OPINION OF ADVOCATE GENERAL TESAURO

delivered on 27 May 1997 *

1. Completion of the internal market, resulting in an area without internal frontiers in which the free movement of goods, persons, services and capital is guaranteed, heralds extremely beneficial developments for Community citizens. Nevertheless, it must be recognized that the removal of fiscal frontiers between the Member States, an essential condition for completion of the internal market, will entail at least one consequence which, if only from the emotional point of view, will not be particularly welcomed by citizens: I refer to the removal of the opportunity to buy tax-free goods (in duty-free shops). That possibility is destined to disappear, with regard of course to travel within the Community, on 30 June 1999.

There is a possibility that these proceedings may bring forward the moment when it will no longer be possible for travellers by air or sea within the Community to buy duty-free goods. The questions on which the Tribunal de Commerce, Paris, seeks a preliminary ruling from the Court of Justice concern the validity of Article 28k of Directive 77/388/EEC [1] (hereinafter 'the Sixth Directive'), as amended by Directive 91/680/EEC, [2] and on the validity of Article 28 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [3] (hereinafter 'the Excise Duty Directive'). The provisions at issue are precisely those which allow the Member States to maintain, until 30 June 1999, the tax exemption for intra-Community travel by air or sea.

Legislative background

2. The main purpose of Directive 91/680 and the Excise Duty Directive is to establish, as from 1 January 1993, the conditions necessary for the removal of fiscal frontiers within the Community. In order to ease the transition to the definitive regime for the taxation of trade by reference to the country of origin of the goods, those directives laid down a transitional period expiring on 31 December 1996. However, as is apparent from the

* Original language: Italian.

1 — Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

2 — The article in question was inserted in the Sixth Directive by Article 1(22) of Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1).

3 — OJ 1992 L 76, p. 1.

preamble to each of the directives in question, 'advantage must be taken of the transitional period of taxation of intra-Community trade to take measures necessary to deal with both the social repercussions in the sectors affected and the regional difficulties, in frontier regions in particular, that might follow the abolition of the imposition of tax on imports and of the remission of tax on exports in trade between Member States; ... Member States should therefore be authorized, for a period ending on 30 June 1999, to exempt supplies of goods carried out within specified time-limits by duty-free shops in the context of air and sea travel between Member States'. [4]

Article 28k of the Sixth Directive, for which the reasons are set out in the recital just quoted, provides, so far as is relevant here:

'The following provisions shall apply until 30 June 1999:

1. Member States may exempt supplies by tax-free shops of goods to be carried away in the personal luggage of travellers taking intra-Community flights or sea crossings to other Member States.

...

Supplies of goods effected by tax-free shops shall include supplies of goods effected on board aircraft or vessels during intra-Community passenger transport.

This exemption shall also apply to supplies of goods effected by tax-free shops in either of two Channel Tunnel terminals, for passengers holding valid tickets for the journey between those two terminals.

2. Eligibility for the exemption provided for in paragraph 1 shall apply only to supplies of goods:

(a) the total value of which per person per journey does not exceed the limits laid

4 — Thirteenth recital in the preamble to Directive 91/680/EEC. The 23rd recital in the preamble to the Excise Duty Directive is almost identical.

down by the Community provisions in force for the movement of travellers between third countries and the Community.'

For its part, Article 28 of the Excise Duty Directive contains provisions to the same effect, drafted in essentially similar terms.

To complete the legislative picture, it should finally be borne in mind that the limits for duty-free purchases, as referred to in Article 22k(2)(a) of the Sixth Directive, were changed by Council Directive 94/4/EC of 14 February 1994. [5] Following that amendment, the provision in question provides that the benefit of the exemption applies only to supplies of goods '(a) the total value of which per person per journey does not exceed ECU 90'.

3. France, which implemented the directives in question by Law No 92-677 of 17 July 1992, availed itself of the possibility of exemption offered by Article 28k of the Sixth Directive and Article 28 of the Excise Duty Directive. The national implementing provisions, which repeat exactly the relevant provisions of the articles in question, provide for exemption from payment of VAT and excise duty until 30 June 1999 regarding purchases by travellers within the Community by air or sea, and in the confines of the (French) terminal for access to the tunnel under the Channel. [6]

The facts and the preliminary questions

4. The dispute in the main proceedings is between the co-managers of the fixed rail link through the Channel Tunnel, namely the French companies Eurotunnel SA and France Manche and the English companies Eurotunnel plc and the Channel Tunnel Group Ltd (hereinafter 'Eurotunnel'), and one of the cross-channel shipping companies, Société Nouvelle d'Armement Transmanche (now called SeaFrance, hereinafter 'SNAT'), a subsidiary of the SNCF, which with the Stena company operates a number of routes under the name 'Sealink'. More specifically,

5 — That directive modifies Directives 69/169/EEC and 77/388/EEC and increases the allowances for travellers coming from third countries and the limits for duty-free purchases by travellers within the Community (OJ 1994 L 60, p. 14). However, that directive did not change the limits laid down by the Excise Duty Directive, which thus continued to be those 'laid down by Community provisions in force in the context of the movement of travellers between third countries and the Community' (Article 28(2) of the Excise Duty Directive).

6 — More specifically, Article 26 *quater* of the General Tax Code, inserted by Article 17 II of Law No 92/677, exempts from VAT until 30 June 1999 trade at sales outlets located in an airport or port or in the area of the (French) terminal for access to the Channel Tunnel. Article 302F of the General Tax Code, inserted by Article 59 of Law No 92-677, contains similar provisions regarding the payment of excise duties.

on 14 June 1995 Eurotunnel brought unfair-competition proceedings before the Tribunal de Commerce, Paris, against SNAT, [7] seeking a declaration that as from 22 December 1994, the date on which the 'Shuttle' extended its operations to carry passenger vehicles, SNAT was engaging in unfair competition against it and, therefore, should be prohibited from carrying out transactions exempted from VAT and excise duties, that it should pay the plaintiff FF 77 000 000 for damage suffered from 22 December 1994 to 31 May 1995 and FF 15 000 000 for each subsequent month, together with FF 500 000 pursuant to Article 700 of the new Code of Civil Procedure.

Whilst conceding that in a few months it had captured very significant shares of cross channel traffic, Eurotunnel contended before the French court that a trade war concerning conditions applicable to crossings had broken out against it; that war was manifested by the sale of tickets below cost, offset by the promotion, which the defendant regards as excessive, of tax-free sales of alcohol and tobacco products on cross-channel routes. Since that was allowed by Article 28k of the Sixth Directive and Article 28 of the Excise Duty Directive, in other words by provisions which in Eurotunnel's opinion were unlawful, a ruling was needed from the Court of Justice as to the validity of those provisions. Those, therefore, are the grounds on which Eurotunnel based its action.

SNAT, for its part, contended that Eurotunnel's claims should be dismissed, maintaining that it had merely applied national provisions which precisely implement Community provisions, so that it could not in any circumstances be accused of unfair competition, and in any event there was no evidence to that effect. It added that Eurotunnel's action was in reality intended to have the directives in question declared invalid, which should not be allowed for two reasons. First, Eurotunnel failed, although entitled to do so, to challenge the directives in question under Article 173. Second, Eurotunnel's claim for a declaration of invalidity had already been dismissed by an English court. That reference, it should be noted, was to the judgment of the High Court of Justice of 17 February 1995, dismissing the action brought by Eurotunnel on 30 June 1994 against the United Kingdom provisions implementing the directives at issue in this case. [8]

7 — In support of SNAT, the following intervened: the association representing companies in the duty-free industry (International Duty-free Confederation); the association representing the interests of most United Kingdom airports (Airport Operators Association Ltd); the company operating on routes across the Channel other than to Calais (Bretagne Angleterre Irlande SA); and the association of passenger shipping companies plying between the United Kingdom and other countries (Passenger Shipping Association Ltd).

8 — More specifically, by that judgment the High Court of Justice, refusing to extend the period of three months provided for by national legislation, declined to authorize Eurotunnel to bring an action for annulment. Nevertheless, it held that Eurotunnel could bring proceedings regarding tax-free sales on 'booze-cruises' — one-day round trips, though not necessarily on the same vessel. However, Eurotunnel did not avail itself of that opportunity.

5. Having noted that Eurotunnel was losing income because of competition from SNAT and that in France sales at a loss are prohibited only for products, not for services, the Tribunal de Commerce reached the conclusion that the only plea on which Eurotunnel could rely in an unfair-competition action was the application, by SNAT, of a national provision which (faithfully) implemented an unlawful Council provision.

The national court therefore considered it necessary to seek a preliminary ruling from the Court of Justice in order to give judgment. Its questions are as follows:

'1. Given the fact that Eurotunnel has not brought an action pursuant to Article 173 for the annulment of those parts of Council Directives 91/680 and 92/12 relating to taxation (value added tax and excise duty) on cross-Channel links and that an application brought by Eurotunnel in the High Court of Justice was dismissed by decision of 17 February 1995, will an application for their annulment brought by Eurotunnel lie pursuant to Article 177 of the Treaty?

2. If so, did the Council adopt those directives lawfully?

In the alternative, does Directive 94/4 cover a possible annulment of those two directives?

3. In the event of annulment, must the fact that SNAT (Société Nouvelle d'Armement Transmanche) SA applied the fiscal laws adopted pursuant to those directives be imputed to it as a fault? If so, as from what date was the fault committed?'

6. The questions referred to the Court thus seek to determine whether Eurotunnel may invoke the invalidity of the directives at issue [9] in preliminary-ruling proceedings, even though it did not challenge them by an action for annulment under Article 173 (first question); whether the two directives in question were lawfully adopted (second question); and what would be the consequences of a declaration that those directives are invalid regarding the unfair-competition proceedings, more particularly with regard to compensation for the damage alleged by Eurotunnel (third question).

Before examining the specific problem of admissibility raised by the national court itself in its first question, I think it is appro-

9 — It need hardly be pointed out that the decisions referred to by the national court in the questions submitted, as set out in the foregoing paragraph, are in fact directives.

priate to consider two other aspects of admissibility, of a more general nature, raised during the proceedings. SNAT and the interveners supporting it contend that the Court of Justice should not answer any of the questions submitted to it. They claim that Eurotunnel's action before the national court is of a manifestly artificial nature and that, in any event, the questions submitted to the Court are entirely irrelevant to the issues in the proceedings before the national court, and are not therefore necessary to determination of the main action.

SNAT's argument, namely that the dispute is artificial and the questions have no bearing on the dispute, thus relates specifically to the two cases in which the Court, in accordance with the case-law just cited, [11] exercises its right to refuse to give an answer to the national court and, thus, to state that it is inappropriate to proceed with the case.

— *The artificial nature of the dispute*

Admissibility

7. In the first place, I would point out that, as the Court has consistently held, 'when a question on the validity of a measure adopted by the Community institutions is raised before a national court, it is for that court to decide whether a decision on the matter is necessary to enable it to give judgment and consequently whether it should request the Court to rule on that question. It is then a matter for the Court, within the framework of the close cooperation with national courts established by Article 177 of the Treaty, to reply to the question submitted by the national court, *unless it should appear to it that the question submitted has no connection with the reality or subject-matter of the dispute in the main proceedings*'. [10]

8. SNAT and the interveners supporting it state that the real subject-matter of the main proceedings is not compensation for any damage suffered by Eurotunnel but rather the issue of the validity of the directives which allow maintenance of the duty-free sales scheme until 30 June 1999. In other words, the essential object of Eurotunnel's action is specifically to have those directives declared invalid and not to secure compensation for damage, a situation which would appear to follow from the fact that Eurotunnel has already endeavoured, unsuccessfully,

10 — Case 306/93 *SMW Winzersekt* [1994] ECR I-5555, paragraph 15 (emphasis added).

11 — That case-law has been further developed in relation to preliminary rulings on questions of interpretation. In such circumstances, the now 'classic' formula used by the Court is to say, after making it clear that it is giving 'its ruling without, in principle, having to look into the circumstances in which a national court was prompted to submit the questions and envisages applying the provision of Community law which it has asked the Court to interpret', that '[t]he matter would be different if it were apparent either that the procedure provided for in Article 177 had been diverted from its true purpose and was being used in fact to lead the Court to give a ruling by means of a contrived dispute, or that the provision of Community law referred to the Court for interpretation was manifestly incapable of applying' (to that effect, see most recently, Case C-85/95 *Reisdorf* v *Finanzamt Köln West* [1996] ECR I-6257, paragraphs 15 and 16).

to persuade the High Court to seek a preliminary ruling, and from public statements made by Eurotunnel's Chief Executive. [12]

In those circumstances, it is all too clear, in SNAT'S view, that the unfair-competition proceedings brought by Eurotunnel amount to a procedural device, a way of persuading the Court to give judgment on the validity of the directives in question. Such use of Article 177 is, however, an abuse and should therefore prompt the Court of Justice, in accordance with the rule in *Foglia* v *Novello*, [13] to say that it has no jurisdiction to respond to the questions submitted to it by the national court.

9. I do not consider that view to be well founded. Whilst it is true that in *Foglia* v *Novello II* the Court stated that in certain circumstances a 'decision by the Court that it has no jurisdiction ... makes it possible to prevent the application of the procedure under Article 177 for purposes other than those appropriate for it', it is also true that it stated by way of preliminary that it 'does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute'. [14]

Now, having regard to the Eurotunnel case as a whole, the possibility certainly cannot be excluded that the proceedings before the French court were tenaciously sought and desired by Eurotunnel specifically and solely in order to obtain a declaration that the directives at issue were invalid. [15] That does not change the fact, however, that the proceedings before the national court are not in reality in the nature of a procedural device arranged by the parties, of the kind defined by the Court of Justice. Rather, it is all too clear that in this case the parties are not in agreement about anything: neither the need to make a reference to the Court of Justice, since SNAT contests the admissibility of the question submitted, nor the substantive result to be arrived at.

10. Moreover, even if it is considered that cases of artificial disputes are not limited to those where the parties agree both on the

12 — As stated in an interview given by Sir Alastair Morton and published in the magazine *Frontier* in September 1995. In that interview, the Chairman of Eurotunnel stated that compensation for damage obtained from the smallest of the shipping companies was not important. What was important was to obtain a decision.

13 — Case 104/79 *Foglia* v *Novello I* [1980] ECR 745, and Case 244/80 *Foglia* v *Novello II* [1981] ECR 3045.

14 — *Foglia* v *Novello II* (cited in the foregoing footnote), paragraph 18.

15 — For the sake of completeness, I would point out that not even the view that Eurotunnel has no *locus standi* as a plaintiff — since the disputed provisions of the Sixth Directive and the Excise Duty Directive, far from having a negative impact on Eurotunnel's interests, allow it to make duty-free sales and therefore are favourable to it — can change the terms of the problem. Suffice it to point out that, whilst it is true that a lack of *locus standi* might prompt a finding that there is no dispute, and the existence of a dispute is a mandatory pre-condition for recourse to the procedure under Article 177, the fact remains that the existence of *locus standi* (and thereby of a dispute) is a matter which should have been assessed by the national court on the basis of its own domestic procedural rules.

subject-matter of the dispute and on the decision to make a reference to the Court, but extend to other circumstances in which Article 177 is used in a manner not in conformity with its purpose, the fact remains that the concept of abuse of procedure must be strictly limited to exceptional cases. [16] That approach is called for, in particular, in view of the role of the national court in preliminary-ruling proceedings: the Court certainly cannot be regarded as a mere 'instrument' in the hands of either or both of the parties. [17]

In short, I consider that there is no evidence to justify describing the dispute in the main proceedings as artificial. I would add that the aim pursued by Eurotunnel in the action brought before the national court is not in any event such as to prompt the view that the questions submitted to the Court of Justice constitute a misuse of procedure and of the purpose of Article 177.

16 — And it is certainly no accident that the principles upheld in the *Foglia* v *Novello* judgments, although constantly reiterated over the years, do not appear to have been applied in practice in later cases. *Foglia* v *Novello* thus remains an isolated case, even if a famous one.

17 — It is not superfluous to note that Article 177 'establishes direct cooperation between the Court and the courts and tribunals of the Member States by way of a non-contentious procedure excluding any initiative of the parties who are merely invited to be heard in the course of that procedure' (Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol* [1994] ECR I-43, paragraph 9).

— *The relevance of the questions*

11. SNAT and the interveners supporting it contend that the questions submitted are not relevant to the substance of the dispute since, even if the directives at issue were declared invalid, SNAT could not in any event be required to redress any damage suffered by Eurotunnel. SNAT has done nothing more than apply, in perfectly good faith, a national law which correctly transposed the directives in question: its conduct cannot therefore be regarded as constituting an offence, giving rise to liability. It follows that, for the decision to be given in the main proceedings, no ruling is in fact needed from the Court of Justice as to the validity of the directives.

12. The view just outlined makes it necessary to verify whether the answer to the questions submitted may or may not be useful to the national court in disposing of the dispute before it. When the Court has examined this question of relevance, albeit only marginally, it has so far declined to give a reply only in response to questions which 'bear no relation to the subject-matter of the action', [18] or 'of a hypothetical nature', [19] or, again, ones which are not 'objectively

18 — To that effect, see the order of 26 February 1990 in Case C-286/88 *Falciola* [1990] ECR I-191, paragraph 9, and Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 42.

19 — Case C-83/91 *Meilicke* v *ADV-ORGA* [1992] ECR I-4871, paragraphs 28 to 30.

required for the decision to be taken by the' Court. [20]

Accordingly, particular importance attaches to any reasons given by the national court in its order for reference clarifying the link between the questions submitted and the proceedings pending before it and, therefore, the need to receive a reply from the Court of Justice. [21]

13. In the present case, the national court merely stated that the only possible basis for an unfair-competition action could be the application, by SNAT, of the national legislation which (faithfully) implemented an unlawful Council provision. Although, therefore, it is clear that if the directives in question were found to be valid Eurotunnel's claims would be dismissed, it is not clear to the same extent how a declaration of invalidity might affect the outcome of the unfair-competition proceedings, particularly Eurotunnel's claim for damages against SNAT.

Is that sufficient reason to consider that the questions submitted to the Court are not necessary for judgment to be given in the dispute before the national court? Whilst recognizing that the order for reference is certainly not a model of clarity with regard to the point at issue here, I am of the opinion that that question can only be answered in the negative.

14. First, the usefulness of the Court's answer, for determination of the dispute in the main proceedings, is beyond doubt if an examination of the questions submitted discloses no factor such as to detract from the validity of the directives at issue. [22] Second, SNAT's assertion that it could not in any circumstances — not even if the directives at issue were declared invalid — be made to pay compensation for any damage suffered

20 — Order of 16 May 1994 in Case C-428/93 *Monin Automobiles* [1994] ECR I-1707, paragraph 15.

21 — This explains why, in the relevant case-law, there is ever-increasing occurrence, particularly in recent years, of the statement to the effect that 'it is essential for the national court to explain the reasons why it considers that a reply to its questions is necessary to enable it to give judgment' (see, for example, *Lourenço Dias*, cited in footnote 18, paragraph 19).

22 — In such circumstances, Eurotunnel's claims, as already mentioned, would certainly fail. In that connection, the *Celestini* case is noteworthy (Case C-105/94, pending), which displays a number of similarities with this one and may be summarized as follows: an Italian court, in order to adjudicate on a claim for damages brought by an Italian company against a German company to which it had sold a consignment of wine, which was sent back to Italy by the German authorities, which considered it unfit for human consumption, asked the Court of Justice to rule as to the compatibility with Community law of a particular system for the examination of wine used by the German authorities. In response to the Commission's view that the questions submitted were manifestly irrelevant to the substance of the dispute, Advocate General Fennelly, in his Opinion of 26 September 1996, regarded as sufficient, with regard to the relevance of the questions, the fact, to which the national court itself drew attention, that 'if the answers provided by the Court were to the effect that the test applied was compatible with Community law, the entire action of the plaintiff would have to be dismissed' (paragraph 28). In the same opinion, the Advocate General rightly emphasized that '[t]he duty of cooperation which governs the relationship between national courts and the Court in Article 177 proceedings obliges the Court, in my opinion, to refuse to answer questions referred, only in circumstances where it is clear that no genuinely useful answer can reasonably be given' (paragraph 29).

by Eurotunnel, [23] might not in itself be such as to deprive the unfair-competition proceedings of any interest. [24]

In short, in my opinion it would be going too far to say that the questions submitted are *manifestly* devoid of any link with the subject-matter of the main proceedings or *objectively* unnecessary for determination of the dispute. [25] I shall therefore consider the questions submitted by the national court.

The first question

15. By its first question, it will be remembered, the national court asks whether Eurotunnel can allege the invalidity of the directives in question in preliminary-ruling proceedings. Its doubts in that connection, as expressed in the question itself, are due to the fact that Eurotunnel did not challenge those directives by means of an action for annulment under Article 173, and also the dismissal, by judgment of 17 February 1995, of the action brought by Eurotunnel before the High Court of Justice, in which it was sought to subject to scrutiny the legality of the measures adopted by the United Kingdom in implementation of the provisions at issue.

16. With regard to the latter point, the national court itself nevertheless emphasizes in its order for reference, first, that 'it is not competent to interpret the decision of the High Court of Justice, which alone is authorized to do so, or to raise questions regarding the grounds of that decision'; second, that 'not all the documents from the London proceedings have been forwarded' and 'the parties are different'.

In that regard, I need only observe that the action brought by Eurotunnel before the High Court of Justice is of no importance as far as the present proceedings are concerned. Quite apart from the fact that it was a different action, involving different parties, it is quite clear that, in proceedings under Article 177, the Court certainly cannot appraise the need for a request for a preliminary ruling by reference to the solution adopted by a different national court in relation to a similar problem. These are proceedings from one court to another, in which the national court fully retains the right to submit questions to the Court of Justice where it has doubts on a point involving the interpretation or the validity of Community law provisions.

23 — It is with that problem that the third question is specifically concerned — see paragraphs 33 to 36 below.

24 — Indeed, the possible invalidity of the directives at issue, to the extent to which it might justify, as the court appears to indicate in the order for reference, describing SNAT's conduct as 'unfair competition' would without doubt be helpful to the national court (at the very least) in calling on SNAT to desist from such conduct, in other words to discontinue duty-free sales, a result which, moreover, is in line with one of the claims made by Eurotunnel in the main proceedings (see paragraph 4 above).

25 — In that connection, see footnote 11, and also paragraph 12, in particular footnotes 18 and 20.

17. With regard to the second aspect of admissibility mentioned in the first question, it is on the other hand necessary to establish whether the national court, before which Eurotunnel has raised the question of the validity of the directives at issue, is precluded from seeking and obtaining on that point, under Article 177(b), a ruling from the Court of Justice, merely because Eurotunnel did not challenge those directives — it being assumed that it had standing to do so — by means of an action for annulment under Article 173. That question, as is clear from the order for reference itself, has been submitted because of the solution adopted by the Court in its judgment in *TWD Textilwerke Deggendorf*. [26]

In that judgment, the Court re-examined its earlier case-law on the subject, from which it was apparent, either expressly [27] or only by implication, [28] that private individuals can indeed allege the invalidity of a Community measure in proceedings under Article 177, without its being necessary to consider whether it might be open to them to challenge the measure in question directly.

18. The *TWD* judgment re-examined that approach to some extent. In that judgment, the Court stated that the beneficiary of aid could not allege invalidity of the Commission's decision, addressed to the Member State which disbursed the aid and required recovery thereof, in proceedings before the national court: the reason for this was precisely that the undertaking in question was fully entitled, having *locus standi* for that purpose, to challenge that decision under Article 173. Any other conclusion, in the Court's opinion, would have been tantamount to recognizing, in favour of the beneficiary of the aid in that case, the possibility of evading the definitive status which, by virtue of the principle of legal certainty, must attach to a decision after expiry of the period laid down in Article 173. [29]

For the sake of the principle of legal certainty, the Court thus altered case-law which was fully acceptable and, in my opinion, more correct, in particular because it was in harmony with the spirit of cooperation between the national court and the Community Court underlying the procedure under Article 177. To deprive the national court of the opportunity to make proper references to the Court, when entertaining doubts as to the validity of a Community measure, goes against that spirit of cooperation and, in the last analysis, undermines the preliminary-ruling procedure.

26 — Case C-118/92 [1994] ECR I-833.

27 — See Case 216/82 *Universität Hamburg* [1983] ECR 2771, paragraphs 7 to 11, and Joined Cases 133/85 to 136/85 *Rau and Others* [1987] ECR 2289, paragraphs 11 and 12.

28 — See, for example, Case 314/85 *Foto-Frost* [1987] ECR 4199, in which the Court answered questions on the validity of a *decision* which the plaintiff in the main proceedings could indeed have challenged under Article 173. See also Case C-16/65 *Schwarze* [1965] ECR 877, in which the Court, giving its views in preliminary-ruling proceedings on a point of validity, regarding the relationship between Articles 173 and 177, observed that '[t]here are, therefore, no grounds for alleging that the parties to the main action have circumvented the provisions of Article 173 of the Treaty. The national court did not intend to determine, on a national level, questions of law exclusively reserved for the Court of the Communities; the parties applied for a reference to the Court of Justice and the Finanzgericht agreed, and complied with the conditions and procedure laid down by the Treaty' (p. 887).

29 — The same reasoning was followed by the Court in the later judgment in Case C-178/95 *Wiljo* [1997] ECR I-585, paragraphs 20 to 23, in which the addressee of the decision, which had not been challenged under Article 173, was nevertheless the same plaintiff in the main proceedings.

19. That said, it is nevertheless true that the new approach in this area should not be construed as meaning that, since the *TWD* judgment, individuals are now precluded from alleging the invalidity of a Community measure before a national court — thereby making it impossible for the latter to seek a preliminary ruling from the Court of Justice — whenever the measure in question could have been challenged by them under Article 173. Indeed, having been asked for its views on the admissibility of preliminary questions concerning the validity of a regulation, the Court stated that 'since the contested provisions are contained in a Community regulation and are addressed in general terms to categories of persons defined in the abstract and to situations determined objectively, *it is not obvious that an action ... challenging that regulation* under Article 173 of the Treaty *would have been admissible*'. [30] The Court thus reached the conclusion that the invalidity of the regulation in question might indeed have been pleaded before the national court and it made clear, on the same occasion, that in circumstances of that kind reference to the *TWD* judgment is inappropriate, since the latter concerned 'a company which was *undoubtedly* entitled, and which had been informed that it was entitled, to bring an action for annulment of the Community act whose validity it was indirectly challenging before a national court'. [31]

The statement just quoted makes it clear that the possibility of alleging the invalidity of a Community measure in reliance on Article 177 may be precluded only where the natural or legal person in question was 'undoubtedly' entitled to bring an action under Article 173 against the Community measure in question. In other words, it is not sufficient for the person in question to have been able to bring an action for annulment: it is also necessary for there to have been no doubt as to the admissibility of the action, either because the person in question was the addressee of the measure or because, as in the *TWD* case, he was definitely entitled to challenge the measure and was apprised of that possibility.

20. As far as the present case is concerned, it must be recognized, in the light of the case-law thus referred to, that Eurotunnel certainly cannot be regarded as 'undoubtedly' entitled to bring an action for annulment under Article 173. It need only be noted that the measures whose validity is being challenged before the national court are directives and are thus measures which, at least in principle, are of general legislative scope, with a result that *it is not obvious* that an action against those directives under Article 173 would have been admissible.

That is sufficient reason, in my view, to conclude that Eurotunnel was not 'undoubtedly' entitled to bring an action for annulment and that, therefore, it may allege the invalidity of the directives at issue in preliminary-ruling proceedings.

30 — Case C-241/95 *Accrington Beef and Others* [1996] ECR I-6699, paragraph 15 (emphasis added).

31 — Ibid., paragraph 16 (emphasis added).

21. I would add, for the sake of completeness, that whilst it is true that the Court has not excluded *a priori* the right of individuals to challenge the provisions of a directive, [32] it is necessary for that purpose for the provisions in question to be in the nature of a decision which is of individual and direct concern to them. However, Article 28k of the Sixth Directive and Article 28 of the Excise Duty Directive merely allow Member States to maintain, until 30 June 1999, the possibility of duty-free sales for travellers by air or sea within the Community, including Channel crossings: this is clearly a power granted to the Member States, not an obligation. This means that the disputed provisions have no direct effect and, in order to be applied, require intervention by the national legislature, which could well have decided not to avail itself of that option and thus not to transpose the provisions in question into its domestic law. That fact in itself could mean that Eurotunnel could not be regarded as 'directly and individually' concerned by those provisions within the meaning and for the purposes of Article 173.

The foregoing observations show clearly that Eurotunnel not only could not be regarded as *undoubtedly* entitled to bring an action for the annulment of the disputed provisions of the directives in question under Article 173 but also that such proceedings would in any event have been inadmissible. In those circumstances, it is quite obvious that the answer to the first question must be that Eurotunnel is entitled to plead, before the national court, the invalidity of the directives in question.

The second question

22. I should first point out that, by its second question, the national court merely asks the Court of Justice whether Directive 91/680/EEC and the Excise Duty Directive were adopted 'lawfully', that is to say in compliance with the applicable procedural rules. More precisely, as is apparent from the order for reference itself, the national court is referring to the fact that the Commission's proposals did not contain the disputed provisions and the Parliament was not reconsulted after they were inserted by the Council.

Eurotunnel, to establish that the directives in question are invalid, has nevertheless

32 — See the order of 27 April 1988 in Case 352/87 *Farzoo and Kortmann* v *Commission* [1988] ECR 2281; the orders of 7 December 1988 in Case 138/88 *Flourez and Others* v *Council* [1988] ECR 6393 and Case 160/88 *Fedesa and Others* v *Council* [1988] ECR 6399; also, more particularly, Case C-298/89 *Gibraltar* v *Council* [1993] ECR I-3605, paragraphs 15 to 19. The Court of First Instance appears more loath to recognize that directives may be challenged by individuals: in its order of 20 October 1994 in Case T-99/94 *Asocarne* v *Council* [1994] ECR II-871, it stated: 'The fourth paragraph of Article 173 of the Treaty makes no provision — for the benefit of individuals — for a direct action before the Community judicature against directives or against decisions adopted in the form of directives. The justification for that exclusion lies in the fact that, in the case of directives, the judicial protection of individuals is duly and sufficiently assured by the national courts, which review the transposition of directives into the domestic law of the various Member States' (paragraph 17). The Court added, however, in the same judgment, that 'even supposing that it were possible — contrary to the wording of the fourth paragraph of Article 173 of the Treaty — to treat directives as regulations in order to allow proceedings against a decision "in the form of" a directive, the directive at issue neither constitutes a "disguised" decision nor contains any specific provision which has the character of an individual decision' (paragraph 18).

claimed, in addition to the grounds mentioned by the national court in its order for reference, that there is a lack of statement of reasons, breach of Community rules on State aid, infringement of Articles 99 and 7a of the Treaty, misuse of powers on the part of the Council, breach of the principles of protection of legitimate expectations, legal certainty and proportionality, and breach of the principle of non-discrimination. The question on validity being drafted in general terms, in so far as the adverb 'lawfully' cannot be construed as meaning that the national court wished to limit consideration of validity to procedural defects, the Court of Justice should, in Eurotunnel's view, as in earlier cases, consider those grounds which it relied on at the procedural stage and before the national court.

23. I do not consider that view to be tenable. Whilst it is true that in certain judgments the Court has considered defects affecting validity not mentioned by the national court but raised by the parties in the course of the procedure, it is also true that the Court did so only where the questions were drafted in wholly general terms and it was impossible to extract from the order for reference the reasons which prompted the national court to doubt the validity of the measure in question. [33] It is permissible to presume that, in cases of that kind, the Court considered that the national court had relied, in deciding to seek a ruling, on matters raised by the parties.

The case before us is entirely different. Even if one declines to attribute a narrow meaning to the adverb 'lawfully', the fact remains that it is very clear from the order for reference that the defects to which the national court refers are the absence of the contested provisions in the proposals submitted by the Commission and the failure to re-consult the Parliament. [34] In this case, therefore, what must be established is whether this Court can and/or must take account not only of the defects mentioned in the questions and, in any event, clarified in the grounds of the order for reference but also of the other defects raised by one of the parties to the main proceedings.

24. In that regard, I should first point out that in a judgment in 1964 the Court, faced with a similar problem, stated that it could confine itself to examining, in addition to the defects mentioned in the questions, only whether the decisions were vitiated by defects which could be considered by the

33 — See for example Case 5/67 *Beus* v *Hauptzollamt München* [1968] ECR 83, in particular at pp. 95 and 96; Joined Cases 103/77 and 145/77 *Royal Scholten-Honig* [1978] ECR 2037, paragraphs 16 and 17; Case C-323/88 *Sermes* [1990] ECR 3027, paragraph 13; and Joined Cases C-13/92, C-14/92, C-15/92 and C-16/92 *Driessen and Others* [1993] ECR 4751, paragraphs 17 to 20.

34 — This reconstruction of the events is confirmed by the fact that the national court asks in the alternative, within the second question, whether the possibly 'irregular' adoption of the directives in question can be rectified by the subsequent 'proper' adoption of Directive 94/4/EC, which changed the limits on duty-free goods per person and per journey.

Court of its own motion. [35] Whilst not expressly returning to that point, the Court subsequently followed that approach; where necessary, its examination of the questions of validity referred to it included defects not mentioned by the national court but qualifying for consideration of this Court's own motion, such as the obligation to state reasons. [36]

That, in my opinion, is the most appropriate way of dealing with the problem before us. Moreover, that solution necessarily follows from settled case-law according to which '[t]he information provided and the questions raised in orders for reference must ... be ... such as to give the Governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 20 of the EC Statute of the Court' and that it is 'the Court's duty to ensure that the opportunity to submit observations is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties'. [37] It goes without saying, of course, that such an approach would not be guaranteed in circumstances where neither the questions submitted by the national court nor the grounds of the order for reference clarified the grounds on which invalidity was alleged.

In the light of those considerations, I consider that, with respect to the points raised by Eurotunnel and not clarified in the order for reference, the Court must only examine the plea alleging lack of a statement of reasons. The absence of a statement of reasons, involving a breach of essential procedural requirements, can be examined by the Court of its own motion, as the Court has stated on several occasions. [38] Consideration of the validity of the contested provisions must therefore relate in particular to the obligation to state reasons laid down by Article 190 of the Treaty.

— *Inadequate statement of reasons*

25. It is to be noted at the outset that, according to settled case-law, the statement of reasons required by Article 190 depends on the nature of the measure in question and

35 — Joined Cases 73/63 and 74/63 *Handelsvereniging Rotterdam* v *Minister van Landbauw* [1964] ECR 1, in particular at p. 14; in that case, the Court reached the conclusion that 'the failure to provide the necessary publicity can be considered by the Court of its own motion'. In contrast, the Court refused to consider, since they were not grounds open to examination of the Court's own motion, defects alleged by the parties and not accepted by the national court (see, for example, Case 6/71 *Rheinmühlen* [1971] ECR 823, paragraph 13; and the Opinion of Advocate General Dutheillet De Lamothe in that case, at p. 842 et seq., in particular p. 852).

36 — Thus, for example, in the '*Butter Cruise*' judgment, when called on to rule as to the validity of a regulation in relation to breach of certain fundamental principles of Community law, the Court considered it appropriate, before considering those grounds, 'to consider whether the regulation complies with the requirements of Article 190 of the Treaty which provides that regulations shall state the reasons on which they are based' (Case 158/80 *REWE* v *Hauptzollamt Kiel* [1981] ECR 1805, paragraphs 18 and 19).

37 — See, among others, the orders in Case C-191/96 *Modesti* [1996] ECR I-3937 paragraph 5, and Case C-196/96 *Hassan* [1996] ECR I-3945, paragraph 5. The same approach was taken as early as in the judgment in Joined Cases 141/81, 142/81 and 143/81 *Holdijk* [1982] ECR 1299, paragraph 6.

38 — In that connection, see footnote 36. The case-law goes the same way in relation to actions for annulment under Article 173: see, for example, Case 32/71 *Jamet* v *Commission* [1972] ECR 483, paragraphs 11/12, and Case 185/85 *Usinor* v *Commission* [1986] ECR 2079, paragraph 19.

the context in which it was adopted. [39] In particular, it 'must disclose in a clear and unequivocal fashion the reasoning followed by the Community institution which adopted the measure in question in such a way as to make the persons concerned aware of the justification for the measure and enable the Court to exercise its power of review'. [40] That makes it clear — if clarification be needed — that a distinction must be drawn between inadequacy of the statement of reasons, a formal defect, and complaints as to the correctness of the statement of reasons. [41]

In this case it need only be pointed out that the 13th recital in the preamble to Directive 91/680/EEC and the 23rd recital in the preamble to the Excise Duty Directive state that the provision of a transitional period, during which the Member States are allowed to exempt from VAT and excise duty trade carried on in connection with air and sea travel within the Community, derives from the need to deal with the social repercussions in the sectors affected and the regional difficulties that might follow the abolition of the tax on imports and the remission of tax on exports. The matters on which the Council relied are therefore made sufficiently clear to enable interested parties to challenge the basis of the measure and the Court to undertake its review of legality. It follows that the provisions at issue are supported by an adequate statement of reasons.

39 — See, for example, Case 13/72 *Netherlands* v *Commission* [1973] ECR 27 and Case 819/79 *Germany* v *Commission* [1981] ECR 21.

40 — Case C-205/94 *Binder* [1996] ECR I-2871, paragraph 25.

41 — On this point, see the Opinion of Judge Vesterdorf, designated as Advocate General in Joined Cases T-1/89, T-2/89, T-3/89, T-4/89 and T-6/89 to T-15/89 (the polypropylene cases), delivered on 10 July 1991 ([1991] ECR II-869, in particular at II-908).

— The lack of a Commission proposal and the failure to re-consult the Parliament

26. As already pointed out, the grounds of the order for reference make it clear that the validity of Article 28k of the Sixth Directive and of Article 28 of the Excise Duty Directive has been put in doubt with regard both to the competence of the Council, in the absence of a Commission proposal, to insert the provisions in question in the text finally adopted and the failure to reconsult the European Parliament after they were inserted.

It having been established that the Commission's initial proposals did not contain the provisions in question, [42] which were added by the Council at the final stage of the procedure and, without therefore being submitted to the Parliament for examination, [43] it remains only to examine the merits of the arguments put forward by Eurotunnel.

27. As regards the lack of a Commission proposal, I consider that a few comments

42 — The proposal for a Council Directive supplementing the common system of value added tax and amending Directive 77/388/EEC was presented on 7 August 1987 (OJ 1987 C 252, p. 2) and was subsequently amended on 17 May 1990 (OJ 1990 C 176, p. 8) and on 2 May 1991 (OJ 1991 C 131, p. 3); the latter amendment followed consultation of the Parliament and, as will be seen, included some of the amendments proposed by the Parliament. The initial proposal for the Excise Duty Directive was presented by the Commission on 27 September 1990 (OJ 1990 C 322, p. 1) and was subsequently amended on 24 January 1991 (OJ 1991 C 45, p. 10).

43 — The Parliament gave its own opinion on the proposal for Directive 91/680 on 20 November 1990 (OJ 1990 C 324, p. 97). The opinion on the proposal concerning the Excise Duty Directive, on the other hand, was approved at the session on 12 June 1991 (OJ 1991 C 183, p. 122).

will suffice. Article 189a(1) of the Treaty confers on the Council the power to issue a measure constituting an amendment to the Commission proposal, acting unanimously. [44] In view of the fact that both the directives at issue are based on Article 99 of the Treaty, that is to say on a provision which requires unanimity, for the purposes of the adoption of the measure in question, it goes without saying that that condition was satisfied.

It need hardly be added, therefore, that Eurotunnel's argument that the existence of a Commission proposal is a mandatory precondition for the exercise by the Council of the powers conferred on it by Article 99 has no basis. What is important, as the Council itself has emphasized, is that the amendments adopted do not fall outside the scope of the measure in question, as defined by the proposal. And I do not think there can be any doubt whatsoever that the insertion in the directives in question of provisions which provide for the maintenance in force, for a limited period, of the exemption conditions for intra-Community trade involving air and sea travellers falls entirely within the scope of the directives, whose stated purpose is to implement the conditions necessary for the abolition of fiscal frontiers within the Community.

28. More complex, however, is the position regarding the obligation to consult the Parliament. In that connection, I would point out first that, according to settled case-law, '[t]he duty to consult the European Parliament in the course of the legislative procedure, in the cases provided for by the Treaty, implies the requirement that the Parliament should be reconsulted whenever the text finally adopted, viewed as a whole, departs substantially from the text on which the Parliament has already been consulted, except where the amendments essentially correspond to the wish of the Parliament itself'. [45]

Further consultation of the Parliament is thus unnecessary in only two cases: where the measure finally adopted, taken as a whole, does not differ in substance from the one on which the Parliament has already been consulted, or where the amendments subsequently made conform essentially with the wishes expressed by the Parliament.

29. In order to establish whether the changes made by the Council are substantial, it is of course necessary to compare the text of the proposals on which the Parliament gave its views and the text of the directives finally adopted. It should be borne in mind once again that the directives in question were intended to provide for transition to a regime characterized by total abolition of fiscal frontiers and that, to that end, they included transitional provisions to facilitate adjustment to the new circumstances

44 — At the material time, that provision was contained in Article 149(1).

45 — Case C-21/94 *Parliament* v *Council* [1995] ECR I-1827, paragraph 18. To the same effect, see, *inter alia*, Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 38, and the judgment of 5 October 1993 cited in footnote 33, paragraph 23.

(this applies in particular to Directive 91/680/EEC) or provisions taking account of the abolition of frontier controls (this applies to the Excise Duty Directive). That being so, it merely remains to verify whether the provisions allowing exemption from VAT and excise duty — what is more under strictly pre-defined conditions and for a limited period — for the precise purpose of offsetting any difficulties in the regions and industries concerned are to be regarded as being such that they undermine the very substance of the directives in question.

In my opinion, having regard to the overall scheme of the directives in question and the results which they pursue, the answer must be no. Whilst it is true that the discontinuation of duty-free sales was thereby deferred for several years, it is also true that the amendments not only are not such as to detract from the ultimate purpose pursued by the directives but also do not alter their scope. Moreover, it should be remembered, the cases in which the Court considered further consultation of the Parliament to be necessary related to departures from the proposal on which the Parliament had been consulted, which appreciably altered the scope thereof or even the very objectives pursued, in such a way as, 'to affect the very essence of the enactment'. [46] Whilst recognizing that the changes made by the Council cannot be regarded as being of a merely technical nature, [47] I must say that I do not consider that to be the case in these proceedings. It follows that, since the changes made by the Council are not of a substantial nature, it was unnecessary to reconsult the Parliament.

30. In any event, I consider that an examination of the amendments proposed by the Parliament itself when it was consulted would lead to the same conclusion. Indeed, with regard to the proposal for a directive on VAT, the Parliament suggested, *inter alia*, amendments Nos 6 and 31. In the first, it requested the inclusion of an additional recital in the preamble, in the following terms: 'Whereas the transitional period must be used to take measures to offset the social repercussions in the professions concerned and to prevent regional problems arising, notably in intra-Community frontier regions, as a result of the abolition of fiscal frontiers' (recital 4f). Amendment 31 then suggested the inclusion of a further recital, in the following terms: 'Whereas the economic and social implications of the completion of the internal market for tax-free sales will be determined through a report undertaken by the Commission and presented to the Council and the European Parliament' (recital 4g).

46 — To that effect, see Case C-21/94 (cited in the foregoing footnote), paragraphs 20 to 22; Case C-388/92 *Parliament* v *Council* [1994] ECR I-2067, paragraphs 11 to 13, and Case C-65/90 *Parliament* v *Council* [1992] ECR I-4593, paragraphs 19 to 21.

47 — Indeed, it should be made clear that the cases in which the Court considered that further consultation of the Parliament was not necessary related to minor and for the most part technical changes. See, for example, Case C-417/93 *Parliament* v *Council* [1995] ECR I-1185, paragraphs 30 to 33, and Case C-280/93 (cited in footnote 45), paragraphs 40 to 42.

And it was precisely amendment No 6, adopted by the Commission in the amended proposal which it submitted on 2 May 1991, [48] that was used by the Council as the reason for inserting Article 28k. The Council itself also argued, in my opinion not without foundation, that the terms in which amendment No 31 is drafted — in particular the request for a report from the Commission on the economic and social implications concerning tax-free sales — support the conclusion that the Parliament advocated maintenance, albeit temporarily, of the scheme in question. The view put forward by the Parliament, [49] to the effect that the report in question presupposed that the tax-free sales scheme would be completely abolished and that the adverse repercussions referred to in amendment No 6 related particularly to repercussions for customs officials, does not appear at all persuasive, particularly in view of the express reference to the need to use the transitional period to mitigate the adverse repercussions for the sectors affected by abolition of the fiscal frontiers.

31. Even less convincing, if not even contradictory, is the position maintained by the Parliament regarding amendments Nos 25 and 38, in which it proposed adding the following text to Article 18 of the Excise Duty Directive: 'The provisions of this directive shall not in any way affect existing agreements on the sale of products subject to excise in duty-free shops at ports and airports, and on board aircraft in flight or vessels at sea up to 31 December 1995'. [50] Contrary to the Parliament's assertions, in fact, that proposal certainly cannot be linked with extra-Community trade, if only because the Excise Duty Directive governs the possession and movement of products subject to excise duty in intra-Community dealings, and not with respect to third countries.

In those circumstances, whatever the real intentions of the Parliament, it seems to me that it cannot be reasonably contended that the Council, by inserting Article 28, amended the Excise Duty Directive in a manner contrary to the wishes expressed by the Parliament itself, [51] which prompts me to conclude, on the basis of the case-law referred to earlier, that fresh consultation of the Parliament was not necessary.

32. The foregoing observations make it clear that consideration of the questions submitted has not disclosed any factor of such a kind as to affect the validity of the contested

48 — See note 42.

49 — Pursuant to Article 29 of the Statute of the Court, the Parliament submitted observations in these proceedings.

50 — That amendment, it need hardly be pointed out, was not included by the Commission in the amended proposal which it submitted to the Council. I would add, for the sake of completeness, that the Commission has always declared its opposition to maintenance in force of the scheme in question, so much so that, when the two directives were adopted, it included a verbal declaration in the records in which it repeated its disapproval. That of course does not affect the terms of the problem here; however, the Commission itself has maintained, in the course of the procedure, that the amendments made by the Council are not in any event liable to affect the actual substance of the directives in question.

51 — The fact remains, it is true, that the Parliament's proposal refers to a transitional period expiring on 31 December 1995, whereas the directive ultimately adopted sets the expiry of the transitional period as 30 June 1999. I do not consider however that such a 'divergence' can be regarded as tantamount to an amendment affecting the substance of the measure taken as a whole.

provisions. I would add, in case the Court should reach a different conclusion, that the 'lawful' adoption of Directive 94/4/EC, by which the Council proceeded to raise the limits for tax-free purchases by intra-Community travellers, cannot in any event be regarded as capable of retroactively rectifying the breach of essential procedural requirements allegedly affecting Directive 91/680/EEC and the Excise Duty Directive as a result of failure to fulfil the requirement of consulting the Parliament.

The third question

33. By its third question, it will be remembered, the national court asks whether the application of a national provision properly implementing a Community directive subsequently declared to be invalid can constitute an unlawful act, giving rise to non-contractual liability. By the same question, the national court also asks the Court of Justice to determine the time from which the invalidity of the provisions in question took effect, and then to give a decision on any limitation in time of the effects of the judgment to be given.

In view of the conclusion which I reached regarding the second question, it is unnecessary to give my views on that last question, which, it will be remembered, was touched upon when I considered the question of admissibility in relation to the alleged irrelevance of the questions submitted. [52] I shall therefore only make a few brief and specific observations on this point.

34. I should first of all make it clear that I do not agree with the view that, since it is the task of the national court to rule as to the consequences (at national level) of a declaration that a Community measure is invalid, it is not for the Court of Justice to give a ruling on the point. Indeed, the very fact that the national court submitted such a question to the Court of Justice can only mean, in my opinion, that it needs to know whether Community law requires, or at least allows, the application of Community provisions subsequently declared to be invalid to be regarded as unlawful. In other words, I consider that the national court submitted that question precisely because the possibly illegal provision is a Community provision and because, if the conduct of SNAT could not be regarded as unlawful on the basis of Community law, that court could not in any event — a fact which I have no reason (and do not dare) to doubt — hold that SNAT was liable vis-à-vis Eurotunnel.

52 — According to SNAT, the Court should not answer the questions precisely because, even if the directives in question had been declared invalid, it would not in any event have been possible to attach liability to a private individual for its conduct in applying a legal provision (see paragraphs 11 and 13 above).

35. That said, I would observe that Community law does not provide any legal basis for the inference that an individual complying with a provision of Community law, subsequently declared invalid, can then be made answerable for any damage suffered by a competitor. In a case like this one, in which the private individual merely applied a national provision implementing a Community provision, that is even more obvious. It goes without saying that, at most, the possibility could be considered of liability attaching to the institution which adopted the measure that was subsequently declared invalid, but not to the State which was under an obligation to adopt the implementing legislation, and still less to an individual who applied such national legislation with its origins in Community law.

The same conclusion, namely that non-contractual liability cannot be based on a provision of Community law, was also reached by the Court in relation to the possibility of the beneficiary of aid, which is subsequently declared incompatible with the common market, being called on to compensate for damage suffered by a competitor, even where the beneficiary had not ascertained whether the aid had been properly granted, particularly as regards the requirement of prior notification of the Commission. [53]

36. In the same judgment, it is true, the Court stated that '[t]hat does not, however, prejudice the possible application of national law concerning non-contractual liability. If, according to national law, the acceptance by an economic operator of unlawful assistance of a nature such as to occasion damage to other economic operators may in certain circumstances cause him to incur liability, the principle of non-discrimination may lead the national court to find the recipient of aid paid in breach of Article 93(3) of the Treaty liable'. [54] In other words, the national court may hold the beneficiary of 'unlawful' aid liable, on the ground that he was well aware — or in any event should have been — of its irregularity, provided that such a case arises in circumstances covered only by national law.

This case, however, is quite different. SNAT cannot be accused of negligence of any kind, having merely availed itself of a possibility expressly provided by national provisions adopted to implement provisions contained in Community directives. More generally, the possibility must be ruled out — categorically — that an individual applying a national provision which has (properly) transposed a Community provision and who, in any event, is required to apply that provision, could then incur liability. I would add that any other solution would be, to say the least, bizarre, whatever the country concerned.

53 — Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 74.

54 — Ibid., paragraph 75.

Conclusion

37. In view of the foregoing considerations, I propose that the Court reply as follows to the questions submitted by the Tribunal de Commerce, Paris:

(1) An individual will not be precluded from alleging in the course of national proceedings that provisions of a directive, such as Article 28k of the Sixth VAT Directive and Article 28 of the Excise Duty Directive, are invalid merely because he failed to challenge those provisions by bringing proceedings for annulment under the fourth paragraph of Article 173 of the Treaty.

(2) Consideration of the question referred to the Court has not disclosed any factor of such a kind as to call in question the validity of Article 28k of the Sixth VAT Directive or Article 28 of the Excise Duty Directive.