OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 18 September 1986

My Lords,

In these proceedings the Commission asks the Court to declare that the Federal Republic of Germany has failed in its obligations under Article 30 of the EEC Treaty by prohibiting the marketing of beer lawfully produced and marketed in another Member State unless that beer complies with Articles 9 and 10 of the German law relating to duty chargeable on beer (Biersteuergesetz, 'BSG').

Leaving aside the question as to which legislation brings it about, there is no doubt about the fact that most beers produced in all but one other Member State, Greece, cannot lawfully be imported and sold in Germany as beer. It is only, in effect, if they are produced specially to comply with German legislation that such beers can be sold, as in proportionately small, even if increasing, quantities they now are. For the Commission the issue is thus an important one in the context of the task of establishing a common market, and in particular of Article 30. The Federal Republic regards the defence of its admitted restrictions on such importation as no less important. It relies in this case on the need to protect the German consumer from confusion as to what he is getting, and on the protection of health, which it is said might be at risk if the German beer drinker were to drink beers produced and widely consumed in other Member States. The issue has thus been hotly, and in the written pleadings it must be said voluminously, contested.

In the preliminary correspondence and in the reasoned opinion, as in the application to the Court, the only legislation mentioned by either the Commission or the Federal Republic was the BSG. Both sides appear to treat this as containing the effective prohibition. It was only for the first time in its defence on the basis of a long report by a legal expert that the Federal Republic contended that the Commission had missed the whole point and that the real prohibition on the importation and marketing of foreign beers sprang from the German law on foodstuffs, relating particularly to the exclusion of additives, the Lebensmittel- und Bedarfsgegenständegesetz (Law on Foodstuffs and Consumer Goods, 'LMBG') and not from the BSG. The Federal Republic's particular criticism of the Commission's stance on this point seems to me to be unjustified; if the real basis for the prohibition on foreign beers derives from rules as to additives it is no less remarkable that the LMBG was not mentioned earlier by the Federal Republic.

However, the question remains as to the ambit of these proceedings. On the face of it the Commission is attacking only the prohibition on the sale of beers which do

not conform to Articles 9 and 10 of the BSG; it does not make any claim in respect of restrictions on such sale arising from other statutory provisions, nor does it make a general allegation that beers from other Member States may not be imported into the Federal Republic. In the light of many previous decisions of the Court it can be said that the Commission was not entitled to do so because it had not raised the matter in the reasoned opinion (e.g. Case 45/64 *Commission* v *Italy* [1965] ECR 857 and Case 211/81 *Commission* v *Denmark* [1982] ECR 4547). Nor can the scope of proceedings as defined in the application be widened in pleadings subsequent to the application (Case 232/78 *Commission* v *France* [1979] ECR 2729, Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, paragraph 6). In Case 123/76 *Commission* v *Italy* [1977] ECR 1449 at p. 1458, where, as here, it was the defendant which tried to widen the scope of the issues, the Court refused to allow it to do so. On the basis of those decisions the alleged restriction in the BSG is the only restriction at issue in these proceedings. The fact that in the reply the Commission picked up the gauntlet thrown down in the defence does not alter the position so as to widen the application. If that is the right approach the LMBG is only relevant if it can be shown that it is the LMBG and not the BSG which contains a restriction, in which case the Commission would fail on the claim relating to the BSG.

However, since the restrictions contained in both the BSG and in the LMBG have been debated so fully without objection by either party, and in the eventuality that the Court is prepared to treat the Commission's claim in substance if not in form as applying generally to the restrictions adopted in the Federal Republic, I shall consider both sets of legislative provisions. Despite the cases to which I have referred and my own reading of the initial claim not to do so would almost inevitably lead to further proceedings covering identical ground to that covered by the issues raised by the Federal Republic itself in this case.

The BSG in force at the relevant time provides by Article 9(1) and (2) under the rubric 'Beer production' the basic rule that (a) 'only barley malt, hops, yeast and water may be used in the production of bottom-fermentation beer' (which is the light-coloured lager type beer most commonly made in the Federal Republic) and (b) that for top-fermented beer the same limitation applies save that the use of other malts and technically pure cane, beet or invert sugar, and glucose and colourants obtained from those sugars, is permitted. By Article 9(3) 'malt means all artificially germinated cereals'.

There are exceptions to this basic rule; thus, e. g. hop powders may be used instead of hops, and 'substances which operate by mechanical means or by absorption and which are then eliminated, except for amounts which are technically unavoidable and negligible from the point of view of health, odour and flavour may be used as fining agents for wort or beer' (Article 9(6)). Moreover, in the production of top-fermentation Einfachbier sweetening agents may also be used subject to the Zusatzstoff-Zulassungsverordnung (Order authorizing the use of certain additives, 'ZZulV') in force at the relevant time, which

permitted saccharin to be used. Moreover the basic rules can be relaxed in individual cases 'for the production of special beer and beer destined for export or scientific experiments' and they do not apply at all to breweries which produce beer purely for consumption on their own premises.

It is clear that this provision in Article 9 applies only to beer produced in the Federal Republic. In itself it thus has no effect on imports. Article 10, however, provides that 'only beverages which have been fermented and which comply with the provisions of Article 9(1), (2) and (4) to (6) may be marketed under the designation "beer" — on its own or in conjunction with other designations — or under designations, or pictorial representations, giving the impression that the product in question is beer'. If sugar is used that must be indicated in a way which is apparent to the consumer.

Article 10 thus refers back to Article 9. The two have to be read together since what cannot be marketed as beer is any beverage which does not comply with Article 9. In this sense Article 9 is plainly relevant and the Commission was plainly right, contrary to what has been argued by the Federal Republic, to mention both in its initial claim. It is also clear that Article 10 applies both to beer made in the Federal Republic and to imported beers.

It is an offence punishable by a fine of up to DM 10 000 intentionally or negligently to infringe the provision of Article 10 referred to.

These basic rules are taken further by the implementing provisions of the Biersteuergesetz (Durchführungsbestimmungen zum Biersteuergesetz). The expressions 'production of beer' and 'beer production' are to be construed in the broadest sense covering all parts of the manufacture and treatment of beer both in the brewery itself and elsewhere — at the premises of the distributor, publican and the like — until the beer has been supplied to the consumer. Detailed provisions are laid down as to what kind of grains may be used for the malt, but there is not, as one would not expect under implementing provisions, any relaxation of the limitation to barley malt in respect of bottom-fermentation beer, the one of greatest economic importance since only 15% of beer sold in the Federal Republic is top-fermented. Although the provisions repeat that for top-fermentation beer malt from cereals other than barley may be used, 'rice, maize and sorghum are not cereals for the purpose of Article 9(3) of the law' (Article 17(4)). It is thus plain that top-fermented beer made outside the Federal Republic from rice or maize cannot, by a combination of Articles 9(2), (3) and 10(1), be marketed in the Federal Republic under the designation 'beer'.

In the interests of ensuring that bottom-fermented beer is made only from barley malt, it is provided that even though permission may be given for residues obtained from beer production in the brewery itself to be used in the making of further beer, residues from top-fermented beer in which malt other than barley malt has been used may not be used in the production of bottom-fermentation beer.

There are thus strict limitations on what may be used in the Federal Republic for the production of beer for domestic sale, subject to the minor exceptions to which I have referred; and equally strict limitations on what may be marketed as 'beer' whether made in the Federal Republic or elsewhere.

On any view a product made from maize or rice, or a bottom-fermented product made from any cereal other than barley, cannot be sold under the designation 'beer'.

On the face of it the BSG goes further than that. By saying that bottom-fermented beer may only be made from barley malt, hops, yeast and water, it excludes the use of any other substances. Although the BSG does not owe its origin to a desire to control additives in the present sense (since it derives from early Bavarian laws to control brewing, such as the Reinheitsgebot (Purity Law) adopted in 1516, which subsequently were extended to other parts of Germany, and which it is said were, at any rate in part, aimed at preserving wheat for use as bread) the words used seem wide enough to mean that additives, which may affect the flavour or keeping qualities, or the colour or the taste or the amount of foam on beer must not be used. Similarly, processing aids which assist the malting, enzymes, yeast nutrients and fining agents to remove yeast and protein particles suspended in the beer before sale to the public (other than those falling within Article 9(6) of the BSG) may not be used even if they disappear in the brewing process.

Thus by virtue of Article 10 any drink which includes these, wherever it was made, may not be sold under the designation 'beer' in the Federal Republic. This is not only the *prima facie* meaning of the words. Counsel for the Federal Republic accepted at the hearing that Article 10 prevents the sale as beer of a beverage which includes additives. It seems to me that the case should be approached on that basis.

Article 10 does not prevent the importation and sale as such of products containing other substances than those specified. It does, however, prevent their sale as 'beer'. This means that drinks known as beer made in other Member States (a) from maize or rice, which are commonly used there to make beer, or (b) which contain additives and processing aids (even extraneous enzymes which are needed for rice and maize, though not barley, to start the germination process which leads to the production of the cereal malt) cannot be sold as 'beer' in the Federal Republic. The Federal Republic has sought to argue that this is a 'relative rather than an absolute ban' so that, apparently the argument runs, it does not fall within Article 30. This argument is in my view untenable. A restriction on the use of a particular designation is capable of being a measure having equivalent effect to a quantitative restriction within the meaning of Article 30: Case 12/74 *Commission* v *Germany* [1975] ECR 181; Case 193/80 *Commission* v *Italy* [1981] ECR 3019; Case 27/80 *Fietje* [1980] ECR 3839 and Case 182/84 *Miro* [1985] ECR 3731. A product lawfully made and marketed in one Member State, or traditionally made there, may *prima facie* be sold in the other Member States under the name used in the Member State of manufacture. It is in particular incompatible with Article 30 of the EEC Treaty for national legislation to restrict a generic designation to one

national variety to the exclusion of varieties produced in other Member States (Case 12/74 and Case 193/80, *supra*).

The Federal Republic argued that 'beer' is not a generic term. That again is untenable. The beverage 'resulting from the alcoholic fermentation of an aqueous extract of cereal grains with the addition of hops' is known everywhere in the Community as 'beer'. If support from a dictionary is needed, which in my view it is not, it is to be found for example in the *New Hutchinson Twentieth Century Encyclopedia*, namely 'Beer is strictly a generic term'. The BSG itself indeed is driven to describe the beverages made for export or for consumption on the premises of the brewer, which need not necessarily comply with Article 9(1) and 9(2), as 'beer'. No other word would obviously be appropriate. They are beer just as much as drinks made in compliance with Article 9(1) and (2) are beer. Subject to any other justification for the rule being shown, there is no valid reason why beer from other Member States should have to be marketed under made-up names.

This restriction in Article 10 does not cease to be a quantitative restriction for the purposes of Article 30 merely because it applies to domestic and to imported beer alike. Thus in Case 193/80 *Italy* (vinegar) at paragraphs 19 and 20 the Court said: 'The Italian Government contends ... that the rules in question are not discriminatory because they apply to national and imported products alike. ... The answer to that argument must be that ... even if the system established by the Italian legislation applies to national and imported products alike, its effects are still protective in nature. It has been drafted in such a way that it allows only wine-vinegar to enter Italy closing the frontier to all categories of vinegar of agricultural origin. It therefore favours a typically national product and to the same extent puts various categories of natural vinegars produced in the other Member States at a disadvantage'. It is said that the Court's judgment in the vinegar case does not apply since the real objection to the Italian legislation was that it made it impossible for Member States with no vines to sell domestically produced vinegar in Italy, whereas in this case all Member States can produce barley so that they can comply with the German rules. That is a difference in fact between the two cases, but it does not affect the principle. The German rule precludes the import of beer made from maize and rice for sale as beer in Member States where it is lawfully and traditionally so made and sold.

Can it be said that the only effective restriction on beer is contained in the German law on additives, so that the apparent restriction in Article 10 is of no moment and the Commission's case against the BSG should fail on that account? That law is to be found principally in the LMBG which was adopted in 1974 as part of a wide-ranging reform of the German law on foodstuffs. Article 2 defines additives for the purposes of the law as 'substances which are intended to be added to foodstuffs in order

to alter the characteristics of such foodstuffs or to give them specific properties or produce specific effects'. Article 11 prohibits the use of unauthorized additives in the commercial production or processing of foodstuffs which are intended to be put into circulation and the commercialization of foodstuffs produced in breach of that prohibition. There are, however, excluded from the prohibition (a) 'additives which are eliminated from the foodstuff altogether or to such an extent that they or their conversion products are present in the product for sale to the consumer . . . only as technically unavoidable and technologically insignificant residues in amounts which are negligible from the point of view of health, odour and taste' and (b) enzymes.

By Article 12, regulations may be made (a) 'in so far as is compatible with consumer protection from the point of view of technological, nutritional and dietary requirements' which 'authorize additives generally or for specific foodstuffs or for specific uses' and (b) 'so far as is required for consumer protection' which establish a maximum content for additives and standards of purity for additives, and which regulate the production, the processing or the putting into circulation of certain additives.

By Article 47(1) the importation into the Federal Republic of foodstuffs which do not comply with the provisions of the food legislation in force there is prohibited.

The LMBG was adopted as part of the Law on the General Reform of Foodstuffs Provisions (Gesetz zur Gesamtreform des Lebensmittelrechts). Under Chapter 4 of the transitional and final provisions of that law (BGBl 1974 I, p. 1963) the Federal Minister is empowered to repeal, *inter alia*, Article 9(1) to (8) and (11) and Article 10(1) and (2) of the BSG together with certain articles of the implementing provisions of the BSG. This, however, has not been done.

Under the LMBG, authorizations have been granted for the use of additives generally by the ZZulV of 1977, as now replaced in 1981, and regulations have been made dealing with specific foodstuffs such as meat, fruit juice and fruit syrups and wine. No such regulation has been made in respect of beer.

It seems clear that the BSG cannot be regarded as being made under Article 12 of the LMBG or that it is a mere application of the ZZulV. In the way they treat the basic raw material, enzymes, additives which are present only in negligible quantities and which are technically inevitable and technologically ineffective residues, and in respect of designation, the two sets of statutory provisions are different. It seems to me that the restriction in the BSG is quite independent of the restrictions in the LMBG. In some respects, as indicated, it is more stringent. It cannot be accepted that the BSG is either not a restriction or that it is one which is so insignificant in relation to restrictions adopted in the LMBG that the BSG is to be disregarded. The LMBG does not, therefore, provide any answer to the claim relating to the BSG on the basis that the LMBG is the effective restriction and the BSG a merely incidental restriction as to designation. The BSG and the LMBG contain their several restrictions.

It must, however, still be considered whether the restriction contained in Article 10 of the BSG is justified on the grounds of the protection of health of humans under Article 36 of the Treaty or under the

Court's decision in *Cassis de Dijon* (Case 120/78 *Rewe-Zentrale* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) where at paragraph 8 the Court accepted that 'in the absence of common rules relating to the production and marketing of alcohol . . . it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory' and that 'obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those 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'. The onus is on the Member State setting up the justification of necessity to prove it (Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraph 40).

In the pre-litigation correspondence the Federal Republic relied on mandatory requirements relating to the protection of health to justify the restrictions in the BSG. At the hearing it expressly abandoned any such contention. It was plainly right to do so. The absolute prohibition on the use of rice and maize cannot be justified on this ground, despite suggestions that rice is not always properly washed and despite references to illnesses caused by the use of millet in the past. Nor, if it is correct to read Article 9 as banning all additives and processing aids, including enzymes, can such a blanket prohibition be justified when some relevant additives are in any event allowed in the Federal Republic, when special and export beers are or may be exempted from the rules, and when the Additives Law, as will be seen, does not go so far, particularly in relation to wine and many individual foodstuffs.

In the result the only real justification relied on for the BSG was defence of the consumer. German beer drinkers, it is said, regard beer as being only that beverage brewed in accordance with the BSG. They will be misled if other beverages are marketed in Germany as beer.

I do not accept that argument. 'Beer' is a generic term which covers many different kinds of beer as is widely known. The Federal Republic's very insistence on the special nature of its beer goes only to underline the fact that other and different beers exist. These beers can be distinguished, and the German beer consumer sufficiently protected, by adequate labelling. It seems to me to be a complete exaggeration to say that a label on a beer bottle cannot indicate with sufficient clarity that a beer is not ordinary German beer complying with the BSG; it may be a little more difficult if beer is sold by the glass but suitable notices at the place of purchase can be given. It is indeed easier to do this in respect of beer than it is to do it in a canteen in respect of the contents of prepared foods, since beer is commonly

offered for sale and ordered by the name of a specific make or type, that being not infrequently displayed on the tap. The Federal Republic, in my opinion, has plainly not made out its case that Article 10 of the BSG is justified in the interests of consumer protection. Accordingly, I consider that the Commission is entitled to the declaration it seeks in respect of the BSG.

The LMBG raises different questions. It plainly constitutes a quantitative restriction on imports since it either does prevent or is capable of preventing or hindering the importation of beers produced in other Member States all of which, unless specially made to comply with the BSG or which come from Greece, contain additives. The issue is whether the restriction is justified on grounds of the protection of the health of humans within the meaning of Article 36 so as to remove it from the prohibition in Article 30 of the Treaty or whether it is necessary in order to satisfy mandatory requirements relating to the protection of public health within the meaning of the Court's judgment in *Cassis de Dijon*.

The Federal Republic does not suggest that beers made in other Member States and containing additives are in themselves harmful to health. Nor does it say that the particular additives used, taken in the quantities which even heavy beer drinkers were likely to ingest, are in themselves shown to be harmful to health. Its case in a nutshell is that it is, in the present state of Community law and pending full harmonization, for each Member State to decide what additives may be used, in what foodstuffs and in what quantities. There has been in recent years an enormous increase in the number of such additives; governments should seek to reduce them. The better policy, widely accepted if not universally accepted, is that additives should not be used until shown to be harmless, rather than that they should be used unless shown to be harmful. The additives in question even if they cannot be shown to be harmful cannot be shown to be harmless. Even where international, Community and national authorities can agree on what is an acceptable daily intake for such additives, that is the maximum and Member States can insist on a lower quantity being available in the interests of their citizens. Moreover, it is argued, the levels of such acceptable daily intake do not reflect the possible interaction of one additive with another nor their cumulative or global effect, nor do they take into account the effect of such additives when ingested, as here, in alcoholic beverages. Nor do they adequately reflect individual divergencies, allergies, or local conditions. In particular, they do not take account of the fact that in the Federal Republic beer is for many a staple food, accounting on average for some 26.7% of the nutritional intake, at any rate by calories if not by volume, of its male inhabitants. If a person drinks, as is said to be not at all uncommon, 1 000 litres of beer a year, the quantity of additives likely to be ingested is very large, especially if such additives are also to be found in other foods. Moreover, account must be taken of other sources of pollution of the atmosphere, and of food, which may react with additives taken. In any event, additives, it is said, may be suppressed unless they are technologically necessary in the sense that they are 'indispensable to the manufacturing process' of the product concerned. Here, because beer is made in

the Federal Republic with barley malt without the use of additives, they plainly are not technologically necessary. Community law does not in any event justify interference with Germany's internal legislation in this field.

The Commission does not contend that, pending further harmonization, national legislation regulating the use of additives, which leads to goods produced in other Member States being excluded from a particular Member State, is necessarily a breach of Article 30 of the Treaty. It recognizes that additives which are suspect may be banned, that the number of additives authorized in a particular Member State may need to be kept within controllable limits and that the 'spread of additives' over various foodstuffs is a factor to be taken into account. Both in its reply and at the hearing, it accepted that it may be justified to ban certain additives either totally or in certain products.

Its primary case is that this total ban on additives in beer is unjustified in the interests of protecting public health, and is wholly disproportionate; in the alternative it is a disguised restriction on trade between Member States.

Thus, so far as beer is concerned, the Commission accepts that a specific ban on glycyrrhizin may be justified on grounds of public health. What, however, is wrong is that beer containing any of the additives which are either used or authorized in other Member States should be totally banned, not least since in some Member States a small number of such additives are authorized and in others, even if a large number are authorized, it does not follow that they are all used.

As a preliminary point both sides agree that the use of additives and processing aids can only be justified if they are technologically necessary. The Commission, however, takes a more liberal view than does the Federal Republic as to when additives can be said to be technologically necessary. They do not have to be indispensable to the manufacturing process as such. Thus the mere fact that some beer can be made without additives or processing aids does not mean that they are not technologically necessary for others. On this, in my view, the Commission is right. If beer cannot be made from cereals other than barley without additives or processing aids to provoke the germination process then such additives or aids are technologically necessary for that purpose. German beer must, apparently, be drunk within a short period of its being brewed; if the only way to make beer with a longer shelf-life is to use preservatives, they are, in my view, technologically necessary for that purpose. Preferences differ as to colour and flavour of beers; if additives are needed to achieve the desired taste and colour or amount of foam they are technologically necessary for this purpose. That view is consistent with the 'General Principles for the Use of Food Additives' adopted by the ninth session of the Codex Alimentarius Committee (Annex 7(2a) to the Commission's application). It thus seems

to me that, for example, substances needed to assist the malting or the brewing processes or to affect the quality of the beer, emulsifiers, foam stabilizers, flavouring agents and colourants are all capable of being technologically necessary for the making of particular beers even if they are not needed or used in the making of German beer. They satisfy, in the words of the Court's judgment in Case 304/84 *Ministère public* v *Muller* [1986] ECR 1511 at p. 1528 'un besoin réel, notamment d'ordre technologique ou économique'.

In a number of cases the Court has recognized that in the absence of Community harmonization, Member States may, in so far as uncertainties exist in the present state of scientific research, decide what degree of protection of health and life of humans is justified. But this is not an absolute discretion. Member States must be able, and the onus is on them, to justify the restrictions adopted in the interests of protecting health and life. They must exercise their discretion having regard to the Treaty requirements of the free movement of goods and must not adopt measures which are more restrictive than is necessary to attain the legitimate aim of protecting health. Such measures must thus satisfy the general principle of proportionality and in any event must not constitute a means of arbitrary discrimination or a disguised restriction on trade. In Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277 at p. 3290, paragraph 12, the Court, there as elsewhere recognizing the discretion vested in Member States, stressed that the discretion was to be exercised 'having regard . . . to the fact that their freedom of action is itself restricted by the Treaty'.

Thus in Case 174/82 *Sandoz* [1983] ECR 2445, which was concerned with vitamins, the Court considered at pp. 2462-4 that the Council directives dealing with colouring matters and preservatives and the composition and labelling of foods showed that the legislature accepted in principle that it was necessary to restrict the use of food additives to the substances specified 'whilst leaving the Member States a certain discretion to adopt stricter rules'. The principle stated in *Frans-Nederlandse Maatschappij* applied to substances such as vitamins which are not as a general rule harmful in themselves, 'but may have special harmful effects solely if taken in excess as part of the general nutrition, the composition of which is unforeseeable and cannot be monitored. In view of the uncertainties inherent in the scientific assessment, national rules prohibiting, without prior authorization, the marketing of foodstuffs to which vitamins have been added are justified in principle within the meaning of Article 36 of the Treaty on grounds of the protection of public health'. That case has certain parallels with the present one. However, it is to be noted that the Court added: 'Nevertheless the principle of proportionality which underlies the last sentence of Article 36 of the Treaty requires that the power of the Member States to prohibit imports of the products in question from other Member States should be restricted to what is necessary to attain the

legitimate aim of protecting health. Accordingly, national rules providing for such a prohibition are justified only if authorizations to market are granted when they are compatible with the need to protect health'. Moreover, despite the wide discretion, Member States 'must, in order to observe the principle of proportionality, authorize marketing when the addition of vitamins to foodstuffs meets a real need, especially a technical or nutritional one'. In *Van Bennekom* (paragraph 40) the Court added the rider: 'In this connection it is for the national authorities to demonstrate in each case that their rules are necessary to give effective protection to the interests referred to in Article 36 of the Treaty and, in particular, to show that the marketing of the product in question raises a *serious risk* to public health' (emphasis added).

Such a test had been satisfied in the earlier Case 53/80 *Officier van Justitie* v *Kaasfabriek Eyssen* [1981] ECR 409, where serious doubts as to the risk of the consumption of products containing nisin had led to investigations by the Food and Agriculture Organization and the World Health Organization. The risk was not simply in relation to cheese but in relation to global quantities likely to be ingested from all sources even though the studies had not 'enabled absolutely certain conclusions to be drawn regarding the maximum quantity of nisin which a person may consume daily without *serious risk* to his health' (emphasis added). There was sufficient doubt about the substance to justify different rules in the Member States, and, in the instant case, to justify the prohibition of the addition of nisin to home-produced or imported processed cheese.

Similarly, in Case 97/83 *Melkunie* [1984] ECR 2367 the Court stated at paragraph 15 that: 'It appears first of all from the documents before the Court that the presence of active coliform bacteria in a milk product means that there is a risk of pathogenic micro-organisms being present and is therefore a direct indication that the product may be a source of *real danger* to human health' (emphasis added). In those circumstances rules adopted in Member States which lay down a maximum limit were justified even if it could be said that the micro-organisms were present in a quantity which constituted a risk 'merely to the health of some, particularly sensitive, consumers' (paragraph 18).

Again, in Case 94/83 *Officer van Justitie* v *Heijn* [1984] ECR 3263 at p. 3279, the Court proceeded on the basis that: 'It is not disputed that pesticides constitute a major risk to human and animal health'. Council Directive 76/895 of 23 November 1976 (Official Journal 1976, L 340, p. 26) confirmed this: 'Pesticides do not have only a favourable effect on plant production, since they are generally toxic substances or preparations with dangerous side effects' (fifth recital). Hence, since quantities absorbed could not be predicted and since conditions vary from Member State to Member State, national restrictions could be justified in the interests of protecting health. In both that judgment and in Case 54/85 *Ministère public* v *Mirepoix* [1986] ECR 1067, the Court stressed the importance of

reviewing restrictions adopted in the light of subsequent scientific research.

More recently, in *Muller* it was accepted that even if the substance at issue was not harmful in itself there was a threshold of absorption beyond which a risk arose, so that restrictions necessary to protect public health could be imposed nationally, taking account of local eating habits but also taking account of international scientific research, particularly that of the Community committees. In Case 247/84 *Motte* [1985] ECR 3887 the Court accepted, as it had done previously, that national authorities are not barred from requiring a prior authorization for importation merely because use of the product is authorized in the exporting State. Yet, it was held, Member States must authorize colouring matter if that corresponds to a real need in the light of the eating habits in the importing Member State and of health risks assessed in the light of current international scientific research and particularly of the relevant Community committees.

Thus, the factors which the Federal Republic points to are largely legitimate factors — the need to avoid excessive use of additives, the risk of the interaction of one additive with others and with alcohol, the cumulative effect, the risk of allergy. I say 'largely' because at times the argument goes too far. It seems to me disproportionate to seek to justify rules which exclude the whole of society from beer other than nationally produced beer because some additives may constitute a risk for a person who drinks in excess of 1 000 litres of beer a year or for an alcoholic already suffering from cirrhosis of the liver. Accepting that such persons may need protection there are other ways of achieving it, medical advice as to quantum and self-restraint to name only two.

The question remains, however, whether the Federal Republic's case for a blanket ban on additives in beer imported from other Member States measures up to the necessary tests. There is produced the evidence of scientific experts to support the government's case which insists on the importance of restraining additives in respect of which safety cannot be guaranteed; it stresses the inherent dangers of the interaction of one additive with others and the possible dangers to those who are allergic to such additives. This evidence taken overall is, however, by no means uncontested. The Commission's experts conclude that the theoretical risk in the Federal Republic is not substantially greater than that in Belgium, Denmark and Ireland where beer consumption is almost 80% as high as in Germany and where additives are accepted; the hypersensitivity risk is less than that suggested by the government's experts and can to some extent be avoided by adequate labelling. There is no greater risk of interaction between additives than between other items of nutrition. Moreover, it is stressed that scientific research into the effect of additives is at least as extensive and perhaps more

extensive than that undertaken in regard to health risks from other food constituents.

At the end of the day, however, it seems to me that the case has to be judged not on generalities and broad statements of principle but on the concrete factual material produced. The starting point is that none of the additives authorized for use in other Member States is said to be harmful in itself nor is it said that any beer brewed in other Member States is in itself harmful, leaving aside the effect of alcohol. There is no real evidence that the additives in themselves have been shown to interact adversely or that they are subject to suspicion based on concrete evidence. Nor is there any convincing evidence to show that the quantities of each additive likely to be ingested through imported beer is such that, taken with additives in other foods, a real risk to health is created by the acceptable daily intake (ADI) of each additive being exceeded. In my opinion, the Federal Republic dismisses too readily and without producing satisfactory reasons the system of ADIs accepted by the Commission and internationally in respect of some if not all of the additives. It is plain that these ADIs do not guarantee absolute safety, as the Commission's witness accepted, since humans are different from animals used in the laboratory tests and the ADIs do not necessarily reflect varying local conditions or personal habits; yet it is difficult to reject the scientific evidence that 1% of the 'no effect level' of ingestion for laboratory animals is an acceptable figure for human ingestion giving an adequate safety margin, particularly if the Commission is right in saying that ADIs do take account, even to some extent, of accumulation and of the interaction of various additives. The Commission recognizes that this ADI has to be examined in relation to all sources of ingestion and that a Member State may allocate the maximum quantity of each additive allowed in each foodstuff so as to ensure as far as possible that the ADI or other limits accepted where such ADIs do not exist at the international level, are not exceeded. That still does not in the Commission's view justify an absolute ban of all additives, especially when it is not shown that likely dietary patterns will lead to an excess. Even less is it so, in my opinion, if, as is argued in relation to consumer protection, habits in the Federal Republic are so entrenched that there will be consumer resistance to beer with additives so that the amount consumed will be small or at least not predictably large.

The specific additives authorized for beer in other Member States have been set out in a schedule in answer to a question from the Court. Of the 27 listed, all but 7 specific ones (and three cellulose derivatives forming part of an eighth group) are authorized for use in some foodstuffs in the Federal Republic, but banned totally for beer. Thus: item 1, ascorbates, used as antioxidants in the brewing of beer, are authorized in Germany for use in certain kinds of cheese, powdered milk and other food products;

item 3, a colouring agent, is authorized for use in puddings or sweets; item 9, tannic acid, is authorized for fruit juices, jams and wines; item 12, gum arabic, is allowed in chewing gum, cheese preparations, mixed dairy products, wine and other foodstuffs; item 14, carrageenan, is authorized for use in edible ices, cheese preparations and mixed dairy products, fruit juices and wine; item 21, saccharin, is authorized for a number of drinks including top-fermented Einfachbier, as a result of Article 9(11) of the BSG and the ZZulV despite the scientific reserve which is expressed about its use in other countries. All of these and others are excluded from beer, save as to saccharin in the limited way mentioned, though they can be used in other foodstuffs and at least six individual items on that list may be used in wine-making.

Others on the list are apparently very little used, such as item 5, calcium disodium EDTA (authorized in Denmark); item 8, ferrous sulphate (used in the Benelux countries and said to be of no health concern).

There may well be others where there is ground for refusing their use in beer. Thus some doubt may exist as to glycyrrhizin (item 11), reductones (item 20), potassium bromate (item 4), unless as the Commission's experts Dalgliesh and Gry say, it is converted into bromide in the course of brewing, and gibberellic acid (item 10) as to which the parties are at issue and which may well be largely eliminated in the brewing process in any event.

I do not deal with these specific items, and the evidence relating to them, in further detail, partly because it is available to the Court in the schedule, and partly because it does not seem to me to be appropriate in this case for the Court to rule on specific additives. The case has not proceeded in that way. The question is whether the overall ban in the LMBG has been shown to be justified for the protection of health.

Obviously the protection of health by the control of additives is important and, in the absence of Community rules, has to be dealt with by the Member States in the light of conditions prevailing in each State. To give any meaning at all to the free movement of goods, however, there must be some solid justification for restrictions adopted in respect of specific additives. The slogan 'everything can be banned in beer until it is cleared and shown to be harmless both in itself and in relation to other substances ingested' in my view goes too far. Without some real ground for suspicion that is not a valid exercise of the discretion which the Court has recognized Member States to have. The onus is on the Federal Republic to show that the ban on each item used is justified rather than on the Commission to prove that each beer made in other Member States is totally harmless, or that the additives which they contain are indispensable for technological reasons.

In this case it seems to me that there really has not been such an item-by-item examination, not least since no detailed subor-

dinate legislation has been made in respect of beer as it has been in respect of many other foodstuffs and wine.

On the evidence, accordingly, I do not consider that the Federal Republic has made out on solid grounds the 'serious risk' or 'real danger' to public health which justifies this absolute restriction; the generalized arguments as to the need to limit additives do not, in my opinion, make out even a *prima facie* case, when as the Court has so often stressed, the restriction must be seen in the light of the principle of the free movement of goods. Moreover, although the Court has already said that the need for Member States to cooperate in order to facilitate frontier checks, and to have regard to certificates of inspection from other Member States does not prevent a Member State from laying down its own legislation to protect public health (see e. g. *Melkunie*, paragraph 14), it seems to me that in deciding whether such a blanket restriction can really be necessary some regard must be had (a) to the standards accepted in other Member States, where substantial amounts of beer are traditionally consumed without any solid evidence of damage to health through the kind of additives there authorized, and (b) to what is regarded as tolerable by the Community's committees on food and by other international health organizations. This does not mean that the say-so of the exporting State is final; it merely means that it should be taken into account. Nor does it mean, as the Federal Republic argues *in terrorem*, that if an additive is used in one Member State it must be accepted everywhere so that the number of additives in the German diet would extend to thousands or that the lowest standards in the Community must be applied in each Member State. What it means is that each additive must be looked at, both separately and in combination, rather than an absolute block being imposed on an *a priori*, theoretical basis. Whether a restriction in the importing State can be justified in respect of specific additives on the ground of their potential harmfulness, or because it can be shown affirmatively that, combined with other foods, the ADI of a particular additive is likely to cause harm, is a different question which I do not consider falls to be dealt with in the present case.

Even if there were a *prima facie* case for this overall ban, which I do not consider that there is, it seems to me that on the evidence as a whole, and not least the fact that no effort has been made in subordinate legislation to curb specific additives for good reason, this ban is, and certainly has not been shown by the Federal Republic not to be, a disguised restriction on trade or arbitrary discrimination within the meaning of Article 36.

I do not accept the arguments based on existing Council directives, that of 23 October 1962 on colouring matters (Official Journal, English Special Edition 1959-62, p. 279); 64/54/EEC of 5 November 1963 on preservatives (Official Journal, English Special Edition 1963-64, p. 99), 70/357/EEC of 13 July 1970 on antiox-

idants (Official Journal, English Special Edition 1970 (II) p. 429) or 74/329/EEC of 18 June 1974 on emulsifiers, stabilizers, thickeners and gelling agents (Official Journal 1974, L 189, p. 1) under which Member States are obliged to prohibit the use of additives not included in the lists annexed, and under which the use of any listed additive may not be prohibited altogether, though a Member State may not be obliged to permit its use in all foodstuffs. It is right that these leave some discretion to Member States; it must, however, be exercised in the way laid down by the Treaty and the Court's judgments. It is also right that further steps by the Community are contemplated. The Court's judgment, however, cannot await that further harmonization. The present issue has to be decided as the law now stands. I do not consider these directives assist the Federal Republic's case.

Accordingly, in my view, the Commission is entitled:

(a) to a declaration that by prohibiting the marketing of beer lawfully produced and marketed in another Member State, unless that beer complies with Articles 9 and 10 of the Biersteuergesetz, and (if the Court accepts that the issue arises, as in the circumstances I think it would be right to do) in maintaining in relation to beer the absolute prohibition on additives contained in the Lebensmittel- und Bedarfsgegenständegesetz, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the EEC Treaty, and

(b) to its costs of these proceedings.