JUDGMENT OF THE COURT (Fifth Chamber)

9 March 2000 *

In Case C-437/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Evangelischer Krankenhausverein Wien

and

Abgabenberufungskommission Wien

and between

Wein & Co. HandelsgesmbH, formerly Ikera Warenhandelsgesellschaft mbH,

and

Oberösterreichische Landesregierung

* Language of the case: German.

on the interpretation of Article 33 of 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 (OJ 1977 L 145, p. 1), of Article 3 of 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 (OJ 1992 L 76, p. 1), and of Article 92 of the EC Treaty (now, after amendment, Article 87 EC),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, J.C. Moitinho de Almeida, C. Gulmann, J.-P. Puissochet and M. Wathelet (Rapporteur), Judges,

Advocate General: A. Saggio,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Evangelischer Krankenhausverein Wien, by B. Kramer, Rechtsanwalt, Vienna,

— the Abgabenberufungskommission Wien, by K. Pauer, Magistratrat in the Abgabenberufungskommission Magistratsdirektion — Verfassungs- und Rechtsmittelbüro, and J. Ponzer, Bereichsdirektor in the Abgabenberufungskommission,

— Wein & Co. HandelsgesmbH, formerly Ikera Warenhandelsgesellschaft mbH, by T. Jordis, Rechtsanwalt, Vienna,

— the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent, and

— the Commission of the European Communities, by V. Kreuschitz, Legal Adviser, and E. Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Evangelischer Krankenhausverein Wien, represented by B. Kramer; the Abgabenberufungskommission Wien, represented by K. Kamhuber, Senatsrat in the Abgabenberufungskommission Magistratsdirektion — Verfassungs- und Rechtsmittelbüro; Wein & Co. HandelsgesmbH, formerly Ikera Warenhandelsgesellschaft mbH, represented by T. Jordis; the Austrian Government, represented by W. Okresek and E. Zach, Ministerialrätin in the Ministry of Finance, acting as Agent; and the Commission, represented by V. Kreuschitz and E. Traversa, at the hearing on 6 May 1999,

after hearing the Opinion of the Advocate General at the sitting on 1 July 1999,

gives the following

Judgment

1 By order of 18 December 1997, received at the Court on 24 December 1997, the Verwaltungsgerichtshof (Administrative Court), Austria, referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 33 of 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 (OJ 1977 L 145, p. 1) ('the Sixth Directive'), of Article 3 of 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 (OJ 1992 L 76, p. 1) ('the excise duty directive'), and of Article 92 of the EC Treaty (now, after amendment, Article 87 EC).

2 Those questions have arisen in two disputes between the Evangelischer Krankenhausverein Wien (Protestant Hospital Society, Vienna) ('the EKW') and the Abgabenberufungskommission Wien (Tax Appeals Commission, Vienna, which is the authority in Vienna responsible for ruling at final instance in cases concerning the recovery of taxes) and between Wein & Co. HandelsgesmbH, formerly Ikera Warenhandelsgesellschaft mbH ('Wein & Co.'), and the Oberösterreichische Landesregierung (Government of the *Land* of Upper Austria) concerning the obligation on the EKW and Wein & Co. to pay the duty on beverages and ice cream ('Getränkesteuer', hereinafter 'beverage duty').

The relevant national legislation

3 Under Paragraph 3 of the 1948 Finanz-Verfassungsgesetz (Constitutional Law on Financial Matters) (BGBl. No 45/1948), as amended by the Federal Constitutional Law (BGBl. No 201/1996), the division of taxation powers and allocation of tax revenue are governed by federal legislation.

4 The Federal Law in force when the beverage duty was levied in the two cases in the main proceedings was the 1993 Finanzausgleichsgesetz (Revenue Equalisation Law, 'FAG') (BGBl. No 30/1993, as amended by the Federal Law published in BGBl. No 853/1995). According to Paragraph 14.1.8 and 14.2 of the FAG, exclusively municipal taxes include:

'Taxes 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. Exemption shall be made in respect of supplies within the meaning of Paragraph 10.3.1 of the 1994 Umsatzsteuergesetz (Law on Turnover Tax, BGBl. No 663) — "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 It should be noted that supplies of wine within the meaning of Paragraph 10.3.1 of the 1994 Umsatzsteuergesetz ('the UStG') correspond to the sale of wine produced from fresh grapes in Austrian vineyards, in respect of which Paragraph 10.3.1 of the UStG provides for the application of a rate of value added tax ('VAT') of 12%, which is lower than that imposed on ordinary sales, in respect of

which the rate is 20%. Pursuant to Paragraph 14.1.8 of the FAG, the direct sale of this wine is exempted from beverage duty.

6 Under Paragraph 15.3.2 of the 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 taxes referred to in Paragraph 14.1.8 of the FAG 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. For the purposes of this provision, non-alcoholic beverages are beverages with an alcohol content of 0.5% or less.

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

8 The municipal taxes which form the background to the disputes in the main proceedings are provided for, in the case of the EKW, by the 1992 Wiener Getränkesteuergesetz (Viennese Law on Beverage Duty, hereinafter 'Wiener GStG') (Vienna LGBl. No 3/1992) and the 1992 Wiener Getränkesteuerverordnung (Viennese Regulation on Beverage Duty, hereinafter 'Wiener GStV') (*Amtsblatt* 6/1992, amended version *Amtsblatt* 44/1992 and *Amtsblatt* 50/1994), and, in the case of Wein & Co., by the Oberösterreichisches Gemeinde-Getränkesteuergesetz (Law of Upper Austria on Municipal Beverage Duty, hereinafter 'Oö GStG') (LGBl. of the *Land* of Upper Austria, No 15/1950, as amended by the Law of the *Land* published in LGBl. No 28/1992). Although the municipal taxes are governed by separate regional provisions, they have characteristics which are broadly similar, and for that reason will hereafter be designated jointly by the term 'beverage duty'.

The relevant Community legislation

9 Article 33 of the Sixth Directive, as amended by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1), 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 the following products as defined by current Community provisions:

— mineral oils,

— alcohol and alcoholic beverages,

— manufactured tobacco.'

10 The third recital in the preamble to the excise duty directive is worded as follows:

'whereas the concept of products subject to excise duty should be defined; whereas only goods which are treated as such in all Member States may be the subject of Community provisions; whereas such products may be subject to other indirect taxes for specific purposes; whereas the maintenance or introduction of other indirect taxes must not give rise to border-crossing formalities'.

11 Article 3 of the excise duty directive provides in this regard:

'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 disputes in the main proceedings

12 The EKW operates a hospital cafeteria. It was, on 6 December 1996, made the subject of a recovery assessment by the Abgabenbehörde Wien (the tax recovery authority in Vienna), under which, pursuant to the Vienna tax legislation, it was requested to pay ATS 309 995 in respect of beverage duty on sales between January 1992 and October 1996.

13 The administrative complaint lodged by the EKW against that decision was dismissed by the Abgabenberufungskommission Wien.

14 The EKW brought proceedings before the Verwaltungsgerichtshof challenging the decision dismissing its complaint, in which it argued that the provisions relating to beverage duty were contrary to Community law, in particular Article 33(1) of the Sixth Directive and Article 3 of the excise duty directive.

15 Wein & Co. is a wine-trading company established in Leonding, Upper Austria, from which the municipal authorities sought payment of ATS 417 628 in respect of beverage duty owing for the period from 1 December 1994 to 31 March 1995.

16 Wein & Co. first brought an administrative appeal against that tax assessment before the Oberösterreichische Landesregierung, which dismissed the appeal, whereupon it brought an action before the Verwaltungsgerichtshof against the decision dismissing its appeal in which it submitted, *inter alia*, that the beverage duty was similar to a turnover tax, which was prohibited by Article 33 of the Sixth Directive, and that it was contrary to Article 3(2) of the excise duty directive.

17 The Verwaltungsgerichtshof is unsure whether the beverage duty is compatible with the Sixth Directive and with the excise duty directive. It is also unsure whether the exemption from beverage duty enjoyed by wine sold directly at the place of production constitutes aid incompatible with the common market, as argued by the Commission in its Communication C 57/96 (OJ 1997 C 82, p. 9).

The questions submitted for a preliminary ruling

18 It was in those circumstances that the Verwaltungsgerichtshof decided to stay proceedings and refer the following questions to the Court 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 of 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

19 By its first question, the national court is in substance asking whether Article 33(1) of the Sixth Directive precludes the maintenance of a tax such as the beverage duty at issue in the main proceedings.

20 The Court has consistently held (*inter alia*, Case 295/84 *Rousseau Wilmot* v *Organic* [1985] ECR 3759, paragraph 16; Case C-347/90 *Bozzi* v *Cassa Nazionale di Previdenza ed Assistenza a favore degli Avvocati e dei Procuratori Legali* [1992] ECR I-2947, paragraph 9; and Case C-130/96 *Fazenda Pública* v *Solisnor-Estaleiros Navais* [1997] ECR I-5053, paragraph 13) that, in leaving the Member States free to maintain or introduce certain indirect taxes such as excise duties on condition that they are not taxes which can be 'characterised as turnover taxes', Article 33 of the Sixth Directive seeks to prevent the functioning of the common system of VAT from being jeopardised by fiscal measures of a Member State affecting the movement of goods and services and applying to commercial transactions in a manner comparable to VAT.

21 Taxes, duties and charges which have the essential characteristics of VAT must in any event be deemed to constitute such measures, even though they are not identical to VAT in all respects.

22 As the Court has already pointed out on many occasions, those characteristics are as follows: VAT applies generally to transactions relating to goods or services; it is proportional to the price of those goods or services, irrespective of the number of transactions which take place; it is charged at each stage of the production and distribution process; and, finally, it is imposed on the added value of goods and services, the tax payable on a transaction being calculated after deduction of the tax paid on the previous transaction (*inter alia*, Case 252/86 *Bergandi* v *Directeur Général des Impôts* [1988] ECR 1343, paragraph 15; *Bozzi*, cited above, paragraph 12; and *Solisnor-Estaleiros Navais*, cited above, paragraph 14).

23 It follows that Article 33 of the Sixth Directive precludes the maintenance or introduction of stamp duties or other types of taxes, duties or charges which have the essential characteristics of VAT. The Court also stated in paragraphs 19 and 20 of its judgment in *Solisnor-Estaleiros Navais* that Article 33 of the Sixth Directive does not preclude the maintenance or introduction of a tax, on condition that it does not have any of the essential characteristics of VAT.

24 A duty of the kind described by the national court is not a general tax since it is not intended to apply to all economic transactions in the Member State concerned (see, to this effect, *Solisnor-Estaleiros Navais*, paragraph 17, and Case C-208/91 *Beaulande* v *Directeur des Services Fiscaux, Nantes* [1992] ECR I-6709, paragraph 16). According to Paragraph 14.1.8 of the FAG, Paragraph 1 of the Wiener GStV and Paragraph 1 of the Oö GStG, the duty applies only to a limited category of goods, being levied only 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 with the products.

25 Consequently, without its being necessary to examine the other characteristics of the beverage duty, the answer to the first question must be that Article 33 of the Sixth Directive, as amended by Directive 91/680, does not preclude the maintenance of a tax such as the beverage duty at issue in the main proceedings, which is 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 with the products.

The second question

26 By its second question, the national court is asking, essentially, whether Article 3(2) and (3) of the excise duty directive precludes the maintenance of a tax such as the beverage duty in force in Vienna and Upper Austria at the material time in the cases in the main proceedings.

27 To answer this question, it is first necessary to draw a distinction according to whether the duty is levied on non-alcoholic beverages and ice-cream, on the one hand, or on alcoholic beverages, on the other. Article 3 of the excise duty directive contains different provisions according to whether the product subject to the duty is listed in paragraph 1, which is the case with alcoholic beverages (the relevant provision in this instance being paragraph 2), or whether it is not so mentioned (in which case the relevant provision is paragraph 3).

28 As regards a tax such as the Austrian municipal duty, in so far as it is levied on non-alcoholic beverages and ice cream, it follows from Article 3(3) of the excise duty directive that a tax which is levied on products other than those listed in paragraph 1 or which is levied on the supply of services and cannot be characterised as a turnover tax may be retained by Member States on condition that it does not give rise to border-crossing formalities in trade between Member States.

29 It is not disputed in the main proceedings or before the Court that the duty on non-alcoholic beverages and ice cream satisfies that condition. That duty is therefore compatible with Article 3(3) of the excise duty directive.

30 As regards a tax such as the Austrian municipal duty, in so far as it is levied on alcoholic beverages, it must be borne in mind that, under Article 3(2) of the excise duty directive, the products listed in paragraph 1 of that article (which include alcoholic beverages) may be subject to indirect taxes other than excise duty if those indirect taxes pursue one or more specific purposes in the sense contemplated by that provision and comply with the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, and chargeability and monitoring of the tax are concerned.

31 It is first necessary to examine whether a tax such as the duty to which alcoholic beverages are subject pursues a specific purpose in the sense contemplated by Article 3(2) of the excise duty directive, that is to say, a purpose other than a purely budgetary one (see, to this effect, the judgment of 24 February 2000 in Case C-434/97 *Commission* v *France* [2000] ECR I-1095, paragraph 19).

32 According to the Austrian Government, the specific purpose of the beverage duty is to reinforce the municipalities' tax autonomy.

33 The reinforcement of municipal autonomy through the grant of a power to generate tax income constitutes a purely budgetary objective which, as has just been indicated, cannot, taken alone, constitute a specific purpose in the sense contemplated by Article 3(2) of the excise duty directive.

34 The Austrian Government has also submitted that the specific purpose of the beverage duty was to be found in the need to offset the substantial costs borne by municipalities in connection with the constraints resulting from tourism.

35 It is clear from the documents relating to the main proceedings and, moreover, it is not disputed by the Austrian Government that municipalities are not required to assign the income from the duty to any predetermined purpose and there is no connection with tourist infrastructures or the development of tourism since this duty, which is imposed on beverages irrespective of where they are consumed, is also levied in areas where there is little or no tourism. Furthermore, taxes already exist in Austria which specifically concern the promotion of tourism (see, in this regard, the judgment of 8 June 1999 in Joined Cases C-338/97, C-344/97 and C-390/97 *Pelzl and Others* [1999] ECR I-3319).

36 Finally, the Austrian Government has contended that the duty is intended to protect public health, since it encourages the consumption of non-alcoholic beverages, which are subject to a lower rate of duty than alcoholic beverages.

37 On this point, it is clear from Paragraph 14.1.8 of the FAG that direct sales of wine in Austria are exempt from beverage duty; consequently, it must be questionable whether that duty is intended to discourage the consumption of alcoholic beverages and to protect public health. Next, as the Commission has stated, without being challenged on this point, it follows from Paragraph 10.3.1 of the UStG that wine produced from fresh grapes and sold directly by national vineyards benefits in Austria from a reduced rate of VAT, with the result that a beverage such as Austrian wine sold directly at the places where it is produced is subject to less duty overall than a non-alcoholic beverage such as orange juice. Furthermore, the beverage duty is levied on ice cream at the same rate as for alcoholic beverages (10%), and is also levied, albeit at a lower rate, on non-alcoholic beverages, which further indicates that protection of public health was not the specific purpose of the legislation in question.

38 It follows that a tax such as the duty to which alcoholic beverages are subject cannot be regarded as pursuing a specific purpose in the sense contemplated by Article 3(2) of the excise duty directive.

39 Second, it is necessary to determine whether a tax such as the duty levied on alcoholic beverages complies with the tax rules applicable for excise duty or VAT purposes as far as determination of the tax base, calculation of the tax, and chargeability and monitoring of the tax are concerned.

40 It must first be pointed out that the language versions of Article 3(2) of the excise duty directive diverge in two respects.

41 The Court has consistently held in this regard that, where a provision of Community law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness (see, *inter alia*, Case 187/87 *Saarland and Others* v *Minister for Industry, Post and Telecommunications and Tourism and Others* [1988] ECR 5013, paragraph 19).

42 Further, where there is divergence between the various language versions of a Community text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, *inter alia*, Case C-372/88 *Milk Marketing Board of England and Wales* v *Cricket St Thomas Estate* [1990] ECR I-1345, paragraph 19).

43 First, in the German, Spanish, French, Italian and Portuguese versions, the use of the word 'or' establishes an alternative between compliance with the Community tax rules applicable for excise duty purposes and compliance with those applicable for VAT purposes, whereas the term 'and', featuring in the English, Danish, Finnish, Greek, Dutch and Swedish versions, appears to call for cumulative compliance with those rules.

44 VAT and excise duty have a number of incompatible characteristics. VAT is proportional to the price of the goods on which it is charged, whereas excise duty is primarily calculated on the volume of the product. Further, VAT is levied at each stage of the production and distribution process (input tax paid on the occasion of the previous transaction being in principle deductible), whereas excise duty becomes payable when the products subject to it are made available for consumption (without any similar deduction mechanism coming into operation). Finally, VAT is characterised by its general nature, whereas excise duty is imposed only on specified products. Consequently, if Article 3(2) of the excise duty directive were to be construed as requiring Member States to comply

simultaneously with the tax rules governing those two categories of charges, it would be laying down a condition that is impossible to satisfy.

45 Second, in its English, Danish, Finnish, Dutch, Portuguese and Swedish versions, the excise duty directive requires compliance with the tax rules applicable for excise duty and VAT purposes. In its German version, in contrast, it requires Member States only to comply with the principles of taxation ('Besteuerungsgrundsätze') in regard to excise duty or VAT. For their part, the Spanish, French, Greek and Italian versions use circumlocutions such as 'las normas impositivas aplicables *en relación* con los impuestos especiales o el IVA', 'les règles applicables *pour les besoins* des accises ou de la TVA', 'κανόνες φορολόγησης που ισχύουν για τις ανάγκες των ειδικών φόρων κατανάλωσης και του ΦΠΑ', 'le regole di imposizione applicabili *ai fini* della accise o dell'IVA'.

46 In this regard, it follows both from a comparison of paragraphs 2 and 3 of Article 3 and of the third recital in the preamble to the excise duty directive, which envisages concomitantly the hypotheses contemplated by Article 3, that that directive is intended to prevent additional indirect taxes from improperly obstructing trade. That would, in particular, be the case if traders were subject to formalities other than those provided for by the Community legislation on excise duty or VAT, in view of the fact that such formalities are liable to vary from one Member State to another.

47 In those circumstances, it must be held that Article 3(2) of the excise duty directive does not require Member States to comply with all rules applicable for excise duty or VAT purposes as far as determination of the tax base, calculation of the tax, and chargeability and monitoring of the tax are concerned. It is sufficient that the indirect taxes pursuing specific objectives should, on these

points, accord with the general scheme of one or other of these taxation techniques as structured by the Community legislation.

48 It must be noted in this regard that the beverage duty does not accord with the general scheme of the rules relating to excise duty on alcoholic beverages. It departs from the rules governing calculation of excise duty since its amount is determined in relation to the value of the product and not on the basis of the product's weight, quantity or alcohol content. Furthermore, it does not comply with the rules governing chargeability of excise duty, since it is chargeable only at the stage of sale to the consumer, and not at the time of release for consumption, as defined in Article 6(1) of the excise duty directive.

49 Nor does the beverage duty accord with the general scheme of the rules applicable for VAT purposes. While it is not incompatible with Article 33 of the Sixth Directive, it does not comply with the rules applicable for VAT purposes as far as the rules on calculation and chargeability are concerned. Since it is charged only at the stage of sale to the consumer, it is not charged at each stage in the production and distribution process; moreover, it is calculated without any deduction being made for input tax.

50 The answer to the second question must therefore be that Article 3(3) of the excise duty directive does not preclude the maintenance of a tax charged on non-alcoholic beverages and ice cream, such as that at issue in the main proceedings. Article 3(2) of that directive does preclude the maintenance of a tax charged on alcoholic beverages, such as that at issue in the main proceedings.

The third question

51 By its third question, the national court is asking, essentially, whether exemption from payment of the beverage duty in the case of direct sales of wine to the end consumer constitutes State aid incompatible with Community law.

52 It should first be pointed out in this regard that, according to consistent case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, *inter alia*, Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 59). Nevertheless, the Court has held that it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Bosman*, cited above, paragraph 61, and judgment of 15 June 1999 in Case C-421/97 *Tarantik* v *Direction des Services Fiscaux de Seine-et-Marne* [1999] ECR I-3633, paragraph 33).

53 The question submitted is wholly irrelevant to the resolution of the disputes in the main proceedings, which concern the obligation on the EKW and Wein & Co. to pay beverage duty in respect of supplies of beverages and ice cream effected for consideration, and not the question whether exemption of wine sold directly at the place of production from payment of such a duty constitutes State aid incompatible with the Treaty.

54 It is for that reason unnecessary to reply to the third question submitted in the order for reference.

Limitation of the temporal effects of the judgment

55 In its observations, the Austrian Government raised the possibility that the Court, should it find that a tax such as the beverage duty is incompatible with the relevant provisions of Community law, might limit the temporal effects of the present judgment.

56 In support of its request, the Austrian Government first drew the Court's attention to the catastrophic financial consequences of a judgment entailing the obligation to repay the duty hitherto improperly levied. Municipalities in Austria would be faced with an incalculable number of requests for repayment, which it would be beyond their capacity to satisfy. Such repayment would, moreover, be made difficult by the considerable number of transactions carried out, running into millions. Moreover, suppliers subject to the beverage duty will, in the course of their activities, have passed the duty on to consumers. Since the latter do not in general keep any record of payment after drinking a beverage or eating an ice cream, it would not be possible to refund the duty to them. Finally, the Austrian Government contended, without being challenged on this point, that Commission representatives had assured it, during the negotiations prior to the accession of the Republic of Austria to the European Union, that the beverage duty was compatible with Community law.

57 It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict for any person concerned the opportunity of relying on a provision interpreted by it

with a view to calling in question legal relationships established in good faith. As the Court has consistently held, such a restriction may be allowed only in the actual judgment ruling upon the interpretation sought. In determining whether or not to limit the temporal effect of a judgment it is necessary to bear in mind that although the practical consequences of any judicial decision must be weighed carefully, the Court cannot go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from a judicial decision (Case 24/86 *Blaizot* v *University of Liège and Others* [1988] ECR 379, paragraphs 28 and 30, and Case C-163/90 *Administration des Douanes et Droits Indirects* v *Legros and Others* [1992] ECR I-4625, paragraph 30).

58 So far as the present case is concerned, it must be noted, first, that Article 3(2) of the excise duty directive has not hitherto been the subject of a judgment by way of preliminary ruling on interpretation and, second, that the Commission's conduct may have caused the Austrian Government reasonably to believe that the legislation governing the duty on alcoholic beverages was in conformity with Community law.

59 In those circumstances, and without there being any need to consider the global amount in question, the absence of proof of payment or the very large number of small transactions concerning small amounts, overriding grounds of legal certainty preclude calling in question legal relations which have exhausted their effects in the past; to do so would retroactively cast into confusion the system whereby Austrian municipalities are financed.

60 It must for that reason be held that the provisions of Article 3(2) of the excise duty directive cannot be relied on in support of claims relating to a tax such as the duty on alcoholic beverages paid or chargeable prior to the date of the present

judgment, except by claimants who have, before that date, initiated legal proceedings or raised an equivalent administrative claim.

Costs

61 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof by order of 18 December 1997, hereby rules:

1. **Article 33 of 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, as amended by Council Directive 91/680/EEC of 16 December 1991 supple-**

menting the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers, does not preclude the maintenance of a tax such as the duty on beverages and ice cream at issue in the main proceedings, which is 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 with the products.

2. Article 3(3) of 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 does not preclude the maintenance of a tax charged on non-alcoholic beverages and ice cream, such as that at issue in the main proceedings. Article 3(2) of that directive does preclude the maintenance of a tax charged on alcoholic beverages, such as that at issue in the main proceedings.

3. The provisions of Article 3(2) of Directive 92/12 cannot be relied on in support of claims relating to a tax such as the duty on alcoholic beverages paid or chargeable prior to the date of the present judgment, except by claimants who have, before that date, initiated legal proceedings or raised an equivalent administrative claim.

Edward Moitinho de Almeida Gulmann

Puissochet Wathelet

Delivered in open court in Luxembourg on 9 March 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber