OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 4 OCTOBER 1983 [1]

Mr President,
Members of the Court,

The Commission has brought an action before the Court against the Council under the first paragraph of Article 173 of the Treaty for a declaration that Council Regulation (EEC) No 1699/82 of 24 June 1982 opening, allocating and providing for the administration of a Community tariff quota for rum, arrack and tafia, falling within subheading 22.09 C I of the Common Customs Tariff and originating in the African, Caribbean and Pacific States (ACP) (1982/83) is void.

By virtue of the fact that the contested regulation is a measure giving effect to an international agreement which is binding on the Community, namely Protocol No 5 annexed to the second ACP—EEC Convention signed at Lomé on 31 October 1971, the Commission requests the Court to exercise the power given to it under the second paragraph of Article 174 of that Treaty by stating that the right to import into the Community free of customs duties, from 1 July 1982 to 30 June 1983, the quantities of the products referred to in Article 1 of the regulation is to be considered as definitive.

The Commission is critical of Article 4 (2) of the aforementioned regulation. That provision imposes certain obligations on the United Kingdom in relation to its share of the quota of rum originating in the ACP States and imported free of customs duties into the community but intended for domestic consumption. This case is essentially concerned with the extent of those obligations.

I — The French version of Article 4 (2) reads as follows: "Le Royaume Uni prend les mesures nécessaires pour que les quantités importées des États ACP dans les conditions fixées aux articles 1 et 2 *soient réservées aux besoins de sa consommation intérieure.*"

The wording of the English version of that provision is as follows:

"The United Kingdom shall take the steps necessary to ensure that the quantities imported from the ACP States under the conditions laid down in Articles 1 and 2 are *restricted to those meeting its domestic consumption* requirements",

which may be translated literally into French as follows:

"Le Royaume-Uni prend les mesures nécessaires pour assurer que les quantités importées des États ACP dans les conditions fixées aux articles 1 et 2 *soient limitées à celles qui répondent aux besoins de sa consommation intérieure.*"

The conditions laid down in Articles 1 and 2 of the regulation consist of the importation free of customs duties of a quantity of rum originating in the ACP States [2] corresponding to the share of the

1 — Translated from the French.

2 — Article 1.

tariff quota intended for consumption in the United Kingdom. [1] The Community tariff quota referred to in Article 1 is in fact divided into two instalments: the first is intended for consumption in the United Kingdom whereas the second is to be allocated among the other Member States. From 1 July 1982 to 30 June 1983 the quantity of pure alcohol admitted free of customs duties was 193 178 hectolitres. The instalment intended for consumption in the United Kingdom amounted to 125 430 hectolitres whilst that allocated among the other Member States amounted to 67 748 hectolitres.

II — (a) The Commission considers that the wording of the provision obliges the United Kingdom to restrict exports to the other Member States of rum originating in the ACP States and imported into its territory duty free. It takes the view that the provision is therefore contrary to Article 34 of the Treaty. It maintains, moreover, that it also infringes Articles 9 and 30.

The Council considers, on the contrary, that the wording of the provision merely obliges the United Kingdom to import free of customs duties such limited quantities as are needed to meet its domestic consumption requirements.

(b) In order to confine ourselves to the real purpose of the action it seems to me to be necessary to state immediately that Article 30 of the Treaty is not relevant in this case. Since Article 4 (2) concerns only the United Kingdom it does not lay down or intend to bring about any quantitative restriction on importation by the other Member States. Thus it is not, of itself, contrary to the provisions of Article 30 of the Treaty.

With regard to Article 9 any infringement thereof must be considered in conjunction with Article 34 and not separately. Article 9 (2) provides that, in particular, the provisions relating to the elimination of quantitative restrictions between Member States, which include Article 34, apply to products which come from non-member countries and which are in free circulation in the Community, like the ACP rum comprising the share of the Community quota imported into the United Kingdom.

Thus it is necessary in reality to examine the contested provision in relation to Article 34 in conjunction with Article 9.

III — I do not think there is any point in dwelling on the differences between the language versions. The two texts seem to me to be sufficiently close to be endowed with a common meaning, whether it is that of the French version which is preferred by the Commission or whether it is that of the English version which is favoured by the Council.

I am firmly of the opinion that even on the basis of the latter version Article 4 (2) is clearly unlawful.

According to the Council's argument, supported by the French Government, Article 4 (2) is confined in its effect to the time when the rum is imported and is not concerned with what happens subsequently. In the view of the Council and the French Government the provision does not contain any prohibition of re-exportation to the other countries of the Community.

That seems to me to be an excessively formalistic view. In addition it is inconsistent with the explanations put forward by the Council itself regarding the purpose of Article 4 (2). The Council has not denied that that purpose was to ensure that the imports appropriated to

1 — Article 2 (1).

the United Kingdom share of the quota were still actually intended for consumption in that country. It clearly follows that those imports are not intended for consumption in the other Member States and thus may not be exported to them.

Accordingly the effects of the provision are not confined to the external frontiers of the Community as is claimed by the Council, supported by the French Government. If that were the case rum imported duty free into the United Kingdom would be able to move freely across the frontiers of the Member States because it had been put into free circulation. Such a situation is inconsistent with a provision which is intended to ensure that the product is actually consumed in the United Kingdom and is therefore incapable of being exported to other Member States. The provision therefore truly is a measure "the aim ... of which is specifically to restrict the flow of exports" between the United Kingdom and other Member States "and thus establish a difference in treatment between the domestic trade of a Member State and its export trade". [1]

IV — It remains to be considered whether that difference may be justified on grounds which render it lawful.

(a) In the light of the observations made by the Council and the French Government it may be asked whether Article 4 (2), despite being objectively contrary to Article 34 of the Treaty, should not nevertheless be regarded as lawful because it is necessary for the implementation of Protocol No 5 of the Lomé Convention. But then Protocol No 5 would itself infringe Article 34. Such a finding "could not fail to provoke, not only in a Community context but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries." [2]

Nevertheless the Council also admits that the Protocol does not force the Community to impose restrictions on the free movement of goods between its Member States.

Article 1 of the Protocol requires the Community, until the entry into force of a common organization of the market in spirits, to allow the importation free of customs duties of rum, arrack and tafia originating in the ACP States under conditions such as to permit the development of traditional trade flows between the ACP States and the Community on the one hand and between the Member States on the other hand. The specific traditional trade flows between the ACP States and the Community referred to by that provision are the exportation of rum from the ACP States, in particular those in the Caribbean, to the United Kingdom. The traditional trade flows between the Member States relate to the exportation of rum from the French Overseas Departments to its traditional markets in the Community, namely, in addition to the French market, the German, Belgian and Luxembourg markets.

The objective of maintaining traditional trade flows was put into effect in Article 2 (a) of the Protocol which provides:

"For the purposes of applying Article 1 ..., the Community shall each year fix

1 — Stated most recently in the Court's judgment of 15 December 1982 in Case 286/81 *Oosthoek* [1983] ECR 4575, 4587, paragraph 13.

2 — Opinion 1/75 of 11. 11. 1975 on the draft "Understanding on a Local Cost Standard", [1975] ECR 1355, at p. 1361.

the quantities which may be imported free of customs duties on the basis of the largest annual quantities imported from the ACP States into the Community in the last three years for which statistics are available, increased by an annual growth rate of 40% on the market of the United Kingdom and 18% on the other markets of the Community."

The only specific obligation laid down by the Protocol in connection with the fixing of the tariff quota is to lay down two different rates of growth, namely one for the United Kingdom market and one for the markets of the other Member States. The purpose of fixing a rate of growth in respect of the United Kingdom which is much higher than that fixed in respect of the other Member States is to allow the consumption on the British market of ACP rum to increase at a rate much higher than those in the other Member States and therefore to give preference to the development of traditional trade flows between the ACP States and the United Kingdom. However, as even the Council states, the implementation of that obligation does not in any way imply the closure of the British market but only the allocation to the United Kingdom of a specific share based on a growth rate of 40%.

It therefore follows from the statements of the defendant itself that the Community is capable of fulfilling its international commitments under Protocol No 5 of the Lomé Convention without infringing Article 34 of the Treaty.

(b) In its defence the Council also maintained that the Community legislature possesses a margin of discretion which enables it to adopt measures which, if they emanated from a national legislature, would be contrary to the Treaty. It considered that that was particularly the case where such provisions are intended to enable the Community to fulfil its international obligations in a proper manner.

I find it difficult to accept such an idea.

How is one to understand the observation concerning the implementation by the Community of its international obligations if, as the Council emphasizes in another connection, compliance with the terms of Protocol No 5 does not lead to an infringement of the Treaty?

The arguments advanced by the Council in support of its main contention seem to me to refute it rather than to prove it. The example of the introduction of monetary compensatory amounts in connection with the common agricultural policy seems to me to be a bad example since the Court has held that "such measures ... aim at ensuring so far as possible the maintenance of normal trade in spite of the impact of divergent monetary policies". [1] Unlike the contested measure, monetary compensatory amounts were introduced with the aim of facilitating trade and not preventing it.

The same comment may be made with regard to the paragraphs of the Court's judgment of 25 June 1977 in the *Bauhuis* case cited by the Council. [2] The passages to which the Council refers relate to a

1 — Judgment of 20 April 1978 in Joined Cases 80 and 81/77 *Les Commissionnaires Réunis et les Fils de Henri Ramel* v *Receveur des Douanes* [1978] ECR 927, paragraph 37 at p. 947.

2 — Case 46/76 [1977] ECR 5, paragraphs 28 to 32 and 42, at pp. 17 to 19.

Community system of health inspections of bovine animals and swine the purpose of which is to render unnecessary inspections at the frontier organized unilaterally by the importing Member State. In those circumstances, not only did the Council directive laying down that system [1] not restrict the free movement in the Community of the products to which it related, but its purpose and effect was to assist that movement.

(c) For its part the French Government contends that the system of dividing the whole of a Community quota amongst the Member States, from which it follows that it is impossible for any part of a national quota to be transferred to another national quota, is one used for other products and has been held by the Court in a line of decisions to be in conformity with the Treaty.

It is true that the system of division referred to by the French Government has the effect of preventing the movement from one Member State to another of the products in respect of which the quotas have been fixed. It is equally true that the system is one used for products other than rum, arrack and tafia. That this is so becomes apparent from a reading of Council Regulations (EEC) No 2787/79 of 10 December 1979 and (EEC) No 3378/82 of 8 December 1982, the first relating to certain wood products and footwear originating in developing countries and the second relating to certain textile products of the same origin.

Yet it is incorrect to state that this Court has held the system to be compatible with the Treaty. The judgments cited by the French Government [2] were given in three cases concerning references made to the Court for a preliminary ruling where the questions referred by the national courts did not relate to the specific problem of the legality of the division of a Community quota amongst all the Member States. That question, which is the sole issue in this case, was not considered by the Court in those judgments.

V — In those circumstances it is not necessary in my opinion to consider the alternative defence relied upon by the Council, according to which, if the issue is to be regarded as an allegation by the Commission that Article 4 (2) involves the adoption by the United Kingdom of measures prohibiting or limiting exports for the purpose of fulfilling its obligations, such national measures do not in fact have such an effect.

Nevertheless an examination of that argument shows that it rebounds on the Council. In order to ensure that the ACP rum imported duty free is actually consumed in the United Kingdom and not in the other Member States, the United Kingdom Government has adopted the Customs Duties (Quota Relief) Order No 884 of 1982. According to that Order products are regarded as part of the British share of the quota after the acceptance of a declaration of domestic consumption. Upon acceptance of that declaration excise duty is paid. Re-exportation of the imported rum is therefore not prohibited but as the classification of the goods admitted for domestic consumption

1 — Council Directive 64/432/EEC of 26 June 1964.

2 — Judgment of 12 December 1973 in Case 131/73 *Grosoli* [1973] ECR 1555; judgment of 23 January 1980 in Case 35/79 *Grosoli and Others* [1980] ECR 177; judgment of 13 March 1980 in Case 124/79 *van Walsum* [1980] ECR 813.

cannot be amended the excise duties cannot be recovered. In those circumstances, as the Council itself admits, "re-exportation offers no economic advantage".

Thus even if the British rules implementing its obligations under Article 4 (2) do not expressly prohibit exports, they do in practice prevent exportation by making it uneconomic.

The whole of the aforementioned considerations lead me to the conclusion that the action brought by the Commission against the Council is well founded.

I therefore propose that the Court should:

1. Declare the regulation in question void;

2. Declare that Article 1 of the regulation is to be considered as definitive;

3. Order the Council to pay the costs.