OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 1 July 1999 *

1. This reference by the Verwaltungsgerichtshof (Administrative Court), Austria, for a preliminary ruling concerns the interpretation of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment ('the Sixth Directive'). [1] The first question is whether this directive prohibits the imposition by national legislation of a duty on the consumption of ice cream and beverages. The provision referred to in this connection is Article 33 of the directive. The second question is whether 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 ('the excise duty directive') [2] precludes the national duty. And the third question is whether the national provisions at issue are contrary to Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC) concerning State aid.

The relevant Community law

2. Article 33 of the Sixth Directive [3] provides:

'1. Without prejudice to other Community provisions, in particular those laid down in the Community provisions in force relating to the general arrangements for the holding, movement and monitoring of products subject to excise duty, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided however that those taxes, duties or charges do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

2. Any reference in this Directive to products subject to excise duty shall apply to

* Original language: Italian.

1 — OJ 1977 L 145, p. 1, as last amended by Council Directive 98/80/EC of 12 October 1998 (OJ 1998 L 281, p. 31).

2 — OJ 1992 L 76, p. 1, as last amended by Council Directive 96/99/EC of 30 December 1996 (OJ 1996 L 8, p. 12).

3 — As amended by Article 1(23) of Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1).

the following products as defined by current Community provisions:

— mineral oils,

— alcohol and alcoholic beverages,

— manufactured tobacco.'

3. Article 3 of the excise duty Directive provides:

'1. This Directive shall apply at Community level to the following products as defined in the relevant Directives:

— mineral oils,

— alcohol and alcoholic beverages,

— manufactured tobacco.

2. The products listed in paragraph 1 may be subject to other indirect taxes for specific purposes, provided that those taxes comply with the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.

3. Member States shall retain the right to introduce or maintain taxes which are levied on products other than those listed in paragraph 1 provided, however, that those taxes do not give rise to border-crossing formalities in trade between Member States.

Subject to the same proviso, Member States shall also retain the right to levy taxes on the supply of services which cannot be characterised as turnover taxes, including those relating to products subject to excise duty.'

The Austrian provisions

(a) The national legislation

4. Under Paragraph 3 of the 1948 Finanz-Verfassungsgesetz (Constitutional Law on Financial Matters, 'the F-VG')[4] the division of taxation powers and allocation of tax revenue are governed by federal legislation. On beverage duty, the 1993 Finanzausgleichsgesetz (Revenue Equalisation Law, 'the FAG')[5] provides (at Paragraph 14.1.8 and 14.2) that exclusively municipal taxes include those levied on the 'supply for consideration of ice cream (including fruits processed therein or added thereto) and of beverages, in each case including the containers and accessories sold therewith, unless such supply is made for the purposes of resale as part of a continuous activity' and that 'exemption shall be made in respect of supplies within the meaning of Paragraph 10.3.1 of the 1994 Umsatzsteuergesetz' (Law on Turnover Tax, 'the UStG'),[6] and specifically sales of 'wine, where the power of disposal is transferred at the place of production and no transport or forwarding are involved, and in respect of supplies of milk.'

5. Under Paragraph 15.3.2 of the 1993 FAG, municipalities may, by decision of the municipal council and without prejudice to any more extensive authorisation by the legislature of the *Land*, impose the aforementioned taxes at the rate of 10% of the selling price in the case of ice cream and alcoholic beverages and at the rate of 5% of the selling price of non-alcoholic beverages. (For the purpose of this provision, non-alcoholic beverages are beverages with an alcohol content of 0.5% or less.) The FAG exempts from these taxes supplies for immediate consumption by passengers and the crew of means of transport on condition that the journey undertaken is not mainly within the same municipality.

6. Paragraph 15.4 of the 1993 FAG[7] provides that the selling price must be determined in accordance with the provisions of the UStG and that it does not include turnover tax, service charge and beverage duty.

(b) The legislation of the Land of Vienna

7. The Wiener Getränkesteuergesetz[8] (the 1992 Viennese Law on Beverage Duty, hereinafter 'Wiener GStG') authorises the municipalities to impose a tax on the

4 — BGBl. No 45/1948, as last amended by the Federal Constitutional Law BGBl. No 201/1996.

5 — BGBl. No 30/1993, as amended by the Federal Law published in BGBl. No 853/1995.

6 — BGBl. No 663.

7 — In the new version of the BGBl. Nos 959/1993 and 853/1995.

8 — Vienna LGBl. No 3/1992.

supply for consideration of ice cream, including fruits processed therein or added thereto and of beverages, in each case including the containers and accessories sold therewith.

8. The 1992 Regulation on Beverage Duty for the city of Vienna [9] (hereinafter 'Wiener GStV'), which is based on the authority cited above and on Paragraph 15.3.2 of the 1993 FAG, imposed duty on the supply for consideration of ice cream and beverages subject to the conditions specified in Paragraph 14 of the 1993 FAG. Paragraph 2 of this regulation specifies the transactions exempted from the duty. [10] These exemptions are additional to that provided for by Paragraph 1 for sales at the place of production. The amount and the method of calculation of the duty are governed by Paragraph 15.3.2 of the 1993 FAG. The duty is at the rate of 10% of the selling price in the case of ice cream and alcoholic beverages and at the rate of 5% of the selling price in the case of non-alcoholic beverages.

9. For the definition of the price, the Wiener GStV makes reference to the 1972 Austrian Law on turnover tax, [11] which provides that the price includes in particular the value of the usual accessories and of the containers sold with the products and, in the particular cases of ice creams and beverages containing fruit, the value of the fruit irrespective of its quantity and value as a proportion of the quantity and value of the ice cream or beverage; on the other hand, the sale price does not include turnover tax, service charge and beverage duty.

(c) The legislation of the Land of Upper Austria

10. In the *Land* of Upper Austria the duty on beverages and ice cream is governed by the 1950 Law of Upper Austria on Municipal Beverage Duty (hereafter the 'Oö GStG'). [12]

This law also incorporates almost entirely the provisions of the FAG as to the transactions which are dutiable, and the amount and method of calculation of the duty. As to the scope of the duty, the Oö GStG states that the municipal duty is levied on the supply for consideration of beer, wine, beverages similar to wine and

9 — *Amstblatt* 6/1992, amended version *Amstblatt* 44/1992 and *Amstblatt* 50/1994.

10 — For example, sales in hospitals and clinics as part of the normal provision for patients, or on medical prescription, are exempted.

11 — As amended by the Federal Law published in the BGBl. No 620/1981.

12 — LGBl. of the *Land* of Upper Austria No 15/1950, as amended by the Law of the *Land* published in LGBl. No 28/1992.

those with a wine base, sparkling wine, beverages similar to sparkling wine, grape juice, brandy or spirit beverages, mineral water (in limited quantities), prepared beverages such as cocoa, coffee and tea ready to drink, and also other vegetable extracts (extracts, fruit juices), and iced coffee and iced chocolate drinks. This duty is levied on the sale of these products in restaurants, brasseries, cafés, cake shops, public houses, delicatessens and other places where such drinks are available for consumption on the premises or outside, except for sales (referred to in Paragraph 14 of the FAG cited above) at the place of production where no transport or forwarding is involved, or sales for immediate consumption by passengers and the crew of means of transport on condition that the journey undertaken is not mainly within the same municipality.

The facts, the main proceedings and the questions submitted for a preliminary ruling

11. The Evangelischer Krankenhausverein Wien (Protestant Hospital Society, Vienna) ('the EKW') operates a hospital cafeteria. By decision of 6 December 1996, of the Abgabenbehörde Wien (the tax recovery authority in Vienna), taken pursuant to the Wiener GStV, the EKW was ordered to pay ATS 309 995 in respect of beverage duty on sales between January 1992 and October 1996. The administrative complaint lodged by the EKW against that decision was dismissed by the Abgabenberufungskommission (the Tax Appeals Commission). EKW brought proceedings before the Verwaltungsgerichtshof against that decision dismissing its complaint, in which it argued that the average duty was in the nature of a turnover tax and was therefore contrary to Article 33(1) of the Sixth Directive. The Tax Appeals Commission disputed this, denying that the duty in question had the characteristics of a turnover tax and arguing also that, in any event, the duty fell within the scope of the derogation in Article 3(2) of the excise duty directive, because the amounts collected were used for a wide range of specific purposes and, in particular, to reinforce the financial independence of the local authorities and to compensate for the costs they incur in meeting the demands of tourism, as well as to discourage the sale of alcoholic beverages by taxing them more heavily than non-alcoholic beverages.

12. Wein & Co. HandelsgmbH, formerly Ikera Warenhandelsgesellschaft mbH ('Wein & Co.'), is a wine-trading company established in Leonding, Upper Austria. The municipal authorities ordered this company, too, to pay a certain sum of money by way of duty on beverages sold between 1 December 1994 and 31 March 1995.

Wein & Co. challenged that decision before the Oberösterreichische Landesregierung. Its application was rejected. Before the Verwaltungsgerichtshof it also contested the latter decision, arguing that the duty

was similar to a turnover tax and thus prohibited by Article 33 of the Sixth Directive. It also emphasised that the duty in question did not serve any specific purpose and could not therefore be brought within the derogation provided by Article 3(2) of the excise duty directive. Wein & Co. argued, lastly, that the duty in question was contrary to Article 95 of the EC Treaty (now, after amendment, Article 90 EC) to the extent that the exemption provided for in the applicable legislation benefitted Austrian undertakings exclusively.

13. The defendant authority contested those submissions, advancing the same arguments as those developed by the Tax Appeals Commission. It also claimed that the European Commission had already recognised that the Austrian municipal duties in question were compatible with Article 33 of the Sixth Directive because it had decided not to initiate an infringement procedure against Austria pursuant to Article 169 of the EC Treaty (now Article 226 EC) with regard to the maintenance of this duty.

14. The national court decided to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Does Article 33(1) of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (77/388/EEC) preclude the maintenance in force of a duty on the supply for consideration of ice cream (including fruits processed therein or added thereto) and beverages, in each case including the containers and accessories sold therewith, the rate of such duty being 10% of the consideration in the case of ice cream and alcoholic beverages and 5% of the consideration in the case on non-alcoholic beverages, where the consideration for the purposes of the relevant provisions of turnover tax law is measured in such a way as to exclude value added tax, service charges and beverage duty?

2. Do Article 3(2) or the second sentence of Article 3(3) of Council Directive 92/12/EEC (excise duty directive) of 25 February 1992 preclude the maintenance in force of a duty such as described in question 1?

3. Does Article 92(1) of the EC Treaty preclude a provision exempting the sale of wine direct from the vineyard from beverage duty?'

The first question

15. By its first question, the national court is essentially asking the Court of Justice whether Article 33 of the Sixth Directive precludes the introduction and maintenance by a Member State of a duty on the consumption of beverages and ice creams of the type described in the question.

I would recall that Court has consistently held that Article 33 does not preclude the introduction or maintenance of taxes in parallel to VAT [13] and that the contrary is evident from this article, namely that Community law permits the existence of systems of taxation which are parallel to VAT. [14] However, the power of Member States to introduce or maintain such other indirect taxes is conditional upon their not having the character of turnover taxes and this, as the Court has made clear, 'is to prevent the functioning of the common system of VAT from being jeopardized by the introduction of taxes, duties or charges levied on the movement of goods and services in a way comparable to VAT'. [15] It may be added in that, called upon to rule on what should be 'characterised as turnover taxes', the Court has stated that 'taxes, duties and charges must in any event be regarded as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT', without its being necessary that they should be like VAT in every respect. [16]

16. To resolve the question it is thus necessary, first, to identify the essential characteristics of VAT on the basis of the relevant Community legislation and, secondly, to verify whether these characteristics are to be found in a duty of the type to which the question refers. It will then be a matter for the national court to establish, on the basis of what emerges from this inquiry if the duty at issue can be 'characterised as a turnover tax' and thus falls within the prohibition in Article 33 of the Sixth Directive.

17. On several occasions the Court has ruled on the essential characteristics of VAT. According to settled case-law, [17] these characteristics may be summarised as follows: (a) VAT applies generally, that is to say, to transactions relating to the supply of goods or services (Article 2 of the Sixth Directive); (b) VAT is proportional to the

13 — Case C-73/85 *Kerrutt* [1986] ECR 2219, Cases 93/88 and 94/88 *Wisselink and Others*, [1989] ECR 2671, and Case C-109/90 *Giant* [1991] ECR I-1385.

14 — *Kerrutt*, at paragraph 22; *Wisselink and Others*, at paragraph 14; *Giant*, at paragraph 9, and Case C-318/96 *SPAR* [1998] ECR I-785, at paragraph 21.

15 — Case C-200/90 *Dansk Denkavit and Poulsen Trading* [1992] ECR I-2217, at paragraph 11. This principle was also laid down in *Giant*, *Wisselink and Others* and *Kerrutt* cited above, and in Case 295/84 *Rousseau Wilmot* [1985] ECR 3759, at paragraph 16.

16 — *Dansk Denkavit and Poulsen Trading* cited above, at paragraphs 11 and 14.

17 — *SPAR*, cited above; Case C-347/90 *Bozzi* [1992] ECR I-2947; Case C-208/91 *Beaulande* [1992] ECR I-6709; *Dansk Denkavit and Poulsen Trading*, cited above; *Giant*, cited above; *Wisselink and Others*, cited above, and Case 252/86 *Bergandi* [1988] ECR 1343.

price of those goods or services (Article 11 of the Sixth Directive); (c) VAT is charged at each stage of the production and distribution process; (d) VAT is imposed on the added value of goods and services, since the tax payable in respect of a transaction is calculated after deduction of the tax paid in respect of the previous transaction;[18] (e) lastly, VAT can be included in the price of services and goods and the burden of it is thus, as a general rule, passed on to the consumer.

The general applicability of the tax

18. The Commission, the Austrian government and the Tax Appeals Commission maintain that the duty at issue does not have the first of these characteristics, namely that the tax must be of general application, because it applies to the sale of only two products — beverages and ice cream. The Tax Appeals Commission points out in addition that the municipalities are not obliged to impose the duty at issue but merely have the option to do so, and that the fact that all have in fact done so does not alter its optional nature.

19. On the other hand, the plaintiffs claim that the duty at issue applies to a large number of products, and specifically a wide range of beverages and ice creams, the fruits that may be contained in them, as well as their containers and accessories. Wein & Co. emphasises in particular that a restrictive interpretation of the condition concerning the generalised application of the duty would have the effect of enabling Member States to circumvent the prohibition in Article 33 of the Sixth Directive: thus, Member States could, in practice, disguise the general character of taxes similar to VAT by subjecting each type of supply or service to a different tax. To avoid that risk, it is necessary, in determining whether a tax is 'general' in nature, to have regard to all the taxes in existence in a Member State which are analogous to VAT. According to Wein & Co. there is in Austria, in addition to the duty on beverages, a multitude of other taxes of the same kind, such as those on entertainments and on tourism, which must be taken into account in an overall appraisal of the tax system.

20. The risks referred to by Wein & Co. are not entirely insignificant. But the argument is not decisive because it is based on a premise which cannot be accepted. It takes it for granted that the Court is able to interpret the Community rules on the basis

18 — It is disputed whether a tax of the kind contemplated by Article 33 must always satisfy the fourth criterion noted above. In his Opinion in Case C-130/96 *Solisnor-Estaleiros Navais* [1997] ECR I-5053, Advocate General Léger submits, at point 42, that '[I]f the input tax is not deductible, this results in the charge having a cumulative effect, such that an interpretation under which Article 33 prohibits only deductible taxes would ultimately amount to authorising reimposition of precisely the type of charges which the abovementioned directives set themselves the task of eliminating'.

of a context other than that described in the order for reference, forgetting, however, that to do that is contrary to settled case-law according to which the Court 'can answer the national court's questions only on the basis of the facts as they appear from the order for reference'; indeed, 'were the Court to base its ruling on the facts mentioned in the course of proceedings before it, the very substance of the problem raised by the questions referred would be changed'. [19] Pursuing the same line of reasoning, the Court also affirms that 'to alter the substance of questions referred for a preliminary ruling would be incompatible with the Court's function under Article 177 of the Treaty and with its duty to ensure that the Governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 20 of the EC Statute of the Court'. [20]

21. The Court will be able to take account of this argument in a different context, namely the examination of the criteria by reference to which the 'generality' of the tax must be identified. In following this line of reasoning, the Court will be able to go in the direction of construing the concept of a general tax in a much wider sense, acknowledging that the condition of generality is equally fulfilled in the absence of proof that the tax applies, without distinction, to all commercial transactions concerning goods and services, [21] and, in so doing, take into consideration other analogous taxes which, added to each other, give rise to a phenomenon presenting the character of generality. A restrictive interpretation of the test of 'generality' could be detrimental to the Community legislature's objective in establishing a harmonised system of VAT, which the prohibition in Article 33 is designed to avoid. The purpose of this article, as explained in *Rousseau Wilmot*, is 'to prevent the functioning of the common system of value-added tax from being compromised by fiscal measures of a Member State levied on the movement of goods and services and charged on commercial transactions in a way comparable to value-added tax'. [22]

22. This approach must, however, take account of the guidance given in the Court's

19 — Case C-352/95 *Phytheron International* [1997] ECR I-1729, at paragraphs 11 and 12.

20 — *Phytheron International*, at paragraph 14.

21 — In fact, VAT itself does not apply without distinction to all commercial transactions. See on this point the Opinion of Advocate General Alber of 18 March 1999 in Cases C-338/97, C-344/97 and C-390/97 *Pelzl and Others* (ECR I-3319, I-3321) at point 40. On this account, the Advocate General accepted (at points 41, 42, and 44 of his Opinion) the general applicability of an Austrian tax for the promotion of tourism which applied to a large number of types of business, even though it did not apply to all. The same Advocate General has also recognised the general applicability of another Austrian tax, concerning the funding of chambers of commerce, for the reason that it 'governs a broad swathe of economic life or economic activities' (Opinion of Advocate General Alber in *Spar*, cited above, at point 33).

22 — *Rousseau Wilmot*, at paragraph 16. See also *Bergandi* cited above, and the Opinion of Advocate General Tesauro in *Dansk Denkavit and Poulsen Trading* cited above at points 5 and 6.

case-law on the concept of a 'general tax'. The Court has, for example, refused so to characterise a special tax on entertainments introduced by a municipality on the gross receipts of payments for entry to public entertainments or amusements, levied on those who occasionally or habitually organised them. The Court held that that tax was not of a general nature because it applied only to a limited category of goods and services. [23] The Court has also refused to characterise as general a special consumption tax which applied to a certain type of vehicle, either on its delivery to the buyer or on its importation. The Court held that the tax in that case did not amount to a general tax since it only applied to two categories of product, namely tourist coaches and motorcycles. [24] Finally, an obligatory supplementary contribution paid by lawyers in practice in Italy to their provident society was not regarded as being in the nature of a general tax. [25] All these citations from the case-law, without exception, show that a tax will not be recognised as being general in nature when it is linked to transactions which concern closely defined categories of goods or activities. [26]

23. On the basis of those considerations a duty of the type described by the national court cannot be characterised as 'general' since, even though it applies to a large number of goods — and specifically to all beverages, whether alcoholic or not, and to ice creams — and although it has been introduced by all the municipalities in Austria and is therefore charged throughout the Republic of Austria, it only affects transactions in specific products.

24. Since it is established that the duty at issue is not of a general nature, it cannot be regarded as a turnover tax within the meaning of Article 33 of the Sixth Directive. [27] It is thus only in the alternative that I will now examine the other characteristics of a turnover tax noted under headings (b) to (e) above.

The other essential characteristics of VAT

25. A tax of the type at issue clearly satisfies the 'proportionality' test mentioned under heading (b) above, since its

23 — *Giant*, cited above, at paragraph 14.

24 — *Wisselink and Others*, cited above, at paragraph 20.

25 — *Bozzi*, cited above. In this decision, the Court's reasoning emphasised that the contribution only affected lawyers and that, moreover, it was not based on all fees but only on those related to their judicial activities.

26 — See the Opinion in *SPAR*, cited above, at point 31.

27 — See to this effect, *Solisnor-Estaleiros Navais*, cited above, at paragraph 31.

amount is linked to the price of the goods taxed. [28] It may be added that compliance with that requirement is not disputed by either the Austrian Government or the Tax Appeals Commission, and that it is explicitly accepted by the Commission.

26. The characteristic noted under (c) above — that the tax must be charged on each stage of production and distribution — is lacking in this case. The duty at issue applies solely to supplies of beverages and ice creams to the final consumer. That follows clearly from Paragraph 14 of the FAG, which provides that the duty is payable 'unless such supply is made for the purposes of resale as part of a continuous activity', which plainly means that the duty is not payable in respect of all supplies of the aforementioned goods between traders.

27. The characteristic mentioned under (d) above — that the tax must be charged on the added value of the goods, meaning that it is calculated after deducting the tax paid on the occasion of the previous transaction — is also lacking here. The duty at issue is only charged at the final stage of marketing and as a result takes no account of the value added but is charged on the entire value of the product.

28 — Moreover, the sale price is calculated in accordance with the provisions laid down in the Law relating to turnover tax.

28. EKW submits that, on the contrary, the duty at issue is a tax on added value. That is so, in its opinion, because in this case the duty on the added value of the product at each stage of production and marketing appears in the uniform and undifferentiated tax levied on the whole of the final price. In the scheme of the duty at issue there is thus only a difference as to the charging method, which, however, cannot affect the final result, so that the duty can, by reason of its economic function, be described as a tax of the same type as VAT.

29. These arguments are unconvincing because they do not demonstrate that the final sale price reflects the value added at each stage of production and marketing. It should also be observed that, in any event, such a fact-finding exercise is a matter for the national court.

30. The last essential characteristic of VAT noted above under (e) is the possibility for the trader charged with the tax to pass on the burden of it to the consumer. The Court has pointed out that for this characteristic to be present, 'it is not necessary for the relevant national legislation expressly to provide that it may be passed on to the consumer' nor that the transaction should

be proved by an invoice.[29] That being the case, it must be noted that a duty of the type described by the national court is calculated as a percentage of the price of the product, which corresponds to the value of the goods and accessories but excluding VAT, the service charge and the duty itself (Paragraph 15.4 of the FAG). Even if this way of establishing the price seems to exclude the automatic passing on of the duty to the consumer, the possibility of such passing on happening in this case cannot be dismissed, given that each trader is free to fix the total price of his products. It will, in any case, be a matter for the national court to decide whether passing on to the consumer had in fact taken place.

31. Although the scheme of the duty is consistent with the principle of proportionality, it is a fact that this duty does not possess a good number of the other essential characteristics of VAT (generality, application to each stage of production and distribution, deductibility). That leads to the conclusion that the duty is not comparable with a turnover tax.

32. I propose therefore that the Court should reply to the first question that Article 33 of the Sixth directive does not preclude the maintenance of a duty such as that described in the order for reference.

29 — Cases C-370/95 and C-372/95 *Careda and Others* [1997] ECR I-3721, at paragraphs 18 and 23.

The second question

33. By the second question, the national court asks whether Article 3(2) or the second sentence of Article 3(3) of the excise duty directive precludes the maintenance of a tax such as the duty described in the first question.

Arguments of the parties

34. EKW and Wein & Co. submit that such a duty is contrary to Article 3 of the excise duty directive, in particular Article 3(2), because it serves no specific purpose. In particular it is in no way shown that the revenue from the duty at issue is used for the specific purposes (tourism, health) described by the Austrian authorities. The fact that the duty is received by the municipalities and that the income from it forms part of their tax revenues does not, in the view of Wein & Co., mean that it is levied for a specific purpose within the meaning of Article 3(2), given that only objectives relating to health, social policy and the environment are included. Wein & Co. disputes also that revenue from the duty is intended to meet the demands of tourism on local bodies, pointing out that there is a specific tax on tourism in Austria

and that the duty at issue is also levied in localities where there is no tourist activity.

The two plaintiffs submit, secondly, that the duty at issue complies neither with the rules applicable to excise duties nor with those applicable to VAT: in so doing that start from the premiss that in Article 3(2) these two requirements are cumulative, as would appear to be the case from certain language versions (for example, the English version). Wein & Co., in particular, argue that the beverage duty does not comply with the rule that the dutypoint for excise duty is the production of the goods or their import to the Community (Article 5 of the excise duty directive), or with the rule requiring the payment of the duty at the point at which the product is released for consumption (Article 6 of the excise duty directive), or indeed with the rule that the duty is due in the Member State of destination of the goods (Article 10 of the excise duty directive). Nor does the duty at issue comply with the rules in Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages [30] ('the structure directive'), and those in Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages. [31] In the submission of Wein & Co., since the duty is calculated on the value of the product it does not comply with the rule for the calculation of the excise duty in the structure directive, under which the amount of the duty is related to the volume of the product. The duty at issue is also contrary to Directive 92/84 because it fails to provide for the duty to be related to the type of product charged.

30 — OJ 1992 L 316, p. 21.
31 — OJ 1992 L 316, p. 29.

35. The Commission, too, maintains that the duty at issue is incompatible with the excise duty directive, the structure directive and with Directive 92/84, and puts forwards arguments in relation to the alcoholic beverages which do not differ in substance from those advanced by the plaintiffs.

36. The Austrian Government and the Tax Appeals Commission maintain, on the other hand, that the duty serves a specific purpose as required by Article 3(2) of the excise duty directive, since it reinforces the financial independence of the municipalities, the income from it is intended to defray the cost of tourist activity and, lastly, because it protects public health by discouraging the consumption of alcoholic beverages.

The Austrian Government and the Tax Appeals Commission also maintain that, in any event, for a duty to be treated as serving one or several specific purposes it is

not necessary for the revenue from it to be earmarked in the accounts for those purposes; it is enough if there is a causal link between the duty and the realisation of the specific purpose. [32]

As regards the question whether a duty must comply simultaneously with the rules for both excise duties and VAT, or with those applicable to one of them only, the Austrian Government and the Tax Appeals Commission support the former view; they contend that a national consumption tax must, in order to be compatible with Community law, comply at the same time with the rules for excise duties and for VAT. They add, however, that, since it is in fact impossible to comply with all the rules of both systems at the same time, the only way in which this provision can be given effect would be to interpret it as meaning that the only restriction it imposes on the national legislature is that a consumption tax which differs from VAT and excise duties must not prejudice the harmonisation achieved in connection with excise duties and VAT, that is to say that it must not be in conflict with these two systems.

Lastly, the Austrian Government and the Tax Appeals Commission contend that this duty, in so far as it relates to non-alcoholic beverages, also complies with Article 3(3), first subparagraph, of the excise duty directive because it does not give rise to border-crossing formalities between Member States, and it cannot be characterised as a turnover tax.

The merits

37. In order to reply to the second question, the Court is required to rule on the interpretation of Article 3 of the excise duty directive and, in particular, on the conditions to which paragraphs (2) and (3) of that article subordinate the right of Member States to introduce or maintain in force indirect taxes on specific products. In this context, it is necessary to take account of the precise wording of this provision, its rationale, the scheme of the legislation in which it is found and the objective which it pursues.

— The interpretation of Article 3(2) of the excise duty directive

38. The excise duty directive lays down the general criteria for the harmonisation of the arrangements for products subject to excise

32 — See the Opinion of Advocate General Fennelly of 12 November 1998 in Case C-346/97 *Braathens* (ECR I-3419, I-3421), at point 15.

duty in order to guarantee the correct functioning of the internal market. [33]

That being so, the meaning of the expression 'specific purposes' must be established first, and then it must be determined whether the duty at issue serves such a purpose.

Article 3(2) of the directive provides a derogation from the general system [34] by recognising Members States' right to introduce, alongside excise duties, other indirect taxes, which obviously cannot be of the same kind as excise duties because there would otherwise be no need for the rule in question. [35] The Community legislature made this right subject to two conditions: first, that the indirect taxes should be for specific purposes and, secondly, that they should comply with 'the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring are concerned'. It therefore goes without saying that this provision, being a derogation, must be interpreted restrictively. [36]

39. The excise duty directive does not define this term explicitly. To determine its meaning it is therefore necessary to have recourse to the ratio of the provision and to the context in which it appears. Since this expression refers to 'other indirect taxes', that is to say, to indirect taxes which differ from excise duties, 'specific purposes' cannot being regarded as covering those purposes which are or could be served by means of excise duties. Bearing in mind that one of the purposes of excise duties is to obtain funds to meet the general budgetary needs of public authorities, taxes whose objective is to increase the revenue of territorial entities, such as regional or municipal authorities, cannot be regarded as serving specific purposes and as thus being brought within the scope of the derogation from the general excise duty regime.

Taking all these considerations into account, all taxes whose objective is other than that of meeting the general demands of public expenditure and which are not contrary to Community objectives may be described as indirect taxes having specific purposes. Examples of taxes satisfying these criteria are those whose purpose is to protect the environment and public

33 — In its judgment in Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315, at paragraph 7, the Court stated that 'the object of Directive 92/12 is to ensure that the conditions applicable to the movement of goods subject to excise duty within the internal market without fiscal frontiers are implemented as from 1 January 1993'.

34 — See, to the same effect, the Advocate General's Opinion in *Braathens*, cited above, at point 23.

35 — This interpretation of Article 3(2) is confirmed by the fact that, in the course of the *travaux préparatoires*, the Commission had proposed a different formulation for paragraph (2) under which the products within paragraph (1) (namely, mineral oils, alcohol, alcoholic beverages and manufactured tobacco) could not be made subject to 'any charge other than excise duty or value added tax' (OJ 1990 C 322, p. 1). This formulation would have excluded completely the possibility of maintaining in force or introducing other consumption taxes. The fact that this version was not adopted shows that the legislature wished to reserve a certain freedom of action for Member States.

36 — See, to the same effect, the Advocate General's Opinion in *Braathens*, cited above, at point 23.

health, as well as those which promote tourism, sport, culture and entertainments.

40. The specific purpose to which Article 3(2) of the excise duty directive refers can be served both by linking the expenditure of the revenue to the accomplishment of particular purposes [37] and by means of the structure of the tax, that is to say, by choosing special methods for its calculation.

Applying the criteria to the duty at issue, in order to demonstrate that it is for the specific purpose of meeting the costs of tourism one or both of the characteristics mentioned must thus be present. It will in consequence be necessary either for the revenue from the duty to be linked in the budget to the accomplishment of that purpose, or for the revenue in question to be assigned to a body whose purpose as such is to promote tourism, and/or for the structure of the duty to be linked to that purpose.

41. In the present case, the Austrian duty does not appear to serve the purposes of promoting tourism and protecting health described by the Austrian Government and the Tax Appeals Commission, either in relation to the intended use of the revenue levied or by means of the structure of the duty. In regard to the first possibility, it must be noted that the revenue in question is not assigned to the accomplishment of any of these purposes. That was confirmed at the hearing by the representative of the Austrian Government who stated that the legislation does not provide for any specific intended use of the revenue from beverage duty, but only a general causal link between the levying of taxation and the accomplishment of specific purposes, such as the putting in place of infrastructures for tourism. The intention to use the duty for the purposes of tourism is also belied by the fact that in Austria municipal duties do exist whose revenues are designated as being for tourist purposes. [38] It should be added to the same effect that, as has been pointed out by Wein & Co, the duty at issue is also levied in non-tourist areas. In regard to the second possibility, then, the fact that the duty is also levied on non-alcoholic beverages, even though to a lesser extent than on alcoholic beverages, appears to be at odds with the claim that a specific purpose of it is the protection of public health, as is the fact that the duty is levied on ice cream to the same extent as on alcoholic beverages.

In reality, in this case, the only certain factor is that the revenues from the duty at issue form part of the budget of the

37 — See, to this effect, the Advocate General's Opinion in *Braathens* cited above, at point 15, where it is maintained that 'whether the tax serves the "specific objective" of environmental protection depends on whether the structure of the tax itself and, more particularly, its calculations are designed to encourage the use of less polluting aircraft engines'.

38 — See, for example, the Tourismusabgabe-Gesetz of 1991 (Law relating to tourism) and the Tourismus-Gesetz of 1990, which provide for municipal duties whose revenues are intended for the promotion of tourism.

municipal authority, helping to reinforce its independence. That, however, does not suffice to make the duty compatible with Community law. As has been seen already, a duty cannot be considered to serve a specific purpose within the meaning of Article 3(2) of the excise duty directive solely because the revenues from it go to the budget of the municipal authority. The appropriate instrument for the increase of revenue is, as has been noted above, excise duty.

42. It must therefore be concluded that the duty at issue does not serve a specific purpose within the meaning given to that expression in Article 2(3) of the excise duty directive, with the result that it must be considered unlawful from the Community point of view.

43. I therefore move on to the second condition to which Article 3(2) of the excise duty directive subjects the Member States' right to introduce, or to maintain in force, indirect taxes on specified products. Article 3(2) provides that products subject to excise duty 'may be subject to other indirect taxes... provided that those taxes comply with the rules applicable for excise duty and VAT purposes as far as the determination of the tax base, calculation of the tax, chargeability and the monitoring of the tax are concerned.' The interpretation of this provision is not easy because the different language versions are at variance on a point that is not of secondary importance. specifically the question whether the compatibility of the national duty with Community law is dependent on simultaneous compliance with the excise duty regime and the VAT regime, or with either one or the other of them. The English, Dutch and Danish versions contain, in effect, the phrase 'excise duties and VAT', whereas the other language versions, for example the French, German, Italian and Spanish, have the expression 'excise duties or VAT', characterised by a disjunctive 'or' in place of a conjunctive 'and' as appears in the other versions.

44. In the case of such differences, it is necessary, first of all to bear in mind the principle, repeatedly stated by the Court, that 'the different language versions of a Community text must be given a uniform interpretation' with the result that 'in the case of divergence between the versions the provision in question must therefore be interpreted by reference to the purpose and general scheme of the rules of which it forms part'.[39] It is thus necessary to refer to the logic of the excise duty regime as a whole, as it appears from the 1992 framework directive, in order to resolve the doubts to which these linguistic differences give rise. In that context, account must be taken above all of the fact that the right given to Member States to introduce other taxes constitutes an exception to the harmonised excise duty regime. From that premiss it follows that the exercise of that right must take place in accordance, as a

39 — Case C-449/93 *Rockfon* [1995] ECR I-4291, at paragraph 28 of the judgment, which reiterates the principle laid down in Case 30/77 *Bouchereau* [1977] ECR 1999, at paragraph 14 of the judgment.

matter of primary importance, with that regime and that, by the same token, the reference to the VAT regime, which appears in the same provision, must be understood as being of merely secondary or subsidiary importance. It may be added that it would be contrary to Article 33(1) of the Sixth Directive, which clearly excludes the possibility of Member States introducing taxes having the character of turnover taxes, to claim that a duty which differs from VAT and excise duties should comply with all the rules applicable for the purposes of VAT, which would be to say that in substance it should have the nature of a turnover tax.

Simultaneous compliance with the rules relating to excise duties and those relating to VAT would, moreover, be impossible in practice: it is sufficient to observe the incompatibility between the differing essential characteristics of the two taxes. The general scope and proportionality of VAT are, for example, in sharp contrast to the rule of the excise duty regime that an excise duty can only be imposed on specified products, and with the further rule that the amount of the duty must be calculated primarily by reference to quantity.

45. On the basis of all the considerations I have set out so far, I am of the opinion that if the provision now under examination is to be effective then the difficulties resulting from the differences between the various language versions should be put aside and the provision should be interpreted as meaning that the national duty must first of all be to comply with the rules relating to excise duties laid down in the provision at issue (that is, the rules for the determination of the tax base, the calculation of the tax, chargeability and monitoring) and only as a secondary matter to comply with those relating to VAT, it being understood that national taxes must not in any case jeopardise the functioning of VAT. [40]

46. Let us now see how compliance with the rules applicable for excise duty purposes is to be understood. I consider that, since it introduces a derogation from the general regime for excise duties, Article 3(2) must be interpreted restrictively. Compliance with the rules in question must not, however, be understood to require that the Community legislation and the rules applicable to the different products which may be distinguished within each category should be entirely the same. By that I mean that the compatibility with Community law of a national duty with a specific purpose should be examined by reference to the Community regime laid down for the entire category of products in question. And, indeed, if the two regimes were completely the same, not only would Article 3(2) have no practical effect, but that uniformity might give rise to other forms of excise duty or to a second type of excise duty, contrary to the principle of the uniform character of the excise duty regime. To give an example, if a Member State wished to subject an alcoholic beverage such as beer

40 — It is not without significance that the reference to VAT in Article 3(2) follows that to excise duty.

to another excise duty, with a specific purpose linked to the protection of health, it could not do so unless it complied with all the rules in the structure directive relating to alcoholic beverages, but it would not also have to comply to the letter with its specific rules relating to beer.

47. That said, it must now be considered whether a duty of the type described by the national court complies with these rules. This must be done by taking account in particular of the structure directive within which the category of the products subject to the duty is defined.

48. I would say at once that the duty at issue does not, in numerous respects, comply with the rules relating to alcoholic beverages which appear in the framework directive and the structure directive. In the first place, the duty does not comply with the methods for calculation of excise duties. The amount of the duty is fixed by reference to the value of the product, and not by reference to volume or alcoholic strength as required by the structure directive. Secondly, the duty does not provide, in contrast to excise duties on alcoholic beverages, for different rates of duty depending on the type of product, but for a single rate of duty on all alcoholic beverages with an alcohol content above 0.5%. Thirdly, the duty does not comply with the general rules concerning the time for payment of excise duties since it becomes due only on sale to the consumer and not on release for consumption.

It must thus be concluded that a duty of the type described by the national court is contrary to Community law because it does not comply with the rules applicable to excise duties contained in the framework directive and the structure directive.

49. It is now necessary to establish whether the duty at issue complies with the first subparagraph of Article 3(3) of the excise duty directive, under which, I would recall, Member States may introduce or maintain taxes levied on products other than those listed in Article 3(1) (namely, mineral oils, alcohol and alcoholic beverages, and manufactured tobacco), provided that those taxes do not give rise to border-crossing formalities in trade between Member States. Even though this provision does not so state explicitly, the right in question is subject at the same time to the further condition that the taxes levied should not have the character of turnover taxes. The prohibition on Member States introducing taxes of this kind is of general application, so that in the absence of express provision I do not think that an exception can be presumed.

50. It is thus a question of determining whether the duty of the type described by the national court complies with those two

conditions in so far as it is levied on non-alcoholic beverages and ice cream, that is to say on two products not mentioned in Article 3(1). The reply to that question must be in the affirmative. That conclusion is reached by reference to what has already been said and specifically because the duty at issue does not have the character of a turnover tax and is levied only on sales within the national territory, because it solely affects sales to the final consumer.

51. I do not think that the exercise of the right provided for by Article 3(3) is subject also to the condition in Article 3(2) that the tax must serve a specific purpose, which applies only to certain stated products. That condition cannot in any way be inferred from the text of Article 3(3) or from any other provision. Article 99 of the EC Treaty (now Article 93 EC) states, on the contrary, that the Community legislature may act to harmonise national regimes relating to other indirect taxes 'to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market'. That means that until the entry into force of harmonised provisions on indirect taxes levied on non-alcoholic beverages and ice cream, Member States remain free to introduce other indirect taxes, complying only with the two restrictions noted above.

52. I turn now to the second part of the present question, which relates to the compatibility of the duty at issue with the second subparagraph of Article 3(3) of the excise duty directive.

The plaintiffs submit, referring to the judgment in *Faaborg-Gelting Linien*,[41] that when it is levied in connection with catering, the duty on beverages bears not only on the sale of the product but also on everything needed for the activity of catering (the decorations, the washing of dishes, the table linen and so forth) and is thus contrary to the second subparagraph of Article 3(3) of the excise duty directive to the extent that it has the character of a turnover tax. I would recall that this provision provides that, subject to any taxes levied on products other than those mentioned in Article 3(1) complying with the condition laid down in the first subparagraph of Article 3(3) (under which the taxes in question must not give rise to border-crossing formalities), 'Member States shall also retain the right to levy taxes on the supply of services which cannot be characterised as turnover taxes, including those relating to products subject to excise duty'. As to this, it is sufficient to note that, even if it is conceded that the duty in this case also bears on the supply of services, the fact that it does not — as has been seen in the examination of the first question — have the character of a turnover tax renders it compatible with the provision cited above.

41 — Case C-231/94 [1996] ECR I-2395.

The third question

53. By the third question, the national court asks whether the exemption provided for sales at the place of production ('direct sales') constitutes State aid within the meaning of Article 92 of the Treaty, which would render it incompatible with Community law. The doubts of the national court arise from the fact that the Commission has already so classified this exemption in a reasoned opinion published in the Official Journal of 14 March 1997. [42]

54. The admissibility of the question is disputed on two accounts: (a) the Austrian Government and the Commission claim that the question is irrelevant to the decision in the main proceedings; (b) all parties, except the Commission and the EKW, claim that, in accordance with Article 93 of the EC Treaty (now Article 88 EC), it is a matter for the Commission alone to decide on the compatibility of a State aid with the internal market.

55. With regard to (a), it must be observed that by notification C 57/96 of 3 February 1999 the Commission concluded the procedure initiated under Article 93(2) of the Treaty. On that date, the Commission did in fact make a decision [43] in which it declared that the exemption which is the subject of the present question was incompatible with the common market and required Austria to abolish it with effect from 31 December 1998.

56. I would point out first that, according to the settled case-law of the Court, rejection of a request by a national court for a preliminary ruling is only possible if it is obvious that the interpretation of Community law requested bears no relation to the subject-matter of the dispute in the main proceedings. [44]

57. That said, I am of the view that the objection of inadmissibility relating to the lack of relevance of the question under consideration to the decision in the main proceedings is well founded in so far as it relates to the effect of the exemption for the period up to 31 December 1998.

58. As regards, next, the second ground which is put forward for the inadmissibility of the third question, and amounts to disputing that the Court has jurisdiction to rule on the compatibility of State aid with the common market, which is said to belong exclusively to the Commission, I consider that argument to be without foundation. According to Community law, national courts may (and must when they are courts of last resort) submit to the

42 — C 57/96 (OJ 1997 C 82, p. 9).

43 — Measure No 10165/99, not yet published.

44 — See Case C-314/96 *Djabali* [1998] ECR I-1149, at paragraph 19 of the judgment. See also Case C-264/96 *ICI* [1998] ECR I-4695, at paragraph 15 of the judgment.

Court of Justice under Article 177 of the EC Treaty (now Article 234 EC), a question for a preliminary ruling on the interpretation of Article 99 of the Treaty, and in particular as to the consequences of the direct effect of Article 93.[45] By contrast, they may not ask the Court to rule on the compatibility with this provision of a rule of domestic law.[46]

59. I turn now to the substantive issue, and would recall that the Court has stated that the concept of a State aid is wider than that of a subsidy, because it includes not only positive benefits such as subsidies but also actions which, in various ways, reduce the burdens which normally have to borne by an undertaking and which, for that reason, have the same effects as subsidies though they are not subsidies in the strict sense of the term.[47] Following that reasoning, the Court has held that a measure by which the public authorities accord a tax exemption to certain undertakings which, though not involving any transfer of resources from the State, places the beneficiaries in a better financial position than other taxpayers is a State aid within the meaning of Article 92(1) of the Treaty.[48]

60. I consider that, in application of these principles, the exemption in question must be regarded as in the nature of a State aid. That conclusion proceeds from the fact that this exemption puts producers selling wine on their premises in an indisputably better position than sellers of alcoholic beverages further down the chain who are subject to the duty at issue: the former can sell at lower prices because they are not constrained to allow for the fiscal burden resulting from this duty. In addition, as the Commission has pointed out, direct wine sales by the producer account for around 50% of the market and, as a result, the exemption cannot but have a significant impact as much on wine produced and sold in Austria as on that produced in other Member States.

61. Moreover, the grounds cited by the Austrian Government and the Tax Appeal Commission in support of the compatibility with the common market of the aid in question are not among those set out in Article 92(2) and (3) of the Treaty. In particular, contrary to the argument of the defendants, the aid is not intended to promote the development of certain activities or regions: the beneficiaries are all wine producers in whichever region of Austria they happen to be. Lastly, the Commission has also shown that the power to grant the exemption in question is not one of those transferred to Member States by Council Regulation (EEC) No 822/87 of

45 — Case C-39/94 *SFEI and Others* [1996] ECR I-3547.

46 — Case C-295/97 *Piaggio* [1999] ECR I-3735.

47 — Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1.

48 — Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, at paragraph 14 of the judgment.

16 March 1987 on the common organisation of the market in wine,[49] or by Council Regulation (EEC) No 827/68 of 28 June 1968,[50] which applies also to fruit wines and other fermented beverages.

Limitation of the temporal effects of the judgment

62. It now falls to be considered whether, and, if so, to what extent, it is justified in this case to limit the retrospective effect of the Court's judgment. The Austrian Government has requested the Court to impose a temporal limitation on its judgment should it find that maintaining the indirect tax at issue is incompatible with Community law. In support of its request, the Austrian Government has urged that, having regard to information received by representatives of the Commission before accession, it had in good faith reached the conclusion that the duty was compatible with Community law. In further support of this request, the Austrian Government has pointed to the serious consequences that retrospectivity of the judgment would have for the finances of municipal authorities. In this connection, it has explained that the amount due for repayment would be ATS 22 000 million for the years 1995 to 1998 and that this sum would amount to approximately 0.9% of the gross national product of Austria. It has emphasised lastly that the repayment of duty to suppliers subject to the beverage duty would for them amount to unjust enrichment, because they have incorporated the duty into their prices and have thus transferred the burden of it to consumers, who in their turn would have great difficulty in obtaining from those suppliers the repayment of the duty passed on in the price since it would usually be impossible for consumers to prove that that was done or to what extent it was done, that is to say to prove the extent of the unjust enrichment.

63. I would first point out, as a general observation, that it is settled case-law that in the exercise of the jurisdiction conferred on it by Article 177 of the Treaty the Court's interpretation of a provision of Community law clarifies and explains where necessary its meaning and scope as it ought to be, or have been, understood and applied from the moment of its entry into force. It follows that the rule thus interpreted must be applied also to legal relations arising and brought into existence before the judgment given in response to the request for a ruling.[51] Departures from this principle can only be allowed in exceptional cases. The Court has limited the retrospective effect of its judgments only where there are exceptional circumstances, and specifically when there was a risk of serious economic repercussions due, for example, to the large number of legal

49 — OJ 1987 L 84, p. 1.

50 — Regulation on the common organisation of the market in certain products listed in Annex II to the Treaty (OJ, English Special Edition 1968 (I), p. 209).

51 — Joined Cases C-197/94 and C-252/94 *Bautiaa and Société française maritime* [1996] ECR I-505, at paragraph 47 of the judgment; and Case 61/79 *Denkavit italiana* [1980] ECR 1205, at paragraph 16 of the judgment.

relationships established in good faith on the basis of legislation reasonably thought to be validly in force, and where both individuals and national authorities were led to adopt behaviour at variance with the Community legislation specifically because of the uncertainty about the scope of the relevant provisions. [52]

64. In this case, there do not seem to be reasons justifying an exception to the principle according to which the effects of a preliminary ruling go back to the date on which the rule being interpreted entered into force. [53] In the first place, the argument based on the claim by the Austrian Government that it acted in good faith regarding the compatibility of the duty with Community law, is not convincing. The assertion that representatives of the Commission, in the course of negotiations for the accession of the Republic of Austria to the Community, stated to or gave it to be understood by the Austrian authorities that the duty at issue was lawful has not been confirmed by the Commission and it finds no echo in the documents before the Court. It may be added that, even assuming that this subject was addressed during the course of negotiations, it is still the case that statements made during the *travaux préparatoires,* just as they cannot, according to the case-law of the Court, [54] be relied on to interpret the provision to which they refer, so they cannot be used either in order to establish the good faith of the contracting parties and to exclude on that basis the restrictive effects of a judgment finding that a course of conduct is contrary to the obligations which have been undertaken.

65. As regards, next, the argument based on the alleged negative economic repercussions for the municipal authorities which would result from the abolition of the duty and thus of the revenues from it, I would point out that, according to the case-law of the Court, if judgments finding — even indirectly, as with preliminary rulings — national provisions or conduct to be unlawful were declared non-retroactive on account of the extent of the financial repercussions on Member States, this would have the paradoxical consequence of treating the most serious infringements more favourably than those of a less serious nature, the former being obviously those which are likely to have the most significant financial implications for Member States. [55] The proper view to take on this is that non-retroactivity of the judgment amounts effectively to a legitimisation of the national legislation that was in conflict with Community law for the whole of the period preceding the judgment, and that it is therefore reasonable and appropriate to treat that situation as falling under the case-law just cited and, on the basis of it, to

52 — Case 43/75 *Defrenne II* [1976] ECR 455, at paragraph 69 et seq. of the judgment; Case C-262/88 *Barber*[1990] ECR I-1889, at paragraph 41 et seq. of the judgment; Case C-163/90 *Legros and Others* [1992] ECR I-4625.

53 — Case C-137/94 *Richardson* [1995] ECR I-3407, at paragraph 33 of the judgment, and *Bautiaa and Société française maritime* cited above.

54 — See Case C-292/89 *Antonissen* [1991] ECR I-745, at paragraph 18 of the judgment, and *Bautiaa and Société française maritime*, cited above, at paragraph 51 of the judgment.

55 — See the judgments in *Denkavit* cited above, and in Joined Cases C-367/93 to C-377/93 *Roders and Others* [1995] ECR I-2229, at paragraph 48.

draw a conclusion that is the opposite of the non-retroactivity urged on the Court.

66. The duty, then, being incompatible with Community law, the administrative authorities are accordingly obliged to refund the sums collected to the suppliers who were subject to it. In the submission of the Austrian Government, however, this should not be done because it would lead to the suppliers being unjustly enriched. The suppliers, it is said, have not in reality suffered any damage through the unlawful duty, because they normally pass it on in the price charged to the consumer. That being so, the Austrian Government considers that it would be reasonable and appropriate to limit the temporal effect of the judgment which gives rise to the obligation to refund the duty at issue to the suppliers.

67. In this connection, it must be observed that in order to resist claims for a refund the authorities have to show that the suppliers have indeed been enriched, that is to say that they have in fact incorporated the duty in the price, thereby transferring the burden of it to consumers. That, however, is very difficult to do. It cannot be stated with certainty either that, in the absence of the duty, the price would have been lower than it was with the duty or, still less, that the difference between those two prices would always have been the same as the amount of the duty.

68. Added to that is the fact that the enrichment of the supplier is only speculative in view of the possible reduction in the volume of sales, and thus of profits, by reason of an increase in price which could have been prompted by the need to allow for the higher costs flowing from the duty. [56]

69. In relation to the third question, the Austrian Government has similarly requested that the Court's judgment should not have retroactive effect if it were to be decided that the exemption from duty of direct sales to consumers by producers had the character of a State aid. In support of that request, the Austrian Government has pointed out that at the time of accession both it and the undertakings concerned were not in a position to know that the exemption in force in the Austrian legal system could amount to an 'existing' aid within the meaning of Articles 92 and 93 of the Treaty. It submitted, in particular, that the inadequacy of the information in its possession on the scope of the Community

56 — In Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, the Court stated at paragraph 31 that 'the trader may have suffered damage as a result of the very fact that he has passed on the charge levied by the administration in breach of Community law, because the increase in the price of the product brought about by passing on the charge has led to a decrease in sales. Thus, the levying of dock dues may make the price of products from other parts of the Community significantly higher than the price of local products which are exempt from those dues, with the result that importers suffer damage, regardless of whether the charge has been passed on.' The Court thus upheld the view, at paragraph 32, that 'the trader may justly claim that, although the charge has been passed on to the purchaser, the inclusion of that charge in the cost has, by increasing the price of the goods and reducing sales, caused him damage which excludes, in whole or in part, any unjust enrichment which would otherwise be caused by reimbursement'.

legislation applicable, and the implications of this for the national system of indirect taxation, was likewise explainable on the basis of Article 144 of the Act of Accession. [57]

As to the merits of the request, I do not see the reference to Article 144 of the Act of Accession as being relevant. That article does no more than establish that the only State aids regarded as existing aids were those notified to the Commission before 30 April 1995. But since the Republic of Austria did not notify the exemption at issue to the Commission, that exemption could be regarded as a 'new aid'.

So far as concerns the argument that the incompatibility of the duty could not easily have been deduced from the relevant Community provisions, and had in addition not been pointed out during the accession negotiations, thus impairing legal certainty, it must be borne in mind that by the decision of 3 February 1999 referred to above the Commission had in effect recognised that the duty was compatible with Community law until 31 December 1998. It follows that to limit the retroactive effect of the judgment for that period would have no practical significance. For the months following 31 December 1998, the period in question is so short that I do not think that the temporal limitation of the effects of the judgment would be justified. Moreover, the very adoption of this decision, and the work surrounding it, must have meant that the Austrian Government was aware of the incompatibility of the duty with Community law, at least from the beginning of 1999.

70. Taking all these factors into account, I do not consider that in this case the exceptional circumstances which can justify the limitation of the retroactive effects of the judgment have been demonstrated.

71. If, none the less, the Court were minded to allow a temporal limitation of the effects of its judgment, I propose that, in accordance with the case-law, the limitation should not apply to any person who has initiated legal proceedings or raised an equivalent administrative claim as provided by the national law applicable. [58]

57 — Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995, L 1, p. 1).

58 — *Legros and Others*, cited above, and Case C-415/93 *Bosman* [1995] ECR 4921.

Conclusion

72. On the basis of these considerations, I propose that the Court should reply to the questions asked by the Verwaltungsgerichtshof (Austria) as follows:

(1) Article 33(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, does not preclude the maintenance of a duty on the supply for consideration of ice cream, including fruits processed therein or added thereto, and beverages, in each case including the containers and accessories sold therewith, the rate of such duty being 10% of the consideration in the case of ice cream and alcoholic beverages and 5% in the case on non-alcoholic beverages.

(2)(a) Article 3(2) of Council Directive 92/12 of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products precludes the maintenance of a duty such as that described in paragraph (1) above;

(b) Article 3(3), second subparagraph, of the same directive does not preclude the maintenance of the abovementioned duty in so far as it is charged on non-alcoholic beverages and ice cream;

(3) Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC) precludes national provisions by virtue of which the direct sale of wine is exempt from beverage duty.