, the prohibition is not manifestly disproportionate. The protection of consumers is an admissible justification, since according to the fourth recital in its preamble the directive was designed to reduce as far as possible the number of volumes of contents that are too close to others of the same product and which consequently are liable to mislead the consumer.

21. *Diageo* argues essentially that in order to be compatible with primary law as well as with the principles developed by the Court in *Cidrerie Ruwet*, [8] Article 5(3)(b), in conjunction with Article 5(3)(d) and Annex III, section 4, of Directive 75/106, must be interpreted in such a way as to allow products in packaging with a volume of 0.071 litre, lawfully manufactured and/or marketed in Ireland or the United Kingdom, also to be marketed in all of the other Member States. This is also, in essence, the *Greek Government*'s submission. Otherwise, the exception which is not limited in time would partition the national markets and would be contrary to the objective of the directive's harmonisation as well as to the objective of the internal market. In addition, any other interpretation would violate Article 28 EC and would not be justified by considerations related to the protection of consumers.

22. The *Belgian Government* submits in essence that the relevant provisions provide that marketing of Baileys in prepackages of a volume of 0.071 litre in territories other than Ireland or the United Kingdom is not allowed. As a derogation, it must be interpreted strictly. The Belgian Government contends that, in any event, even if the prohibition under Article 5(3)(b) should be considered to be an obstacle to intra-Community trade, it would be justified by the considerations related to the protection of consumers.

23. The *French Government* essentially shares the view of the Belgian Government.

24. The *Commission* submits that in the current state of law the product is in principle prohibited from being marketed in the Community, with the exception of Ireland and the United Kingdom. However, having been marketed in Ireland and the United Kingdom, the placing of the product on the market in the other Member States should not be limited. Otherwise such a restriction would exceed the objective of the derogation and would be contrary to the principle of free movement of goods.

25. The Commission argues that this principle, inherent in Article 28 EC, applies not only in the absence of harmonisation of national legislation, but also in a case where it is necessary to interpret Community provisions which establish a derogation within the framework of full harmonisation. It submits that under Article 5(1) of the Directive, Member States cannot — for reasons of, inter alia, nominal volumes that appear in Annex III, column I — refuse the

8 — Case C-3/99 *Cidrerie Ruwet* [2000] ECR I-8749.

placing on the market of prepackages satisfying the provisions of the directive (that is to say, the product lawfully marketed in Ireland and the United Kingdom). This would take account of the fact that Article 5(3)(d) is a derogation from the principle laid down in Article 5(3)(b). This interpretation complies with the requirements of the free movement of goods and is consistent with the will of the Community legislature. Therefore it is not necessary to answer the second question.

26. The *Council* agrees with the interpretation given by the Commission.

B — *Appraisal*

27. I would like to note, as a preliminary remark, that whereas prepackaging rules are clearly meant to promote market access, they may, however — as the present case shows — somewhat paradoxically lead to a situation where such access may actually be hindered.

28. Moreover, even if it not relevant ratione temporis for the purposes of the present case, on 25 October 2004 the Commission presented a Proposal for a Directive of the European Parliament and of the Council laying down rules on nominal quantities for pre-packed products, repealing Council Directives 75/106/EEC and 80/232/EEC, and amending Council Directive 76/211/EEC.[9] The Commission itself stated in its pleadings that it was induced to present the above proposal by the complexity of the existing rules, covering a wide range of products, and in view of the 'partly optional' and 'partly full harmonisation', on the one hand, and the Court's decision in *Cidrerie Ruwet*, on the other. The proposed provisions envisage a far-reaching deregulation of the nominal quantities, those of Baileys Minis included.

1. First question

29. By its first question, the referring court asks the Court whether Directive 75/106 is to

9 — COM(2004) 708 final. See also the Amended Proposal of 12 April 2006, COM(2006) 171 final.

be construed as allowing products prepackaged with a volume of 0.071 litre, which, by way of a derogation incorporated in that directive, are lawfully manufactured and/or marketed in Ireland or the United Kingdom, to be marketed in the other Member States.

30. In application of Article 234 EC, the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them. [10] It is solely for the national court to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. [11] However, it is for the Court, where necessary, to examine the circumstances in which the case was referred so as to assess whether it has jurisdiction and, in particular, to determine whether the interpretation of Community law that is sought bears any relation to the facts of the main action or its purpose. [12] If it appears that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment. [13]

31. To my mind, there is no need, for the purposes of deciding the present case, to deal with the question of the manufacture of the product. It is evident from the file before the Court that what is at stake in the present case is whether the product, which has been lawfully marketed in Ireland and the United Kingdom, may also be marketed in the other Member States.

32. Article 5(1) of Directive 75/106 establishes a *lex generalis* which provides that Member States may not refuse, prohibit or restrict the placing on the market of goods in prepackages which comply, inter alia, with the nominal volumes set out in Annex III, column I. Thus, if the prepackaging of goods complies with the specified nominal volumes in the annex in question their marketing may not be opposed on the basis of their nominal volume. However, Article 5(1) of Directive 75/106 does not require that goods must be prepackaged in those nominal volumes in order to be placed on the market.

33. The second sentence of the second subparagraph of Article 5(3)(b) ('Article

10 — See, inter alia, order in Case C-361/97 *Nour* v *Burgenländische Gebietskrankenkasse* [1998] ECR I-3101, paragraph 10.

11 — Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, in particular, Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb* v *TK-Heimdienst Sass* [2000] ECR I-151, paragraph 13.

12 — This is so that the Court is not obliged to deliver advisory opinions on general or hypothetical questions.

13 — See Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 15.

5(3)(b)') of Directive 75/106, as amended by Directive 88/316, establishes a *lex specialis* for spirits, liqueurs and other spirituous beverages [14] which provides that they may be marketed only in the nominal volumes as set out in column I of Annex III, section 4. In my view, this provision ensures that the prepackaging of liqueurs and other spirituous beverages must comply with one of the limited nominal volumes specified in column I of Annex III, section 4, in order to be lawfully marketed in the Community.

34. Article 5(3)(d) of the Directive, which was also inserted by Directive 88/316, introduces a derogation, which is not limited in time, and provides that liqueurs and other spirituous beverages may, in addition, be marketed in Ireland and the United Kingdom if they are prepackaged in the nominal volume of 0.071 litre.

35. Given that the permanent derogation, which incorporates an additional nominal volume, specifically refers to Ireland and the United Kingdom to the exclusion of other Member States, the question arises whether the other Members States may oppose the marketing on their territory of liqueurs and other spirituous beverages prepackaged in the nominal volume of 0.071 litre despite the fact that they have been lawfully marketed in a Member State, that is to say Ireland or the United Kingdom.

36. Directive 75/106, as amended, in particular the scheme of Article 5(3)(b), in conjunction with Article 5(3)(d) and Annex III, section 4, lacks, in my view, legislative purity and gives rise to difficulty as regards the comprehension or interpretation of such a permanent derogation. To my mind, the use of such a legislative technique should have been understood by the Community legislature as being apt to cause interpretative difficulties and should thus have been avoided.

37. Indeed, since Article 5(3)(d) of Directive 75/106, as amended, introduces a permanent derogation in favour of Ireland and the United Kingdom in relation to the marketing of liqueurs and other spirituous beverages prepackaged in the nominal volume of 0.071 litre, the question may be asked whether Article 5(3)(b), in conjunction with Article 5(3)(d) and Annex III, section 4, column I, of Directive 75/106 brings about a full harmonisation or merely a partial

14 — In full: 'Spirits, other than those of CCT headings No 22.08: liqueurs and other spirituous beverages; compound alcoholic preparations (known as "concentrated extracts") for the manufacture of beverages (CCT heading No 22.09)', hereinafter 'liqueurs and other spirituous beverages'.

harmonisation of the nominal volumes in accordance with which liqueurs and other spirituous beverages may be marketed in the EC. This in my view has a direct impact on the manner in which Article 5(3)(b), in conjunction with Article 5(3)(d) and Annex III, section 4, column I, of Directive 75/106 must be interpreted and, if necessary, its validity assessed.

38. In the *absence of harmonisation* of national laws, Article 28 EC prohibits in particular obstacles to the free movement of goods that are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, such as those relating, for example, to their presentation, labelling and packaging, even if those rules apply without distinction to national products and to imported products alike. [15]

39. In the case of *partial harmonisation* the Court held in *Cidrerie Ruwet* that this prohibition applies to the ban on the marketing of prepackages that are not the subject of such harmonisation. In such a case, a contrary interpretation would be tantamount to authorising the Member States to partition their national markets in regard to products not covered by the Community rules, contrary to the objective of free movement pursued by the Treaty. [16]

40. It is clear that Article 5(3)(b), in conjunction with Article 5(3)(d) and Annex III, section 4, column I, of Directive 75/106, as amended, are intended to regulate definitively the nominal volumes of prepackages in accordance with which liqueurs and other spirituous beverages may be marketed in all the Member States. These provisions therefore seek to establish a *fully regulated* system under which common rules completely replace existing national rules in the field, since in my view they explicitly prevent Member States from laying down national rules which are different from the common rules. The possibility for Ireland and the United Kingdom pursuant to Article 5(3)(d) of Directive 75/106 to market liqueurs and other spirituous beverages in an additional nominal volume does not in my view alter the fact that the matter has been fully regulated at Community level.

41. Therefore, the present question is whether the directive may be interpreted in conformity with Article 28 EC.

15 — Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln* v *Mars* [1995] ECR I-1923, paragraph 12.

16 — Cited in footnote 8, paragraph 47.

42. It is sufficient to recall in that regard that, as the Court has consistently held, a rule of secondary legislation, such as Article 5(3)(b), in conjunction with Article 5(3)(d) and Annex III, section 4, column I, of Directive 75/106, cannot be interpreted as authorising the Member States to impose or to maintain conditions contrary to the Treaty rules on the free movement of goods. [17]

43. It should be borne in mind that the free movement of goods is one of the fundamental principles of the Treaty and of the Community. [18] The Court has consistently held that Article 28 EC aims to prohibit all rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. [19]

44. Moreover, it should be noted that pursuant to the case-law of the Court, in interpreting a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaty and the general principles of Community law. [20]

45. In addition, the Court has consistently held that, in interpreting a provision of Community law, it is necessary to consider not only its wording but also the context in which it occurs and the aims of the rules of which it forms part. [21]

46. In that regard, it should be recalled, first, that Directive 75/106 was adopted on the basis of Article 94 EC (formerly Article 100 of the EC Treaty) relating to the approximation of the laws, regulations or administrative provisions of the Member States which directly affect the establishment or functioning of the common market. Secondly, Directive 88/316, which introduced in the Directive the litigious provisions, was based on Article 95 EC (formerly Article 100a of the EC Treaty).

47. Moreover, measures adopted on the basis of Article 95 EC have as their object the establishment and functioning of the internal market. According to the Court's

17 — See, to that effect, inter alia, Case C-47/90 *Delhaize et Le Lion* [1992] ECR I-3669, paragraph 26; Case C-315/92 *Verband Sozialer Wettbewerb* [1994] ECR I-317, (commonly known as '*Clinique*'), paragraph 12; and Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* [1996] ECR I-3457, paragraph 27.

18 — Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 24, and Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 51.

19 — Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

20 — See, inter alia, Case C-90/92 *Dr. Tretter* v *Hauptzollamt Stuttgart-Ost* [1993] ECR I-3569, paragraph 11, and Case C-98/91 *Herbrink* [1994] ECR I-223, paragraph 9 and the case-law cited therein.

21 — See, inter alia, Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 50, and Case C-191/99 *Kvaerner* [2001] ECR I-4447, paragraph 30.

case-law, such measures must genuinely have as their object the improvement of the conditions for the establishment and functioning of the internal market. [22]

48. In particular, the overriding purpose of the Community legislature in adopting Directive 75/106, as is particularly clear from the first recital in its preamble, was to lay down approximated provisions for prepackages of liquids, which in most Member States had been subject to mandatory regulations which differed from one Member State to another, in order to ensure the free movement of those products within the Community.

49. In my view, it appears from the above principles that it would be contrary to Article 28 EC if the product, once lawfully marketed in the two Member States concerned, could not also be marketed in the rest of the Community. The provisions in issue, despite the ambiguous legislative drafting technique used, create a permanent derogation in favour of Ireland and the United Kingdom which allows the marketing of liqueurs and other spirituous beverages in a nominal volume of 0.071 litre in those two Member States and, to my mind, also allows, or opens the door to, the marketing of those products in the rest of the Member States.

22 — Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, paragraph 83 et seq.

50. In view of the foregoing, I am of the opinion that on a proper construction, the full harmonisation (and the fact that Annex III, section 4, column I, does not include the volume of 0.071 litre) in conjunction with the permanent derogation, as provided for in the directive, has the effect that the latter is to be construed as meaning that products in prepackaging with a volume of 0.071 litre, once lawfully marketed in Ireland or the United Kingdom, may also be marketed in all of the other EC Member States.

2. Second question

51. As is clear from the order for reference, the second question referred regarding the compatibility of the directive with Articles 28 EC and 30 EC would only arise in the present case if the directive could not be construed in such a way as to permit the product to be marketed in all the other Member States.

52. In view of the answer to the first question, it is not necessary to reply to the second question referred.

IV — Conclusion

53. I recommend that the questions referred by the Landgericht Wiesbaden be answered as follows:

On a proper construction, the second sentence of the second subparagraph of Article 5(3)(b), in conjunction with Article 5(3)(d) and Annex III, section 4, column I, of Council Directive 75/106/EEC of 19 December 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids, as most recently amended by the Act of Accession of 23 September 2003, is to be construed as meaning that products in prepackaging with a volume of 0.071 litre, once lawfully marketed in Ireland or the United Kingdom, may also be marketed in all of the other EC Member States.