OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 23 March 2000 *

I — Legal and factual background

1. In the present reference from the Kingdom of Belgium, Cidrerie Ruwet SA seeks to restrain Cidre Stassen SA (which is supported by H.P. Bulmer Ltd, a related United Kingdom company) from marketing cider in 33 cl containers contrary to Belgian law. The questions referred raise issues of interpretation of the Directives concerning harmonisation of bottle sizes as well as of Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC).

2. The Royal Decree of 16 February 1982 relating to the ranges of nominal quantities and nominal volumes of contents allowed for certain prepacked products [1] (hereinafter 'the Royal Decree') provides that certain products, including cider products in 33 cl prepackages, may not be placed on the market, unless — among other things — they are intended exclusively for trade purposes (see Articles 1 and 3 of the Royal Decree). That Decree constitutes the measure transposing into Belgian law Council Directive 75/106/EEC, [2] as amended by Council Directive 79/1005/EEC. [3]

3. In spite of the prohibition provided for in the Royal Decree, Cidre Stassen has been selling to the retail sector (supermarkets) 33 cl bottles of cider products whose sale is permitted in Belgium in the sector called 'horeca' (hotels, restaurants, cafés). By way of justification it submits that, for some time, foreign manufacturers of ciders have been exporting 33 cl bottles of cider throughout the European Community, and in particular to Belgium, which fact encouraged it to import into Belgium some 33 cl bottles of cider, and then to begin producing it in 33 cl bottles intended for hotels and restaurants. Cidrerie Ruwet called on Cidre Stassen by letter of 29 May 1998 to cease that practice.

4. Cidre Stassen responded by indicating that either the Directive had been incorrectly transposed into Belgian law, or the

* Original language: English.

1 — *Moniteur Belge* of 12 March 1982.

2 — Council Directive 75/106/EEC of 19 December 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids (OJ 1975 L 42, p. 1).

3 — Council Directive 79/1005/EEC of 23 November 1979 amending Directive 75/106/EEC on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids (OJ 1979 L 308, p. 25).

Directive itself was contrary to Article 30 of the EC Treaty and thus was invalid. Cidre Stassen and H.P. Bulmer took a pre-emptive action (hereinafter 'the first action') against the Belgian State, joining Cidrerie Ruwet, before the Tribunal de Première Instance (Court of First Instance), Brussels, seeking an interlocutory order, a preliminary reference on the compatibility of the Royal Decree with Community law, and a declaration, *inter alia,* that the production, import and marketing on Belgian territory of 33 cl bottles of cider did not constitute a breach of the Royal Decree if that decree was interpreted in accordance with the rules and principles of Community law.

5. In the first action, the Belgian State submitted that, with the repeal of Article 4(2) of Directive 75/106/EEC by Directive 79/1005/EEC, the Directive changed from a total harmonisation directive to an optional harmonisation directive. The Belgian State invoked the European Commission's position that optional harmonisation allowed Member States to authorise the use of other sizes and volumes. Yet those which did not do so could block the import of goods which did not conform to the standards in the Directive.[4] This position was justified by the goal of allowing small and medium-sized undertakings to operate on the domestic market while moving towards total harmonisation. In the Belgian State's view of the Commission's position, a Member State which specified the Directive's standards as the sole permissible ones had brought about total harmonisation and the *Cassis de Dijon* line of case-law was not applicable.[5] Moreover, the Belgian State maintained that the law was not disproportionate, since the requirement of compliance with specified standard nominal quantities was the most appropriate means of allowing the consumer to compare the prices of prepackaged goods, certainly before the introduction of the obligation to show both sale price and price per quantity.

6. Several days after commencement of the first action, Cidrerie Ruwet, in turn, brought an action against Cidre Stassen before the Tribunal de Commerce (Commercial Court), Brussels (hereinafter 'the national court'), claiming that that court should declare that the marketing in Belgium by Cidre Stassen of 33 cl bottles of cider intended for sale to the public, in particular the 'Pêche', 'Classique', 'Passion Lime' and 'Woodpecker' brands, which it manufactured in Belgium, was contrary to the Royal Decree and thereby constituted an act contrary to fair trading practice within the meaning of Article 93 of the Loi sur les Pratiques du Commerce et sur l'Information et la Protection des Consommateurs (Law on Commercial Practices and Consumer Information and Protection) of 14 July 1991. It sought an order requiring Cidre Stassen to cease all marketing of those bottles in Belgium under penalty of a daily fine.

4 — European Parliament Question No 1176/81 and Reply by the Commission, OJ 1982 C 92, p. 2.

5 — Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (hereinafter '*Cassis de Dijon*').

7. The national court noted that the transitional period provided by Directive 79/1005/EEC had lasted for 20 years and that the different laws of the Member States have still not been harmonised.

8. Meanwhile the factual situation has changed considerably. The 33 cl container has become more and more popular and the consumer is accustomed to that format. This format is used for all the drinks which compete with cider, in particular beer and soft drinks. The marketing of cider in the volume provided for by the Belgian law, 37.5 cl bottles, has almost disappeared. By contrast, cider in 33 cl containers is very well received abroad and most Member States authorise and allow the marketing of cider in 33 cl containers.

9. The fact that certain Member States authorise the marketing of cider in 33 cl containers while others, like Belgium, do not amounts in the view of the national court to a restriction on the free movement of goods. Furthermore, indication of the unit price is used more and more by Belgian retailers, particularly in supermarkets, so that the consumer is in a position to compare prices without its being necessary to close the Belgian market to a container which is widely used in the other Member States.

II — The questions and observations

10. The Tribunal de Commerce, Brussels, pursuant to Article 177 of the EC Treaty (now Article 234 EC), has referred the following questions to the Court for a preliminary ruling:

'1. Does Article 30 of the EC Treaty preclude Directive 75/106/EEC of 19 December 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids, as amended by Directive 79/1005/EEC of 23 November 1979, which provides for a transitional period, from allowing Member States, even today, some twenty years later and even though during that period of time habits have changed and the 33 cl container has become popular and widely used all over the world, to authorise or not, as they wish, the marketing of containers other than those listed in Annex III, taking account of the fact that this may, and in this case does, give rise to differences between the various national laws, with the result that by this means the Member States which limit the range of containers, like Belgium which limits the range of containers for cider, have at their disposal a measure whose purpose or effect is to restrict the free movement of goods?

2. Having regard to the principle of the free movement of goods, does Directive

75/106/EEC of 19 December 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids, as amended by Directive 79/1005/EEC of 23 November 1979, allow Member States to implement the Directive in such a way that the national legislation prohibits the marketing of containers of a quantity not listed in Annex III to the Directive, in this case the 33 cl container for the marketing of cider?'

11. Cidre Stassen and H.P. Bulmer (hereinafter 'Stassen'), the Kingdom of Belgium, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Council and the Commission have submitted written observations. They were joined by Cidrerie Ruwet at the oral hearing.

III — Substance

A — *Not a purely internal matter*

12. Cidrerie Ruwet maintains that the matter is purely internal. However, the Royal Decree is generally applicable, and Article 30 of the EC Treaty cannot be considered inapplicable simply because all the facts of the specific case before the national court are confined to a single Member State.[6] The Royal Decree is clearly capable of affecting the free movement of goods between Member States.

B — *Principal features of the Directive*

13. It is necessary, in the first instance, to recall the principal relevant provisions of the Directives which are at the heart of the problem, before reverting to Article 30 of the EC Treaty. Council Directive 75/106/EEC is the basic Directive. It has been amended on many occasions.[7]

14. Directive 75/106/EEC, as appears from both its title and its first recital, was adopted by virtue of Article 100 of the EC Treaty (now Article 94 EC) to approximate the laws of the Member States regarding the sale of liquids in prepackages by reason of their effect in hindering trade between Member States. It relates to the

6 — Joined Cases C-321/94 to C-324/94 *Pistre & Others* [1997] ECR I-2343, paragraph 44 (hereinafter '*Pistre*').

7 — Amended by Commission Directive 78/891/EEC of 28 September 1978 adapting to technical progress the Annexes to Council Directives 75/106/EEC and 76/211/EEC on prepackaging (OJ 1978 L 311, p. 21), Council Directive 79/1005/EEC of 23 November 1979, Council Directive 85/10/EEC of 18 December 1984 (OJ 1985 L 4, p. 20), Council Directive 88/316/EEC of 7 June 1988 (OJ 1988 L 143, p. 26), and Council Directive 89/676/EEC of 21 December 1989 (OJ 1989 L 398, p. 18).

sale of liquid products 'in individual quantities of between 5 ml and 10 litres inclusive'. [8]

15. The central provision of Directive 75/106/EEC is the specification of detailed conditions for the employment of an EEC mark in the form of a small 'e' affixed to each prepackage. This case, however, focuses solely on the regulation of volume sizes for prepackaged cider in Community circulation.

16. The fourth recital in the preamble to Directive 75/106/EEC states:

'Whereas it is necessary to reduce as far as possible the number of volumes of contents that are too close to others of the same product and which consequently are liable to mislead the consumer; whereas, however, in view of the extremely high stocks of prepackages in the Community such a reduction can only be undertaken gradually.'

8 — Article 1 as amended by Article 1 of Directive 79/1005/EEC.

17. Article 4(2) of Directive 75/106/EEC in its original form reads as follows:

'For such prepackages only the nominal volumes of the contents indicated in Annex III shall be permitted.'

18. However, the form of complete harmonisation of container sizes thereby proposed was proved impracticable and was later modified substantially. The third recital in the preamble to Directive 79/1005/EEC states:

'Whereas at the time of the adoption of Directive 75/106/EEC, the Council, with a view to providing better protection for the consumer, requested the Commission to submit before 31 December 1980 a new proposal reducing the list of nominal values in Annex III by eliminating values that were too close to one another.'

The sixth recital in the preamble to that Directive states:

'Whereas certain Member States will find it difficult to reduce the number of nominal values; whereas, therefore, provisions should be made for a transitional period for these Member States which does not, however, impede intra-Community trade in the products in question or jeopardise implementation of this Directive in the other Member States.'

19. In consequence, Article 4 was amended. Article 4(1) now reads:

'1. All prepackages referred to in Article 3 must in accordance with Annex I bear an indication of the volume of liquid called the "nominal volume of the contents", which they are required to contain.'

Article 4(2) of Directive 75/106/EEC has been eliminated and replaced with a provision that is immaterial to the present case.

20. These measures are all designed to facilitate the use of the 'EEC mark' as a sort of 'passport'. Thus, Article 3 reads:

'1. The prepackages which may be marked with the EEC mark referred to in subsection 3.3 of Annex I are those which comply with Annex I.

2. They shall be subject to metrological control under the conditions defined in Annex I, Section 5, and in Annex II.'

21. Cider and perry are included in Annex III to the Directive.[9] Item 1(c) of that Annex includes the size, 0.375 litres but not 0.33 litres, as 'definitively allowed' under the heading 'Nominal volume of contents in litres' for those products.

22. Following the repeal of Article 4(2), the legal significance of this item in Annex III is to be found in Article 5(1),[10] which reads:

'5(1). Member States may not refuse, prohibit or restrict the placing on the

9 — Annex III to Directive 75/106/EEC as amended by Article 8 of Directive 79/1005/EEC.

10 — As amended by Article 5 of Directive 79/1005/EEC.

market of prepackages which satisfy the requirements of this Directive on grounds related to the determination of their volumes, the methods by which they have been checked or the nominal volumes where these are set out in Annex III, column I.'

C — *The degree of harmonisation laid down by the Directive*

23. From the moment that Directive 79/1005/EEC repealed Article 4(2) of Directive 75/106/EEC, the attempt at complete harmonisation was, at least temporarily, abandoned. On that basis, it is common case that the Directive consists of optional harmonisation. It does not prohibit a Member State from allowing the marketing of products in volumes other than those specified.

24. For the specified volumes, Article 5 of Directive 75/106/EEC, as amended, prevents a Member State from prohibiting the marketing of prepackaged products which otherwise comply with the Directive. However, Belgium, supported by Cidrerie Ruwet, reasons *a contrario* that the Directive immunises a refusal by a Member State to allow the marketing of products not complying with the Directive from the application of Article 30, including even the need to respect the principle of proportionality.

25. However, in my view, it is clear that, on the removal of Article 4(2) by Directive 79/1005/EEC, [11] Directive 75/106/EEC became a partial harmonisation Directive. It does not directly affect the control exercised by virtue of Article 30 of the EC Treaty in respect of products sold in volumes not covered by the Directive.

26. Secondary Community legislation is adopted pursuant to the Treaty; it must respect the basic rules of the Treaty and, consequently, as is pointed out by Stassen, must be interpreted in harmony with the Treaty and, in the particular context, 'in the light of the provisions of the Treaty on free movement of goods'. [12] Even if Community secondary law may, as the occasion demands, itself lead to an incidental restriction of trade, this should result from a considered balancing of objectives. [13] I do not consider that the Directive can be interpreted as immunising the restriction of trade in this case by implication from the

11 — In this regard it is to be noted that Case 244/78 *Union Laitière Normande* v *French Dairy Farmers* [1979] ECR 2663, paragraphs 11 and 12, was decided before the adoption of Directive 79/1005/EEC. Furthermore, that case primarily concerned the application of a derogation for the United Kingdom then contained in Article 7 of the Directive. Finally, the facts of that case concerned a Member State prohibition, pursuant to an express derogation, of the marketing of a product at a volume specified to be allowed in the Directive, not, as here, a Member State prohibition not pursuant to an express derogation applying to a product of a volume not specified in the Directive.

12 — Case C-315/92 *Verband Sozialer Wettbewerb* v *Clinique Laboratories and Estée Lauder* [1994] ECR I-317, paragraph 12.

13 — See my Opinion of 16 September 1999 in Case C-220/98 *Estée Lauder Cosmetics* v *Lancaster Group* [2000] ECR I-I-117 (hereinafter '*Estée Lauder*').

sort of *a contrario* reasoning upon which Belgium relies. I agree with the argument of Stassen that the effect of the stance adopted by Belgium is that the Directive is treated, for that Member State alone, as one of complete harmonisation of bottle sizes. The consequence would be the partitioning of the Belgian market.

27. Furthermore, as Cidrerie Ruwet points out, the Court held, in *Cassis de Dijon*, that Article 30 of the Treaty applied '[i]n the absence of common rules relating to the production and marketing of alcohol'. [14] That state of affairs exists in the present case in so far as bottle size is concerned. As the Court has held in its constant case-law, 'in the absence of harmonisation of legislation, obstacles to the free movement of goods that are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, such as those relating, for example, to their presentation, labelling and packaging, are prohibited by Article 30, even if those rules apply without distinction to national products and to imported products'. [15]

28. This is not a case, as Belgium submits, of a *lex specialis* derogating from a *lex generalis*, but of a situation not covered by the obligation in Article 5 of Directive 75/106/EEC, as amended, and which, as a result, remains covered by Article 30 of the Treaty. The Commission's contrary view expressed in a reply to a parliamentary question, [16] and cited by Belgium, has changed over the years as the Commission acknowledged in its oral submissions. But this cannot constrain the interpretation of the Directive by the Court.

29. In the light of these conclusions, there is no issue of the validity of Directive 75/106/EEC, as amended, which the Council has intervened to defend against the subsidiary argument of Stassen.

D — *Proportionality*

30. Belgium argues, as an alternative to its primary submission, and with the support of Cidrerie Ruwet, that the Royal Decree contains a justifiable restriction on trade adopted in the interest of the protection of consumers. Such an interest certainly 'rank[s] among the imperative requirements which the Court has consistently held may justify restrictions on the free

14 — Loc. cit., footnote 5 above, paragraph 8.

15 — Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln* v *Mars* [1995] ECR I-1923, paragraph 12.

16 — Commission's Answer to Written Question No 1176/81 (OJ 1982 C 92, p. 2).

movement of goods within the meaning of Article 30 of the Treaty'. [17]

31. The framework for analysis of the issue raised by the referring court is Article 30 of the EC Treaty which prohibits all 'quantitative restrictions on imports and all measures having equivalent effect'. As a fundamental Treaty freedom, this article is interpreted broadly:

'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.' [18]

32. It has been found by the national court that the Belgian rule actually hinders intra-Community trade in cider. Consequently it is, prima facie, prohibited by Article 30.

33. The question then is whether the Belgian restriction on the free movement of 33 cl cider bottles is necessary in order to satisfy the mandatory requirement of the defence of the consumer. [19]

34. Nevertheless, it must be recalled that, even in the case of a directive providing for total harmonisation, where there is provision for Member States to take measures to protect consumers such measures must be proportionate [20] and must comply with the Treaty. [21]

35. As the United Kingdom and the Commission point out, the question is not whether the restriction is necessary in the abstract, but whether the particular restriction is justified in fact, having regard to all relevant circumstances. [22] In this latter respect, I would stress, as I did in my Opinion in *Bluhme*, [23] that the determination of actual justification is, as a matter of Community law, within the competence of the national court in application of interpretative criteria furnished by the Court.

36. The Court may assist by indicating considerations to be borne in mind and by

17 — Case C-220/98 *Estée Lauder*, loc. cit., paragraph 25.

18 — Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, paragraph 5; *Pistre*, op. cit., footnote 6 above, paragraph 43.

19 — Case 120/78 *Cassis de Dijon*, loc. cit., paragraph 8.

20 — Case C-77/97 *Österreichische Unilever* v *Smithkline Beecham Markenartikel* [1999] ECR I-431, paragraph 27.

21 — Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831, paragraph 27.

22 — Case 94/82 *De Kikvorsch* [1983] ECR 947, paragraph 12.

23 — Case C-67/97 *Ditlev Bluhme* [1998] ECR I-8033 (hereinafter '*Bluhme*'), paragraphs 34 and 35 of the Opinion.

defining as a matter of Community law the viewpoint of the consumer. [24]

37. The standard is the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect. [25] The actual level of protection will vary with the product and the market. For example, the Court has taken account of differences in quality not easily discernible to the average consumer ('crystal glass' and 'crystalline'), in particular where the product is infrequently purchased, as justifications for requiring the clearest possible information. [26]

38. Being a derogation from Article 30, the national measure must be necessary and proportionate in relation to its aim, here consumer protection, and it must not have been possible to achieve the same result by less stringent measures. [27] The matters which may be considered by the national court in determining necessity are not limited either in law or a priori. There are several considerations which arise in this case.

39. First, the proximity of volumes of competing products may be considered to be likely to cause confusion. As Belgium points out, the Directive is predicated on the assumption that the restriction of the number of marketable volumes for prepackaged liquids will prevent consumer confusion over the quantity of what they are being offered, particularly where the volumes are close together. One type of confusion is over value per volume. For example, if there are two cider bottles on a shelf, the 33 cl bottle which is the subject of the dispute, and the 37.5 cl bottle finally allowed under Annex III of Directive 75/106/EEC, and if both are offered at the same price, a consumer might not look closely enough to realise that the 37.5 cl bottle is better value, as the difference in volume of 4.5 cl would be insufficient to alert his attention. However, the national court must act on the hypothesis that the consumer is reasonably well-informed, observant and circumspect.

40. Second, other measures may alleviate or remove any risk of confusion. Germany submits that the Court had to decide a similar issue in *Kelderman*. [28] In that case the Netherlands submitted that the Netherlands bread order (Broodbesluit) introduced a clear delimitation between the various shapes and weights of bread to prevent consumers being misled on the

24 — Case C-220/98 *Estée Lauder*, loc. cit., footnote 13 above, paragraphs 27 and 28.

25 — Ibid., paragraph 27.

26 — Case C-51/93 *Meyhui* v *Schott Zwiesel Glaswerke* [1994] ECR I-3879, paragraph 11.

27 — *Bluhme*, loc. cit., footnote 23 above, paragraph 35 of the judgment.

28 — Case 130/80 *Kelderman* [1981] ECR 527.

quantity of bread. [29] The Court held that 'the provision of suitable information for consumers may easily be ensured by appropriate means, such as requiring labelling showing, for example, the weight and specific composition of an imported product'. [30]

41. Such other risk-alleviating measures may be derived from other legal obligations imposed by Community law. [31] In this regard, as appears from all the observations submitted, save those of Belgium and that Cidrerie Ruwet, there are other directives providing for measures to ensure protection for consumers from confusion which might arise through proximity of volumes of competing products. The Commission has referred to Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers. [32] This Directive was to have been implemented by the Member States by 18 March 2000. [33] It requires in Article 3 that the selling price and the unit price shall be indicated, which will allow a direct price per volume comparison between cider bottles of different sizes without identity of volume. The United Kingdom, however, points out that the existence of the price per unit obligation is not in itself necessarily sufficient protection for the consumer, since other questions such as the nature and size of packaging used remain.

42. It is, of course, relevant for the determination of the likelihood of consumer confusion if, in reality, the 33 cl container has become widely popular at the expense of the 37.5 cl size, and also to take account of the sizes of containers used for competing products such as beer and soft drinks.

43. In view of the foregoing, I am of the opinion that the Directives 75/106/EEC and 79/1005/EEC, as amended, not amounting to complete harmonisation, do not, in themselves, either permit or require Member States to prohibit the sale on their territory of cider in prepackaged volumes other than those listed in Item 1(c) of Annex III to Directive 75/106/EEC, as amended. Any rule enforcing such a prohibition comes within the field of application of Article 30 of the EC Treaty and can be justified as a mandatory requirement in pursuit of the interest of consumer protection only if it is necessary and proportionate to that objective.

29 — Ibid., see paragraph 11.

30 — Paragraph 12.

31 — Case C-67/97 *Bluhme*, loc. cit., paragraph 36; Case C-383/97 *Criminal Proceedings against Van Der Laan* [1999] ECR I-731.

32 — OJ 1998 L 80, p. 27.

33 — Article 11 of the Directive.

IV — Conclusion

I recommend that the questions referred by the Tribunal de Commerce, Brussels be answered as follows:

(1) Council Directive 75/106/EEC of 19 December 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids, as amended by Council Directive 79/1005/EEC of 23 November 1979 amending Directive 75/106/EEC on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids, does not require Member States to refuse the marketing on their territory of cider in volumes other than those set out in Annex III thereof;

(2) Such a refusal is a measure prohibited by Article 30 of the EC Treaty (now, after amendment, Article 28 EC) and is incompatible with Community law unless it is necessary to satisfy a mandatory requirement of the public interest, in this case the defence of the consumer, where it is established that the average consumer, reasonably well-informed and reasonably observant and circumspect, is misled into confusing prepackaged liquid products by reason of the close proximity of their sizes.