OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 1 July 1999 *

1. In this case, the Commission charges the French Republic with maintaining in force the tax on alcoholic beverages with an alcoholic strength exceeding 25% by volume, introduced by Article 26 of Law No 83-25 of 19 January 1983, the proceeds of which are intended for purposes of social security, and with thereby failing to fulfil its obligations under Article 3(2) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products ('the excise duty directive') [1] and Article 20 of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages ('the directive on structures'). [2]

Legislative framework

2. The excise duty directive harmonised the system of excise duty applicable to certain products, namely mineral oils, alcohol and alcoholic beverages, and manufactured tobacco. Article 3(2) states that those products 'may be subject to other indirect taxes for specific purposes, provided that those taxes comply with the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.'

The provisions relating to the structures and rates of excise duty on the products subject to it are contained in specific directives. In particular, the directive on structures harmonises the excise duties on alcohol and alcoholic beverages. It provides in Article 19 that 'Member States shall apply an excise duty to ethyl alcohol', while Article 20 defines what constitutes ethyl alcohol (this includes products with an alcoholic strength by volume exceeding 1.2% volume which fall within CN codes 2207 and 2208, even when those products form part of a product which falls within another chapter of the CN, products of CN codes 2204, 2205 and 2206 which have an actual alcoholic strength by volume exceeding 22% volume, and potable spirits containing products, whether in solution or not). Article 21 of the structures directive sets out the method for calculating the excise duty in question, stating that the rate is to be fixed 'per hectolitre of pure alcohol at 20 °C and shall be calculated by

* Original language: Italian.

1 — OJ 1992 L 76, p. 1.

2 — OJ 1992 L 316, p. 21.

reference to the number of hectolitres of pure alcohol' and that, 'subject to the provisions of Article 22, Member States shall charge the same rate of duty on all products chargeable with the duty on ethyl alcohol.'

3. The aforementioned Article 26 of French Law No 83-25 relating to measures concerning social security introduced a tax on tobacco and alcoholic beverages for the benefit of the Caisse Nationale d'Assurance Maladie (National Sickness Insurance Fund) on the ground of the health risks involved in immoderate use of those products. This tax is payable on alcoholic beverages with an alcoholic strength greater than 25% by volume. The amount is fixed at FRF 0.84 per decilitre or fraction of a decilitre and, with the exception of the minimum level stated, takes no account of the alcoholic strength, which may be higher or lower but exceeds the threshold of the particular beverage under consideration; it thus takes no account of the amount of alcohol which is actually present in a given volume of alcoholic beverage and which varies according to the type of beverage.

Procedure

4. By letter of formal notice of 14 February 1996, the Commission informed the French Government that, in its opinion, the social security contribution levied on alcoholic beverages by the aforementioned Law was not compatible with the structure of the excise duties on alcohol and alcoholic beverages, having regard to its scope and tax base, and could therefore not be covered by the derogation in Article 3(2).

In its response, the French Government disputed that charge, arguing that Article 3(2) required Member States to define the arrangements for any 'other indirect taxes' for specific purposes levied on products subject to excise duty, complying with the tax rules applicable 'for' excise duty or VAT 'purposes', and not purely and simply to extend to these additional taxes the same rules as those applicable to excise duty and VAT. It also stated that, by taking the alcoholic strength of 25% by volume as a minimum threshold for the tax base, it had taken as a reference the lowest alcoholic strength by volume in the category of 'beverages with a high alcohol content'.

In its reasoned opinion of 12 February 1997 the Commission restated its position and called on the French Government to take the necessary steps to comply with Community law within two months of receiving that opinion.

The French Government did not comply with the reasoned opinion. Consequently, the Commission, by a document lodged with the Court Registry on 22 December 1997, instituted proceedings against the French Government under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that it was in breach of its obligations under the excise duty directive.

Arguments of the parties

5. According to the Commission, inasmuch as it empowers Member States to introduce derogations from the harmonised system of excise duties for specific purposes, Article 3(2) of the excise duty directive should be interpreted restrictively, that is to say, in the sense that States may maintain or introduce 'other' taxes for specific purposes only where they comply with the tax rules applicable to excise duty and VAT. Apart from being contrary to the wording of the provision, any other interpretation would allow the creation of indirect national taxation, parallel to excise duty, which would jeopardise attainment of the actual objective of the excise duty directive, namely to guarantee the free movement of goods subject to excise duty within the internal market, as resulting from the removal of fiscal frontiers.

6. The Commission emphasises that Article 3(2) should be interpreted not as a mere reference to the prohibition of placing obstacles in the way of the free movement of goods, but as a specific condition governing the ability to derogate from the harmonised system, consisting in the obligation on national legislative authorities to comply, when operating within the scope of that provision, with the essential elements of the harmonised system of excise duty and VAT concerning the tax base, the method of calculation, chargeability and monitoring, as specifically indicated in that provision.

According to the Commission, Article 26 of the aforementioned French law is incompatible with the structure of excise duty on alcohol and alcoholic beverages because it links the application of the tax to categories of products identified according to criteria which differ from those defined for excise duty in the directive on structures and also because the amount of tax is calculated on the basis of volume and not alcoholic strength.

7. The French Government points out that, according to the interpretation of Article 3(2) put forward by the Commission, Member States retain only the option to introduce a second excise duty, in addition to that of Community origin, without affecting the possibility of increasing the existing excise duty, offered by the directive on structures and included in the arrangements for excise duty on alcoholic beverages. By essentially preventing Member States from pursuing specific aims by taking the fiscal instrument beyond the aspect of quantity alone, such an interpretation renders Article 3(2) of the excise duty directive ineffective.

8. Contrary to the Commission's assertions, the French Government submits that the social security contribution at present in force in its legislation comes within the exception set out in Article 3(2), since it is for a specific purpose, namely the protection of public health. On this point the French Government submits that the methods of calculating the national contribution at issue are the most appropriate to obtain that result. Since this contribution is

applied on the volume of the beverage rather than on the percentage of alcohol per unit of measure which the beverage contains, it affects uniformly the consumption of beverages with an alcoholic strength between 25 and 50 °C, these being the products most commonly sold. The effectiveness of this charge in regard to public health is demonstrated by the fact that between 1980 and 1994 the consumption of such alcoholic beverages increased by only 14% in France, whereas in the preceding decade the increase had been in the region of 31%.

9. With regard to the scope of the national measure, the French Government points out that the Commission confines itself to challenging its compatibility with the structure of excise duties (and therefore the possibility of bringing it within the scope of Article 3(2)) with reference solely to products with an alcoholic strength exceeding 22% by volume, that is, those products referred to in the second indent of Article 20 of the directive on structures, which defines the term 'ethyl alcohol', and that it takes no account whatever of products with an alcoholic strength exceeding 1.2% by volume, that is to say, the products referred to in the first indent of Article 20, even though these also come within the definition of ethyl alcohol.

Existence of failure to fulfil obligations

10. The central issue in this case concerns the interpretation of Article 3(2) of the excise duty directive. This provision sets out the limits within which other indirect taxes on alcoholic beverages may be lawfully introduced: it states that the arrangements governing additional taxes on products already subject to excise duty must comply with 'the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.'

The parties put forward two different interpretations of this provision. According to the Commission, it should be interpreted literally, as meaning that any 'other taxes' must comply in full with the harmonised rules laid down for excise duty (and for VAT) which relate to determination of the tax base and the calculation, chargeability and monitoring of the tax. In contrast, according to the French Government, that provision allows the Member States to provide, in regard to other indirect taxes on the same products, for taxation arrangements which are not the same as those of the excise duty (and VAT) system, subject, however, to the condition that this does not prejudice the proper application of the harmonised rules either from the fiscal point of view or from the broader aspect of the free movement of goods.

11. The argument of the Commission cannot be accepted. It finds no support in either the wording or the purpose of the provision.

Concerning the wording of the provision, I consider that, while it is true that there are slight linguistic differences between the expressions used to indicate how national legislation must comply with the relevant Community rules in order for derogating national law to comply with Article 3(2), it is also true that these differences are not significant. The French version ('à condition que ces impositions respectent les règles de taxation applicables pour les besoins des accises'), the Italian version ('regole applicabili ai fini delle accise') and the Spanish version ('normas aplicables en relación con los impuestos'), given the use of the words 'pour les besoins', 'ai fini' and 'en relación con', do not seem to require pure and simple compliance with all the rules on the tax base, calculation, chargeability and monitoring of the tax concerning excise duty and VAT, but give relatively flexible indications on those points. Indeed, if the Community legislature had wished to impose a condition of this kind, that is, if it had wished to impose full compliance with the rules in question, it would probably have used a more definite expression, for example, in the Italian version, by referring to compliance with the rules applicable *to* excise duty rather than for excise duty *purposes*, and also by using similar expressions in the other versions. In my opinion, the same conclusion must be reached on the basis of the English version ('comply with the tax rules applicable for excise duty') or the German version ('sofern diese Steuern die Besteuerungsgrundsätze der Verbrauchsteuern... beachten'), because the expressions used do not differ substantially from those in the other versions and therefore, in my view, do not exclude the less rigorous interpretation. It is consequently reasonable to take the view that, while some indications may be derived from the actual wording of the provision, such indications point more towards confirmation that there is no rigorous obligation to comply with the aforementioned Community rules.

In addition, according to the case-law of the Court, if there are differences between the different language versions of a provision, that provision must be interpreted 'by reference to the purpose and general scheme of the rules of which it forms part.' [3] As we shall see later, application of this criterion means that the provision at issue must be interpreted in such a way that its utility is recognised and that, in this respect, preference must be given to the less rigorous interpretation described above.

12. The wording of the provision offers further confirmation to the same effect, and thus contrary to the argument of the Commission. In some language versions, and specifically the English, Dutch and

3 — Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28, which repeats the principle expressed in Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 14.

Danish versions, the possibility of creating other taxes on products already subject to excise duty is subject to cumulative compliance with the rules relating to VAT and those relating to excise duty: this is due to the use of the conjunction 'and' between these two forms of charges instead of the disjunctive 'or', which appears in other language versions. If one were to accept the interpretation of the Commission, which is based on full compliance with the rules, Member States would have to observe two different sets of rules at the same time and would consequently be unable to follow them both fully and rigorously, which the Commission none the less considers essential for the derogation to be able to apply. Suffice it in this regard to point out that one of the essential characteristics of VAT is the fact that it is proportional to the price of the goods and services on which it is imposed, [4] whereas one of the essential characteristics of the excise duty which is charged on alcoholic beverages is that it is applied according to the volume of the product. In my view, this rules out a literal interpretation of the reference to the rules applicable to excise duty and VAT as being a condition of the legality of national indirect taxes.

13. The same conclusion is reached if we look at the purpose behind the provision. It is a provision in the excise duty directive, which, as we know, defines the general criteria for the harmonisation of the arrangements for products subject to excise duty with the aim of guaranteeing the proper functioning of the internal market. [5] In line with this general objective the rule in question is designed to allow Member States to introduce 'other' indirect taxes for specific purposes on products already subject to excise duty, for example to achieve effective protection of public health by discouraging the consumption of alcohol by means of taxation. If we were to accept that this derogating rule has the scope suggested by the Commission, Member States would have very limited room for manœuvre to attain specific objectives. In short, according to this argument, Member States could only introduce a second excise duty, parallel to the Community duty.

If that were the case, the exception would be without justification and the provision providing for it would be unreasonable. The same conclusion is in particular reached if we consider the relationship between the additional indirect taxes and the harmonised excise duty. In fact, it is not clear what the difference is, according to the Commission, between these two categories of tax.

The Commission states that, even following the restrictive interpretation of the derogation which it favours, it would still be possible for Member States to introduce new indirect taxes: in fact they would retain the power to alter the national

4 — Joined Cases C-370/95, C-371/95 and C-372/95 *Careda and Others* [1997] ECR I-3721, paragraph 14.

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

taxation in a different way to that set out in the directive on structures. This argument, however, does not help to clarify the scope of the derogation: it only explains a power of the States which lies in the methods of application of the harmonised excise duties, which only provide for minimum levels. The end result of the Commission's interpretation is to deprive the rule in question of all reasonable utility, since the same effects produced by the introduction of a second excise duty could be obtained by increasing the harmonised excise duty. As the French Government points out in its defence, the Commission's interpretation amounts to the reintroduction into Article 3(2), by way of a contrived interpretation, of the wording which the Commission had proposed at the preparatory stage, and which the Council rejected. [6]

14. That being so, it still remains to clarify the meaning of the reference to the rules on the tax base, calculation, chargeability and monitoring of the taxes applicable for the purposes of excise duty, which appears in Article 3(2). Having recognised the Commission's submission that the provision should be interpreted strictly as being without foundation, two possible readings must be considered, the second of which can in turn be divided into formulas with differing degrees of obligation: first, we can consider that, as the French Government argues, the provision requires only that States do not compromise the system of excise duty (and VAT) when they introduce other indirect taxes; second, we can consider that the provision makes the power of States to introduce other indirect taxes subject to compliance with specific obligations, that is, the obligations which arise from the express reference to the rules governing the excise duty system which concern the tax base, calculation, chargeability and monitoring of the tax.

It can be stated in favour of this second interpretation that the provision in question is not limited to requiring general compliance with the system of excise duty, which could confirm the interpretation proposed by the French Government, but goes even further inasmuch as it specifies four general areas which Member States are required to respect when introducing other indirect taxes. The reference to these four specific areas does not, in my view, mean that we can accept the submission of the French Government. It is, however, necessary to establish the restrictions on the action of the Member States which arise from the reference to the rules concerning these areas.

Even if Article 3(2), by introducing a derogation from the general system of excise duty, can only be interpreted restrictively, I am still of the opinion that compliance with the rules in question need not mean that the Community rules must be on all fours with the rules applicable to the individual products in each category. I believe that the legality of a national tax under Community law must be evaluated in relation to the Community system for the entire category of products involved and

6 — The Commission had proposed the following wording for Article 3(2): 'The products mentioned in paragraph 1 shall not be subject to any tax other than excise duty and value added tax' (OJ 1990 C 322, p. 1).

not in relation to that laid down for the individual product. To require total agreement between the national and Community laws relating to an individual product (wine, beer, fermented drinks other than wine and beer, intermediate products, as defined in Article 17 of the directive on structures, ethyl alcohol) would not only deprive Article 3(2) of any useful function, but would risk leading to additional forms of excise duty, contrary to the principle of a single excise duty. For example, if a Member State intended to subject an alcoholic beverage such as wine to a tax other than excise duty, for health-protection purposes, it could do so only on condition that it complied in full with the rules which appear in the directive on structures concerning alcoholic beverages, but need not also comply to the letter with all the specific rules in that directive relating to wine. However, the parameter in question could not be considered to have been complied with if the amount of the indirect national tax were determined in proportion to the value of the product: in that case the national law would be totally outside the reasoning of the directive, which does not envisage this method of calculation for any of the products governed by it, and therefore would not come under the derogation set out in Article 3(2).

15. Taking into account the proposed interpretation of Article 3(2) of the excise duty directive, it is now necessary to determine whether the French legislation under discussion fulfils the conditions to which this provision subjects the power of States to introduce indirect national taxes. To that end, national taxes must: (a) have a specific purpose and (b) comply with the rules for excise duty with reference to the four areas already mentioned.

With regard to condition (a), I think that the Commission, albeit with some ambiguity evident particularly during the hearing, recognises that the French tax does have a specific purpose, namely that of health protection. Although there was no specific challenge on this point by the Commission, the French Government has emphasised that the introduction of the indirect national tax on alcoholic beverages coincided with a reduction in the consumption of the beverages concerned, that is to say, beverages with an alcoholic strength exceeding 25% by volume.

The complaint which the Commission levels against the French Government concerns the failure to comply with condition (b). On this point, the Commission takes issue with the French Government in regard to the fact that the tax concerned applies only to alcoholic beverages with an alcoholic strength greater than 25% by volume and also that the amount therof is determined in proportion to the quantity of the beverage. The Commission considers that such a rule is not in accordance with Article 3(2), in conjunction with Articles 20 and 21 of the directive on structures. In my opinion, that charge is unfounded.

On the first point, that is to say, the identification of the alcoholic beverages subject to the national tax, I should point out that, according to the system of French law, the tax is imposed on all beverages having an alcoholic strength above 25% by volume, while, according to Article 20 of the directive on structures, excise duty is charged on a first group of alcoholic beverages, indicated in the customs nomenclature by code numbers 2207 and 2208, with on average a very high alcoholic strength (this category includes spirits obtained from distilling wine, whisky, rum, gin, vodka and similar products), and a second group of beverages with an alcoholic strength above 22% by volume, indicated in the customs nomenclature by the code numbers 2204, 2205 and 2206 (this group includes wines, vermouths and other fermented beverages such as cider).

On the second point, that is to say, the method of calculating the amount of the tax, it should be noted that, according to the French legislation, the amount of the tax is determined at a fixed sum of FRF 0.84 per decilitre or fraction of a decilitre, without taking account, with the obvious exception of the minimum stated, of the alcoholic strength, which may be higher or lower, but which exceeds the threshold of the particular beverage under consideration. In other words, the French legislation quantifies the tax irrespective of the amount of alcohol which is actually present in a certain volume of alcoholic beverage and which varies depending on the type of beverage. For example, it follows that beverages with an alcoholic strength of 26% by volume and those with an alcoholic strength of 70% by volume are treated in the same way. The directive on structures, however, provides that the excise duty on ethyl alcohol is to be 'fixed at ECU 550 per hectolitre of pure alcohol'. [7]

As matters stand, there can be no doubt that the French legislation under examination does not comply in all respects with the Community rules set out in the directive on structures. However, in my opinion, it is compatible with Community law, considering that the range of alcoholic beverages subject to the French tax is within that indicated in the directive on structures. I do not think that the fact that the French tax is not also charged on alcoholic beverages with an alcoholic strength between 22% and 25% by volume is such as to affect the Community system. The only limit which Article 20 appears to indicate in strict terms, namely that the alcoholic beverage must have an alcoholic strength above 1.2% by volume, is in no way compromised by the French law.

Although the methods of calculation defined by the French legislation do not tally with those set out for ethyl alcohol in Articles 19 and 21 of the directive on structures, since the calculation is made on the basis of the quantity of the beverage and not of its alcoholic strength, it is also true that for other products (wine, beer, other fermented drinks, intermediate products) the directive on structures takes the quantity as the basis for the calculation. [8] Moreover, the French tax (equivalent to FRF 0.84 per decilitre) is consistent with

7 — Article 3 of Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages (OJ 1992 L 316, p. 29).

8 — More specifically, the directive on structures, at Articles 9, 13 and 18, takes as the sole reference factor 'the number of hectolitres of finished product'.

the minimum Community rate for the taxation of alcohol (equivalent to ECU 550) set in Directive 92/84. It cannot, therefore, be argued that the methods of calculation for the French tax fall outside the rules which govern the category of products subject to excise duty taken into consideration in the directive on structures.

16. In conclusion, I take the view that the French legislation in question is compatible with Article 3(2) of the excise duty directive with regard to both the scope and the method of calculation of the tax, as explained above.

17. It follows that the action brought by the Commission against the French Government should be dismissed.

Costs

18. Under Article 69(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the French Republic has applied for the Commission to be ordered to pay the costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

Conclusion

19. For all of the foregoing considerations, I propose that the Court should:

— dismiss the action; and

— order the Commission to pay the costs.