2. Orders the French Republic to pay the costs.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 10 July 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 2 JULY 1980 [1]

Mr President,
Members of the Court,

The issue in the proceedings brought for a breach of the Treaty on which I am giving my opinion today concerns the compatibility of the French rules on advertising in respect of alcoholic beverages with the prohibition contained in Article 30 of the EEC Treaty on measures having an effect equivalent to quantitative restrictions on imports.

In Article L 1 in the First Title, the Law on the sale of beverages and on measures against alcoholism (Decree of 8 February 1955, Order No 59-107 of 7 January 1959) divides beverages into five groups according to their manufacture, sale and consumption.

The first group comprises non-alcoholic drinks. Group 2, contained in Order No 60-1253 of 29 November 1960, covers fermented drinks which are not obtained by means of a distillation process, such as wine, beer, cider or perry and mead. Also in this group are natural sweet wines under the tax arrangements applying to wine as well as "Crème de Cassis" and fermented fruit or vegetable juices having an alcoholic content of 1 to 3°. The remaining natural sweet wines not covered by the second group — liqueur wines, wine-based aperitifs and strawberry, raspberry, blackcurrant or cherry liqueurs having an alcohol content of not more than 18° — belong to the third group. The fourth group, added by Law No 57-725 of 27 June 1957, comprise the following types of drinks: rum, tafia, spirits obtained from the distillation of wine, cider or perry or

1 — Translated from the German.

from other fruit and which contain no essence, as well as liqueurs sweetened with sugar, glucose or honey. Aniseed liqueurs must contain at least 400 grams, and the other liqueurs at least 200 grams, of those substances per litre but must not have more than half a gram of essence per litre. Finally, all other alcoholic beverages fall into the fifth group.

Advertising in respect of drinks is regulated by Chapter II of the Law, to be more precise, in Articles L 17 and L 18 thereof. Under those articles there are no restrictions on advertising for drinks listed in Groups 1, 2 and 4. There are restrictions on advertising for drinks in the third group whereby only the description of the product, its composition and the name and address of the manufacturer and of the dealers may be stated. Finally, as regards drinks referred to in the fifth group, that is, all alcoholic drinks which are not expressly mentioned in the Law, all advertising of any kind is prohibited.

Exception had already been taken to these rules in Commission Recommendation No 70/125/EEC of 22 December 1969 to the French Republic on the adjustment of the State monopoly of a commercial character in alcohol (Official Journal, English Special Edition, Second Series, VI, p. 27) on the ground that they were in particular prejudicial to certain products traditionally considered as products of the *other* Member States. In a subsequent exchange of letters between the Commission and the French Government the latter adopted the view, however, that the rules in question on the advertising of alcoholic drinks, which in any case did not make any distinction in regard to the origin of those products, helped to combat alcoholism and therefore contributed to public health. The Commission, on the other hand, stood by its opinion that Articles L 17 and L 18 of the Law on the sale of drinks and on measures against alcoholism were capable of hindering the importation of alcoholic beverages from other Member States into France and therefore constituted a measure, unjustified under Article 36 of the EEC Treaty, having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the EEC Treaty.

By a letter of 4 June 1976 the Commission began formal proceedings in accordance with Article 169 of the EEC Treaty. The French Government, in a letter from its Permanent Representation of 9 July 1976, maintained its view, and by a letter of 25 January 1978 the Commission sent a reasoned opinion to the French Republic in accordance with the first paragraph of Article 169 of the EEC Treaty. Thereupon the French Government informed the Commission by a letter from its Permanent Representation of 29 March 1978 that it would give close attention to its opinion and would communicate with the Commission again in a short while in order to let it know what it intended to do. The Commission did not receive any further word from the French Government and therefore decided to bring the action introduced at the Court of Justice on 6 July 1978 in which it applies for a declaration that the French Republic has subjected advertising in respect of alcoholic beverages to discriminatory rules thereby maintaining obstacles to intra-Community trade and has thus acted contrary to its obligations under Article 30 of the EEC Treaty; it further claims that the French Republic should be ordered to pay the costs.

The French Republic, on the other hand, contends that the Commission's application should be dismissed and that the applicant should pay the costs of the proceedings.

1. In assessing the facts of this case it is necessary first to decide the question — on which there has been no decision by the Court of Justice so far — whether a national restriction on advertising in respect of certain alcoholic drinks, which does not relate to the fact of importation, *can*, in any event, be a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the EEC Treaty. The purpose of that provision is to ensure freedom of movement of goods between Member States under normal conditions of competition. Hitherto the Court of Justice has made it clear in its case-law that all trading rules or measures by Member States which *are capable* of hindering intra-Community trade, directly or indirectly, actually or potentially, are to be considered as measures having an effect equivalent to quantitative restrictions (cf. judgments of 11 July 1974, Case 8/74, *Procureur du Roi* v *Benoît and Gustave Dassonville*, [1974] ECR 837; of 8 July 1975, Case 4/75, *REWE-Zentralfinanz eGmbH* v *Landwirtschaftskammer*, [1975] ECR 843; of 20 May 1976, Case 104/75, *Adriaan de Peijper* [1976] ECR 613; of 15 December 1976, Case 35/76, *Simmenthal SpA* v *Italian Minister for Finance*, [1976] ECR 1871; and of 15 December 1976, Case 41/76, *Suzanne Criel, née Donckerwolcke, and Henri Schou* v *Procureur de la Republique au Tribunal de Grande Instance, Lille, and Director-General of Customs* [1976] ECR 1921). It follows from that statement of the law that Article 30 *et seq.* come into play not only when the *crossing of frontiers* by goods becomes more difficult, but also if their *sale*, in the State into which they are imported, is impeded as compared to national products. Clearly, prohibited measures meeting this description may take the most varied forms.

The case-law of the Court of Justice on national price control measures seems to me to be of particular importance in regard to the solution of this case. In its judgments of 26 February 1976 in Case 65/75 *(Riccardo Tasca*, [1976] ECR 291) and Joined Cases 88 to 90/75 *(Società SADAM and Others* v *Comitato Interministeriale dei Prezzi and Others* [1976] ECR 323), in which a State price provision was at issue, the Court of Justice first gave the above-mentioned interpretation of the concept of a measure having an effect equivalent to a quantitative restriction and then declared:

"Although a maximum price applicable without distinction to domestic and imported products does not in itself constitute a measure having an effect equivalent to a quantitative restriction, it may have such an effect, however, when it is fixed at a level such that the sale of imported products becomes, if not impossible, more difficult than that of domestic products."

The judgment of 24 January 1978 in Case 82/77 *(Openbaar Ministerie of the Kingdom of the Netherlands* v *Jacobus Phillipus van Tiggele* — minimum prices for gin — [1978] ECR 25) is expressed in the same terms.

That view must also be valid in regard to the nationally prescribed restriction on the advertising of certain alcoholic drinks. The point should first be made

here that, as the Court of Justice put it in its judgment of 20 February 1979 in Case 120/78 *(REWE-Zentral AG* v *Bundesmonopolverwaltung für Branntwein,* [1979] ECR 649), in the absence of common rules relating to the production and marketing of alcohol it is for the Member States to regulate all matters relating to the production and marketing of alcohol and of alcoholic beverages on their own territory. Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must, the judgment states, also be accepted on condition that those provisions, irrespective of whether they constitute measures applicable with or without distinction, are necessary in order to satisfy mandatory requirements such as for example the protection of public health.

A further requirement, as may be deduced from the above-mentioned judgments of the Court of Justice on State price provisions, is that State marketing rules which may be necessary, such as for example, a restriction on advertising, must not lead to imported products being put at a disadvantage compared to similar national products. However, it is obvious that a restriction on the advertising of certain products, which applies in the main to imported products, whilst similar national products are not affected by it, is potentially capable of having the effect of restricting competition for importers. In such a case there is arbitrary discrimination or a disguised restriction on trade between Member States within the meaning of the second sentence of Article 36 of the EEC Treaty with the result that the provisions in question are to be regarded as measures having an effect equivalent to quantitative restrictions on imports.

2. Thus in the present case it must be established whether the rules on the advertising of alcoholic beverages contained in the French Law on the sale of drinks and on measures against alcoholism are necessary and appropriate to meet the imperative requirement of the protection of public health and whether or not imported products are put at a disadvantage as against similar national products by those specific rules. Both parties acknowledge that it is necessary to combat alcoholism, which is a danger to public health. The parties further agree that a restriction on advertising in respect of alcoholic beverages is in principle capable of effectively curbing that danger. The dispute is simply whether advertising in respect of alcoholic beverages is regulated in France in a discriminatory way, that is to say, whether their differential treatment is objectively justified by their varying degrees of harmfulness.

The Commission takes the view that the classification has been conceived for extraneous reasons and primarily serves to restrict the marketing of non-French beverages. Only alcohol content and, additionally, sugar and essence content may be used as objective criteria for harmfulness. All drinks which exhibit the same characteristics when those criteria

are applied to them are therefore to be regarded as similar and thus equally harmful.

However, in the view of the French Government, besides those criteria, a number of other factors are of importance in regard to the harmfulness of the drinks. Mention must be made in particular of the different non-alcoholic constituents which determine the taste of the drinks and thereby give rise to drinking habits which differ from country to country and which must be taken into account in the campaign against alcoholism. Further, regard must be had to whether a drink is used as an aperitif or for digestive purposes. Consumers have grown appreciably more inclined towards aperitifs among which a distinction must again be drawn between so-called sweet aperitifs mainly manufactured from wine and those which are based on other types of alcohol and consumed neat or mixed with water. That distinction would also appear to justify classifying wine-based aperitifs among the drinks of the third group, the advertising of which is merely restricted, and aperitifs based on other types of alcohol such as aniseed-flavoured spirits, whisky and grain spirits, on the other hand, in the fifth group, in regard to which all advertising is prohibited. In that respect the French legislation constitutes a coherent body of rules which corresponds to the various habits of drinking and consumption. From the health point of view the drinks in the third and fourth group have different effects and are therefore logically classified in different groups. Finally, the very fact that drinks of French origin feature in both groups in regard to which advertising is restricted or prohibited proves that there is no intention to put non-French drinks at a disadvantage.

However, those submissions of the French Government are not convincing for several reasons. The question whether a measure is one which has an effect equivalent to a quantitative restriction on imports is not concerned with whether it is *intended* to hinder trade by means of the measure in question, but with whether the rules are *capable* of constituting an obstacle to trade. Furthermore, the fact that national products are also caught by the restrictive effect of a measure on trade does not mean that there is no obstacle to imports. Rather, as I showed at the beginning, a measure has an effect equivalent to a quantitative restriction on imports whenever imported products are put at a disadvantage compared to similar or competing national products and the latter thereby acquire a competitive advantage.

When considering the question of the extent to which individual beverages are similar to or in competition with one another it must first be pointed out that under the French rules advertising in respect of spirits made from wine, fruit, grain and sugar-cane is not subject to any restrictions whilst spirits made from molasses, potato-spirit and other raw materials may not be advertised at all. However, as is shown by the judgment of 27 February 1980 in Case 168/78 *(Commission* v *French Republic)* which concerned the differential French taxation of spirits made from wine and fruit on the one hand and spirits flavoured with juniper berries and other

grain spirits on the other hand, France produces a considerable amount of products such as cognac, armagnac or calvados, for example, which belong to the first of the groups which I have just referred to. On the other hand there is no significant production in France of spirits flavoured with juniper berries and other grain spirits such as aquavit, geneva, gin, schnapps and whisky which are for the most part imported. In the case I have just referred to the French Government likewise tried to justify the different tax treatment on the ground that, because of the link with different uses and drinking habits, the rules served to protect public health. In its judgment of 27 February 1980 the Court of Justice rejected that contention and made it clear that under Article 95 of the EEC Treaty, which was conclusive in regard to that case, no objective value could be attached to the distinctions upon which the French tax practice was based. In particular the Court stressed that, irrespective of their individual characteristics, all the products in question belonged to a category which was different from other alcoholic beverages on account of their relatively high potable spirit content. Grain spirits including those flavoured with juniper berries had, as products obtained from distillation, sufficient characteristics in common with other spirits to constitute at least in certain circumstances an alternative choice for consumers. Because of their characteristics grain spirits and those flavoured with juniper might be consumed in very varied circumstances and at the same time competed with beverages described as "aperitifs" or "digestives" according to French tax practice whilst, moreover, serving purposes which do not come within either of those two categories. Such a variety of uses enabled these drinks to be regarded as similar or at least as being in competition with one another. In view of this competitive relationship and the fact that the products might be substituted for one another, the protective nature of the contested tax system was obvious.

As the Commission correctly points out, those conclusions must not only be valid in regard to Article 95 but also in regard to Articles 30 and 36 of the EEC Treaty. Since the distinctive feature of all spirits is that they have roughly the same alcohol and sugar content they all represent equally a risk to public health. The very variety of the uses indicated shows that from an objective point of view there is no justification for treating the drinks in question differently on grounds of their harmfulness for the reason that public health must be protected. The protective nature of the differential rules to which the Commission objects on advertising in respect of different sorts of spirits resides in the fact that a major part of national production, namely spirits made from wine, fruit and sugar-cane, receive preferential treatment compared to other products which are virtually all imported from other Member States. On the other hand aniseed-flavoured spirits, although actually representing a particularly significant risk to human health owing to their anethol content, are equated with the other spirits.

Finally, the French Government's contention that whisky has been able to increase its market share despite the disadvantage just described does not prove that there is no protective effect. It need only be stated in reply that even a potential obstacle to trade is enough to establish the existence of a measure

having an effect equivalent to a quantitative restriction on imports and that furthermore, as I argued in my opinion in the case last referred to, Case 168/78, there may be other reasons for such a trend.

At this juncture I should like to examine again the Commission's proposition that aniseed-flavoured spirits, for which advertising is prohibited, receive a competitive advantage over other spirits falling into the fifth category because the so-called aniseed liqueurs, which belong to the fourth category, may be advertised without restriction. This allegedly enables well-known manufacturers of aniseed-flavoured spirits in France to advertise indirectly, by the addition of the word "liqueur" or "anisette", the products for which advertising would otherwise be prohibited. Because of the long-established reputations of these firms consumers associate the names of the manufacturers with the respective aniseed-flavoured spirits. Such indirect advertising is not available, however, to whisky manufacturers for example.

In my view that argument would be convincing only if the respective aniseed liqueurs were not actually regarded in the eyes of consumers on the French market as an independent kind of drink in the category of liqueurs and there was thus a chance of its being confused. If French consumers were not in fact able to distinguish between aniseed liqueurs and aniseed-flavoured spirits, non-French spirit manufacturers in particular, who, either for actual reasons or because their name is not sufficiently well-known on the French market, could not have that chance to advertise indirectly would be handicapped compared to French manufacturers.

Finally, the classification of the other alcoholic drinks into different categories is not, on the basis of the criteria elaborated in the Court's case-law, objectively justified either and causes foreign products to be handicapped in relation to similar or competing national products.

Thus it must be stated that liqueurs having an alcohol content of more the 18° and sweetened with sugar, glucose or honey — for example, typically French products like Cointreau, Grand Marnier and Chartreuse — fall into the fourth group on which there is no restriction on advertising. Strawberry, raspberry, blackcurrant and cherry liqueurs having an alcohol content of less than 18°, on the other hand, are classified in the third group of drinks, in regard to which advertising is permissible only to a limited extent. These latter liqueurs, which indisputably have roughly the same sugar content and which are produced in considerable quantities in other Member States as well, are thus treated more stringently than French products with a higher alcohol content. However, as we know from the judgment in Case 120/78, *Rewe*, such discriminatory treatment cannot be justified on the ground of the protection of public health. In that case an import licence for a consignment of Cassis de Dijon from France into the Federal Republic of Germany was refused by the Bundesmonopolverwaltung für Branntwein [Federal Monopoly Administration for Spirits] on the ground *inter alia* of the protection of

public health. The German Government adopted the view on this point that the laying down in national law of a minimum wine-spirit content was to prevent the national market from being flooded with alcoholic drinks, particularly those with moderate wine-spirit content; for such products could lead to addiction more easily than drinks with a higher wine-spirit content. The Court of Justice expressly rejected those considerations on the ground that an extremely wide range of various products of low or moderate alcohol content was available to consumers on the market and furthermore that a considerable proportion of the alcoholic beverages with a high wine-spirit content freely sold on the German market was generally consumed in diluted form. That consideration must undoubtedly apply to this case.

Under the French rules, moreover, liqueur wines such as port, malaga, sherry and madeira are to be classified in the third group of beverages, advertising for which is restricted whilst the typically French products such as Avèze and Suze which indisputably have the same alcohol and sugar content and are likely to contribute to the same drinking habits, fall into the fourth group and are thus free of any advertising restrictions. Even if those kinds of drink vary in taste, that criterion does not offer any sufficient feature for distinguishing them in relation to the harmfulness of the drinks in question since, as the Court of Justice stated in Case 168/78, it varies too much in terms of place and time for that criterion alone to be capable of providing a sufficiently sound basis for making such distinctions.

Finally the Commission pertinently remarks that among the second group of drinks, for which there is likewise no advertising restriction and which is mainly intended for alcoholic drinks which are obtained from fermentation, such as beer and wine, are also to be found the natural sweet wines coming under the French tax arrangements applying to alcohol. That means that liqueur wines of exclusively French origin may be advertised without restriction whilst the other liqueur wines, which, on the basis of all the relevant criteria are to be regarded as similar or at least as competing products, are classified in the third group and are thus subject to a restriction. The same applies to the so-called "Crème de Cassis", which, as may be seen from a decree of 28 July 1908 which regulates the composition and description of those drinks, include only the so-called "Cassis de Dijon", that is to say, once again, only national drinks. On the other hand, in respect of competing products which are similar in the eyes of consumers, like fruit liqueurs from other Member States which are put into the third group, advertising is allowed to a limited extent only, with the result that those products suffer a marketing disadvantage compared to national products whereas no distinction would appear to be justified on the ground that they are dangerous to public health.

As a result of all these considerations I take the view that the French Law on the sale of drinks and on measures against alcoholism, which lays down discriminatory advertising rules for various alcoholic beverages, constitutes a

measure having an effect equivalent to a quantitative restriction on imports, which is prohibited by Article 30 of the EEC Treaty since the classification adopted therein is capable of putting foreign beverages at a disadvantage compared to national products, although as regards their danger to public health they must be considered as similar or as being in competition with one another.

3. To sum up I therefore propose that the Court of Justice should declare that the French Republic has subjected advertising in respect of alcoholic beverages to discriminatory rules thereby maintaining obstacles to intra-Community trade, and has thus failed to fulfil its obligations under Article 30 of the EEC Treaty. In view of this outcome the French Republic should also be ordered to pay the costs of the proceedings.