

OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER

delivered on 15 June 2000 *

1. By this action, brought under Article 173 of the EC Treaty (now, after amendment, Article 230 EC), the Italian Republic is asking the Court of Justice to annul Commission Decision 98/617/EC¹ denying Italy the authority to refuse to grant certain alcoholic products exemption from excise duty.

3. However, the Directive establishes certain exemptions. Specifically, under Article 27:

‘1. Member States shall exempt the products covered by this Directive from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

I — The Community legislation

A. *Legislation on customs duties*

2. Directive 92/83/EEC² provides that the Member States are to apply an excise duty on ethyl alcohol [Article 19(1)] which is to be fixed per hectolitre of pure alcohol at 20 °C and calculated by reference to the number of hectolitres of pure alcohol at a rate which, in principle, is the same for all the products chargeable with the duty on ethyl alcohol (Article 21).

(a) when distributed in the form of alcohol which has been completely denatured in accordance with the requirements of any Member State, such requirements having been duly notified and accepted in accordance with paragraphs 3 and 4 of this Article.³ This exemption shall be conditional on the application of the provisions of Directive 92/12/EEC⁴ to commercial movements of completely denatured alcohol;

* Original language: Spanish.

1 — OJ 1998 L 295, p. 43.

2 — Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21).

3 — Paragraphs 3 and 4 lay down the procedure for the disclosure and authorisation, at Community level, of the national denaturing processes. Having regard to the notifications made by the Member States, the Commission adopted Regulation (EC) No 3199/93 of 22 November 1993 on the mutual recognition of procedures for the complete denaturing of alcohol for the purposes of exemption from excise duty (OJ 1993 L 288, p. 12). As regards Italy, the communication of an amendment to the formula of the denaturant authorised in that Member State made it necessary for the Commission to adopt Regulation (EC) No 2559/98 (OJ 1998 L 320, p. 27) amending the basic Regulation.

4 — 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).

(b) when both denatured in accordance with the requirements of any Member State and used for the manufacture of any product not for human consumption;

referred to in Article 18(1) of the Directive.⁵

...

5. That provision was implemented by Regulation (EEC) No 3649/92,⁶ Article 5 of which provides:

5. If a Member State finds that a product which has been exempted under paragraphs 1(a) or 1(b) above gives rise to evasion, avoidance or abuse, it may refuse to grant exemption or withdraw the relief already granted. The Member State shall advise the Commission forthwith. The Commission shall transmit the communication to the other Member States within one month of receipt. A final decision shall then be taken in accordance with the procedure laid down in Article 24 of Directive 92/12/EEC. Member States shall not be obliged to give retroactive effect to such a decision.

'The simplified accompanying document shall also be used to accompany commercial intra-Community movements of completely denatured alcohol, provided for in Article 27(1)(a) of Council Directive 92/83/EEC.'

...'

6. That provision excludes the movement of completely denatured alcohol from the obligation to use the accompanying administrative document for movements under duty-suspension arrangements of products subject to excise duty (that is to say, products on which tax has not yet been paid), to which Article 18(1) of Directive

4. Under Article 7(4) of Directive 92/12, to which Article 27(1)(a) of Directive 92/83 refers, products subject to excise duty, which have already been released for consumption in a Member State, are to move between the various Member States under cover of an accompanying document listing the main data from the document

⁵ — Article 18(1) of Directive 92/12 provides: 'Notwithstanding the possible use of computerised procedures, all products subject to excise duty moving under duty-suspension arrangements between Member States shall be accompanied by a document drawn up by the consignor. This document may be either an administrative document or a commercial document. The form and content of this document shall be established in accordance with the procedure laid down in Article 24 of this Directive.'

⁶ — Commission Regulation (EEC) No 3649/92 of 17 December 1992 on a simplified accompanying document for the intra-Community movement of products subject to excise duty which have been released for consumption in the Member State of dispatch (OJ L 369, p. 17).

92/12 refers. That document is defined in Regulation (EEC) No 2719/92.⁷

B. *Legislation relating to cosmetics*

7. Article 5 of Directive 80/232/EEC⁸ states that the latter's aim is that Member States should not 'refuse, prohibit or restrict the placing on the market of prepackages which satisfy the requirements of this Directive, on the grounds of their nominal quantity in the case of prepackages listed in Annex I ...'.

8. Annex I lays down, for the products to which Article 1 of the Directive refers, the range of values of the nominal quantities of the contents of the prepackages. Point 7.4 of that Annex (Cosmetics: beauty and toilet preparations), refers to 'Alcohol-based products containing less than 3% by volume of natural or synthetic perfume oil and less than 70% by volume of pure ethyl alcohol: aromatic waters, hair lotion, pre-shave and after-shave lotions.'

7 — Commission Regulation (EEC) No 2719/92 of 11 September 1992 on the accompanying administrative document for the movement under duty-suspension arrangements of products subject to excise duty (OJ 1992 L 276, p. 1).

8 — Council Directive 80/232/EEC of 15 January 1980 on the approximation of the laws of the Member States relating to the ranges of nominal quantities and nominal capacities permitted for certain prepackaged products (OJ 1980 L 51, p. 1).

9. Lastly, mention should be made of Directive 78/768/EEC.⁹ Article 1(1) defines 'cosmetic products' as follows:

'A "cosmetic product" shall mean any substance or preparation intended to be placed in contact with the various external parts of the human body (epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance and/or correcting body odours and/or protecting them or keeping them in good condition'.

II — Background to the dispute

A. *The Italian Republic's request*

10. In June and July 1997, the Italian Revenue Authorities notified the Commission that, by Ministerial Order No 524 of 9 July 1996,¹⁰ certain national conditions for exemption from excise duty had been imposed on alcohol products falling within Article 27(1)(b) of Directive 92/83.

9 — Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products (OJ 1976 L 262, p. 169). That Directive has been amended by, amongst others, Council Directive 93/35/EEC of 14 June 1993 (OJ 1993 L 151, p. 32).

10 — *Gazzetta Ufficiale* No 237 of 9 October 1996.

The following conditions were amongst those laid down:

- only pure alcohol, not reject-quality alcohol, should be denatured to produce perfumes and cosmetics, and

- the alcohol content of certain household cleaning products should not exceed 40%.

Those conditions, which merely reflected the normal composition of those products, were designed to ensure that goods prepared in an irregular manner could not improperly benefit from the denaturing formulae or the movement and warehousing procedures laid down for certain categories of goods. In particular, in the case of cosmetics, the aim was to prevent certain lightly denatured products, marketed as perfume but not having the requisite properties to be considered perfume, from being substituted in practice for the completely denatured alcohol referred to Article 27(1)(a) of Directive 92/83. The Italian Revenue Authorities pointed out that the latter kind of alcohol provided better safeguards against tax evasion, owing to the greater degree of denaturing and the stricter movement and warehousing procedures.

11. As the Italian Government points out in its application, the imposition of the aforementioned conditions was suspended after an action for Treaty-infringement was brought against it for failing to give prior notification of technical rules. Nevertheless, the Italian Revenue Authorities persisted in seeking authority to refuse exemption from excise duty for products which might give rise to avoidance, evasion or abuse.

12. In its reply, the applicant State explains the denaturing process and the risks of tax evasion in the following way.

The aim of denaturing is to render the alcohol toxic and unable to be ingested or regenerated for human consumption. For the manufacture of detergents, the denaturing procedures require the use of the denaturant approved by the State. This is a highly toxic stabiliser which prevents chemical regeneration of the alcohol into potable alcohol.

Perfumes, which are also exempt from excise duty, raise a particular problem. They can only be manufactured using special, mild, perfumed denaturants. Since impure alcohol has an unpleasant odour and contains organic compounds of distillation products (such as aldehydes, ketones and methanol, which are toxic to human beings) that are incompatible with use on the face, skin or mucous mem-

branes, it is necessary to use good quality alcohol to manufacture a perfume. sought.¹¹ The institution considered:

Although the alcohol used in a perfume is denatured to a lesser degree and is therefore easy to regenerate, is not usual for it to be regenerated because the operation would be very expensive, given the price of pure alcohol. On the other hand, the operation would be feasible if the rules allowed waste alcohol to be used to make a 'perfume'.

The Italian Government therefore believes that the obligation to use pure alcohol in the manufacture of perfumes and cosmetics constitutes a means of combatting smuggling and tax avoidance. It states that there has been a case in Italy in which a product made with lightly perfumed reject-quality alcohol, after being declared by the manufacturer to be a cosmetic, was marketed as a household cleaning product and, consequently, as a substitute for the completely denatured alcohol to which Article 27(1)(a) of Directive 92/83 refers, without being subject to the stricter denaturing, movement and warehousing rules applicable to that product.

'(11) As regards the reasons given by Italy for the refusal of exemption to cosmetics (perfumes) containing impure alcohol, the use of cheap impure alcohol to produce goods falling within Article 27(1)(b) cannot be regarded as a cause of evasion, avoidance or abuse in particular since, on the one hand, impure alcohol presents less danger of improper use and, on the other hand, whether or not cosmetics produced from impure alcohol are cheaper, Article 1(b) is in no way restricted to expensive goods, the disparate goods falling within it varying extremely widely in price. Nor does anything in the Directive require products exempt under Article 27(1)(b) (which are not for human consumption) to be derived from pure alcohol.

B. *Commission Decision 98/617/EC*

13. On 21 October 1998 the Commission refused to grant Italy the authority it

11 — In accordance with the procedure laid down in Article 27(4) and (5) of Directive 92/83, the Commission adopted its Decision after obtaining the approval of the Committee on Excise Duties established by Article 24 of Directive 92/12 and composed of representatives of the Member States. The Commission emphasises that the arguments put forward by the Italian authorities were so unconvincing that the members of the Committee on Excise Duties voted unanimously (14 Member States opposed Italy's position) in favour of the draft decision to deny its request.

(12) Moreover, since Article 27(1)(b) covers not only, or even mainly, cosmetics, but also products used *inter alia* for cleaning purposes, the use of goods described as cosmetics for cleaning purposes cannot affect their classification under Article 27(1)(b) and cannot be regarded as evasion, avoidance or abuse. This seems particularly clear in view of the fact that in some Member States it is not unusual for colognes and the like to be used for non-cosmetic purposes such as cleaning. The fact that the “completely denatured” alcohols of Article 27(1)(a) may also be used for such purposes is not relevant.

III — Forms of order sought

14. The Italian Government asks the Court to annul the Commission’s decision, to refer the matter back to the Commission for review, and to order the Commission to pay the costs.

15. The Commission contends that the Court should dismiss the application and order the Italian Republic to pay the costs.

IV — Pleas in law

16. The Italian Republic alleges an infringement and misapplication of Article 27(1)(a) and (b) and (5) of Directive 92/83, Article 1 of Directive 76/768 and point 7.4, of Annex I to Directive 80/232. It also alleges that the decision is vitiated by inappropriate conditions, a lack of logic and an inadequate statement of reasons.

...

(16) In addition, Italy has not shown that any of the products subject to refusal of exemption have in fact given rise to any actual evasion, avoidance or abuse. Nor has any other Member State — most of which have much heavier duty rates than Italy — reported any problems of evasion, avoidance or abuse arising from the exemption of these products.’

Specifically, the applicant Government considers that the contested decision is invalid and should be annulled because:

— it maintains, generally and in spite of the provisions of point 7.4 of Annex I,

to Directive 80/232, that cosmetic products may be manufactured using impure alcohol;

ducts which present the same risk of avoidance, discrimination of a fiscal nature which also affects the market and, consequently, the competitiveness of the products themselves.

- it accepts — contrary to the provisions of Article 1(1) of Directive 76/768, as amended by Directive 93/35 — that cosmetic products may be used for purposes other than application to the human body and that they may, therefore, be manufactured specifically for such other purposes;

V — Legal analysis

A. Products subject to the excise duty on ethyl alcohol

- in not distinguishing between the concepts of avoidance, evasion or abuse, to which Article 27(1) and (5) of Directive 92/83 refer, and by equating them all with the concept of avoidance, the Commission does not regard as abuse the attempt to benefit, without justification, from more favourable tax rules; and
- in removing any limits as to alcoholic content and therefore permitting the preparation of products which are substantially similar, in terms of composition and potential applications, to completely denatured alcohol, which is subject to more favourable rules, the Commission is creating, between pro-

17. According to the Commission, it is to be inferred from Articles 20, 25 and 27 of Directive 92/83 that the only products subject to the excise duty on ethyl alcohol are alcoholic drinks. Since the other ethyl alcohols are compulsorily exempt from the duty, it would be illogical to refuse exemption to an ethyl alcohol not contained in an alcoholic drink merely because it has been inappropriately classified as alcohol exempt under Article 21(1)(b) instead of alcohol exempt under Article 21(1)(a).

18. It is true that, in the first stage of the long negotiations leading to the adoption of Directive 92/12,¹² the Commission pro-

12 — The Commission's first proposals were published in 1972.

posed that excise duty should be levied only on alcohols intended for human consumption.¹³ However, it does not appear that the Council pursued that initiative.

— products of CN codes 2204, 2205 and 2206 which have an actual alcoholic strength by volume exceeding 22%,

— potable spirits containing products, whether in solution or not.’

19. Indeed, after it is laid down, in Article 19(1) of Directive 92/83, that ‘Member States shall apply an excise duty to ethyl alcohol in accordance with this Directive’, Article 20 provides as follows:

‘For the purposes of this Directive the term “ethyl alcohol” covers:

— all products with an actual alcoholic strength by volume exceeding 1.2% volume which fall within CN codes 2204, 2205 and 2206, even when those products form part of a product which falls within another chapter of the CN,

20. Under Article 26 of Directive 92/83, references to the Combined Nomenclature codes are to be deemed to be the version in force at the time of adoption of the Directive.¹⁴ Now, although it is true that almost all the products to which the codes mentioned in Article 20 refer are alcoholic drinks, it is also true that CN code 2207 includes ‘denatured ethyl alcohol and potable spirit, of any grade’, which cannot, under any circumstances, be classified as alcoholic drink.

21. Directive 92/83 thus establishes the principle that excise duty will be levied on ethyl alcohols not intended for human consumption, subject to the proviso that they may be exempt if they satisfy the conditions laid down in Article 27.

13 — Article 7 of the Proposal for a Council Directive on the harmonisation of excise duties on alcohol, submitted by the Commission on 7 March 1972, granted exemption from duty to ethyl alcohol used under fiscal monitoring to make products not intended for human consumption and for the manufacture of perfumery or hygiene products and cosmetic products. Ethyl alcohol completely denatured in accordance with the national provisions was also exempt (OJ 1972 C 43, p. 25).

14 — Commission Regulation (EEC) No 2587/91 of 26 July 1991 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the common customs tariff (OJ 1991 L 259, p. 1).

22. I do not believe that Article 25 of Directive 92/83, which the Commission cites, can lead to any other conclusion. According to that provision: 'Member States may refund the excise duty on alcoholic drinks withdrawn from the market because their condition or age renders them unfit for human consumption.' In my opinion, it cannot be inferred from the fact that that article refers only to *alcoholic drinks* that excise duty is chargeable only on products intended for human consumption. As I have pointed out, the scope of this excise duty is defined in Article 20, whereas Article 25 is merely a particular provision applicable to a specific type of the dutiable products.

23. In its rejoinder, the Commission states that, in any case, given the wide variety of denaturing methods available to economic operators (methods approved by Community law and national methods to which the principle of mutual recognition between Member States applies), it is inconceivable, except in the event of a clandestine release on to the market, that an operator will not use one of them. It considers that, before marketing a denatured alcohol, a manufacturer or distributor who is not only honest but also reasonable, will first of all make sure that the alcohol satisfies the Community or national denaturing conditions required for obtaining exemption, for the obvious reason that a denatured alcohol burdened with the heavy fiscal charge intended for ethyl alcohol would be too expensive and would be unsaleable.

24. That argument does not seem convincing to me either. The large number of

denaturing methods which, according to the Commission, are accepted at Community or national level only means that it will be easy for operators to obtain exemption. However, the fact is that Article 27(1) of Directive 92/83 links the obtaining of the exemption to the use of one of the denaturing methods approved by a Community (Article 27(1)(a)) or national (Article 27(1)(b)) rule. If, for any reason, the denaturing method which is used does not fall into either of those two categories, the resulting alcohol may not benefit from the exemption made available by those two provisions, irrespective of how the operator who acts in this way may be described.

25. I think, therefore, that the Commission is wrong to maintain that, in any case, denatured ethyl alcohols are exempt from excise duty and that it is irrelevant, from a tax point of view, whether an alcohol falls under Article 27(1)(a) or (b) of Directive 92/83. As I have shown, it is not true that those alcohols are *always* exempt from excise duty: in order to be so, they must satisfy the conditions indicated in the aforementioned provision.

B. *The allegations as to infringement of Directive 80/232 and Directives 76/768 and 93/35*

26. The Italian Government maintains that the various regimes provided for in Art-

icle 27(1)(a) and (b) of Directive 92/83 are closely linked to the various types of products, inasmuch as the denaturing formulae have been decided upon taking into account the specific use to which each of them is put. Every product must therefore be given a precise classification, according to its composition and use, to prevent it benefitting unfairly from a more favourable system than the one which corresponds to it, entailing not only a risk for the public purse but also a distortion of competition to the detriment of honest operators.

It claims that, by denying it the authority to refuse the exemption established in subparagraph (b) of the aforementioned provision to products presented as 'perfumes' but manufactured with waste alcohol, the Commission has not taken into consideration the fact that Directive 80/232 requires that pure alcohol be used, at least for the manufacture of certain categories of cosmetics.

The applicant Government also contends that the Commission, by considering that it is irrelevant, from a tax point of view, whether 'cosmetic' products may be used for household cleaning, is overlooking the provisions of Directives 76/768 and 93/35.

27. In my view it is not possible to infer from the wording of Article 27(1)(a) and (b) of Directive 92/83 that certain types of product, such as detergents, must neces-

sarily fall within subparagraph (a), as the applicant State seems to suggest. On the contrary, I believe, as does the Commission, that the essential thing, when it comes to granting or refusing exemption, is the denaturing method. If it is one of those approved at Community level, the alcohol is exempt from excise duty under subparagraph (a). If, on the other hand, the alcohol contained in a product not intended for human consumption has been denatured in accordance with a procedure approved in a Member State, it is appropriate to apply the exemption available under subparagraph (b). Finally, if the denaturing method is not one of those approved by Community rules or by the national legal systems, the product does not qualify for exemption.

28. It would therefore be contrary to Directive 92/83 to refuse to exempt a product which satisfies the conditions laid down in Article 27(1)(b) merely because it is discovered that its actual use does not correspond to the designation which the operator has given it. As the Commission rightly states, neither the use of pure alcohol nor the maximum alcohol content was considered by the Community legislature to be a criterion for applying the exemption.

29. Nor, for the same reason, can the fact that the conditions imposed may reflect the normal composition of the products serve as justification. Although it is true that, as regards cosmetics, point 7.4 of Annex I to

Directive 80/232 refers only to pure alcohol, a product presented as a cosmetic and containing impure alcohol may not and must not be penalised by loss of the exemption, provided it satisfies the conditions laid down in Article 27(1) of Directive 92/83. On the other hand, Member States may, in accordance with the Community directives, prohibit it from being marketed and, if necessary, impose the economic or even criminal sanctions provided by their respective national legal systems. The same can be said about the other condition laid down by the Italian Government, regarding the maximum alcohol content of household cleaning products.

30. Consequently, I consider that the claim based on an alleged infringement of Directive 80/232 on cosmetic products should be rejected. The Commission, in the contested decision, does not say that those products may be made with impure alcohol. What it maintains — rightly, in my view — is that the use of that type of alcohol in products which have been presented as cosmetics does not prevent the exemption from applying if the alcohol used has been denatured in accordance with one of the procedures mentioned in Article 27(1) of Directive 92/83.

31. The claim relating to the alleged infringement of Directive 76/768, as amended by Directive 93/35, should suffer a similar fate. It is true that that Directive states that only substances or preparations intended to be used directly on the human body

(Article 1(1)) may be classified as ‘cosmetic products’ and that Member States must adopt the provisions necessary to ensure that the labelling, presentation and advertising of cosmetic products do not suggest that those products possess characteristics which they do not (Article 6(3)). Thus, a household cleaning product, such as a detergent, may not be presented under the designation ‘cosmetic product’.

As I have already said, the fact that a household cleaning product cannot be called a cosmetic product does not mean that the denatured alcohol with which it is manufactured has to forfeit the benefit of the exemption from excise duty established by Directive 92/83 if it satisfies the conditions laid down in Article 27(1)(a) or (b). In this situation too, what Member States may — and must — do is prohibit it from being marketed as a cosmetic product and, if appropriate, impose economic, or even criminal, sanctions on those responsible, in accordance with the rules in force in each State.

C. The claim based on a misinterpretation of the concept of ‘abuse’

32. The Italian Republic emphasises that, in any case, Article 27(1) and (5) allow Member States to lay down conditions to prevent any kind of avoidance, evasion or abuse in the application of the exemptions.

It believes that if products which are denatured in accordance with subparagraph (b) and, as such, do not satisfy the conditions laid down in subparagraph (a), are used, in practice, as substitutes for the products covered by subparagraph (a), in order to benefit from more favourable tax rules, this constitutes an abuse against which Member States must be accorded the right to take action. It therefore considers that the contested decision is invalid because it treats avoidance, evasion and abuse as the same thing and does not acknowledge that the attempt to benefit from more favourable tax rules constitutes an abuse.

33. In connection with this claim, the Commission points out, first, that under Article 27 of Directive 92/83, for avoidance, evasion or abuse to be able to justify a decision not to grant or to revoke an exemption, it has to be proved that such an irregular action has actually taken place. It states that, as it indicated in paragraph 16 of the statement of reasons of the contested decision, Italy has not shown, in the present case, that any of the products affected by its refusal of exemption have given rise to avoidance, evasion or abuse.

34. The applicant Government states, in that connection, that, in the Italian version, Article 27(1) of Directive 92/83 refers to the need to 'prevenire' (prevent) evasion, avoidance and abuse, and that Article 27(5) and the twenty-second recital in the preamble to the Directive refer to 'eventuale' (possible) evasion, avoidance or abuse, from which it infers that it is

not necessary for evasion, avoidance or abuse to have occurred: the risk that they may occur is enough.

35. The Commission replies that, according to the case-law of the Court of Justice, '... the need for a uniform interpretation of Community regulations makes it impossible for the text of a provision to be considered in isolation but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages ...'.¹⁵ It points out that the adjective 'eventuale' which appears in the Italian version of Article 27(5) does not have an equivalent in the other language versions. It adds that there is a clear contradiction between the adjective and the verb which precedes it, which is conjugated in the indicative ('dà luogo') and is not preceded, as would be logical, by the verb 'potere' in the conditional ('potrebbe dar luogo'). The other language versions confirm that the sentence is in the indicative. For these reasons, the Commission believes that the Italian Government cannot rely on the adjective 'eventuale' in the Italian version of Article 27(5) to argue that the mere possibility of avoidance, evasion or abuse is sufficient to enable the Member State to lay down conditions for a product to benefit from exemption.

¹⁵ — Case C-219/95 *Ferriere Nord v Commission* [1997] ECR I-4411, paragraph 15, and in Case C-296/95 *Emu Tabac and Others* [1998] ECR I-1605, paragraph 36.

36. Reading the versions in the different languages does not make it easier to interpret Article 27(5). Some lead to the conclusion that, as the Commission maintains, avoidance, evasion or abuse must have occurred for the Member State to be able to lay down conditions for the application of the exemption.¹⁶ Others, on the contrary, seem to suggest that the mere possibility that such circumstances may occur is sufficient for Member States to take action.¹⁷

37. At the hearing the Commission claimed that Article 27(1) and Article 27(5) regulate two different situations. Whereas paragraph 1 allows Member States to lay down general conditions to ensure, as a preventive measure, the correct application of the

exemption, paragraph 5 refers to the revocation of an exemption *ex post facto* in the event of avoidance, evasion or abuse.

38. I think this is an artificial distinction. First of all, paragraph 5 does not refer only to the revocation of an exemption, but also to the refusal to grant it. However, which is more important, it would be illogical for the Directive to allow Member States to lay down general conditions, under paragraph 1, with no controls other than a possible action for failure to fulfil obligations and, on the other hand, to require them to use the procedure established in paragraph 5 merely to refuse or revoke an exemption in certain circumstances. Moreover, if paragraph 5 referred only to specific, proven cases of avoidance, evasion or abuse, there would be no point to its final sentence, which says Member States shall not be obliged to give retroactive effect to the decision taken by the Commission after obtaining the report of the Committee on Excise Duties.

39. In my view, the aim of Article 27(1) and (5) is to allow Member States to adopt measures to prevent evasion, avoidance and abuse, irrespective of whether it has been proved that fraudulent practices have occurred.¹⁸ For such measures to be valid, they must not unduly restrict application of

16 — That is true of the French version ['Si un État membre estime qu'un produit qui a fait l'objet d'une exonération en vertu du paragraphe 1 points (a) ou (b) est à l'origine d'une fraude, d'une evasion ou d'un abus, il peut refuser d'accorder l'exonération ou retirer l'exonération déjà accordée'], the English version ['If a Member State finds that a product which has been exempted under paragraphs 1 (a) or 1 (b) above gives rise to evasion, avoidance or abuse, it may refuse to grant exemption or withdraw the relief already granted'], the German version ['Stellt ein Mitgliedstaat fest, daß ein gemäss Absatz 1 Buchstabe (a) oder (b) befreites Erzeugnis zu Steuerflucht, Steuerhinterziehung oder Missbrauch führt, so kann er die Befreiung versagen oder die bereits gewährte Befreiung zurückziehen'] and the Spanish version ['Si un Estado miembro considera que un producto exento con arreglo a las letras (a) o (b) del apartado 1 del presente artículo origina fraudes, evasiones o abusos, podrá negarse a conceder una exención o anular la ya concedida e informará inmediatamente de ello a la Comisión'].

17 — That is the position in the Portuguese version ['Se um Estado-membro considerar que um produto isento ao abrigo das alíneas (a) e (b) do no 1 pode suscitar uma eventual fraude, evasão ou utilização indevida, poderá recusar a isenção ou retirar a redução já concedida'] and, to a certain extent, in the Italian version ['Se uno Stato membro viene a sapere che un prodotto che è stato esentato ai sensi del paragrafo 1, lettera (a) o (b) dà luogo ad eventuale evasione, frode o abuso, tale Stato può rifiutarsi di concedere l'esenzione o revocare lo sgravio già concesso. Lo Stato membro ne informa immediatamente la Commissione'], although, in this latter case, as the Commission states, there may be doubt owing to the use of the indicative ('dà luogo').

18 — On the other hand, the fact that the existence of such irregular acts has not been proved may be considered when it comes to assessing the need and proportionality of the measures which a Member State intends to adopt. It is interesting to point out, with regard to the present case, that, in answer to a question put to them at the hearing by this Advocate General, the representatives of the parties stated that there was no record, either in Italy or the other Member States, of other cases of 'abuse' like the one which led the applicant Government to submit its initial request.

the exemption established by the Directive, a matter which must be determined by means of the procedure laid down in paragraph 5. If, on the basis of the report from the Committee on Excise Duties, the Commission verifies that the measures are in conformity with the scope of the exemption, it will proceed to approve them. Otherwise, it may refuse to authorise them.

40. It is therefore unimportant whether the measures for which the Italian Republic had requested authorisation under paragraph 5 were motivated by the need to control proven tax evasion practices or merely to prevent them from occurring. The prescribed procedure was followed, and therefore the Commission had to verify not whether such practices were occurring but whether the aforementioned measures unreasonably and unjustifiably restricted the scope of the exemption established by the Community rules. It is clear from the contested decision that the Commission considered that the planned measures disproportionately restricted the scope of the exemption. It is that assessment which is being examined in the present case.

41. The parties also disagree about the interpretation to be given to the concept of 'abuse' for the purpose of applying Article 27(1) and (5).

42. The Italian Republic maintains that the concept of abuse cannot be restrictively interpreted as being equivalent to avoid-

ance, as the Commission claims, but must be taken to bear its usual meaning of any unlawful behaviour, other than avoidance or evasion.

43. The Commission replies that the three concepts mentioned are characterised by leading to the same result, that of improperly escaping the obligation to pay taxes on a product subject to excise duty. It states that the only distinction permitted by the Court of Justice relates to the concepts of evasion and avoidance. Thus, in its judgment in *Direct cosmetics II*,¹⁹ the Court held, in respect of those two terms in Article 27 of the Sixth Council Directive on value added tax,²⁰ that:

'That distinction is confirmed by the historical background to Article 27. Whilst the Second Council Directive on value added tax ... referred exclusively to the concept of "fraud", the Sixth Directive mentions in addition the concept of tax avoidance. This means that the legislature intended to introduce a new element in relation to the pre-existing concept of tax evasion. That element lies in the inherently objective nature of tax avoidance; intention on the part of the taxpayer, which constitutes an essential element of evasion, is not required as a condition for the existence of avoidance.'

19 — Joined Cases 138/86 and 139/86 [1988] ECR 3937, paragraph 22

20 — 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).

For the Commission, if the Community legislature had wished to include in the concept of abuse the behaviour of an operator benefitting without justification from more favourable monitoring and movement rules, it would have had to make express provision for that infringement, by separating the concept of abuse from the parallel concepts of tax evasion and avoidance. In the absence of any distinction in Article 27(5), the Commission comes to the conclusion that ‘abuse’ must be taken to mean a course of action which is technically lawful, carried out intentionally by the taxpayer, with the sole aim of avoiding payment of excise duty.

44. Irrespective of the interpretation of the term ‘abuse’, for which Community law offers no definition, I agree with the Commission that the hypothesis to which the Italian Government refers cannot be classified as such for the purposes of Article 27(1) of Directive 92/83.

45. It is my view that the applicant Government is starting from a false premise. As I have indicated, it is not true that household cleaning products may only obtain exemption under subparagraph (a) of the aforementioned provision, or that subparagraph (b) refers exclusively or mainly to cosmetic products. On the contrary, exemption is granted according to the *denaturing process* used in their manufacture. It cannot therefore be said that the fact that a product — which satisfies the conditions for denaturing laid down in subparagraph (b) and has been presented as a cosmetic — may be used as a substitute for a household cleaning product

constitutes an attempt to benefit from more favourable tax rules or, consequently, that it is an ‘abuse’ which justifies the refusal or withdrawal of the exemption.

46. For the sake of completeness, it is apposite to recall, as the Commission has done, the case-law of the Court of Justice concerning Article 13B(h) of the Sixth Council Directive, which has similar wording to Article 27 of Directive 92/83. In its judgment in *Gemeente Emmen*,²¹ the Court stated:

‘... whilst, according to the opening words of Article 13B of the Sixth Directive, the Member States are to lay down the conditions for exemptions for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse, those conditions cannot define the content of the exemptions provided for ...’

47. This case-law was confirmed recently in respect of excise duty. In its judgment in the *Braathens* case,²² concerning the inter-

21 — Case C-468/93 [1996] ECR I-1721, paragraph 19. See also Case 8/81 *Becker* [1982] ECR 53, paragraph 32; Case 173/88 *Henrikson* [1989] ECR 2763, paragraph 20, and Case 124/96 *Commission v Spain* [1998] ECR I-2501, paragraph 11.

22 — Case C-346/97 [1999] ECR I-3419, paragraph 31.

pretation of Article 8(1) of Directive 92/81/EEC,²³ the Court of Justice declared:

'... Second, the degree of latitude afforded to Member States by the introductory wording of Article 8(1), whereby exemptions are granted by the Member States "under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse", cannot detract from the unconditional nature of the obligation imposed by that provision to grant exemption ...'

48. I think that, by making the grant of the exemption conditional on compliance with the requirements relating to the type of alcohol used in the manufacture of cosmetics and to the maximum alcohol content of the household cleaning products, the Italian Government was laying down conditions which are not envisaged in the Community rules and which cannot be justified by invoking the fact that it is possible for Member States to adopt measures in order to prevent possible abuses.

49. For these reasons, I believe that the Commission made no mistake at all in

23 — Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12).

refusing the Italian Government's request and that this claim should therefore be rejected.

D. The claim based on tax discrimination between products

50. With regard to this claim, the applicant State merely says that, by allowing the products concerned to benefit unfairly from more favourable tax rules than those which correspond to them, the Commission is creating a distortion of competition to the detriment of honest operators.

51. The conditions laid down for obtaining exemption under Article 27(1)(a) and (b) of the said Directive, and also the applicable tax rules, are based on an objective criterion: the method of manufacture of each product and, specifically, the denaturing process used. In the contested decision, the Commission merely required the correct application of the said rule, so it cannot be said that it allowed unfair use of the relevant tax rules. Therefore this claim should be rejected.

E. The claims relating to the other conditions which denatured alcohols must satisfy in order to benefit from the exemption

52. Finally, I think it is appropriate to deal briefly with two issues which have been discussed by the parties in their written submissions; they both relate to the other conditions which denatured alcohols must satisfy in order to benefit from the exemption under Article 27(1)(a) and (b) and which I consider properly fall outside the scope of these proceedings.

53. The first point which was discussed concerns the *procedural conditions*, specifically the requirement that alcoholic products move under cover of an accompanying document.

According to the applicant Government, movement of completely denatured alcohols, to which subparagraph (a) refers, must be covered by the simplified accompanying document provided for in Article 5 of Regulation No 3649/92, and those of alcohols denatured by a method approved by a Member State, which are covered by subparagraph (b), must be covered by the accompanying document provided for by Regulation No 2719/92 for products moving under duty-suspension arrangements. The Government considers that the absence of those documents results in loss of entitlement to exemption.

The Commission, on the other hand, considers that the only condition for a dena-

tured alcohol to be able to benefit from the exemption is that it has been denatured by a method approved at Community level (subparagraph (a)) or in the Member State of origin (subparagraph (b)). For the former, although it is true that they have been transported under cover of the simplified accompanying document, the lack of that document may give rise only to an administrative penalty but not, under any circumstances, to loss of entitlement to exemption, which would be a disproportionate consequence for which provision is not made in Community law. With regard to the latter, the Commission believes that they may move freely between the Member States, without any procedural conditions.

54. I agree with the Commission that this issue is irrelevant to the present case. The fact is that the Italian Republic did not seek authorisation to refuse exemption for those products subject to excise duty whose movements were not covered by the accompanying document.²⁴ Therefore, the Committee on Excise Duties did not examine this point, which appears only incidentally in point 13(i) of the contested decision, in connection with the specific case of 'abuse' which had been referred to by the Italian Government. In the circumstances, I consider that the Court of Justice should not rule on it in the context of this action for annulment.²⁵

24 — Article 2(7) of Ministerial Decree 524 of 9 July 1996 seems to lay down this condition in respect of the alcohols covered by Article 27(1)(b) of Directive 92/83.

25 — In its defence, the Commission points out that its relevant staff will immediately examine whether Article 2(7) of Decree 524 is compatible with Directive 92/83.

55. Nor do I think it is appropriate for the Court of Justice to give a decision on another of the points disputed by the parties, which is whether the exemption provided for in subparagraph (b) applies only to alcohol denatured in accordance with the provisions of a Member State which *has already been used* to manufacture a product not intended for human consumption.

The Italian Government states that subparagraph (b) refers to denatured alcohol *already used* to manufacture any product not intended for human consumption. If it has not yet been used, alcohol thus denatured cannot benefit from the exemption in subparagraph (b) and must be considered as a product subject to duty-suspension arrangements.

The Commission, for its part, points out that Directive 92/83 uses the term 'pro-

ducts' rather loosely, since it sometimes means finished products ready for consumption (as in the third recital or the second indent of Article 20), and sometimes alludes to raw materials used to manufacture finished products (as in Article 27(2)(d) and (e)), including the denatured alcohols covered by Article 27(1)(b). Therefore, it must be possible to apply the exemption under subparagraph (b) to the denatured alcohol 'product' used to manufacture any product not intended for human consumption. It is for the national tax authorities to check that the product is actually intended for a use other than human consumption.

56. I, for my part, believe that — as I have already said and as the Commission has pointed out — this issue falls outside the scope of these proceedings since there is no reference to the matter either in the Italian Government's initial application or in the contested decision. In my view, therefore, the Court of Justice should not give a ruling on it.

VI — Conclusion

57. In the light of the foregoing considerations, I propose that the Court of Justice should dismiss the action brought by the Italian Republic against Commission Decision 98/617/EC, and order the applicant State to pay the costs.