In Case 152/78

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, René-Christian Béraud, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

applicant,

v

THE FRENCH REPUBLIC, represented in the written procedure by Guy Ladreit de Lacharrière, Director, and in the oral procedure by Noël Museux, Deputy Director of the Department of Legal Affairs at the Ministère des Affaires Etrangères [Ministry of Foreign Affairs], both acting as Agents, with an address for service in Luxembourg at the French Embassy,

defendant,

APPLICATION for a declaration that the French Republic, by subjecting advertising in respect of alcoholic beverages to discriminatory rules, has failed to fulfil its obligations under Article 30 of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts of the case, the course of the procedure and the submissions and arguments of the parties may be summarized as follows:

I — Summary of the facts

Article L 1 in Title I of the French Code on the retail sale of beverages and on measures against alcoholism (Decree of 8 February 1955, Order No 59-107 of 7 January 1969) divides beverages into five groups for the purpose of regulating their manufacture, sale and consumption.

Group 1 comprises "non-alcoholic" beverages (beverages without alcohol), mineral or aerated waters, fruit or vegetable juices unfermented or not containing traces of alcohol in excess of 1° after the commencement of fermentation, flavoured aerated waters, cordials, infusions, milk, coffee, tea, chocolate, etc. . . .

The four other groups comprise "alcoholic" beverages divided as follows:

Group 2 (Order No 60-1253 of 29 November 1960): undistilled fermented beverages namely wine, beer, cider, perry and mead, to which are added natural sweet wines coming under the tax arrangements applying to wine as well as blackcurrant liqueurs and fermented fruit or vegetable juices containing 1 to 3° of alcohol;

Group 3 natural sweet wines other than those belonging to Group 2, liqueur wines, wine-based aperitifs and strawberry, raspberry, blackcurrant or cherry liqueurs containing no more than 18° of pure alcohol;

Group 4 (Law of 27 June 1957): rums, tafias, spirits obtained from the distillation of wines, ciders, perries or fruits not containing any added essence, as well as liqueurs sweetened with sugar, glucose or honey in a minimum amount of 400 grams per litre in regard to aniseed-flavoured liqueurs and 200 grams per litre in regard to other liqueurs which do not contain more than half a gram of essence per litre;

Group 5: all other alcoholic beverages.

In Chapter II the Code on the retail sale of beverages and on measures against alcoholism regulates advertising in respect of beverages. In Section 2 concerning alcoholic beverages it contains in particular the following provisions:

Article L 17(1) (Order No 59-107 of 7 January 1959):

No person shall engage in advertising of any kind in respect of beverages the manufacture and sale of which are prohibited or of beverages comprised in the fifth group.

Article L 18 (Order No 60-1253 of 29 November 1960):

Subject to the provisions of the second paragraph of Article L 17 advertising in respect of the beverages comprised in the third group (Order No 59-107 of 7 January 1959) the manufacture and sale of which are not prohibited shall be permitted if it indicates exclusively the name and composition of the product, the name and address of the manufacturer, his agents and stockists.

The type of bottling and labelling may be reproduced only if it bears exclusively the name and the composition of the product, the name and address of the manufacturer, his agents and stockists.

No person shall engage in advertising of any kind in respect of matters other than those set out in the third paragraph of this article.

As regards alcoholic beverages, those rules do not specifically restrict advertising in respect of beverages comprised in the second and fourth groups; on the other hand advertising is restricted in regard to beverages comprised in the third group and prohibited in regard to beverages comprised in the fifth group.

In its Recommendation No 70/125 of 22 December 1969 on the adjustment of the State monopoly of a commercial character in alcohol (Official Journal, English Special Edition (Second Series) VI, p. 27) the Commission drew the attention of the French Republic to the fact that the national rules on the advertising of alcoholic drinks placed a handicap on certain spirits and spirituous beverages traditionally considered as the produce of other Member States and the Commission invited it to remove the discrimination which existed in that regard.

By a letter of 16 June 1970 to the Commission the French Government referred, by way of justification of the rules in question, first, to grounds of public health and, secondly, to the fact that the distinction between the different groups of products was not based on their origin.

By letters of 18 September and 4 November 1975 the Commission requested the French Government to state its views on the compatibility of the disputed rules with Article 30 *et seq.* of the EEC Treaty. The Commission itself thinks that the provisions of Articles L 17 and L 18 of the Code on the retail sale of beverages and on measures against alcoholism are capable of impeding, directly or indirectly, actually or potentially, imports of alcoholic beverages into France from other Member States and that, unless they are justified under Article 36 of the EEC Treaty, they are thus caught by the prohibition on measures having an effect equivalent to quantitative restrictions, contained in Article 30 of the Treaty.

In its reply of 23 January 1976 the French Permanent Representation to the Communities referred to the arguments set out in the letter of 16 June 1970 and denied that the rules in question were incompatible with Article 30.

By a letter of 14 June 1976 the Commission requested the French Republic pursuant to the first paragraph of Article 169 of the EEC Treaty to submit its observations to it on the breach of the Treaty with which it was charged. The Commission contended in that letter that although the rules in question did not make any formal distinction in regard to the origin of the products they still prescribed more stringent treatment for certain beverages, most of which were produced in other Member States, whereas that difference in treatment did not appear to be justified on objective grounds.

On 9 July 1976 the French Government denied in a letter from its Permanent Representation that the rules on the advertising of alcoholic beverages were intended to confer an advantage on typically French products; their purpose was to protect the health of humans against the evils of alcoholism; they did not draw any distinction in regard to the origin of the products and there was therefore no discriminatory intention at all in regard to products from other Member States.

On 25 January 1978 the Commission sent to the French Republic the reasoned opinion provided for by the first paragraph of Article 169 of the EEC Treaty.

By a letter of 29 March 1978 from its Permanent Representation the French Government informed the Commission that it was giving special attention to its requests and that it would get in touch with the Commission again as soon as possible in order to let it know what it intended to do.

II — Written procedure

The Commission did not receive any subsequent communication from the French Government and by an application lodged on 6 July 1978 it therefore brought an action pursuant to the second paragraph of Article 169 of the EEC Treaty in respect of the alleged failure of the French Republic to fulfil its obligations under Article 30 of the EEC Treaty in regard to the advertising of alcoholic beverages.

The written procedure followed the normal course.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

III — Conclusions of the parties

The *Commission* claims that the Court should:

— Declare that the French Republic, by subjecting the advertising of alcoholic beverages to discriminatory rules and thus maintaining obstacles to intra-Community trade, has failed to fulfil its obligations under Article 30 of the EEC Treaty;

— Order the French Republic to pay the costs.

The *Government of the French Republic* contends that the Court should.

— Declare the Commission's application unfounded;

— Order the applicant to pay the costs.

IV — Submissions and arguments of the parties in the course of the written procedure

The *Commission* does not deny that in the absence of any Community rules Member States retain the power to introduce trade rules in order to achieve an object affecting matters left to them by the Treaty. However, such rules, applying to national products and products imported from other Member States alike, may not make imports either impossible or more difficult or onerous in comparison with the marketing of national products unless that is necessary to achieve the legitimate object intended and so long as that object cannot be achieved by other means which impose less of an obstacle on trade. More

specifically, Member States retain the power to protect public health by means of measures intended to combat alcoholism and the regulation of advertising with regard to the harmfulness of alcoholic beverages is amongst the means available to the French Government to achieve legitimate objectives. However, by Article 36 of the EEC Treaty such measures must not "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

Whilst the French rules in question in this case purport, as regards their form, to be rules which apply to national and imported products alike, in fact they treat similar products in a different way although the reasons advanced do not justify such discriminatory treatment.

(a) The classification of drinks into different groups is dependent, first, on their pure-alcohol content and, secondly, on consumer habits. The first criterion for classification is unexceptionable; the second one is not and, in any event, the application of those criteria to the different products concerned gives rise to arbitrary discrimination and to disguised protection within the meaning of the second sentence of Article 36 since, in trade between Member States, beverages of a comparable degree of harmfulness, or even less, are treated more stringently.

(b) Thus, liqueurs of more than 18° which are sweetened with sugar, glucose or honey, such as Cointreau, Grand Marnier or Grande Chartreuse, which are national products, belong to the fourth group on which there is no specific advertising restriction, whilst strawberry, raspberry, blackcurrant and cherry liqueurs, the alcohol content of which may not exceed 18°, are classified in the third group on which there are advertising restrictions. Those two liqueur categories contain sugar in equivalent quantities and are both subject to the same habits of consumption; however, without any apparent justification liqueurs of less than 18° are treated more stringently than liqueurs of more than 18°.

The French rules create a distinction between, on the one hand, sweet natural wines such as banyuls and muscats, which are national products, which belong to the second group on which there is no advertising restriction and, on the other hand, wine-based aperitifs such as Byrrh, Martini, Cinzano, Campari and Ambassadeur which belong to the third group in regard to which advertising is restricted. Again, both those categories of drinks have an equivalent alcohol and sugar content and are likewise subject to the same habits of consumption.

The French rules classify liqueur wines, such as port, malaga, sherry and madeira in the third group whilst they classify "bitter" aperitifs such as Avèze and Suze, which are national products, in the fourth group. Again, both of those categories of drinks have an equivalent alcohol and sugar content and are subject to the same habits of consumption.

Spirits obtained from tubers, such as aquavit or geneva and grain spirits, such as whisky, gin and schnapps, belong to the fifth group which is subject to a total prohibition on advertising, whilst rum and alcoholic beverages obtained from the distillation of wines, such as

calvados, cognac and armagnac, which are national products, belong to the fourth group which is not subject to any specific advertising restrictions. Again, both those categories of drinks have an equivalent alcohol and sugar content and both are generally consumed in France at the end of a meal.

(c) In this context it should particularly be observed that the fact that fruit liqueurs are mainly produced by French companies may be explained by the fact that having regard to their classification those products are subject to advertising restrictions the effect of which is nothing more or less than a lack of penetration of the French market by similar products originating in or coming from other Member States. National products, on the other hand, whilst being subject to the same advertising restrictions, are still well known to consumers owing to the fact that they are most frequently marketed by manufacturers whose name is known because of the advertising of the other products classified in the second and fourth categories which those manufacturers are able to effect — which is rarely the case in regard to producers in other Member States.

Moreover, it should be pointed out that the production, in France, of geneva and, still more, of whisky, has nothing in common with that of the national products which the rules in question put at an advantage, in fact if not by intention.

The fact that aniseed-based aperitifs are classified in the fifth category is attributable to the presence of the constituent anethol which is considered by the French Government to be particularly harmful; the classification in that category of products which are mainly imported, like whisky, which do not contain that constituent, amounts to blatant discrimination in favour of national products which do contain it.

The indirect advertising of aniseed-based aperitifs which represents another source of discrimination against grain spirits, classified in the fifth category, should also be taken into account.

(d) In particular regard to rum and alcoholic beverages obtained from the distillation of wines, the statement that their classification is justified by different consumer habits is untenable. It is true that it has been scientifically proved that alcoholic beverages consumed on an empty stomach are more harmful to health than when taken after meals. However, rum is generally consumed on an empty stomach, either neat or mixed with other ingredients; cognac and armagnac are often consumed on an empty stomach and advertising campaigns exist to persuade people to drink them as aperitifs like whisky; in certain parts of France it is customary to consume spirits obtained from fruit or sugar-cane as aperitifs; liqueurs of a strength of more than 18° are frequently consumed on an empty stomach; in the case of many beverages taken as an aperitif, such as whisky, consumers tend to dilute them with water which considerably reduces their harmfulness; single malt whiskies, like Glenfiddich, are drunk only after meals.

(e) It might be objected against the scientific arguments put forward by the French Government on the different levels of harmfulness of the products concerned that in certain Member States the time at which alcohol is taken and

the sugar content are not as crucial as the quantity of alcohol absorbed.

It is a matter of challenging the twofold distinction between alcoholic beverages taken on an empty stomach and those taken during and at the end of meals, on the one hand, and unsweetened alcoholic beverages and sweetened alcoholic beverages on the other hand as it is accepted that sweetened beverages taken on an empty stomach are the most harmful; what may be challenged are the assumptions which the French Government believes it may infer in the classification of different alcoholic drinks into the five categories contained in the rules in dispute.

That classification in fact arbitrarily equates the definition of aperitifs with that of drinks taken on an empty stomach. It is difficult, for example, to think of a drink such as whisky as being consumed on an empty stomach whilst, even before meals, it is in fact consumed diluted with three parts of water and taken with foods which traditionally accompany aperitifs; furthermore it is customarily followed immediately by a meal and thus reaches the digestive organs together with drinks taken during or at the end of a meal. When whisky is diluted to quarter strength the amount of alcohol absorbed in the bloodstream is reduced by half and is then about the same as in the case of wine.

In actual fact the distinction between aperitifs and drinks taken after meals is really valid only in regard to alcoholic beverages which are drunk on an empty stomach and not followed by a meal; yet no alcoholic beverage answers to that criterion or, to be more precise, all of them may be consumed in those circumstances. Such a criterion is not therefore appropriate as a basis for the rules in dispute.

In any event the criteria for the harmfulness of drinks based on consumer habits cannot ensure sufficient objectivity since consumer habits may vary from one region to another and may alter in the course of time under the influence of external factors, including advertising itself. Only objective criteria, such as alcohol content, sugar content and essential oil content, should be used for classifying drinks into the different groups.

(f) The fact that per head France is the largest consumer of alcohol in the world may be due in particular to the glaring ineffectiveness of its rules on the advertising of alcoholic beverages; of all alcoholic beverages consumed in France in 1975 those beverages on which there are no advertising restrictions at all totalled more than 90% the great majority of which is made up of domestic products; on the other hand, those beverages for which advertising is prohibited account for only 8% of national consumption and include grain spirits, like whisky, virtually all of which are imported.

Therefore the rules complained of not only prove inappropriate in regard to the very criteria of harmfulness which are their basis, they also involve effects on trade which are disproportionate to their level of effectiveness in achieving the

intended aim of curbing alcoholism. They therefore constitute a measure having an effect equivalent to a quantitative restriction on imports contrary to Article 30 of the EEC Treaty.

(g) The distinctions made by the French rules, which cannot be justified by the degree of harmfulness of the drinks concerned, may moreover tend to promote certain trade patterns to the detriment of others, whilst putting products which are typically French at an advantage. All that matters, in this respect, are the effects which the rules in question have; motives are not on trial.

(h) The growing number of imports into France of certain products from other Member States does not alter the Commission's views on the matter.

Under the Court's case-law the potential restrictive effect and not the real effect on trade should be taken into consideration for the purpose of applying the provisions of Article 30 as well as of Article 12. Besides, the possibility that if rules such as those at issue in this case did not exist, the imports would be still greater cannot be ruled out. An equivalent effect is defined as being the effect which, but for the disputed measure, would have resulted from imports, assuming that those imports had been made.

(i) In the final analysis, however attractive the approach adopted by the rules in question my appear in theory, by referring to national, often conflicting, customs which necessarily help to promote the consumption of national products, that approach takes the form in practice of a pattern of discriminatory treatment between national products and imported products which is not objectively justified and which thereby constitutes arbitrary discrimination within the meaning of the second sentence of Article 36 of the EEC Treaty.

The *Government of the French Republic* insists that the national legislation contested by the Commission constitutes a coherent entity that it has been formulated without any intention of discriminating against foreign produce and that is intended, as far as advertising is concerned, to protect public health and to curb alcoholism in France. The scourge of alcoholism is particularly disturbing in France which, *per caput*, is the heaviest consumer of alcohol in the world; the results of that state of affairs justify the French legislature in taking steps to cut back the consumption of alcohol.

The ability of a Member State to adopt legislation restricting advertising in order to contain the spread of alcoholism is not in dispute; this is possible under the first sentence of Article 36 of the EEC Treaty. The issue in this case is whether the French legislation has been drafted in a discriminatory way, as the Commission contends, in such a way as to penalize foreign products as against French products, and whether, as a result, it offends against the second sentence of Article 36. That is, however, not the case; foreign products are not treated more stringently than national products and alcoholic beverages are genuinely

classified according to the risk which they consitute in regard to alcoholism.

(a) The classification of drinks into five categories does not entail treating foreign products more stringently.

The two categories of alcoholic beverages for which advertising is restricted, namely the third and fifth, include as many French products as foreign products, if not more.

It is true that third group includes wine-based aperitifs such as Byrrh, Ambassadeur, Cinzano and Martini; but it should be stressed that those drinks are French produce. Moreover, the fruit liqueurs sold on the French market are in the main produced by French companies.

As regards the alcoholic drinks in the fifth group, the advertising of which is prohibited, the fact should not be overlooked that, first, as far as geneva spirits are concerned, more than half of such spirits, such as gin, consumed in France are produced in France and that there is some national production of whisky, admittedly limited but none the less real, and secondly and above all that the fifth group basically covers all aniseed-based aperitifs which are consumed in France in incomparably greater quantities than whisky or gin. All the companies which manufacture aniseed-based drinks are French companies.

Those two examples demonstrate the superficiality of the complaints made by the Commission when it indicates that the French legislation was drafted in order to protect French alcoholic beverages from foreign competition.

(b) The actual fact that there is a classification of different alcoholic beverages is not at issue in this case; the difference of opinion between the Commission and the French Republic arises from the concept of harmfulness, which is the only criterion related to objectives of public health which is capable of justifying the splitting-up of the various beverages into different categories.

The Commission wishes to confine its assessment of harmfulness to the sole criterion of alcohol content, with some regard also to the content of sugar and essential oils; that concept of harmfulness should be assessed according to the national context and on a broader basis than that adopted by the Commission.

The pure alcohol content of a drink is certainly an important criterion in assessing its harmfulness. However, in any given society, it is not possible to adhere purely to alcohol content in order to assess the harmfulness of a product; account must also be taken of the whole of the pattern of consumption which helps to produce the effects of the drink on the body.

Apart from regional or social habits of consumption, taste itself may be a determining factor in regard to the volume and the pattern of consumption of an alcoholic beverage. Taste is derived from non-alcoholic, volatile compounds which, when combined, give the "flavour" of the distillate, that is to say, the organoleptic qualities in which are combined the taste, aroma and smell of the liquid consumed. The chemical composition of the products varies and those qualities lead to different behaviour as regards consumption; it

therefore seems disputable to say the least to treat cognac as similar to whisky on the ground that their alcoholic strength is the same.

Such "factors other than alcohol" explain why different drinks have a different solubility in water and also the different patterns of consumption.

All those factors combine to influence consumers in behaving in a particular way in regard to each drink; they cannot be ignored.

The patterns of consumption affect, first, the time at which the drinks under consideration are consumed; scientific experts unanimously agree that the time at which and the circumstances in which alcoholic substances are consumed are decisive as to the effects of alcohol on the body. Thus it has been scientifically proved that alcoholic beverages consumed on an empty stomach are particularly harmful, especially in the case of strong, undiluted spirits such as whisky and grain spirit with ice. That justifies the stringency of the French legislature in regard to the so-called "aperitif" drinks, in other words those consumed on an empty stomach, as compared to "digestive" drinks consumed at the end of meals and in which the content of non-alcoholic constituents makes the consumption of large quantities physically impossible.

That distinction between aperitif and digestive drinks corresponds to the consumption of alcoholic beverages in France; in contrast to alcoholic beverages and liqueurs taken after meals, the bulk of consumption tends to be concentrated on aperitif drinks amongst which a distinction should be made between sweetened aperitifs with a basis of "vins cuits" [wine strengthened by partial evaporation] or naturally sweet wines (with a sugar rating between 35 and 45) and those which are alcohol based and are taken neat or with water (with a sugar rating between 0 and 5 and of high strength: 25-45°). Such a distinction is the justification for the fact that French legislation on the one hand regulates the advertising of wine-based aperitifs (third group) and on the other hand prohibits the advertising of spirit-based aperitifs of the fifth group (aniseed-flavoured drinks, whisky and grain spirits).

(c) When presented in this way the French legislation is consistent throughout. As they correspond to different habits of consumption, the drinks in the third and fourth groups have different effects from the point of view of public health and are therefore logically classified in different categories.

(d) In regard to the special cases of rum and cognac the statements of the Commission contain serious factual errors. It is statistically established that rum is largely consumed in culinary dishes and that its consumption neat, on an empty stomach, is of small proportions. Likewise, more than 90% of cognac and armagnac are not taken on an empty stomach but used for digestive or culinary purposes; despite the advertising campaign to which the Commission refers the consumption of cognac as an aperitif has remained insignificant. In contrast, spirits obtained from tubers or grain which also have a high alcoholic strength, are most often drunk on an empty stomach or at the beginning of meals. It is for that reason that such spirits, French or foreign, are

classified in the same category (fifth group) as aniseed-flavoured aperitifs.

(e) Therefore, the French legislation on the advertising of alcoholic beverages does not have an arbitrary discriminatory effect in regard to foreign products. It is furthermore striking to see that of recent years this legislation has not had any restrictive effect on the patterns of trade, as a study of the statistics on the consumption of alcoholic beverages in France will show. In particular, the statistics make it apparent that the alcoholic beverages which, according to the Commission, benefit from the French legislation, are at a standstill while the products in the fifth group are, in contrast, making increasing headway. This actual state of affairs cannot be ignored in any objective assessment of whether or not the French legislation is capable of affecting trade patterns.

(f) In point of fact it should be remembered in particular that although it is correct that 90% of alcoholic beverages consumed in France enjoy unrestricted advertising that figure merely represents the preponderance of wines of which France is one of the largest producers in the world; on the other hand the greater part of the 8% of the products to which the prohibition on advertising applies, is made up of French products (aniseed-flavoured) or products manufactured in France. It is not therefore possible to draw from these statistics the conclusions put forward by the Commission.

Furthermore, the creation of the fifth category, entailing a prohibition on advertising, is not attributable to any intention to cut down the presence of anethol or any other constituent.

Finally, the fact that there is considerable litigation proves that the French authorities are alert to deal with forms of "indirect advertising".

V — Oral procedure

During the sitting held on 9 October 1979 the Government of the French Republic, represented by Noël Museux, requested the Court to postpone the oral procedure owing to consultations taking place with the Commission; The Commission, represented by René-Christian Béraud, confirmed that since the application was made negotiations had taken place on the initiative of the French authorities and that the Commission had no objection to the request that the oral procedure be postponed. The Court acceded to that request.

During a fresh sitting held on 12 December 1979 the Government of the French Republic, represented by Noël Museux, indicated to the Court that a draft law introducing new rules on advertising relating to alcoholic beverages had been drawn up and submitted to the Commission and that it was possible that it might be adopted by the French Parliament during its next session; consequently the French Government requested the Court for further postponement of the case. The Commission, represented by René-Christian Béraud, stated that it did not have any objection to the request that the oral procedure be postponed. The Court acceded to the request.

The Commission, represented by René-Christian Béraud, and the Government of the French Republic, represented by

Noël Museux, presented oral argument at the sitting on 10 June 1980.

At that sitting the *Commission* argued amongst other things that in its judgment of 20 January 1979 (Case 120/78, *REWE,* reference for a preliminary ruling from the Hessisches Finanzgericht, [1979] ECR 649) the Court had held that national rules on the marketing of a specific product are compatible with the basic principle of the freedom of movement of goods within the Community only if they are necessary to meet imperative requirements — including the protection of public health; that is clearly not the case here since national products, which are no less harmful than competing imported products, enjoy greater advertising freedom. Besides, the judgment of the Court of 27 February 1980 (Case 168/78, *Commission* v *French Republic),* rejected the argument that national habits of consumption may justify discrimination against foreign products. The draft law lodged on 24 May 1980 before the French National Assembly would, contrary to what the defendant thinks, continue to bestow complete advertising freedom on sweet natural wines produced in France whilst any form of advertising in regard to similar or competing products imported from other Member States would be prohibited; the Commission is also disturbed by the provision in the draft law fixing the space to be devoted each year to the advertising of alcoholic beverages in the press; since that provision would enable the discriminatory prohibition of all advertising of imported drinks such as aquavit, whisky, gin or schnapps to be maintained.

The *Government of the French Republic* contended that the regulating of advertising in respect of alcoholic drinks by the French legislature had the legitimate aim of protecting public health and that it was not arbitrarily discriminatory. Justification for such regulation may be found in Article 36 of the EEC Treaty whilst the disputed rules are justified by the varying degrees of harmfulness of the products; in this regard not only the pure-alcohol content of a product but also habits of consumption should be taken into account.

The *Advocate General* delivered his opinion at the sitting on 2 July 1980.

Decision

1 By an application of 6 July 1978 the Commission brought an action under Article 169 of the EEC Treaty for a declaration that the French Republic, by subjecting advertising in respect of alcoholic beverages to discriminatory rules and thereby maintaining obstacles to the freedom of intra-Community trade, has failed to fulfil its obligations under Article 30 of the EEC Treaty.

2 The action is directed more specifically against Articles L 17 and L 18 of the Code des Débits de Boissons et des Mesures contre l'Alcoolisme [Code on the retail sale of beverages and on measures against alcoholism], hereinafter referred to as "the Code", which are intended to regulate advertising in respect of alcoholic drinks. The Commission contends that those rules have been so formulated that advertising in respect of certain imported alcoholic products is prohibited or subject to restrictions whilst it is completely unrestricted in regard to competing national products. This discriminatory effect is the result of the division of alcoholic beverages into categories in Article L 1 of the Code and the different way in which those provisions regulating advertising are made to apply to those categories. Those restrictions on the marketing of the products in question originating from other Member States are, it is claimed, to be regarded as measures having an effect equivalent to quantitative restrictions and as such are prohibited by Article 30 of the EEC Treaty.

3 Article L 1 on the Code divides beverages into five groups for the purpose of regulating their manufacture, sale and consumption; the first of those groups covers non-alcoholic beverages and the others alcoholic beverages. The latter groups are defined in these terms by Article L 1:

Group 2: undistilled fermented beverages namely wine, beer, cider perry and mead, to which are added natural sweet wines coming under the tax arrangements applying to wine, as well as blackcurrant liqueurs and fermented fruit or vegetable juices containing 1 to 3 degrees of alcohol;

Group 3: natural sweet wines other than those belonging to Group 2, liqueur wines, wine-based aperitifs and strawberry, raspberry, blackcurrant or cherry liqueurs containing no more than 18° of pure alcohol;

Group 4: rums, tafias, spirits obtained from the distillation of wines, ciders, perries or fruits, not containing any added essence, as well as liqueurs sweetened with sugar, glucose or honey in a minimum amount of 400 grams per litre in regard to aniseed-flavoured liqueurs and 200 grams per litre in regard to other liqueurs, which do not contain more than half a gram of essence per litre;

Group 5: all other alcoholic beverages.

4 As regards the system of regulating advertising, under Article L 17 of the Code it is prohibited to advertise drinks in the fifth group in any form whatsoever. By virtue of the system set up by Article L 1 all the alcoholic products which are not expressly stated to come under Groups 2, 3 or 4 may not therefore be advertised.

5 Under the terms of Article L 18 advertising in respect of drinks in Group 3 is permitted if it indicates exclusively the name and composition of the product and the name and address of the manufacturer, his agents and stockists. The type of bottling and labelling may be reproduced only if it gives no other information than that just mentioned. The result of Article L 1 is that those rules restricting advertising affect natural sweet wines other than those classified in Group 2, liqueur wines, wine-based aperitifs and strawberry, raspberry, blackcurrant or cherry liqueurs not exceeding 18° of pure alcohol.

6 Since there are no restrictions on them, the alcoholic beverages in Groups 2 and 4, that is to say, first, wine, beer, cider, natural sweet wines coming under the tax arrangements applying to wine, as well as blackcurrant liqueurs and fermented fruit juices and, secondly, rums, tafias, spirits obtained from the distillation of wines, ciders, perries or fruits, and sweetened liqueurs, may be freely advertised.

7 The Commission thinks that the classification contained in Article L 1 together with Articles L 17 and L 18 causes many imported products to be put at a disadvantage, as far as advertising is concerned, compared to the competing national products.

8 It points out, in particular, that under this system natural sweet wines coming under the tax arrangements applying to wine — a benefit given only to national sweet wines — also enjoy the benefit of completely unrestricted advertising whilst imported natural sweet wines and liqueur wines are subjected to a system of advertising restrictions.

9 It further contends that rums and spirits obtained from the distillation of wines, ciders, perries or fruits, as well as sweetened liqueurs, enjoy unrestricted advertising whilst numerous competing products, notably grain spirits like whisky and geneva, nearly all of which are imported, are covered by a prohibition on advertising.

10 In its defence the French Government advances two kinds of arguments; first, that, taken as a whole, the advertising rules are not more favourable to French products than to imported products and therefore do not infringe Article 30 of the Treaty; secondly, the aim of the rules is to protect public health and to curb alcoholism and that they therefore come under Article 36 of the Treaty.

The application of Article 30 of the Treaty

11 As a preliminary point it should be observed that there is no dispute between the parties on whether a restriction on freedom of advertising for certain products may constitute a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty. Although such a restriction does not directly affect imports it is however capable of restricting their volume owing to the fact that it affects the marketing prospects for the imported products. The issue in point is therefore whether the prohibitions and restrictions on advertising laid down by the French legislation place a handicap on the importation of alcoholic products from other Member States.

12 In this respect the French Government contends that significant categories of French drinks are also covered by the prohibitions and restrictions on advertising criticized by the Commission. For example, aniseed-flavoured alcoholic beverages, consumed in particularly large quantities in France, may not be advertised in any way, as is the case with the other beverages falling into the fifth category. As regards the advertising restrictions imposed on drinks in the third category the French Government maintains that many wine-based aperitifs are in fact French products although they may bear trade names which appear to be foreign. There can therefore be no question of discrimination here when the categories laid down by the Code are applicable in an objective manner according to the properties of the various products and the prohibitions and restrictions on advertising apply to an appreciable number of French products as well as to imported products.

13 That defence of the French Government cannot be accepted. Even though it is true that the system adopted by the Code has the effect of subjecting some national products to prohibitions or restrictions on advertising, including widely-consumed products, nevertheless the fact remains that it still has

undeniably discriminatory features. It should be emphasized in particular that as a result of their coming under the tax arrangements applying to wine, French natural sweet wines enjoy unrestricted advertising whilst imported natural sweet wines and liqueur wines are subjected to a system of restricted advertising. Similarly, whilst distilled spirits typical of national produce, such as rums and spirits obtained from the distillation of wines, ciders or fruits, enjoy completely unrestricted advertising, it is prohibited in regard to similar products which are mainly imported products, notably grain spirits such as whisky and geneva. As regards the similarity and competition existing between the products just mentioned, reference need only be made to the judgment which the Court gave between the same parties on 27 February 1980 in Case 168/78 on the tax system for spirits.

14 It is apparent from the foregoing that even though it is conceded that an appreciable number of national products are subject to the prohibitions and restrictions on advertising laid down by Articles L 17 and L 18 of the Code, nevertheless the fact remains that the classifications which determine the application of those provisions put products imported from other Member States at a disadvantage compared to national products and consequently constitute a measure having an effect equivalent to a quantitative restriction prohibited by Article 30 of the Treaty.

The application of Article 36 of the Treaty

15 Secondly, the French Government draws attention to the part which the prohibitions and restrictions on advertising play in the campaign against alcoholism and in the protection of public health. The French Government is of the opinion that the disputed legislation is thereby covered by Article 36 of the EEC Treaty by which the provisions on the free movement of goods do not preclude prohibitions or restrictions on imports justified on grounds of the protection of health and life of humans. The French Government explains on this point that the legislation contested by the Commission is based on the distinction between drinks which are habitually consumed for "aperitif" purposes and drinks consumed for "digestive" purposes as it is accepted that it is the former which are more of a danger to public health owing to the fact that they are taken on an empty stomach. The scheme of the Code is so arranged, it is claimed, that the prohibitions and restrictions on advertising apply first and foremost to the category of aperitif drinks, such as aperitifs based on enriched wine, pastis and whisky. As regards the distilled spirits comprised in the fourth category, which may be freely

advertised, they are spirits consumed as digestive beverages and as such are less harmful to health.

16 A preliminary observation is necessary in regard to the distinction between "aperitif" drinks and "digestive" drinks. As the Court has had the occasion to observe in the judgment of 27 February 1980, cited above, that distinction does not represent an effective criterion for the purpose of assessing the competitive relationship existing between the different categories of alcoholic drinks. Those observations, made in the context of a dispute on the tax arrangements applying to the drinks in question, apply for identical reasons to the assessment of obstacles of a commercial nature covered by Articles 30 and 36 of the Treaty.

17 On the other hand, it must be recognized that the connexion made by the French Government between the control of advertising in respect of alcoholic drinks and the campaign against alcoholism does exist. It is in fact undeniable that advertising acts as an encouragement to consumption and that the disputed rules are not therefore a matter of indifference from the point of view of the requirements of public health recognized by Article 36 of the Treaty. However, it should be pointed out that it is expressly specified in the same article that such prohibitions or restrictions "shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

18 The fact cannot be disputed that several alcoholic beverages on which there are no advertising restrictions under the French legislation, have, from the point of view of public health, the same harmful effects in the event of excessive consumption as similar imported products which, as such, are subjected to prohibitions or restrictions on advertising. Even though it is true that grounds relating to the protection of public health are not wanting in the disputed legislation, none the less its effect is to transfer the effort to restrict excessive alcohol consumption above all to imported products. It is therefore apparent that although the disputed legislation is in principle justified by concern relating to the protection of public health, none the less it constitutes arbitrary discrimination in trade between Member States to the extent to which it authorizes advertising in respect of certain national products whilst advertising in respect of products having comparable characteristics but originating in other Member States is restricted or entirely prohibited. Legislation restricting advertising in respect of alcoholic drinks

complies with the requirements of Article 36 only if it applies in identical manner to all the drinks concerned whatever their origin.

19 Therefore that defence by the French Government must also be dismissed.

20 It follows that the French Republic must be found to have failed to fulfil its obligations having regard to the fact that the rules on advertising in respect of alcoholic beverages laid down by Article L 17 and L 18 of the French Code on the retail sale of beverages together with Article L 1 of the same Code are contrary to Article 30 of the EEC Treaty inasmuch as they constitute an indirect restriction on the import of alcoholic products originating in other Member States to the extent to which the marketing of those products is subject, in law or in fact, to more stringent provisions than those which apply to national or competing products.

Costs

21 Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. As the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that by subjecting advertising in respect of alcoholic beverages to discriminatory rules and thereby maintaining obstacles to the freedom of intra-Community trade, the French Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty;**

2. Orders the French Republic to pay the costs.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 10 July 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 2 JULY 1980 [1]

Mr President,
Members of the Court,

The issue in the proceedings brought for a breach of the Treaty on which I am giving my opinion today concerns the compatibility of the French rules on advertising in respect of alcoholic beverages with the prohibition contained in Article 30 of the EEC Treaty on measures having an effect equivalent to quantitative restrictions on imports.

In Article L 1 in the First Title, the Law on the sale of beverages and on measures against alcoholism (Decree of 8 February 1955, Order No 59-107 of 7 January 1959) divides beverages into five groups according to their manufacture, sale and consumption.

The first group comprises non-alcoholic drinks. Group 2, contained in Order No 60-1253 of 29 November 1960, covers fermented drinks which are not obtained by means of a distillation process, such as wine, beer, cider or perry and mead. Also in this group are natural sweet wines under the tax arrangements applying to wine as well as "Crème de Cassis" and fermented fruit or vegetable juices having an alcoholic content of 1 to 3°. The remaining natural sweet wines not covered by the second group — liqueur wines, wine-based aperitifs and strawberry, raspberry, blackcurrant or cherry liqueurs having an alcohol content of not more than 18° — belong to the third group. The fourth group, added by Law No 57-725 of 27 June 1957, comprise the following types of drinks: rum, tafia, spirits obtained from the distillation of wine, cider or perry or

1 — Translated from the German.