# JUDGMENT OF THE COURT
11 November 1997 *

In Case C-408/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal de Commerce, Paris, for a preliminary ruling in the proceedings pending before that court between

**Eurotunnel SA and Others**

and

**SeaFrance**, formerly Société Nouvelle d'Armement Transmanche SA (SNAT),

interveners:

**International Duty Free Confederation (IDFC),**

**Airport Operators Association Ltd (AOA),**

**Bretagne Angleterre Irlande SA (BAI),** trading as Brittany Ferries,

* Language of the case: French.

**Passenger Shipping Association Ltd (PSA),**

on the validity of the transitional arrangements for tax-free shops under Article 28k of the Sixth 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), as inserted 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), and under 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 (OJ 1992 L 76, p. 1),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm (Rapporteur), M. Wathelet (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: G. Tesauro,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Eurotunnel SA and Others, by Jean-Michel Darrois and Philippe Villey, of the Paris Bar,

— SeaFrance, by Xavier de Roux, Philippe Derouin and Olivier d'Ormesson, of the Paris Bar,

— International Duty Free Confederation (IDFC), by Philippe Ruttley, Solicitor,

— Airport Operators Association Ltd (AOA), by Pascale Poupelin, of the Paris Bar, and David Marks, Solicitor,

— Bretagne Angleterre Irlande SA (BAI), by Jean-Michel Payre, of the Paris Bar,

— Passenger Shipping Association Ltd (PSA), by John Pheasant, Solicitor, and Guy Danet, of the Paris Bar,

— the French Government, by Catherine de Salins, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and Gautier Mignot, Foreign Affairs Secretary in that directorate, acting as Agents,

— the Spanish Government, by Rosario Silva de Lapuerta, Abogado del Estado, of the State Legal Service responsible for representing the Spanish Government before the Court of Justice, acting as Agent,

— the European Parliament, by Johann Schoo, Head of Division in its Legal Service, and José Luis Rufas Quintana, of its Legal Service, acting as Agents,

— the Council of the European Union, by Jean-Paul Jacqué, Director of its Legal Service, and John Carbery, Legal Adviser, acting as Agents,

— the Commission of the European Communities, by Hélène Michard and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Eurotunnel SA and Others, represented by Philippe Villey and by Petrus Mathijsen, of the Brussels Bar; SeaFrance, represented by Xavier de Roux and Philippe Derouin; Passenger Shipping Association Ltd (PSA), represented by Guy Danet; International Duty Free Confederation (IDFC), represented by John Colahan and Peter Duffy, Solicitors; Airport Operators Association Ltd (AOA), represented by Pascale Poupelin and David Marks; Bretagne Angleterre Irlande SA (BAI), represented by Jean-Michel Payre; the French Government, represented by Gautier Mignot; the Greek Government, represented by Vasileios Kontolaimos, Assistant Legal Adviser in the State Legal Service, and Dimitra Tsagkaraki, Adviser to the Deputy Minister for Foreign Affairs, acting as Agents; the Spanish Government, represented by Rosario Silva de Lapuerta; the Parliament, represented by Johann Schoo and José Luis Rufas Quintana; the Council, represented by Jean-Paul Jacqué and John Carbery; and the Commission, represented by Hélène Michard and Enrico Traversa, at the hearing on 14 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 27 May 1997,

gives the following

## Judgment

1 By judgment of 27 November 1995, received at the Court on 29 December 1995, the Tribunal de Commerce (Commercial Court), Paris, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the validity of the transitional arrangements for tax-free shops under Article 28k of the Sixth 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, hereinafter 'the Sixth Directive'), as inserted 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), and under 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 (OJ 1992 L 76, p. 1).

2 Those questions were raised in proceedings brought by the French companies Eurotunnel SA and France Manche SA and the English companies Eurotunnel plc and The Channel Tunnel Group Ltd, the joint operators of the Channel Tunnel railway link (hereinafter 'Eurotunnel'), against SeaFrance, a cross-Channel maritime transport company.

3 The object of Directive 91/680 is to ensure that the conditions necessary for the elimination of fiscal frontiers within the Community as regards supplies of goods and services are implemented as from 1 January 1993.

4 Directive 91/680 was amended by Council Directive 94/4/EC of 14 February 1994 amending Directives 69/169/EEC and 77/388/EEC and increasing the level of allowances for travellers from third countries and the limits on tax-free purchases in intra-Community travel (OJ 1994 L 60, p. 14). Directive 94/4 increased the allowance for intra-Community travellers from ECU 23 to ECU 90, while the allowance for travellers from third countries was raised to ECU 175.

5 According to the 13th recital in the preamble to Directive 91/680,

'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 limits by duty-free shops in the context of air and sea travel between Member States'.

6 Article 28k of that directive provides:

'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. For the purposes of this Article:

(a) "tax-free shop" shall mean any establishment situated within an airport or port which fulfils the conditions laid down by the competent public authorities pursuant, in particular, to paragraph 5;

(b) "traveller to another Member State" shall mean any passenger holding a transport document for air or sea travel stating that the immediate destination is an airport or port situated in another Member State;

(c) "intra-Community flight or sea crossing" shall mean any transport, by air or sea, starting within the territory of the country as defined in Article 3, where the actual place of arrival is situated within another Member State.

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.

...'

7 The object of Directive 92/12 is to ensure that the conditions applicable to the movement of goods subject to excise duty within the internal market without fiscal frontiers are implemented as from 1 January 1993.

8 The 23rd recital in the preamble to Directive 92/12 is drafted in terms virtually identical to those of the 13th recital in the preamble to Directive 91/680. The same is true of the drafting of Article 28 of Directive 92/12 and Article 1(22) of

Directive 91/680 inserting the new Article 28k in the Sixth Directive (hereinafter 'Articles 28 and 28k').

9 By Law No 92-677 of 17 July 1992 implementing Directives 91/680 and 92/12 (*Journal Officiel de la République Française* (JORF) of 19 July 1992, p. 9700), the French Republic made use of the possibility of granting exemptions provided for in Articles 28 and 28k, reproducing those provisions word for word. Until 30 June 1999 it exempts supplies by tax-free shops situated within an airport, port or Channel Tunnel terminal from value added tax (Article 17 II of Law No 92-677) and excise duty (Article 59 of Law No 92-677), within the limits laid down by Articles 28 and 28k. Decree No 93-1139 of 30 September 1993 (JORF of 3 October 1993, p. 13769) was adopted pursuant to Articles 17 and 59 of Law No 92-677.

10 It appears from the national court's judgment that Eurotunnel's case is that, since 22 December 1994, SeaFrance has been guilty of unfair competition by selling goods free of tax and excise duty on board its vessels, thus enabling it to offset transport charges at below cost prices. Since it considered that such a practice proceeded from the authorization in both Article 28k of the Sixth Directive, as inserted by Article 1(22) of Directive 91/680, and Article 28 of Directive 92/12, Eurotunnel challenged the validity of those provisions before the Tribunal de Commerce, which considered it appropriate to make a reference to the Court.

11 Before putting its questions the national court first granted leave to the International Duty Free Confederation (hereinafter 'IDFC'), the Airport Operators Association ('AOA'), Bretagne Angleterre Irlande SA ('BAI') and the Passenger Shipping Association Ltd ('PSA') to intervene in support of the form of order sought by SeaFrance.

12 The national court then noted that the sale at a loss of services, as opposed to goods, was not prohibited in France. It therefore considered that in its action

alleging unfair competition, it was open to Eurotunnel only to contest the validity of the Council directives on which SeaFrance relied in offering goods for sale tax-free.

13 The court observed, finally, that Eurotunnel had also made an application to the High Court of Justice on 30 June 1994 for leave to apply for judicial review of the lawfulness of the measures by which the United Kingdom had transposed Articles 28 and 28k.

14 It appears from the documents in the main proceedings that, by judgment of 17 February 1995, the High Court dismissed Eurotunnel's application principally on the grounds, first, that Eurotunnel had not made its application for leave promptly and, second, that if leave were granted substantial hardship would be caused not only to the objectors but also to many other persons in the United Kingdom and throughout the Community. Eurotunnel did not appeal against that decision of the High Court. However, the High Court allowed Eurotunnel to make a fresh application concerning the sale of tax-free goods during short trips known as 'booze cruises', which in Eurotunnel's view did not constitute genuine intra-Community journeys. Eurotunnel did not take up that possibility.

15 In those circumstances the Tribunal de Commerce, Paris, stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'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?'

16 By those three questions the Tribunal de Commerce seeks to know, essentially, whether Eurotunnel may challenge the validity of Articles 28 and 28k in the context of a preliminary ruling procedure, even though it has not brought an action for annulment pursuant to Article 173 of the EC Treaty against those provisions. If so, it asks whether those provisions were lawfully adopted by the Council. Finally, if they are invalid, the Court is asked to state the consequences of a declaration of invalidity of Articles 28 and 28k with respect to SeaFrance.

## Admissibility of the questions

17 The first point to be addressed is the argument of SeaFrance and the interveners in the main proceedings that the questions are inadmissible and that the Court should therefore not answer them. They claim that the proceedings in the national court are artificial and that the questions referred are of no relevance to the decision in those proceedings.

18 They contend, as does the French Government, that SeaFrance cannot incur liability, even in the event of a declaration that the Community directives are invalid, since it merely complied with national laws and regulations adopted pursuant to those directives. Only the Council, as author of Articles 28 and 28k, could on any view incur liability. In the absence of any fault on the part of SeaFrance, the action

alleging unfair competition pending in the national court is devoid of purpose and the questions referred are therefore immaterial. SeaFrance and the interveners submit, finally, that in any event the real subject-matter of Eurotunnel's action relates to the validity of Articles 28 and 28k, not to any award of damages against SeaFrance.

19 It is to be remembered that 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. Accordingly, where the national court's questions relate to the validity of a provision of Community law, the Court is obliged in principle to give a ruling.

20 However, the Court has observed that, in order to determine whether it has jurisdiction, it is necessary to examine the circumstances in which the case has been referred to it by the national court. The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (see, in particular, Case C-412/93 *Leclerc-Siplec* v *TF1 Publicité and M6 Publicité* [1995] ECR I-179, paragraph 12).

21 It is with that function in mind that the Court has taken the view that it is unable to rule on a question referred by a national court where it is manifest that the interpretation or the assessment of the validity of Community law sought by that court bears no relation to the true nature of the main action or its purpose, or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted

to it (see, in particular, Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 61, and C-105/94 *Celestini* v *Saar-Sektkellerei Faber* [1997] ECR I-2971, paragraph 22).

22 With respect to the true nature of the main proceedings, it is to be observed that Eurotunnel is asking the national court to find that SeaFrance is guilty of unfair competition by exercising its right under national rules to sell goods tax-free on its cross-Channel services even though those national rules are based on Community directives — which, in Eurotunnel's view, are unlawful. SeaFrance, on the other hand, contests all Eurotunnel's arguments before the national court. It is thus apparent that there is in fact a genuine dispute between the parties to the main proceedings.

23 With respect to the argument that the questions referred are of no relevance to the decision to be given in the main proceedings, it is indeed the case that the national court has not provided enough information to enable the Court to see clearly what effect any declaration that Articles 28 and 28k were unlawful might have on the outcome of the action alleging unfair competition, in particular on Eurotunnel's claim for damages against SeaFrance.

24 However, it is sufficient for present purposes that if the directives were unlawful the national court could, at the very least, order SeaFrance to refrain in future from effecting tax-free sales, as Eurotunnel requests.

25 It follows from all the foregoing that the Court must answer the questions.

## Question 1

26 By its first question the national court essentially asks whether a natural or legal person, such as Eurotunnel, may challenge before a national court the validity of provisions in directives, such as Articles 28 and 28k, even though that person has not brought an action for annulment of those provisions pursuant to Article 173 of the Treaty and even though a court of another Member State has already given judgment in separate proceedings.

27 With respect to the first part of the question, the national court is uncertain whether, in the light of Case C-188/92 *TWD Textilwerke Deggendorf* v *Germany* [1994] ECR I-833, Eurotunnel may, by the plea of illegality, challenge before that court the validity of Articles 28 and 28k, when it did not bring an action for annulment of those provisions within the time-limit provided for in Article 173 of the Treaty.

28 It should be noted that the judgment in *TWD Textilwerke Deggendorf* concerned a company which, unquestionably, was entitled and had been informed that it was entitled to bring an action for annulment of the Community act whose validity it was challenging by a plea of illegality before a national court.

29 On this point, in the case of Community directives whose contested provisions are addressed in general terms to Member States and not to natural or legal persons, it is not obvious that an action by Eurotunnel challenging Articles 28 and 28k under Article 173 of the Treaty would have been admissible (see, with respect to a regulation, Case C-241/95 *R* v *Intervention Board for Agricultural Produce*, ex parte *Accrington Beef and Others* [1996] I-6699, paragraph 15).

30 In any event, Eurotunnel cannot be directly concerned by Articles 28 and 28k. The exemption arrangements introduced by those provisions constitute no more than an option open to Member States. It follows that Articles 28 and 28k are not directly applicable to the operators concerned, namely passenger transporters and travellers.

31 With respect to the second part of the question, suffice it to state that it is not for this Court, in the procedure provided for in Article 177 of the Treaty, to assess the need for a preliminary ruling by reference to the judgment, on a similar question, given in separate proceedings by a court of another Member State.

32 The answer to Question 1 must therefore be that a natural or legal person may challenge before a national court the validity of provisions in directives, such as Articles 28 and 28k, even though that person has not brought an action for annulment of those provisions pursuant to Article 173 of the Treaty and even though a court of another Member State has already given judgment in separate proceedings.

## Question 2

33 Eurotunnel submits that the national court's second question relates not only to whether the Parliament was properly consulted but also to whether all the other grounds of invalidity put forward in the originating application are such as to affect the validity of Articles 28 and 28k. Those other pleas relate to failure to state reasons, breach of Articles 7a, 92, 93 and 99 of the EC Treaty, misuse of power by the Council and breach of the principles of protection of legitimate expectations, legal certainty, proportionality and equal treatment.

34 In this respect, the reasoning of the judgment making the reference and the wording of the second question make it clear that the only grounds of invalidity raised by the national court relate to the possibility that the procedure whereby Articles 28 and 28k were adopted may have been irregular by reason of the alleged lack of a proposal from the Commission and failure to consult the Parliament again. That is further confirmed by the alternative question put by the national court as to how the lawfulness of Articles 28 and 28k may be affected by the fact that the rights of the Parliament were duly respected in the adoption of Directive 94/4.

*The lack of a proposal from the Commission*

35 Eurotunnel and the Parliament submit that Articles 28 and 28k were not the subject of a proposal of the Commission, contrary to Article 99 of the EEC Treaty.

36 The Council argues that the amendments it made to the proposals for Directives 91/680 and 92/12 remained within the scope of those directives as defined in the original proposals from the Commission.

37 As to that point, by virtue of its power to amend under, at that time, Article 149(1) of the EEC Treaty (now Article 189a(1) of the EC Treaty), the Council could amend the proposal from the Commission provided it acted unanimously, that requirement being imposed in any case by the legal basis of those two directives, namely Article 99 of the Treaty.

38 Moreover, the maintenance for a limited period of the system of exemption from value added tax and excise duty of supplies of goods by tax-free shops, notwith-

standing the Commission's opposition to that maintenance in the context of intra-Community travel, falls fully within the scope of Directives 91/680 and 92/12, which are intended to ensure that the conditions necessary for the movement of goods and services subject to value added tax or excise duty within an internal market without fiscal frontiers are implemented as from 1 January 1993.

39 Consequently, to the extent that the Council's amendments to the proposals for Directives 91/680 and 92/12 remained within the scope of those directives as defined in the original proposals from the Commission, the Council did not exceed its power to make amendments under Article 149 of the Treaty.

*The requirement for the Parliament to be consulted again*

40 Eurotunnel and the Parliament submit that Articles 28 and 28k as adopted make substantial changes to the Commission's proposals which do not correspond to what the Parliament wished.

41 With respect to Article 28k of the Sixth Directive, the Parliament submits that the amendments introduced by the Council involve substantial changes, both quantitatively and qualitatively, compared to the texts submitted to it for consultation. Furthermore, it claims that it never proposed such derogating arrangements.

42 With respect to Article 28 of Directive 92/12, the Parliament submits that the version finally adopted by the Council diverges from the sense of its amendments Nos 25 and 38, in that, first, the date is different (the amendment provided for a

date of 31 December 1995, the directive 30 June 1999) and, second, the amendment does not expressly mention the Channel Tunnel, but only 'ports' and 'airports'.

43 SeaFrance, IDFC, AOA, BAI, the Spanish and French Governments, the Council and the Commission submit that the adoption of Directives 91/680 and 92/12 was not tainted by any procedural defect. The differences between the text on which the Parliament gave its opinion and that definitively adopted were not essential, and the two directives, taken as a whole, remained substantially identical to the Commission's original proposals which were submitted to the Parliament.

44 In any event, SeaFrance, IDFC, AOA, BAI and the Spanish and French Governments and the Council consider that there was no need for fresh consultation, in that the amendments to the directives corresponded to the Parliament's wish to maintain the system of tax-free shops. The Parliament thus did not have to be consulted again.

45 It is to be remembered that due consultation of the Parliament in the cases provided for by the Treaty constitutes an essential formal requirement, breach of which renders the measure concerned void. Effective participation of the Parliament in the Community's legislative process, in accordance with the procedures laid down by the Treaty, represents an essential factor in the institutional balance intended by the Treaty. This function reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly (see, in particular, Case C-392/95 *Parliament* v *Council* [1997] ECR I-3213, paragraph 14).

46 It is settled law that the requirement to consult the European Parliament in the legislative procedure, in the cases provided for by the Treaty, means that it must be consulted again whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted, except

in cases in which the amendments substantially correspond to the wishes of the Parliament itself (*Parliament* v *Council*, cited above, paragraph 15).

47 With respect, first, to Article 28k of the Sixth Directive, that provision derives from the Commission's original proposal of 7 August 1987 (OJ 1987 C 252, p. 2), amended on two occasions on 17 May 1990 (OJ 1990 C 176, p. 8) and 2 May 1991 (OJ 1991 C 131, p. 3). In its original proposal submitted to the Parliament, which was not amended on this point by the two other proposals, the Commission proposed that Council Directive 69/169/EEC of 28 May 1969 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) should cease to apply on 31 December 1992 in respect of intra-Community trade relations.

48 According to the explanatory statement in the report of the Parliament's Committee on Economic and Monetary Affairs and Industrial Policy on the proposal for a directive amending the Sixth Directive (Fuchs Report, A3-0271/90), presented on 7 November 1990, the situation of the businesses and employees engaged in tax-free sales had to be considered in order to determine whether specific measures were necessary.

49 The Parliament, on 20 November 1990, proposed amendments Nos 6 and 31, reading respectively as follows:

'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);

'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).

50 In its amended proposal of 2 May 1991, the Commission proposed the addition of the following ninth recital:

'Whereas the transitional period must be used to take measures to offset the social repercussions in the occupations concerned and to prevent regional problems arising, notably in trans-frontier regions, from the abolition of tax frontiers'.

51 With respect, finally, to the procedure by which Article 28 of Directive 92/12 was adopted, the Commission's proposal, presented on 27 September 1990 (OJ 1990 C 322, p. 1), did not contain any provision relating to the possibility for travellers within the Community to purchase goods free of excise duty.

52 It appears from the explanatory statement in the report of the Parliament's Committee on Economic and Monetary Affairs and Industrial Policy on the proposal for an 'excise duty' directive (Patterson Report, A3-0137/91), presented on 27 May 1991, that since no report was available on the situation of the businesses and employees engaged in tax-free sales, the amendment adopted then was without prejudice to the final formulation.

53 The Parliament proposed on 12 June 1991 that Article 18 should be amended by adding the following wording:

'The provisions of this directive shall not in any way affect existing agreements on the sale of products subject to excise duty in duty-free shops at ports and airports, and on board aircraft in flight or vessels at sea up to 31 December 1995.'

54 The Commission made the last amendments to its proposal on 24 January 1992 (OJ 1992 C 45, p. 10), but without taking the Parliament's proposal into account.

55 It must therefore be considered whether the amendments referred to by Eurotunnel and the Parliament go to the essence of the measures considered as a whole.

56 The purpose of the Commission's proposals for Directives 91/680 and 92/12 presented to the Parliament was to adjust the systems of value added tax and excise duty to the existence of an internal market, defined as an area without internal frontiers.

57 The object of Articles 28 and 28k is to permit a pre-existing system to be maintained if the Member States so wish. Those articles must therefore be interpreted as optional exceptions of limited scope. The possibility of tax-free sales is reserved for certain categories of traders and is limited in extent (ECU 90) and time (30 June 1999).

58 It follows that the changes made by Articles 28 and 28k are not such as to affect the intrinsic tenor of the provisions introduced by Directives 91/680 and 92/12 and thus cannot be classed as changes in the essence of the measures.

59 In any event, the Parliament not only had an opportunity to express its opinion on the question of tax-free sales, it recommended that they should be maintained.

60 Thus in its opinion on Directive 91/680 the Parliament had proposed amendments Nos 6 and 31, which are entirely compatible with the tenor of the final text of the directive. That text recommended that advantage should be taken of the transitional period to take into consideration the social repercussions and the regional difficulties which might follow, especially in trans-frontier regions, from the abolition of fiscal frontiers.

61 In its opinion on Directive 92/12, the Parliament expressly proposed that the derogating arrangements in force for sales free of excise duty should temporarily be maintained until 31 December 1995.

62 Consequently, by deciding to maintain tax-free sales until 30 June 1999 in order to deal with the social repercussions in that sector, the Council responded in substance to the wishes of the Parliament.

63 In those circumstances, it was not necessary for the Parliament to be consulted again on Articles 28 and 28k.

64 It follows from all the foregoing that consideration of the questions raised has not disclosed any factor of such a kind as to affect the validity of Articles 28 or 28k.

65 In view of that answer, there is no need to answer the second part of Question 2 on the subsequent adoption of Directive 94/4, nor is there any need to answer Question 3.

## Costs

66 The costs incurred by the French, Greek and Spanish Governments and by the European Parliament, the Council of the European Union and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal de Commerce, Paris, by judgment of 27 November 1995, hereby rules:

**1. A natural or legal person may challenge before a national court the validity of provisions in directives, such as 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 and 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, even though that person has not brought an action for annulment of those provisions pursuant to Article 173 of the EC Treaty and even though a court of another Member State has already given judgment in separate proceedings.**

**2. Consideration of the questions has not disclosed any factor of such a kind as to affect the validity of Article 1(22) of Directive 91/680 or Article 28 of Directive 92/12.**

Rodríguez Iglesias Gulmann Ragnemalm

Wathelet Mancini

Moitinho de Almeida Kapteyn Murray

Edward Puissochet

Hirsch Jann Sevón

Delivered in open court in Luxembourg on 11 November 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President