OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 16 JANUARY 1979 [1]

Mr President,
Members of the Court,

1. This new Rewe case presents the Court with the opportunity to tackle the problem of the limits within which the Member States are still free to make the marketing of certain categories of products, whether national or imported, conditional upon the presence of certain characteristics, thereby creating an obstacle to the importation of foreign products within those categories which do not possess the requisite characteristics.

The facts are straightforward. In September 1976 the German undertaking Rewe requested the Federal Spirits Monopoly to authorize it to import from France a consignment of the well-known liqueur "Cassis de Dijon". The Monopoly Administration replied that a special authorization was not necessary for the importation since, by way of a notice of 8 April 1976, it had made a general grant of the authorization required by law; however, at the same time it informed the company concerned that the sale in Germany of "Cassis de Dijon", which has an alcohol content of between 15 and 20%, was prohibited pursuant to another provision of the same Federal Monopoly Law, according to which the marketing of potable spirits is permitted only if they have an alcohol content of not less than 32% (which percentage is however reduced to 25 for liqueurs of the Cassis type). Certain liqueurs, listed in an appropriate regulation, are exempt from the application of that rule by way of exception, but since "Cassis de Dijon" is not one of them the Monopoly Administration stated that it was not in a position to permit the sale thereof within Federal territory.

That attitude was contested by Rewe before the Verwaltungsgericht Darmstadt, which then referred the case to the Hessisches Finanzgericht. The latter, by order of 28 April 1978, referred the following questions to the Court of Justice for a preliminary ruling within the meaning of Article 177 of the EEC Treaty:

1. Must the concept of measures having an effect equivalent to quantitative restrictions on imports contained in Article 30 of the EEC Treaty be understood as meaning that the fixing of a minimum wine-spirit content for potable spirits laid down in the German Branntweinmonopolgesetz, the result of which is that traditional products of other Member States whose wine-spirit content is below the fixed limit cannot be put into circulation in the Federal Republic of Germany, also comes within this concept?
2. May the fixing of such a minimum wine-spirit content come within the concept of "discrimination regarding the conditions under which goods are procured and marketed ... between

1 — Translated from the Italian.

nationals of Member States" contained in Article 37 of the Treaty?

2. I will begin by examining the second question, and then turn to the first, which appears to me to be the only important one. It is clear why the court in Hesse thought it appropriate to refer also to Article 37 of the EEC Treaty: as I noted above, the basic rule fixing a minimum alcohol content as a precondition for the marketing of spirits in Germany is contained in the Federal Law on the Monopoly in Spirits and Article 37, as is well-known, concerns State monopolies of a commercial character. I do not think it is necessary to devote a lengthy discussion at this juncture to the statement of the Commission, refuted by various arguments of Rewe, to the effect that the German Spirits Monopoly has now been eliminated; in effect the Law of 2 May 1976 merely amended its rules, and the fact that the exclusive right to import spirits, which formerly belonged to the Monopoly, has been curtailed, does not in my view mean that the Monopoly has come to an end. It is a fact that a Federal Monopoly Administration continues to exist (it is the defendant before the national court!), with various powers in this field; it is also a fact that, simultaneously with this case, another case is pending before the Court — Case 91/78 *Hansen* — which involves an examination of the detailed rules on the functioning of the German Spirits Monopoly in the light of Article 37.

Having said that I believe that the second question referred by the Finanzgericht must also be answered in the negative, for two reasons. First, even if the basic rule relating to the minimum alcohol content of spirits appears in the German law relating to the Spirits Monopoly, it is evident that it is not a provision which logically pertains to the Monopoly: it could remain in force independently of the latter's existence and in other States equivalent rules are in fact in force in the absence of any monopoly. Within the German legal order, as the Commission has recalled, the Law amending the Law relating to foodstuffs, of 15 August 1974, itself provided that the provision of the Spirits Monopoly Law relating to minimum alcohol contents was to be replaced by appropriate regulations, within the context of the Law relating to foodstuffs. Be that as it may, it should not be forgotten that the problem is to be considered here in general terms by reason of the nature of the procedure for interpretation by way of a preliminary ruling; in general terms, it seems clear that a restrictive measure such as that in issue in this case lies outside the scope of Article 37.

Secondly, even on the assumption that Article 37 (1) is applicable to the case in point, it seems to me that the fixing of a minimum alcohol content which is applicable without distinction to national and imported products cannot come within the concept of "discrimination regarding the conditions under which goods are procured and marketed ... between nationals of Member States" (the first subparagraph of Article 37 (1), already cited). It is accepted that for there to be discrimination between nationals of the Member States there must be treatment which differs on the basis of nationality; however, if a minimum alcohol content is the condition upon which the sale of any spirit or liqueur is rendered conditional, national and foreign products are expressly placed on the same footing

with regard to fulfilment of that condition. Article 37 could possibly have some relevance from the point of view of the obligation placed upon the Member States to refrain from introducing any new measure "which restricts the scope of the articles dealing with the abolition of ... quantitative restrictions between Member States" (Article 37 (2)); however, that aspect of the problem is extraneous to the second question put by the German court, being relevant rather to the first question to which I shall now turn in greater detail.

3. With regard to the wording of the first question, the defendant in the main action has observed that the procedure under Article 177 does not permit the assessment of the lawfulness with regard to Community law of legal provisions in force in a Member State. That is undoubtedly true. But the defendant has recognized that the question also raises a general problem, namely that as to whether measures such as those existing within the Federal Republic of Germany are compatible with Article 30 of the EEC Treaty. In such terms, there is no doubt that the problem may be examined within the context of these proceedings.

It is well-known that the meaning and scope of the prohibition on measures having an effect equivalent to quantitative restrictions on imports are the subject-matter of an important series of decisions of this Court. I will cite in particular the judgment of 15 December 1976 in Case 41/76 *Donckerwolcke* ([1976] ECR 1921), according to which such measures include "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade". That judgment expresses the settled legal view of the Court: there have been many others which have also established that the fact that a measure is capable indirectly of creating an obstacle to trade within the Community is sufficient to render that measure contrary to Article 30 (amongst others: the judgments of 15 December 1976 in Case 35/76 *Simmenthal* [1976] ECR 1871; of 20 May 1976 in Case 104/75 *de Peijper* [1976] ECR 613; and of 8 July 1975 in Case 4/75 *Rewe* [1975] ECR 843).

In the light of those decisions, it appears at first sight to be justifiable to state without more ado that national measures such as those contested by Rewe are covered by the prohibition contained in Article 30, since there is no doubt that the fixing of a minimum alcohol content for spirits and liqueurs, both national and imported, which is to be understood as a precondition for marketing within a Member State, has the indirect consequence of creating an obstacle to the importation from the other Member States of spirits and liqueurs having a lower alcohol content.

However, a closer examination of the problem is necessary in view of the fact that the provisions at issue here are national provisions relating to the composition of certain products (spirits and liqueurs), falling within the wide field of measures determining the technical characteristics upon which the marketing of beverages and foodstuffs is made conditional. Is it possible to go so far as to state, as the German Spirits Monopoly, the defendant in the main action, has done, that each Member State retains full legislative jurisdiction within the above-mentioned field and that the Commission is empowered solely to lay down and subsequently impose measures of harmonization (within the meaning of Article 100 of the EEC Treaty) by means of directives, and that the applicability of Article 30 remains

limited to the case of trading measures relating solely to imported goods?

It must be stated immediately that this argument is based on Commission Directive No 70/50 EEC of 22 December 1969, which was adopted on the basis of Article 33 (7) of the EEC Treaty, that is to say on the basis of the rule entrusting to the Commission the task of establishing the procedure and timetable for the abolition of measures having an effect equivalent to quotas in existence when the Treaty entered into force. Reliance was also placed on the same directive by the plaintiff in the main action and I therefore think it necessary to devote particular attention to it. It is concerned, first, with trading measures other than those applicable without distinction to national and imported products (the fourth to the seventh recitals in the preamble and Article 2) and, secondly, with measures which, on the other hand, apply both to national products and to imported products (the eighth to the eleventh recitals in the preamble and Article 3). Measures of the first group which, according to the fourth recital, "either preclude importation or make it more difficult or costly than the disposal of domestic production", are considered *per se* as being capable of producing an effect equivalent to that of quantitative restrictions on importation. On the other hand, in relation to measures of the second group — to which those at issue in these proceedings undoubtedly belong — the eighth recital in the preamble to the directive states that their effects are not *as a general rule* equivalent to those of quantitative restrictions, "since such effects are normally inherent in the disparities between rules applied by Member States in this respect". Nevertheless, the ninth and tenth recitals as well as Article 3 of the directive place such measures in the category of those which are prohibited pursuant to Article 30 of the Treaty where "the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules" and therefore, in particular, where "the restrictive effects on the free movement of goods are out of proportion to their purpose" and also where "the same objective can be attained by other means which are less of a hindrance to trade". In this case the Administration of the German Spirits Monopoly maintains that measures such as those at present in force in Germany relating to the minimum alcohol content of spirits and liqueurs have a restrictive effect proportional to their purpose and that there is no other means of attaining the objectives sought, namely the protection of public health, the protection of the consumer against fraud and unfair competition. Rewe naturally does not share this view.

4. Before conducting a deeper examination of these two opposing opinions, I would like to make certain observations on the subject of the tendency displayed in Directive No 70/50 and, more generally, on the subject of the problem of the determination of the technical characteristics of goods for the purposes of the marketing thereof.

First, I have already recalled that Directive No 70/50 is expressly based on Article 33 (7) of the Treaty. It is therefore to be seen in the context of the stage of progressive abolition of quotas which coincided with the transitional period (the second paragraph of Article 32 is very clear in this respect). That may

explain the prudent attitude shown by the Commission in relation to the phenomenon of measures relating to the marketing of products which are applicable without distinction to domestic and imported products, the effects of which were judged, as we have seen, in the eighth recital of the preamble to the said directive, not to be "as a general rule" equivalent to those of quantitative restrictions. Furthermore, the Commission also opts for prudence (or perhaps for a limited interpretation of Article 30) on the subject of the formalities upon the completion of which importation is made conditional, stating (in the third recital of the preamble to the directive under consideration) that those formalities "do not *as a general rule* have an effect equivalent to that of quantitative restrictions"; that argument has subsequently been rejected by the Court of Justice in the above-mentioned Donckerwolke decision.

However, once the transitional period was over and the prohibition on quotas and measures having equivalent effect had thereby become absolute that attitude of prudence was no longer justified.

Secondly, the statement contained in the ninth recital of the preamble to the directive in question, according to which the Treaty does not adversely affect the powers of the Member States to regulate trade, must be taken with a pinch of salt. Such powers have indeed not been transferred to the Community but Community law is capable of limiting the exercise of them and in fact limits that exercise by means of numerous rules, including Article 30. The *Donckerwolcke* decision applied the prohibition contained in Article 30 to national trading rules which were capable of forming an obstacle to intra-Community trade. Consequently, to maintain that the Member States are completely free to fix conditions for marketing consisting in the requirement of a given composition of goods — and that in this field Community law is not relevant — would be a manifest error.

I am not convinced by the ground advanced in the eighth recital of the preamble to the directive in order to justify the argument that measures which relate to the marketing of products and which apply equally to domestic and imported products do not (at least "as a general rule") have an effect equivalent to that of quantitative restrictions. As I have already said, that ground states that the effects of such measures "are normally inherent in the disparities between rules applied by Member States in this respect". No doubt disparities between rules relating to the marketing of products may distort conditions of competition within the common market (this is the case referred to in Article 101 of the EEC Treaty) and may, in that sense, have some effect on the free movement of goods, so that the abolition of disparities by harmonization directives is logical; but meanwhile it still remains to be ascertained whether one of the bodies of national rules in question does not contain measures having an effect equivalent to quantitative restrictions on imports which as such are prohibited by Article 30. That would not be the case, for example, if a Member State rendered the sale of certain products manufactured on its own territory subject to specific conditions as to composition or quality, while at the same time permitting the sale of imported products of the same category which bear a registered indication of origin or precise information relating to their constituents.

Indeed the question of the relationship between Article 30 *et seq.* of the EEC Treaty, on the one hand, and Articles 100 to 102 (on the approximation of

laws), on the other, is badly framed if it is supposed that the fact that the second group of rules applies to a specific matter is sufficient to exclude the applicability of the prohibition contained in Article 30 to the same matter. In the case in point the defendant in the main action appears to be convinced that since conditions relating to the quality or composition of goods are involved, Community law may intervene only in the form of directives on the approximation of laws; consequently, pending such approximation in relation to the given product, the assessment of measures adopted by the Member States in the light of Article 30 is said to be out of the question. That argument cannot be accepted (it is indeed rebutted by Directive No 70/50 itself). It is clear that when the approximation of laws is undertaken, Article 30 is rendered inoperative simply on the ground that the directives adopted pursuant to Articles 100 and 101 must be presumed to be in conformity with the Treaty (including Article 30); however, until that approximation has taken place, Article 30 is and remains applicable to each of the laws which await harmonization. The natural consequence, therefore, is that provisions of national law which may be contrary to the prohibition contained in Article 30 may not serve as points of reference for the purposes of a subsequent harmonization.

As regards the general problem of national provisions the disparities between which create technical barriers to trade, it should be recalled that on 28 May 1969 the Council drew up a general programme for the removal of such obstacles (Official Journal C 76 of 17 June 1969) and, in particular, a resolution concerning foodstuffs. The programme made provision, *inter alia*, for the adoption by the Council before 1 January 1971 of directives in the spirits sector and it was accompanied by an agreement between the representatives of the Governments of the Member States meeting within the Council to establish a provisional system preserving the *status quo*. The timetable adopted in May 1969 was later replaced by another, annexed to the Council Resolution of 17 December 1973 (Official Journal C 117 of 31 December 1973), which postponed until 1 January 1978 the final date for the adoption by the Council of the Commission's proposals relating to spirits. However, it appears that proposals in that field have not yet been submitted to the Council.

Having made those remarks I should add that where harmonization directives have been adopted (for example in the fruit juices sector: see Council Directive No 75/726 of 17 November 1975), the elimination of technical obstacles to trade was achieved by the fixing of common rules relating not only to the composition of products and the characteristics of their manufacture, but also the use of reserved designations and labelling. Until common rules have been adopted it is quite possible that each of those aspects may be regulated by the law of a single Member State, such that there are effects equivalent to quantitative restrictions; it all depends on the purpose of each national rule and the manner in which the problem of the conditions under which imported products may be marketed is resolved.

5. Having reached this point in my analysis I must now turn to the objectives pursued by rules such as those in force in the Federal Republic of Germany; it should be examined whether they are sufficient to justify the obstacle placed in the way of imports. The defendant in the main action indicated

three aims which it claimed amount to such justification: the protection of public health, the protection of the consumer against fraud and the suppression of unfair competition. The measure laying down the minimum alcohol content of spirits and liqueurs with which we are at present occupied may therefore be examined in the light of the criteria laid down by Article 3 of Directive No 70/50 so as to establish whether its restrictive effects are out of proportion to the results sought and whether those same objectives may not be attained by other means which would create less of an obstacle to trade. That measure may also be examined in the light of Article 36 of the EEC Treaty which, as we know, states, *inter alia,* that notwithstanding the rules contained in Articles 30 to 34 there is no prohibition upon restrictions on imports justified on grounds of public policy or the protection of health of humans.

I would like to observe in this connexion that Article 36 is without any doubt a more solid basis for assessment than anything which is offered to us by Directive No 70/50, in view of the reservations which I have expressed in relation to the compatibility of that directive with the prevalent strict interpretation of Article 30. I would also emphasize that the criteria contained in Article 3 of Directive No 70/50 presuppose that, in relation to Community law, the results sought by Member States when enacting measures relating to the marketing of products are lawful. The protection of public health is without any doubt a legitimate aim and express reference is made thereto in Article 36. Exceptions to Article 30 which appear necessary for the purpose of protecting producers and consumers against commercial fraud are similarly legitimate: the Court recognized this, also on the basis of Article 36 and the concept of public policy which appears there, in its judgment of 20 February 1975 in Case 12/74 *Commission* v *Federal Republic of Germany* ([1975] ECR 181) at paragraph 17 of the decision. On the other hand, I doubt whether the suppression of unfair competition may justify exceptions to Article 30; it appears doubtful, at the very least, that the concept of public policy to which reference is made in the said Article 36 may be stretched thus far. However, I think it is useful to recall that in Directive No 75/726, cited above, on the approximation of laws concerning fruit juices, the prohibition on the creation of obstacles to intra-Community trade in those products by non-harmonized provisions concerning the composition, manufacturing specifications, packaging or labelling of those products (Article 12 (1)) was stated not to apply to provisions justified on grounds of the repression of unfair competition, in addition to those of the protection of public health, the repression of frauds, the protection of industrial and commercial property, of indications of source and appellations of origin (Article 12 (2)).

I shall turn now to the measures involved in this dispute. I have great difficulty in sharing the view put forward by the German Spirits Monopoly Administration, according to which the fixing of a minimum alcohol content for spirits and liqueurs serves to protect public health against the risks of alcoholism. It was stated in support of that argument that the lower the tolerated level of alcohol, the higher the quantities of spirits and liqueurs consumed, and that in any event the fact that the market would be inundated with imported products once the dam of a minimum alcohol content was breached would

increase the temptation upon consumers. For my part I believe that the placing on the market of an alternative in the form of beverages which are weaker from the point of view of their alcoholic strength would give hope of a diminution in the number of consumers of beverages which are more harmful because they have a higher alcohol content. In connexion with the liqueur which is the subject-matter of this case, there are in Germany drinkers of "Cassis de Dijon" who are at present obliged to drink a version of it with an alcoholic strength of 25%, which is specially produced for the German market, since the marketing of authentic "Cassis de Dijon" is prohibited. Would it not be better for public health if consumers who are partial to a liqueur with a blackcurrant flavour had the possibility of consuming less alcohol, quite independently of the satisfaction of drinking the original product? And if it is true, as the Advocate for the German Monopoly has stated, that it is the habits and demands of consumers which determine quality standards, with the result that they find on the market that which they wish and expect to find there when asking for a given product, it is not also true that in order to direct those habits and possibly to modify them, it would be advisable, if not necessary, to provide greater possibilities for choice? To guide the public towards beverages with a lower alcohol content would, in my view, show a greater regard for public health than forcing it to consume only beverages whose minimum content of a harmful substance may not be reduced.

As regards the repression of frauds, in my view it is important to avoid the sale of products which are passed off for that which they are not or which wrongfully appropriate a designation which should not be applied to them or in relation to which doubt is maintained as to the place of production or in respect of which no indication is given of the substances of which they are composed. I therefore believe that from the point of view of Community law it is perfectly lawful for each Member State to resolve in an appropriate manner the problem of the identification of each product, its designation, its origin and the indication of the substances of which it is composed. But all that has nothing to do with the fixing of a mandatory minimum alcohol content for all spirits and all liqueurs.

It has been maintained that the information appearing on the label may constitute a further guarantee for the consumer (and that it is to this end that such information is required by the German legislation), but not the sole guarantee. It is claimed that, in general, the consumer fails to take notice of the characteristics of the product and is almost automatically drawn towards less expensive products (in the present case, those having the lowest alcohol content); he is therefore open to frauds of all kinds. But the idea of this widespread, if not general, incapacity on the part of the consumer seems to me to doom to failure any effort to protect him, unless it be to impose upon him a single national product the composition of which is constant and is rigorously controlled. On the other hand, the fixing of a minimum alcohol content in itself merely obviates the risk of purchasing a spirit or liqueur having a minimum alcohol content which is lower than that indicated. But is there perhaps a concept of a spirit or a liqueur which is necessarily linked to a given alcohol content? And in connexion with spirits, is the most serious fraud to be avoided by way of a strict legislative limit the existence of an alcohol level which is lower than that which the consumer expects?

These doubts lead me to say that the real motive for the measure in question must be sought elsewhere; it is to be found in a market tradition to which national producers have long conformed and to which, therefore, the tastes of consumers have grown accustomed, such that there is reason to fear an invasion of foreign products having a lower alcohol content. The defendant in the main action has denied that the rules at issue here give national producers an advantage, in that they apply without distinction to all products, whether national or imported. It appears to me that the principal advantage under the rules is to be found in the restriction on the importation of competing products which are already known in their country of origin but which are not marketable because they have an alcohol content which is lower than the prescribed limit. The defendant in the main action has also observed that if it was necessary to allow the marketing of foreign products having a low alcohol content, the whole of national production would be forced to adapt to that type of product, with the consequence that the minimum alcohol content adopted in the Member State having the least exigent requirements in this matter would have to be substituted for the original limit. But that argument is wholly based on the idea that the consumer is guided in his purchases solely by price, that for products having the lowest alcohol content being the lowest. Common experience shows that such is not the case: in countries where the consumption of wine is high (to take the example of a beverage having a relatively low alcohol content), that fact has not led producers of brandy, grappa or other spirits to reduce the alcohol content of those products. From the point of view of Community law, there is nothing to prevent a Member State from fixing a minimum alcohol content for nationally produced spirits or liqueurs, at the same time requiring that the corresponding foreign products should bear a clear indication as to their origin and alcohol content (obviously without misappropriating duly protected national designations).

On the basis of the above considerations as a whole I am convinced that measures such as those in force in the Federal Republic, which create an indirect obstacle to imports and, therefore, are contrary to Article 30 of the EEC Treaty, are not justified under Article 36 of the Treaty or Article 3 of Commission Directive No 70/50 of 22 December 1969. The objective of the protection of the consumer against frauds may, in fact, be attained by other means which are less harmful to trade; in relation to that objective, the obstacles placed in the way of the free movement of goods are excessive and, therefore, disproportionate.

6. In consequence, it is my opinion that the Court should reply to the questions referred to it by the Hessisches Finanzgericht, by order of 28 April 1978, by stating, in accordance with Article 177 of the EEC Treaty, as follows:

(a) The concept of "measures having an effect equivalent to quantitative restrictions" (Article 30 of the EEC Treaty) covers the fixing of a minimum alcohol content for spirits and liqueurs, as provided by the law

of a Member State as a condition for marketing, where it applies without distinction to national products and foreign products, thereby creating an obstacle to the importation of products from other Member States having an alcohol content lower than the limit fixed.

(b) National measures of the type indicated above are not covered by the concept of "discrimination regarding the conditions under which goods are procured and marketed ... between nationals of Member States" (Article 37 of the EEC Treaty), even where they are adopted in the context of a national spirits monopoly system.