OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 3 July 1990 *

Mr President,
Members of the Court,

1. The Commission has brought before the Court, for broadly similar reasons, two actions against Denmark and Ireland respectively for failure to fulfil their obligations by adopting certain measures with regard to imports into their territory of beer purchased by travellers in another Member State. More specifically, in connection with the application of Council Directive 69/169/EEC of 28 May 1969,[1] Ireland adopted an administrative measure restricting the travellers' allowance for beer imported across the land frontier to a maximum of 12 litres per person, imports in excess of that quantity being subject to tax, whilst Denmark decided by an Order of 9 June 1986 of the Ministry of Finance that travellers could import duty free only 10 litres of beer per person and that quantities in excess of that limit would be taxable. The Commission has formulated the general allegation that those measures, which are very similar in scope, disregard the provisions of Directive 69/169 since that directive provides in principle for a duty-free allowance for goods contained in the personal luggage of travellers from Member States whose value was not to exceed, at the time when Ireland and Denmark decided to act, a limit of ECU 350, and beer is not one of the goods for which specific quantitative limits are laid down by way of derogation from that overall limit. The Commission is therefore asking the Court to declare that Ireland and Denmark have failed to fulfil their obligations under the Treaty as a result of that infringement.

2. According to Article 2(1) of Directive 69/169, exemption from tax and excise duty on imports is to apply to goods contained in the personal luggage of travellers from Member States of the Community, provided that they have been acquired subject to the general rules governing taxation on the domestic market of one of the Member States, that such imports have no commercial character and that the total value of the goods does not exceed a specified amount per person. That amount, now standing at ECU 390,[2] was fixed, as I said earlier, at ECU 350[3] when the contested measures were adopted. I shall therefore refer to the latter figure in my Opinion.

3. Under the system established by Directive 69/169, two types of derogation from the principle of a duty-free allowance not exceeding ECU 350 are relevant to these cases.

* Original language: French.

1 — Directive on the harmonization of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (OJ, English Special Edition 1969 (I), p. 232).

2 — Article 1 of Council Directive 88/664/EEC of 21 December 1988 amending for the ninth time Directive 69/169/EEC (OJ 1988 L 382, p. 41).

3 — Article 1 of Council Directive 85/348/EEC of 8 July 1985 amending Directive 69/169/EEC (OJ 1985 L 183, p. 24).

4. The first type of exemption forms the subject-matter of Article 4 of the directive. That article lays down quantitative limits for specific products which are expressly listed, namely tobacco products, certain alcoholic beverages, perfumes, coffee and tea. With regard, more particularly, to alcoholic beverages those limits apply, since the adoption of Council Directive 72/230/EEC of 12 June 1972,[4] to distilled beverages and spirits, aperitifs with a wine or alcohol base, sparkling wines, fortified wines and still wines. Article 1(2) of Directive 85/348[5] supplemented that list by laying down quantitative limits for tafia, saké or similar beverages. It follows from the specific limits thus laid down that, in travel between Member States, the aforesaid beverages may be imported duty free up to a limit of 1.5 or three litres, whichever is applicable, whilst the limit in the case of still wines is five litres.

5. The second type of exemption derives from the fact that, even within the overall limit of ECU 350, the imports must, as Article 2(1) of Directive 69/169 lays down, 'have no commercial character', whilst Article 3(2) of that directive specifies that 'importations shall be regarded as having no commercial character if they:

(a) take place occasionally, and

(b) consist exclusively of goods for the personal or family use of the travellers, or of goods intended as presents; the nature or quantity of such goods must not be such as might indicate that they are being imported for commercial reasons'.

6. With regard to the exemptions referred to in Article 4 of Directive 69/169, that is to say the specific quantitative limits, it is clear that beer is not mentioned amongst the alcoholic beverages listed. That directive therefore imposes no quantitative limit in respect of beer. It is indisputable, in that regard, that the contested Irish and Danish measures have the effect, as it were, of supplementing the directive by fixing a quantitative limit for beer.

7. Viewed from that angle, those measures seem scarcely compatible with Community law. According to the case-law of the Court, as most recently referred to in its judgment of 12 June 1990[6] in proceedings brought by the Commission against Ireland for failure to fulfil its obligations by restricting the benefit of the exemptions for travellers having spent at least 48 hours outside Ireland, the Member States are left, with regard to the exemptions provided for by Directive 69/169, 'with only the restricted power given to them by the actual provisions of the directives in question'.[7] Neither Directive 69/169 nor the amending directives laid down any quantitative limit for beer and it is hard to see from what source the Member States could derive the right to fix such a limit. The list of quantitative limits set out in Article 4 of Directive 69/169 cannot be regarded merely as a guide for the Member States, who then have the option of supplementing it. Such an

4 — Directive on the harmonization of provisions laid down by law, regulation or administrative action relating to the rules governing turnover tax and excise duty applicable in international travel (OJ, English Special Edition 1972 (II), p. 565), Article 2.

5 — See footnote 3.

6 — Case C-158/88 [1990] ECR I-2367.

7 — Case C-158/88, cited above, paragraph 7.

approach would in fact tend purely and simply to undermine the directive. The system established by the directives in general, and by Directive 69/169 in particular, excludes any unilateral power of amendment by the Member States, even reasoning by analogy of the kind referred to by Denmark and Ireland as regards the alleged equivalence in alcoholic volume between 10 or 12 litres of beer and the alcoholic beverages covered by the aforesaid quantitative limits laid down in Article 4. It would render the very concept of a specific quantitative limit utterly meaningless if the Member States were entitled to apply a limit to products other than those expressly referred to by the directive on the ground that there was an analogy between them of one kind or another.

8. A quantitative limit for a product not referred to in Article 4 of Directive 69/169 can be fixed only as a result of an express amendment of that directive. Accordingly, Directive 85/348 laid down certain limits for tafia, saké and other similar beverages, which were not previously subject to a quantitative limit. Furthermore, it is possible to derogate from the directive on a temporary basis for the benefit of a Member State by imposing quantitative limits for one or more products. Thus, for example, Denmark had been authorized by Article 1 of Directive 77/800/EEC of 19 December 1977 [8] not to apply the exemptions until 31 December 1980 when the stay outside Denmark was less than 72 hours, and from 1 January 1981 until 31 December 1982 when the stay was less than 48 hours, except for a two-litre limit in the case of beer. Article 1 of Council Directive 83/2/EEC of 30 December 1982 [9] extended until 31 December 1983 the limit of two litres for beer when the stay abroad was less than 48 hours, raising it to four litres until 31 December 1984 and to six litres until 31 December 1985, no limit being set for beer after that date. [10]

9. Admittedly, Denmark was able for a time to benefit from a quantitative limit for beer although it was not laid down by a directive. However, that derogation was the result not of a unilateral measure adopted by Denmark, but of an express provision of the Act of Accession. Article 133 of the Act of Accession and Annex VII thereto empowered that new Member State to refuse exemption for beer until 31 December 1975 in so far as the quantity was in excess of two litres.

10. Therefore it is indisputable that, in principle, no Member State may adopt provisions fixing quantitative limits other than those laid down by Article 4 of Directive 69/169 or by a directive derogating therefrom.

11. However, by way of justification for the measures adopted by them, Denmark and Ireland have put forward other arguments which I shall consider below.

12. The two defendant States have argued, in substance, that they had to deal with certain practices involving the duty-free

8 — Directive on a derogation accorded to the Kingdom of Denmark relating to the rules governing turnover tax and excise duty applicable in international travel (OJ 1977 L 336, p. 21).

9 — Directive on a derogation accorded to Denmark relating to the rules governing turnover tax and excise duty applicable in international travel (OJ 1983 L 12, p. 48).

10 — It is worth noting that Directive 83/2 was repealed on 31 December 1984 by Article 3(2) of Council Directive 84/231/EEC of 30 April 1984 amending Directives 69/169/EEC and 83/2/EEC (OJ 1984 L 117, p. 42).

importation by individuals of quantities of beer valued at ECU 350 or, in the case of Denmark, of 500 litres representing 1 500 bottles contained in 50 crates, whilst Ireland stated that in 1984 up to 120 litres of beer per person were being imported into the country. It therefore seemed all the more necessary to take steps since, in certain cases, it had been possible to establish that the imported beer had been resold. Accordingly, Denmark and Ireland considered that the fixing of a quantitative limit of 10 or 12 litres of beer constituted a legitimate method of ensuring compliance with Article 2(1) of Directive 69/169, inasmuch as it provides that the exemptions are to apply if the imports have no commercial character, and with Article 3(2) which specifies what is meant by the phrase 'having no commercial character'. In a sense, the national measures at issue constituted in substance not an addition, unlawful as such, to the list of specific exemptions in Article 4 of Directive 69/169 but the implementation of the general exemption in Article 2(1) by the imposition of a quantitative limit beyond which the importation is regarded as having a commercial character.

13. The quantity chosen by Ireland, namely 12 litres, constitutes the maximum quantity which a traveller is able to carry in the right conditions, namely a carton of 24 500 ml cans of beer weighing 12.6 kilos in all. In the case of Denmark, the limit of 10 litres, corresponding to a crate containing 30 33 cl bottles of beer, normally constitutes the largest quantity purchased by a Danish family on a single occasion. Furthermore, the two defendant States refer to a comparison between the alcoholic strength of the beverages expressly subjected to quantitative limits by the directive and the alcoholic strength of beer in order to determine the quantity of beer over and above which the importation would cease to have no commercial character. The calculations carried out by the Danish and Irish Governments on those 'equivalences in alcoholic strength' yield quantities of beer varying from 10 to 13 litres, which are said to justify the quantitative limits laid down by them in the contested measures. Denmark stated that the Court's judgment of 12 July 1983 in *Commission* v *United Kingdom*[11] on the United Kingdom's tax arrangements for wine could, in view of the method of comparison applied as between wine and beer, provide a basis for the argument concerning equivalence in alcoholic strength in the sphere of duty-free allowances.

14. Finally, Ireland and Denmark have emphasized that the measures limiting the quantity of beer which may be imported free of duty constituted an appropriate response to situations involving abuses of the right to import goods duty free which is enshrined in the directive. In their view, the refusal, by the imposition of quantitative limits, to grant the exemption to practices which, whilst ostensibly in conformity with Directive 69/169, constitute in practice an abuse of the right which it confers cannot be regarded as an infringement of that directive.

15. The various arguments put forward by the two defendants prompt the observation that they have given an answer which is insufficient for legal purposes to meet certain, ultimately legitimate, concerns. It is reasonable for a Member State to raise the question whether 'individual' imports of, for instance, 50 crates of beer representing 500

11 — Case 170/78 [1983] ECR 2265.

litres satisfy the requirement laid down by Directive 69/169 that the importation must have no commercial character, particularly where it is established in practice that such operations may be followed by resale. But it is out of the question, in my view, for a Member State to be able to resolve that question, without infringing Community law, by fixing a quantitative limit unilaterally and by legislative means.

16. As the Court demonstrated in its judgment of 14 February 1984 in *Rewe II*, [12] compliance with Directive 69/169 means that the authorities of the Member States are not to extend the benefit of the exemption to operations which do not fulfil the pre-conditions for it. Accordingly, it seems to me that those authorities not only can but must ensure that the exemption is not granted in respect of imports of beer which have a commercial character. But it is not for those authorities to accomplish that task by laying down, through a rule of national law, a quantitative limit beyond which any importation whatsoever is treated as having a commercial character. In practice, such an approach amounts to dispensing with the verification required by Article 2(1) of the directive rather than carrying it out effectively.

17. In my view, it is contrary to the directive to exclude a priori, by laying down a quantitative limit, exemption from duty in respect of any importation in excess of that limit, thereby dispensing with the obligation to verify whether it has a commercial character. I consider that, subject to certain exceptions which are expressly laid down in Directive 69/169, such as, for instance, specific quantitative limits or limits connected with the unit value of certain goods, all of a traveller's imports which are comprised within the overall limit of ECU 350 qualify for the exemption, provided they have no commercial character. The correct application of the directive therefore presupposes that the non-commercial character of an importation of goods whose total value does not exceed ECU 350 can be taken into consideration at all times and that the benefit of the exemption is not refused in those circumstances. That is not the case where the fixing by a Member State of a quantitative limit of 10 or 12 litres for beer excludes the exemption altogether in respect of any importation of larger quantities, regardless of their true character. Where that limit is imposed by legislative means, it raises an irrebuttable presumption that the importation has a commercial character.

18. Compliance with Directive 69/169, as interpreted — in reply to a Danish observation — in its German version as well as in its French and English versions, therefore involves on-the-spot verification of a practical nature, on the part of the national authorities, which may make it possible for the non-commercial character of an importation of a seemingly large number of litres of beer to be taken into consideration. Does that necessarily entail verification of each individual case, the cumbersome nature and practical difficulty of which was rightly emphasized by the defendant States? In fact, it seems that the customs authorities of the Member States are quite capable of organizing some degree of appropriate verification. As the Commission acknowledged at the hearing, it seems reasonable, and in conformity with the directive, for customs officers to be able to presume that over and above a certain quantity an importation has

12 — Case 278/82 [1984] ECR 721.

a commercial character, without barring a traveller altogether from furnishing proof to the contrary. The issue here is the difference which exists between laying down a mandatory rule, which precludes consideration of specific situations, and laying down, for instance by means of internal administrative regulations, a quantitative criterion which permits a presumption to be raised without, however, preventing it from being rebutted. The implementation of the latter procedure would not seem to be in any way incompatible with Article 7a of the directive [13] in so far as the possibility for travellers 'to confirm tacitly or by a simple oral declaration that they are complying with the authorized limits and conditions for the duty-free entitlements' [14] may be deemed to be set aside once the limit is reached which in practice raises a simple presumption that an importation has a commercial character. Moreover, the Commission's Agent has informed the Court that, provided the quantitative limit viewed in those terms corresponds to a level that is reasonable and is not excessively low, the national authorities may be exacting as regards the proof they require to be adduced in order to rebut the presumption of a commercial character.

19. Accordingly, there would seem to be some scope for an orderly application of the directive which does not go too far and seek to achieve the impossible, namely verification of each individual case, and which does not undermine the very core of the Community system by reducing the scope of a directive by means of a unilateral internal rule. In those circumstances, the arguments put forward by Denmark and Ireland concerning the need to ensure compliance with the requirement that imports must not have a commercial character, laid down by Article 2(1) of Directive 69/169, or concerning the abuse of the right to duty-free allowances, cannot justify the imposition by legislative means of a quantitative limit for beer of 10 or 12 litres which restricts the scope of the allowances provided for by the directive. The directive leaves to the Member States the possibility of ensuring its application within a reasonable framework without laying the authorities concerned open to any operational difficulties, and Denmark and Ireland were under no obligation whatever, in order to achieve that result, to add by means of internal rules further quantitative limits to those laid down by the directive.

20. Finally, let me state in response to an argument put forward by Ireland and Denmark that the fact that the Commission did not propose any exemption for beer to the Council, although it did so for tafia and saké, did not in any way authorize a Member State to take the place of the Community institutions.

21. These two cases, like the one in which the Court gave judgment on 12 June 1990, constitute demonstrations, which are sometimes spectacular and difficult for the Member States to deal with, of the disadvantages resulting from the lack of harmonization of taxes and excise duties with regard to the system of duty-free allowances in intra-Community travel. Those differences, for similar products, in the levels of taxation between Member States with a common frontier lay those States which are most exacting in fiscal matters open to economic difficulties. Whilst it is to be hoped that those difficulties are only

13 — Introduced by Article 5 of Directive 75/230, see footnote 4 above.

14 — Article 7a of Directive 69/169.

temporary, with the approaching realization of the large internal market it must be borne in mind, as the Court stated, moreover, in its aforesaid judgment of 12 June 1990, that where, on account of the economic situation in a Member State, it becomes necessary to adopt provisions restricting the scope of Directive 69/169, such provisions may be adopted only in pursuance of a directive derogating from Directive 69/169, as was done in the case of imports of beer into Denmark until 31 December 1984, or by way of a protective measure when the conditions laid down in Articles 108 and 109 of the Treaty are satisfied. The Community institutions, which are duly mindful of the aim of harmonization, must not, however, exclude recourse to similar derogations where very serious problems are encountered by a Member State. But a Member State may not, under the system established by the European Economic Community, unilaterally derogate from Directive 69/169.

22. In the light of those observations, therefore, I suggest that in Cases C-208/88 and C-367/88 the Court should:

(i) declare that Denmark and Ireland have failed to fulfil the obligations referred to by the Commission;

(ii) order those Member States to pay the costs.