OPINION OF ADVOCATE GENERAL MISCHO

delivered on 25 February 1999 *

1. Société Critouridienne de Distribution ('Socridis') has brought proceedings against the tax authorities before the Tribunal de Grande Instance de Foix, France, seeking relief in respect of duties paid for the period from May to December 1993. In support of its claim it argues that Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages [1] ('the structures directive') and Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages [2] ('the rates directive'), transposed into French law and applied during the period in question, are invalid because they establish a Community system of taxation which authorises discriminatory and anti-competitive practices indirectly favouring the production of wine over the competing production of beer.

2. The national court, which held that in practice the French provisions adopted in accordance with the two directives result in a rate of tax on beer which is considerably higher than that applied to wine, found that the validity of the two directives was open to doubt having regard to the fact that the Court has held that wine and beer are competing products for the purposes of the second paragraph of Article 95 of the EC Treaty.

3. Since it considered, correctly, that it did not have jurisdiction to resolve that issue, it decided to refer the following question to the Court of Justice for a préliminary ruling:

'Are Council Directives 92/83 and 92/84 on the harmonisation of excise duties invalid from the point of view of the EC Treaty and in particular the second paragraph of Article 95 of the Treaty, in that they

— fix a minimum rate of tax on beer of ECU 1.87 per degree per hectolitre

— whereas they authorise taxation of wine by reference solely to the volume, with a minimum rate of zero,

thus requiring Member States to raise the tax on beer to the said minimum rate and so bringing about the creation of tax

* Original language: French.

1 — OJ 1992 L 316, p. 21.

2 — OJ 1992 L 316, p. 29.

differentials liable to give rise to discrimination as between wine and beer?'

4. It is necessary first to recall the provisions of the two directives underlying the Community scheme that gives rise to the uncertainty expressed by the national court.

5. The structures directive contains a Section I relating to beer and a Section II relating to wine.

6. Article 1 in the section relating to beer provides that:

'1. Member States shall apply an excise duty to beer in accordance with this Directive.

2. Member States shall fix their rates in accordance with Directive 92/84/EEC',

whilst Article 3 provides that:

'1. The excise duty levied by Member States on beer shall be fixed by reference either:

— to the number of hectolitre/degrees Plato,

or

— to the number of hectolitre/degrees of actual alcoholic strength by volume of finished product.

2. In assessing the charge to duty on beer in accordance with the requirements of Directive 92/84/EEC, Member States may ignore fractions of a degree Plato or degree of actual alcoholic strength by volume.

...'

7. Article 7 in the section relating to wine provides that:

'1. Member States shall apply an excise duty to wine in accordance with this Directive.

2. Member States shall fix their rates in accordance with Directive 92/84/EEC',

whilst Article 9 provides that:

'1. The excise duty levied by Member States on wine shall be fixed by reference to the number of hectolitres of finished product.

...'

8. Article 5 of the rates directive provides that:

'As from 1 January 1993, the minimum rate of excise duty on wine shall be fixed:

— for still wine at ECU 0,

and

— for sparkling wine at ECU 0

per hectolitre of product',

and Article 6 thereof that:

'As from 1 January 1993, the minimum rate of excise duty on beer shall be fixed [at]:

— ECU 0,748 per hectolitre/degree Plato,

or

— ECU 1,87 per hectolitre/degree of alcohol

of [the] finished product.'

The grounds to be examined

9. Having regard to the observations that have been submitted to the Court, it is necessary first to define carefully the subject-matter of the question referred for a preliminary ruling. In the grounds of the judgment making the reference the national court specifically states that 'the dispute does not concern the transposition into French law' of the two directives. Therefore, it does not expect the Court to give judgment on the compatibility with Community law of the detailed rules on the respective taxation of beer and wine in France viewed in relation to each other, or, in other words, to state whether or not those detailed rules are contrary to the provisions contained in the second paragraph of Article 95 of the Treaty.

10. The questions it raises concern only the validity of the structures directive and the rates directive which, by fixing a minimum rate of tax on beer of ECU 1.87 per degree per hectolitre while at the same time authorising taxation of wine by reference solely to the volume, with a possible rate of zero, could, in the view of the national court, bring about the 'creation of tax differentials' which are incompatible with the EC Treaty and in particular the second paragraph of Article 95 thereof.

11. As the Court clearly confirmed in *Eurotunnel*,[3] it is for the referring court to identify the grounds of complaint.

12. However, Socridis challenges the validity of the two directives on other grounds. It considers that they infringe the Treaty in four respects:

(i) they adopt a harmonisation technique and courses of action in respect of wine and beer that infringe Article 95 of the Treaty and, more precisely, the second paragraph thereof;

(ii) they are contrary to the general principle of proportionality in that they impose and legitimise tax differentials between wine and beer which are disproportionate to the dissimilarity which may objectively be acknowledged to exist between those two competing types of fermented beverage;

3 — Case C-408/95 *Eurotunnel and Others* v *SeaFrance* [1997] ECR I-6315, paragraphs 33 and 34.

(iii) they infringe Article 99 of the EC Treaty in that, in one essential respect, they do not approximate but, on the contrary, increase the disparities in taxation between the Member States and consequently the obstacle to trade constituted by such disparity;

(iv) the reasons stated for them are flawed and consequently they do not satisfy the requirements of Article 190 of the EC Treaty.

13. Whereas the first ground corresponds very closely to that mentioned by the referring court, the connection between the other three and the doubts raised by the national court appears to be less obvious. Nevertheless, as regards the second ground the connection seems to me to be possible since the introduction of differential taxation is normally a matter for Article 95 of the Treaty, the provision in the light of which the national court has raised doubts.

14. As regards the third ground, the matter is considerably more complex, because at first sight it appears to challenge the very nature of measures of approximation for the purposes of Article 99 of the Treaty, which forms the legal basis of the two directives. It is a challenge that the referring court does not venture to make and which would be difficult to ascribe to it for the simple reason that it raises questions as to the validity of the two directives from the point of view of the EC Treaty and not solely from the point of view of the second paragraph of Article 95 thereof.

15. However, I do not think it appropriate to rule out examination of that ground raised by Socridis, since it may be regarded as another way of approaching the question whether the two directives authorise the tax differentials between competing products which has given the national court cause for concern.

16. That leaves the fourth ground, the alleged failure to state reasons, to which the referring court makes no reference at all. Need we consider it? We certainly should if the settled case-law of the Court, as summarised by Advocate General Tesauro in his Opinion in *Eurotunnel*, is to be followed. According to that case-law, which the Advocate General did not suggest should be changed, although in references for a preliminary ruling the Court must consider the validity of acts of secondary law solely in the light of the grounds mentioned by the national court, there is an exception based on the existence of grounds for invalidity which the Court may raise of its own motion, including infringements of essential procedural requirements such as failure to state reasons.

17. Since the Court may examine that failure of its own motion, it must certainly be considered where a plaintiff in the main proceedings refers to it in its observations. However, is that case-law still relevant? The question arises because in *Eurotunnel* the Court did not, despite the fact that the company and the Advocate General requested that it should do so, consider at any stage whether or not Article 190 had been infringed before reaching the conclusion that the questions referred by the

national court had disclosed nothing to affect the validity of the contested measures. Was that a departure from precedent that has to be taken as read? To me it would appear premature to state that that is the case. Therefore, I will take the customary approach and also examine the fourth ground of invalidity which Socridis claims to have found.

Infringement of the second paragraph of Article 95 of the Treaty

18. As regards the validity of the two directives in respect of the requirements laid down in Article 95 of the Treaty, I consider that the case-law of the Court regarding the implications of that article for the detailed rules on the taxation of beer and of wine respectively should be taken as the starting point for the relevant reasoning. It follows from that case-law firstly that beer and wine are not similar products for the purposes of the first paragraph of Article 95 of the Treaty and consequently the requirements laid down in that provision are not applicable to differential taxation between those two beverages. On the other hand, wine and beer are competing products for the purposes of the second paragraph of Article 95 and therefore the Member States may not, in their respective tax systems, favour one, which is produced domestically, to the detriment of the other, which is imported from other Member States.

19. Secondly, it follows that not all types of wine and all types of beer may be regarded as being in competition, because they cannot all be used to substitute one another. That is because the Court has ruled, most recently in *Commission* v *Belgium*, [4] that 'only commonly consumed wines, which in general are cheap wines, have enough characteristics in common with beer to constitute an alternative choice for consumers and may therefore be regarded as being in competition with beer for the purposes of the second paragraph of Article 95 of the Treaty'.

20. Thirdly, it is apparent from the case-law of the Court that

'the second paragraph of Article 95 of the EEC Treaty does not preclude the application of a system of taxation which differentiates between certain beverages on the basis of objective criteria. Such a system does not favour domestic producers if a significant proportion of domestic production of alcoholic beverages falls within each of the relevant tax categories'. [5]

21. Finally, it cannot be emphasised too strongly that the limits which Article 95 of the Treaty imposes on the Member States as regards the structuring of their tax systems exist only in so far as they relate to the taxation of products imported from

4 — Case 365/85 *Commission* v *Belgium* [1987] ECR 3299, paragraph 11.

5 — Case 243/84 *John Walker & Sons* v *Ministeriet for Skatter og Afgifter* [1986] ECR 875, paragraph 23.

other Member States. As the Court has pointed out on many occasions: 'The abovementioned provisions [of Article 95] supplement, within the system of the Treaty, the provisions on the abolition of customs duties and charges having equivalent effect.' [6]

22. Now that that has been made clear, I can compare the rules laid down in the two directives with those laid down in the second paragraph of Article 95, because the fact that they were adopted on the basis of Article 99 of the Treaty cannot make them immune to the rules contained in Article 95 since all primary law prevails over all secondary law. With regard to tax harmonisation those principles were reiterated unambiguously in *Schul*. [7]

23. However, at the same time there also is no doubt, as the Council and Commission have made clear, that the two directives would have to be considered invalid only if they *required* the Member States to adopt transposition measures which were incompatible with the requirements laid down in the second paragraph of Article 95, that is to say which put them in a situation where the proper implementation of the directives would automatically put them at odds with that article. Is that in fact the case?

24. In order to answer that question it is necessary to assume that the essential obligation imposed by the two directives is to impose a minimum rate of excise duty on beer.

25. However, even if a Member State has to consider carefully the manner in which it is to implement the two directives, so as not to give rise to suspicion that it is favouring domestic production, having regard to the fact that its domestic production is considerable as regards one of the beverages but non-existent or negligible as regards the other, it is impossible to see how the fact that it has to impose a minimum rate of excise duty on beer which varies according to alcoholic strength would prevent it from establishing a relationship between the taxation of wine and that of beer which precluded any protection of domestic production.

26. It has thus a considerable margin of discretion: provided that it applies the methods of taxation laid down in the two directives and does not fix for beer a rate below the level imposed, it may fix the rate of excise duty freely for both wine and beer.

27. The constraints imposed on it by the two directives are not in any way such as to prevent it from taking into account, when fixing actual rates of excise duty, the competition between certain categories of wine and certain categories of beer, the existence of which has been acknowledged by the Court.

6 — Case 168/78 *Commission* v *France* [1980] ECR 347, paragraph 4.

7 — Case 15/81 *Gaston Schul Douane Expediteur* v *Inspecteur der Invoerrechten en Accijnzen, Roosendaal* [1982] ECR 1409.

28. However, Socridis has claimed that even if it must be acknowledged that the two directives do not make it impossible for the Member States to comply with the second paragraph of Article 95, they are nevertheless invalid because they 'legitimise' possible infringements of that provision.

29. That is because it considers that 'since the minimum rates of ECU 0 for wine and ECU 1.87 per degree per hectolitre [for beer] are fixed by the Council, the resultant minimum differential between wine and beer of 4° (748%) will seem legitimate. The Member States will not consider that such a minimum differential can, in itself, be incompatible with the Treaty as it has been accepted unanimously by the Council. Consequently, any lower differential will be regarded as legitimate. It goes without saying that similar differences will, by the same token, be deemed to be compatible with the Treaty where they concern rates of taxation above the minimum rates. It is clear that such differentials double, treble or even quadruple the maximum differential permitted by the Court in Case 170/78'.

30. In that context Socridis refers to Case 170/78 *Commission* v *United Kingdom*, [8] in which the Court compared the duty levied on wine and beer respectively in the United Kingdom and concluded that the differential found made the taxation on wine excessive. However, in that case the Member State concerned was not, to all intents and purposes, a wine producer. The Court actually ruled as follows:

'It is clear, therefore, following the detailed inquiry conducted by the Court — whatever criterion for comparison is used, there being no need to express a preference for one or the other — that the United Kingdom's tax system has the effect of subjecting *wine imported from other Member States* to an additional tax burden so as to afford protection to *domestic beer production*.' [9]

31. In that judgment the Court did not, therefore, lay down the requirement that there be an *objective differential*, to be maintained by all Member States and in all circumstances, between the two products in question, but addressed the specific question of the additional tax burden on imported wine where no domestic production existed.

32. It was also in the context of a clearly defined situation well known to it, that is, the situation in which all the Member States, without exception, themselves produce a significant proportion of their beer consumption, that the Council adopted the two directives in question. Having regard to the case-law of the Court it was justified, in the light of that situation, in taking the view that even if a Member State applied in full the differential resulting from the two directives, that is to say zero duty for wine

8 — Case 170/78 *Commission* v *United Kingdom* [1983] ECR 2265.

9 — Emphasis added.

and a rate of ECU 1.87 per degree per hectolitre for beer, it would not be indirectly protecting its domestic wine production (in so far as it had any).

33. On the other hand, by 'leaving open' a facility for the Member States to tax the two products at a higher level the Council neither intended, nor was able, to tell the Member States that henceforth they were free to apply any rate, in particular to wine, if they were not wine producers.

34. Furthermore, for even more general reasons, I cannot agree that the two directives have the effects which Socridis alleges.

35. It effectively claims that wherever a directive leaves the Member States a large degree of latitude as regards implementation, as is the case here, the simple fact that they might infringe, by using that latitude improperly, a provision or a principle of Community law which they are required to observe in all circumstances invalidates that directive.

36. The particular feature of the directive as a legislative device is precisely that it leaves the Member States a certain discretion, that is to say the option for each to adopt, to the extent to which it is concerned and in the light of the situation in its country and the constraints, in particular the legal constraints, with which it is confronted specifically, the measures which it considers to be the most appropriate.

37. In my view there is no possibility at all that the improper use which a Member State makes of the latitude left to it by a directive might rebound on that directive so as to undermine its validity.

38. Moreover, it should be noted in that respect that when the Member States implement directives they do so under the supervision of the Commission, which, in accordance with the task conferred on it by Article 155 of the EC Treaty, may bring proceedings for failure to fulfil obligations under the Treaty if it considers that such implementation has led to the infringement of an obligation or a rule of Community law with which the Member States are required to comply in any event.

39. It is difficult to imagine the Court accepting in such proceedings a ground of defence whereby the Member State against which proceedings had been brought sought refuge in the freedom granted to it by the directive. It is wrong, therefore, to claim that the structures directive and the rates directive authorise infringement of the second paragraph of Article 95 by a Member State.

40. The relationship between the two directives and the second paragraph of

Article 95 has, in the various observations that have been submitted, also been considered from a different angle, that of whether differential taxation is permissible and the conditions to which the case-law of the Court subjects it. There appears to me to be no need to dispute the fact that the structures directive and the rates directive lay down detailed rules on the differential taxation of beer and wine and that those rules appear to be more favourable to wine than to beer as regards both the method of calculating duty and the minimum rates of such duty.

41. On the other hand, what may be disputed is the true nature of the problem posed by that differential taxation, which appears to be more favourable to wine. As I have stressed, all the Member States are beer producers but only some of them are wine producers and therefore an additional tax burden on beer does not necessarily give domestic production an advantage over imported production, which is the decisive criterion in respect of the second paragraph of Article 95.

42. In point of fact, as the proceedings brought before the Court have demonstrated, the real risk of an additional protective tax burden applies to wine, in the case of States that produce only beer.

43. As regards the permissibility of differential tax arrangements note should be taken, in addition to the judgment in *Walker*, cited above, of the judgment in *Essevi and Salengo*,[10] which states that

'In its present stage of development Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law if it pursues objectives of economic policy which are themselves compatible with the requirements of the Treaty and its secondary legislation and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products' (paragraph 21).

44. The judgment in *Commission* v *France*[11] confirms that case-law in all respects.

45. When examined in the light of that case-law, tax arrangements which differentiate between beer and wine by favouring the latter are perfectly justifiable. Not only are the raw materials used (grapes for one and hops and cereals for the other) and the production processes employed (craft processes in one case and industrial processes in general in the other) radically different, but the place of wine production and

10 — Joined Cases 142/80 and 143/80 *Amministrazione delle Finanze dello Stato* v *Essevi and Salengo* [1981] ECR 1413.

11 — Case 196/85 *Commission* v *France* [1987] ECR 1597, paragraph 6.

brewing respectively in the economies of the Member States is not comparable. Even in the Member States where wine is not produced it is difficult to attach to the brewing industry the same socio-economic importance as is attached to wine production in certain other Member States.

46. There is also, of course, the fact that the disposal of wine production, and in particular ordinary wines, the very wines in respect of which it has been possible to identify competition with certain beers, poses serious problems within the context of the common agricultural policy and will continue to do so in years to come. Moreover, as has been emphasised in the observations that have been submitted, the cost of beer production is always considerably lower than that of wine in respect of both ordinary and superior products.

47. I do not, of course, conclude from that that an additional tax burden must necessarily be placed on beer in comparison with wine — simply that the additional tax burden may be based on sound reasons and, furthermore, that the statistical evidence that has been adduced demonstrates that the requirements relating to the taxation of beer in the two contested directives are certainly not such as to compromise the competitive position thereof even if a Member State makes use of the option to refrain from levying excise duty on wine.

48. It should not be forgotten either that excise duty is not the only tax levied on wine and beer and that in order to assess the competition between those two beverages as far as consumers are concerned it is certainly necessary to take into account the burden of VAT on wine which, having regard to the higher price of the latter, places it at a disadvantage and reduces the advantage that it may enjoy in terms of excise duty.

49. Therefore, I conclude that the differential taxation which the two directives tolerate, but by no means impose — since it is for each Member State to provide for taxation which, in its specific situation, is not protective — cannot be regarded *per se* as constituting an infringement of the principle of proportionality.

Infringement of Article 99 of the Treaty

50. However, Socridis maintains that there is an infringement of the principle of proportionality at another level — that of the exercise by the Council of its powers under Article 99 of the Treaty. After reiterating that observance of the principle of proportionality is determined by ascertaining whether or not the measures implemented are appropriate for the purpose of achieving the intended aim or go beyond what is necessary to attain it, it states that the two directives have not gone far enough towards bringing about harmonisation

because they 'fall far short of what was necessary to bring about the minimum harmonisation of taxation between wine and beer necessary to be compatible with the second paragraph of Article 95 and the principle of proportionality'.

51. I consider that that criticism is based on a misunderstanding because the objective pursued by the Community legislature when it adopted the two directives was not to approximate the taxation of beer and wine. The aim of those directives was by no means to implement Article 95, which confers no power on the Council to that effect as responsibility for its application lies with the Member States alone. In adopting them the Council intended, by using the powers specifically conferred on it by Article 99 of the Treaty, to approximate Member States' legislation on excise duties, which it regarded as necessary to ensure the establishment and the functioning of the internal market within the time-limit laid down in Article 7a of the EC Treaty.

52. The aim in adopting the two directives was not to resolve problems relating to competition between different types of beverage or to put an end to tax discrimination in certain Member States, but to ensure, in the best manner possible, the free circulation of various types of beverage between the Member States in view of the establishment of the internal market. Moreover, that was precisely what was done, as the two directives do not comprise solely the provisions contested before the Court. They impose with regard to many problems raised by excise duties on alcoholic beverages rules which simplify that area of taxation considerably. It is otiose to list them and would take us too far from the question put to the Court. However, to see the progress that those directives have permitted it is sufficient to refer to the very detailed provisions that they lay down as regards the various reductions in duty which certain products may enjoy.

53. To allege that the Community legislature has failed to approximate the excise duties levied on wine and beer respectively is to misunderstand the powers that Article 99 confers on it. The Council may act under Article 99 only to adopt provisions necessary to establish the internal market. It does not, as it has quite rightly reminded us, grant an unconditional or unlimited power to harmonise excise duties.

54. However, that constraint does not preclude the existence of a discretionary power, which the Council exercised when it considered that the proposals which the Commission had put to it in, first in 1987 and then in 1989, went beyond what was required for the establishment of the internal market. That was generally true, if credence is to be given to the relevant report drawn up in 1995 by the Commission, as it is required to do, to review the first two years of the application of the harmonised system.

55. It is certainly permissible to profess a different opinion, taking the view that the harmonisation achieved has certainly been timid and that the internal market still has shortcomings as regards products subject to excise duties.

56. However, the Court's task is not to enter into a debate on that subject but to rule on the question whether the two directives are invalid under Article 99, on which they are based. In my view that question must clearly be answered in the negative, since there is no indication that the Council exceeded its powers under Article 99 by adopting the provisions referred to in the question raised by the national court.

The duty to state reasons

57. That leaves the final point raised by Socridis, which I will examine briefly, relating to the statement of reasons for the two directives as regards the provisions they lay down on the structure and rate of excise duty on beer and on wine. It is difficult to deny that the statement of reasons is elliptical. However, an elliptical statement of reasons is not necessarily an inadequate one, still less an absent one. It should be borne in mind that it is the reasons stated for directives adopted by the Council and which are addressed solely to the Member States that are at issue here and that the Court has always taken into account, when deciding whether or not the reasons stated are sufficient, the fact that the person to whom a measure is addressed could not misunderstand the grounds for a decision because it was closely involved in the process from which it stemmed. [12] Furthermore, sight must not be lost of the fact that the Court has never required that all the technical aspects of a measure laying down complex rules should be the subject of a specific and detailed statement of reasons. [13] It is not possible, moreover, to ignore the fact that the two directives are mutually dependent and dependent on other directives, in particular Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, [14] and consequently may not be read in isolation as that might give rise to confusion.

58. Finally, it must be acknowledged that the use of expressions such as 'whereas... should' or 'whereas it is appropriate' is more frequent than is imagined in the statement of reasons for Community legislative acts and that the validity of many of such acts could be called into question under Article 190 of the Treaty if such a statement of reasons were regarded as insufficient.

12 — See, for example, Case 819/79 *Germany* v *Commission* [1981] ECR 21.

13 — See, for example, Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755.

14 — OJ 1992 L 76, p. 1.

59. When the Community legislature adopts provisions of a general nature pursuant to a power to harmonise coupled with a broad discretion it would be unreasonable, to my mind, to require it to accompany each measure it adopts with a statement of reasons comprising both a justification of the contents thereof and a refutation, in advance, of criticism from all those whom that measure does not suit because it fails to promote their interests.

60. The statement of reasons for a harmonisation directive and that for a decision declaring State aid incompatible with the Treaty or imposing a fine on an undertaking for infringing competition rules cannot be assessed by the same standard.

61. Therefore, I propose that the complaint of failure to state reasons in the two directives should not be upheld.

Conclusion

62. Since none of the complaints submitted to the Court for examination appears to me to be such as to affect the validity of the contested provisions of the structures directive and the rates directive, I propose that the Court answer the question referred by the Tribunal de Grande Instance de Foix as follows:

Consideration of the question referred for a preliminary ruling has disclosed nothing to affect the validity of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages and Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages.