OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 24 May 1988

My Lords,

This case raises a difficult and sensitive issue — the compatibility of measures taken to protect the environment with the fundamental rule of the EEC Treaty that quantitative restrictions and measures of equivalent effect in relation to imports into one Member State from another are unlawful.

It has long been the practice in Denmark to charge a deposit on the sale of bottles containing beer and soft beverages. The attraction of recovering the deposit was enough to encourage a high percentage of consumers to return the bottles voluntarily and so the countryside and open spaces were kept free of empty discarded bottles. It seems that the system worked well on a voluntary basis whilst the number of different bottles used was limited and, where soft drinks were marketed by foreign manufacturers, they were frequently made under licence in Denmark or at least bottled in Denmark.

In the mid-1970s, however, Danish beer manufacturers began to use cans and different shaped bottles. It is said that there was thus competition not merely between the drinks but between the containers. And so to ensure that the deposit system continued to be effective, legislation was introduced. Law No 297 of 8 June 1978 (*Lovtidende* A 1978, p. 851) applied to, *inter alia*, containers used for drinks (Article 1 (1) (2)) and was expressed to be an anti-pollution measure (Article 2 (1)). It empowered the Minister to 'introduce rules limiting or prohibiting the use of certain materials and types of container . . . or requiring the use of certain materials and types of container' (Article 8), to promulgate rules introducing compulsory deposits for certain types of container and to fix the amount of such deposits (Article 9). Chapter 5 (Articles 12 and 13) provided for the National Agency for the Protection of the Environment ('the Agency') to oversee the detailed administration of the law, while Article 14 laid down notification requirements.

Order No 397 of 2 July 1981 (*Lovtidende* A 1981, p. 1081), made under the powers delegated by Law No 297, applies to containers for gaseous mineral waters, lemonade, soft drinks and beer (Article 1 (1)). Such products may only be marketed in returnable containers (Article 2 (1)), which are defined in Article 1 (2) as containers for which there is a system of collection and refilling under which a large proportion of containers used will be

refilled. Such containers must have been approved by the Agency, which may impose conditions or withdraw its approval (Article 2 (2)). In deciding whether to approve a particular container, the Agency is to check:

(1) whether the container is technically adapted to use in a deposit-and-return system,

(2) whether the system for returning containers is so designed as to ensure that a high proportion of containers are actually returned, and

(3) whether approval has already been granted to an alternative container of equal capacity which is both available and suited to the intended use (Article 2 (3)).

There was initially provision for the use of bottles not approved under Article 2 on certain conditions. Penalties were prescribed for the sale of containers not complying with these articles. Annexed to the order are descriptions of 18 approved types of bottle (which are both general, 'Eurobouteille 50 cl' and specific 'Coca Cola 25 cl') and one approved 10-litre barrel. Since the introduction of the order, one further bottle type has been approved. It appears that, to date, no request for type approval has been rejected by the Agency.

Having received protests from the producers of beverages and containers in other Member States and European associations representing the retail trade that the containers in which drinks were normally sold could not be used in Denmark and as to the costs involved in the collection system, the Commission considered that these provisions were contrary to Article 30 of the Treaty and, after a letter of formal notice on 16 December 1981, a reasoned opinion was issued on 21 December 1982. On 16 March 1984, the Danish Government promulgated Order No 95 (*Lovtidende* A 1984, p. 345), which replaced the existing Article 3 of Order No 397 with a new text.

The effect was to modify the limited derogation from Article 2 contained in Article 3. By the amendment, beverages of the types in question may be sold in non-approved containers provided that the quantity sold does not exceed 3 000 hectolitres a year per producer or that the beverage is being sold in a container normally used for that product in the country of production in order to test the market in Denmark. The container used may not be of metal; a system for returning containers for refilling or recycling must be set up; and the deposit per container must be equal to that normally charged on a similar approved container. The person marketing the product must keep the Agency fully informed to show compliance with these conditions. From the replies given by counsel for Denmark at the hearing, it appears that the 3 000-hectolitre derogation is available to Danish producers and to importers of beverages manufactured outside Denmark alike whereas the test-marketing derogation is available only to importers of beverages manufactured outside Denmark.

The Commission was not satisfied with that amendment. It considered that a system achieving either re-use or recycling was sufficient to achieve the environmental aim

and that to limit the volume of the product which could be marketed in bottles not approved under Article 2, or the period during which a test might be made, was unjustified. After issuing a new letter of formal notice of 20 June 1984 and a further reasoned opinion of 18 December 1984, the Commission brought the present proceedings on 1 December 1986 for a declaration that, by introducing and applying by Order No 397 of 2 July 1981 a system under which containers for beer and soft drinks must be returnable, as modified by Order No 95 of 16 March 1984, the Kingdom of Denmark has failed to fulfil its obligations under Article 30 of the EEC Treaty. The United Kingdom has intervened in support of the Commission.

It seems to me plain, and Denmark does not really contest, that the rules adopted are 'trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' and that they are accordingly 'to be considered as measures having an effect equivalent to quantitative restrictions' (Case 8/74 *Procureur du roi* v *Dassonville* [1974] ECR 837, at p. 852). The Court has already made it clear that requirements as to the type of packaging for goods which may be used are national measures which are capable of affecting trade between Member States (Case 261/81 *Rau* v *De Smedt* [1982] ECR 3961, at p. 3972, paragraph 12; Case 104/75 *De Peijper* [1976] ECR 613, at p. 635 and Case 16/83 *Prantl* [1984] ECR 1299, at p. 1327, paragraph 25). The present rules either do restrict or are capable of precluding the use of containers in which beer and soft beverages are lawfully marketed in the Member State of origin. The deposit, collection and re-utilization requirements are equally capable of restricting the movement of goods within the Community. Prima facie, therefore, the measures are contrary to Article 30 of the Treaty and they do not, in my view, fall within any of the exceptions listed in Article 36.

The question is, therefore, whether the present measures fall within the principle enunciated by the Court in Case 120/78 'Cassis de Dijon' [1979] ECR 649, at p. 662, paragraph 8, that: 'In the absence of common rules relating to . . . production and marketing . . . it is for the Member State to regulate all matters relating to the production and marketing . . . in their own territory'. The question is thus are these 'obstacles to movement within the Community . . . relating to the marketing of the products' which 'must be accepted in so far as [these] provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer'?

In this respect it is to be noticed that Council Directive 85/339/EEC (Official Journal 1985, L 176, p. 18) on containers of liquids for human consumption recognizes the importance of recycling or re-using waste materials and the possible impact of used containers on the environment, yet recites that measures taken by Member States must comply with Treaty rules concerning the free movement of goods. It does not lay down specific levels

of environmental protection to be achieved nor specific methods to be adopted. Member States are 'with due regard for the provisions of the Treaty on the free movement of goods', 'either by legislative or administrative means or by voluntary agreements [to] take measures designed *inter alia*' to develop consumer education in the advantages of refilling or recycling containers, to facilitate the refilling and/or recycling of containers and as regards non-refillable containers, to provide for their selective collection, to retrieve them from household waste, and to maintain and, where possible, increase the proportion of refilled and/or recycled containers.

Council Directive 80/777/EEC of 15 July 1980 (Official Journal 1980, L 229, p. 1) requires that mineral waters may be bottled only in accordance with Annex II of the directive. Annex II, paragraph 2 (d) prohibits the transport of natural mineral water in containers other than those authorized for distribution to the ultimate consumer.

It is also to be noted that the Single European Act inserted into Part Three of the EEC Treaty a new Title VII which by Article 130 R includes the preservation, protection and improvement of the quality of the environment as one of the objectives of action taken by the Community. The rational use of natural resources and the principle that preventive action should be taken are recognized and whereas the Council is empowered to act under Article 130 S, 'The protective measures adopted in common pursuant to Article 130 S shall not prevent any Member State from maintaining or introducing more stringent measures compatible with this Treaty' (Article 130 T).

In 1980 the Commission recognized the importance of environmental protection as a potential limitation on the rule contained in Article 30 of the Treaty (Official Journal 1980, C 256, p. 2). This was further accepted by the Court in Case 240/83 *Procureur de la République* v *Association de défense des brûleurs d'huiles usagées* (Adbhu) [1985] ECR 531, at p. 549, paragraphs 12 and 13, where it was recognized that 'the principle of free trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantially impaired' and that the directive there in question 'must be seen in the perspective of environmental protection, which is one of the Community's essential objectives'.

In my view, national measures taken for the protection of the environment are capable of constituting 'mandatory requirements' recognized by the judgment in 'Cassis de Dijon' as limiting the application of Article 30 of the Treaty in the absence of Community rules.

The judgment in 'Cassis de Dijon' does not, however, give Member States *carte blanche* — the level of protection required for one of the acceptable categories must not, as I see it, be excessive or unreasonable and the measures taken to achieve the requirement must be necessary and proportional (Case 66/82 *Fromançais SA* v *Fonds d'orientation et de régularisation des marchés agricoles (Forma)* [1983] ECR 395, at p. 404, paragraph 8; judgment of 18 September 1986 in Case 116/82 *Commission* v *Germany* [1986] ECR 2519, paragraph 21). Moreover, the measures taken must be 'indistinctly applicable' in form and in substance to domestic producers and to

producers from other Member States (Case 113/80 *Commission* v *Ireland* [1981] ECR 1625, at p. 1639, paragraph 10; Case 6/81 *Industrie Diensten Groep* v *Beele* [1982] ECR 707, at p. 716, paragraph 7; Case 207/83 *Commission* v *United Kingdom* [1985] ECR 1201, at p. 1212, paragraphs 19 to 22).

The measures taken by Denmark in relation to approved bottles are highly effective. The producer or importer supplies bottles and cases against a deposit to the wholesaler or retailer who in turn charges the retail purchaser the same deposit on the bottle. The retail purchaser can return the bottle to any retailer selling beer and soft drinks. He gets his deposit back. The retailer collects the various bottles and returns them down the chain to the producer or importer who finally refunds the deposit. Vehicles go out with cases of filled bottles and return with cases of empty bottles and the retailer, the wholesaler or the producer sorts out the different categories of bottles. In the result, it is said, 99% of such bottles are returned and they may be used up to 30 times. Some bottles which are not returned by the purchaser are returned by enterprising children, the deposit repaid forming a valuable source of pocket money. The result is a cleaner countryside and a saving of raw materials.

Non-approved containers, it is said, do not have the same advantages. Although subject to the deposit system they cannot be returned to any retailer but only to retailers who stock that beverage and in the result a lower percentage of bottles is returned. Moreover, they do not have to be re-utilized but may be broken up and recycled. It appears from the evidence that in March 1987 some 31 imported products were marketed in non-approved containers (Defence, pp. 7 and 8).

At the hearing, Denmark commented that, whereas the Commission's initial correspondence challenged the exclusion of metal cans for the sale of beer, the application to the Court appeared to be limited to the rules relating to bottles and plastic bottles. The Commission did not challenge this. Even if this is right and there appears no difference in principle between the exclusion relating to bottles and that relating to cans, I do not think that the Commission's case in relation to the former is necessarily prejudiced by a failure to seek an order in relation to the latter.

The Commission's case is that the measures adopted go too far. Moreover, they discriminate against producers or importers from other Member States. Denmark replies that the steps taken are all essential to achieve a very high standard of environmental protection and that the system is an integrated one — approval, collection against deposit and re-utilization — so that the removal of any of the conditions affects the efficiency of the system as a whole. It contends, moreover, that the Commission did not allege in the preliminary stages that the system discriminated against producers from other Member States. Although it is important that the initiating letter and the reasoned opinion under Article 169 should

give sufficient notice of the Commission's case, it seems to me that the second initiating letter of the Commission and the second reasoned opinion quite plainly raise the issue that these measures impose greater burdens on the non-Danish than the Danish producer. The words 'discrimination' and 'not indistinctly applicable' may not appear as such, but the whole thrust of the case is that the non-Danish importer is under greater difficulties because of the rules adopted. I therefore reject Denmark's argument that it is not open to the Commission to allege that the measures adopted are not indistinctly applicable.

Whilst fully recognizing the importance of environmental protection, and bearing in mind the Community's and Member States' increasing awareness of it, it seems to me that the Danish rules impose serious restrictions on the producers of beer and soft beverages in other Member States. In the first place, only approved bottles can be used, subject to the derogation in respect of 3 000 hectolitres per year per producer. Although it is said that so far no bottles have been refused approval, it is an essential argument of the Danish Government that the present system could not absorb more than 30 types of bottle. If increasingly producers from other Member States wish to sell beer in Denmark there is a risk that approval will not be given because withdrawal of an existing approval cannot be obtained. The result would be that producers outside Denmark would have to make or purchase bottles of a type already approved — at the sort of increased cost which was recognized in e. g. *Prantl* to be a restriction on the free movement of goods.

The requirement in Article 2 of Order No 397 that the Agency shall be satisfied that the system is such as to ensure that a large number of containers are re-used seems to me also to impose a considerable burden on producers in other Member States. They are faced with the alternative of returning empty bottles to their own plants in their Member States of origin (at, it seems to me, a deterrent extra cost) or of setting up plants to make beer or to bottle it from barrels imported into Denmark (again at appreciable extra cost which they may not wish to incur). Both Council Directive 85/339/EEC and the amendment to Article 3 of the Danish Order recognize recycling as an alternative to re-utilization, the latter of course restricted in quantity. If the bottles are returned or collected and are not left in the countryside, the environment is protected. Re-utilization is not necessary for that purpose. Although the conservation of resources is an important objective, it does not seem to me in the present state of Community legislation that an obligatory re-utilization should be accepted if its effect is seriously to inhibit the free movement of goods. In my view, accordingly, the limitation of 3 000 hectolitres per producer per annum for bottles which do not have to be re-utilized is not justified or proportional.

At first glance the requirement of a compulsory deposit system seems sensible and is effective. At the end of the day, however, it seems to me that, to the extent

that non-approved bottles may be used, the system imposes certain restrictions on the importer from other Member States. Under the present system only approved bottles can be returned to any shop; non-approved bottles must be taken back to a retailer of the particular product. It may well be that as a result consumers will not buy imported beers if their deposit is more difficult to recover — though it is clearly possible that a purchaser of a foreign beer is likely to go back to the retailer for more, and to take his empty beer bottles with him. A compulsory deposit system may also be unworkable in respect of disposable containers.

It may be that some brewers will prefer to use approved bottles in order to benefit from the system so that consumers can take their bottles back to any shop and recover their deposit. Even though on the face of it the system is indiscriminately applicable to Danish and to non-Danish brewers and even though it is said that, before the deposit-and-return system became compulsory, non-Danish beers were either made under licence or bottled in Denmark, it seems to me that the system as it presently operates does have greater disadvantages for the non-Danish brewer because the requirement that containers be re-used, rather than merely recycled, necessarily bears more heavily upon him than upon his Danish counterpart, and because the use of approved bottles for sales to the Danish market may well involve incurring additional overhead costs for plant and bottling machinery. I am not satisfied that the costs imposed on Danish manufacturers of collecting the bottles and sorting them is of the same order as that faced by manufacturers from other Member States.

I am accordingly of the view that, even though on the surface indiscriminately applicable to Danish and non-Danish manufacturers, the rules bear in practice more heavily on the latter. On that basis Denmark cannot, as I see it, rely on the principle stated in 'Cassis de Dijon', since the Danish provisions in practice even if not in form are not indistinctly applicable even if, as I accept, environmental protection is within the category of possible exceptions to the basic rules.

It is for the Danish authorities to show that the measures are necessary and that they are not disproportionate to achieve a legitimate aim (judgment of 6 May 1986 in Case 304/84 *Ministère public* v *Muller* [1986] ECR 1511).

Denmark argues that foreign beers are not popular with drinkers of Danish beer and that only 0.01% in 1985 (perhaps now a little higher) of total consumption was accounted for by imported beers. That is no argument in itself to justify the restriction and indeed, if anything, goes the other way since the threat to environmental protection posed by the imported products is that much less.

I accept, as Denmark contends, that it achieves the highest standard of environmental protection in respect of the collection of containers, though it obviously accepts the risk of certain kinds of bottle or

container being left around the countryside (e. g. wine bottles which it is said are only left in small quantities).

I also accept that it may be difficult by other methods to achieve the same high standard. Yet it does not seem to me that Denmark must succeed in this application unless the Commission can show that the same standard can be achieved by other specified means. There has to be a balancing of interests between the free movement of goods and environmental protection, even if in achieving the balance the high standard of the protection sought has to be reduced. The level of protection sought must be a reasonable level: I am not satisfied that the various methods outlined in the Council directive and referred to at the hearing — selective collection by governmental authorities or private industry, a voluntary deposit system, penalties for litter, education of the public as to waste disposal — are incapable of achieving a reasonable standard which impinges less on the provisions of Article 30.

Accordingly, in my view, the Commission is entitled to the declaration it seeks and to its costs of these proceedings.