the taxation arrangements of the United Kingdom. Furthermore, in relation both to wine and to beer there is not always a fixed ratio between the alcoholic content of those beverages and their price.

Those considerations in my view show that the relatively heavier taxation of wine as opposed to that on beer, which has been described, does not in itself justify with sufficient certainty the assumption that those tax arrangements are of such a nature as to afford indirect protection to domestic beer production. In this regard it should not be overlooked that, until the taxation of beer and wine is harmonized throughout the common market, the requirement that there should be an "appropriate tax ratio" offers the Member States in the framework of *autonomy with regard to taxation* a *discretion* limited only by the fact that the tax arrangements in question may not be *discriminatory or protective in nature* in relation to imported interchangeable products. The limits of that discretion are naturally wider, the smaller or more partial the possible degree of interchangeability between the two products.

In view of the fact that beer and wine are only partly interchangeable and of the considerable differences described between those two beverages, it therefore seems to me in this case that it has still not been proved that those limits have been exceeded. There is in my view support for the opposite opinion above all, in the fact that, both according to the criterion for comparison used by the Commission and on the basis of other methods of comparison, substantial grounds emerge which are *still* capable of justifying tax arrangements of that kind and that the Commission has not succeeded in proving that the tax arrangements in question lead with a certain *degree of probability* to indirect protection of British beer production against wine imported from other Member States.

7. I therefore conclude once again that the application must be dismissed as unfounded and that the Commission must be ordered to pay the costs.

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 10 MAY 1983 [1]

Mr President,
Members of the Court,

1. State of the procedure

1.1. Today the Court is once again concerned with the question whether the Commission correctly concluded in its application of 7 August 1978 that the excise duty on still light wine levied by the United Kingdom at that time conflicted with the second paragraph of Article 95 of the EEC Treaty. At that time the excise duty was UKL 3.250 per gallon, compared with UKL 0.6084 per gallon of beer of standard quality.

1 — Translated from the Dutch.

1.2. The material time for purposes of the decision

The relevant situation, according to the judgment of the Court in *inter alia* Case 7/61 *(Commission* v *Italy* [1961] ECR 317, paragraphs 1 to 7, relating to pigs) and the commentaries thereon, is the situation at the time at which the application is lodged (see H.G. Schermers, *Judicial Protection in the European Communities,* Second Edition, p. 227, and H. A. H. Audretsch, *Supervision in European Community Law,* pp. 29, 36, 38 and 40 to 46). That judgment shows that even if the Member State concerned has fulfilled its obligations during the procedure the Commission may have an interest "in obtaining a decision on the issue whether the failure occurred."

Mr Advocate General Lagrange, at page 334 of his Opinion in Case 7/61, cited above, reached the same conclusion as the Commission, *inter alia* on the basis of the text of Article 171 of the Treaty, namely that the Court must decide "whether the failure to fulfil obligations under the Treaty has occurred, without taking into account what has happened since" and that the Commission may still have an interest in a decision even after the infringement has ended, if only because the Member State concerned would otherwise be free "to carry on with its improper conduct in the absence of any judgment finding that it was in breach of its obligations."

I consider the foregoing reference to the earlier case-law of the Court to be of particular importance in this case for two reasons. First, certain passages of the written and oral submissions of the parties since the Court's interlocutory judgment of 27 February 1980 give the impression that they regard the situation between 1980 and 1983 as relevant for the purpose of determining whether the Treaty was infringed. However, such a view would conflict with the interpretation of Articles 169 and 171 of the Treaty contained in the judgment cited. In that regard, developments in the United Kingdom after the application was lodged are of importance solely in so far as they may be helpful in throwing new light on the position at the time at which the application was lodged. Secondly, the reference to the earlier case-law of the Court is important in this case because the Commission clearly takes the view that even since its application was lodged the infringement of the Treaty which it set out has still not been wholly brought to an end. On that ground alone the Commission retains a specific and obvious interest in a decision of the Court of Justice which states sufficiently clearly the measures to be taken by the United Kingdom under Article 171 of the Treaty in order to put an end to the alleged infringement of the Treaty.

1.3. The relevant facts according to the application

In its reasoned opinion of 8 November 1977, the Commission stated that the excise duty on still light wine had been increased with effect from 1 January 1977 from UKL 2.955 per gallon to UKL 3.250 per gallon, whilst the excise duty

on the relevant beer was UKL 0.6084 per gallon. Per degree of alcohol, an excise duty of UKL 0.2955 and UKL 0.2708 per gallon was levied on still light wines of 11° and 12° respectively, in comparison with UKL 0.2028 per gallon of beer. In relation to price, the excise duty on beer represented on average 25% and the excise duty on wine at least 38% of the sale price to the consumer.

According to the reasoned opinion, the excise duty on the relevant wines was, according to the criteria used, approximately 50% (on the basis of the criterion of alcoholic strength or price to the consumer) or even more than 400% (on the basis of the criterion of volume used in the United Kingdom legislation on excise duty) higher than the excise duty on beer.

There was a competitive relationship between beer and wine so that the differential taxation described afforded indirect protection to the production of beer, such as is prohibited by the second paragraph of Article 95 of the EEC Treaty.

1.4. Judgment of 27 February 1980

In its interlocutory judgment of 27 February 1980, [1980] ECR 417, the Court stated first that the United Kingdom had essentially admitted (had not called in question) the facts put forward by the Commission, especially as regards the evolution in the rates of excise duty. The United Kingdom did deny the existence of a competitive relationship between wine and beer, with the result that there was no possibility of substitution, which was the condition for the application of the second paragraph of Article 95. Moreover, according to the United Kingdom, even if such a possibility of substitution were recognized, the tax system applied to wine was not protective in nature within the meaning of that provision.

In paragraph 6 the Court stated that, in order to determine whether there was a competitive relationship within the meaning of the second paragraph of Article 95, it was necessary to look not only at the present state of the market but also at possible developments within the context of free movement of goods within the Community and at further possibilities for the substitution of products for one another which might be revealed by intensification of trade, so as fully to develop the complementary features of the economies of the Member States in accordance with the objectives laid down by Article 2 of the Treaty.

In paragraph 10 of the judgment, the Court emphasized that the second paragraph of Article 95 (in relation to determining whether there was a protective effect) was linked to the "nature" of the tax system in question so that it was not possible to require in each case that the protective effect should be shown statistically. The Court stated: "It is sufficient for the purposes of the application of the second paragraph of Article 95 for it to be shown that a given tax mechanism is likely, in view of its inherent characteristics, to bring about the protective effect referred to by the Treaty."

In paragraph 14 of the judgment, the Court stated: "It is impossible to deny that to a certain extent the two beverages in question are capable of meeting identical needs, so that it must be acknowledged that there is a certain degree of substitution for one another."

In his first Opinion Mr Advocate General Reischl further confirmed that the products were interchangeable by stating at page 442 that, from the point of view of consumers, beer and wine were put to the same use and had the same characteristics. Both were produced by fermentation and differed from the other thirst-quenching beverages listed in Chapter 22 of the Common Customs Tariff in that they contained alcohol. According to his Opinion, the relatively small alcoholic content also distinguished both drinks from spirits covered by tariff heading 22.09 C of the Common Customs Tariff and obtained by distillation. I regard paragraph 14 of the judgment, as amplified by Mr Advocate General Reischl in his first Opinion on this case, as an important starting-point for my own Opinion.

With regard to the basis of calculation to be used, in relation to the established competitive relationship, for comparing the total tax burdens imposed on the two products, the Court stated in paragraph 18: "The explanations supplied show that neither *simply* taking into consideration the volume of the two beverages nor a comparison between the typical units of consumption can provide a suitable basis for comparison. The *same* applies to a comparison based on the effect of the tax burden on the selling price of the two types of beverages in view of the fact that although it is relatively easy to ascertain an average price in the case of beer it is *difficult* to determine a representative basis for comparison in the case of wine, a characteristic of which is the wide range of prices."

In paragraph 19 of its judgment the Court added: "Of the criteria put forward by the parties, the only factor which may enable an appropriate and somewhat objective comparison to be made consists therefore in the appraisal of the incidence of the tax burden in relation to the alcoholic strength of the beverages in question." By taking into consideration that criterion, the Court then ascertained *inter alia* that wine was at that time subject in the United Kingdom to a tax which was approximately 50% higher than that on beer, assuming that the alcoholic strength of the beverages was respectively 11° to 12° and 3° to 3.7°. As appears from the same paragraph, the Italian Government argued that in the case of normal table wines with an alcoholic strength of 9° to 10° the margin of discrimination was approximately 100% to 125%.

In paragraph 20 the Court stated in conclusion and subject to the observations made in paragraph 16 on the need first to determine an appropriate tax ratio between wine and beer that, according to the only criterion whereby an objective, *although imperfect*, comparison could be made between the rates of tax applied to wine and beer, it seemed that wine was subject in the United Kingdom to a tax burden which was heavier than that imposed on beer.

I shall take paragraphs 18 to 20 inclusive in relation to the criteria to be used for comparison as the second starting-point for my own analysis. In that regard, I infer from the words which I have italicized on the one hand that the Court considers alcoholic strength to be an appropriate, although imperfect, criterion for comparison. On the other hand, I infer that the Court did not intend also to exclude the supplementary use of the criteria of volume and price. At least in relation to the supplementary importance of the criterion of price, that

also seems to be the logical inference to be drawn from the questions put to the parties in the Court's subsequent order of 15 July 1982.

A third important starting-point for my own analysis is in my opinion to be found in the view expressed in paragraph 24 "that a comparison of the development of the two tax systems in question shows a protective trend as regards imports of wine in the United Kingdom."

1.5. The further course of the procedure

For a summary of the supplementary observations of the parties on the basis of the Court's interlocutory judgment, I will at this stage simply refer to the second Report for the Hearing. With reference to those supplementary observations, the Court in the letter of summons to the re-opened oral procedure expressly asked the Commission to explain at the hearing its views concerning the appropriate tax ratio between wine and beer and also for an explanation of the influence of the manufacturing processes for wine and beer on their price structures. At the sitting on 19 May 1982, the Commission confirmed that in its view a ceiling should be established by the Community for the taxation of wine but there should be no fixed reciprocal relationship between rates of taxation applicable to wine and beer. That point of view, to which I shall return in my analysis, is based on the twofold consideration that there are Member States which produce beer exclusively or almost exclusively but that in the remaining Member States both beer and wine are produced without its appearing that the heavier taxation of beer in those countries affects the healthy development of breweries. There is virtually no importation of beer in that group of countries, whilst in the first-mentioned group of countries there is in fact significant importation of wine. The Commission added that, as appears from the judgments of the Court in Case 127/75 *Bobie* v *Hauptzollamt Aachen-Nord* [1976] ECR 1079, Case 148/77 *Hansen* v *Hauptzollamt Flensburg [1978]* ECR 1787, Case 21/79 *Commission* v *Italy* [1980] ECR 1, and Case 46/80 *Vinal* v *Orbat* [1981] ECR 77, a Member State may lay down differing tax arrangements even for identical products on the basis of objective criteria provided that such arrangements pursue objectives of economic policy which are themselves compatible with Community law and that they are not discriminatory or protective in nature. The establishment of a reciprocal relationship between the rates for beer and wine, like the harmonization of the rates of taxation, constitutes an essential aim only in the context of the harmonization of legislation and cannot be achieved by means of the application of Article 95. For a summary of the remaining submissions of the parties at the second hearing I refer to the third Report for the Hearing.

In his Further Opinion of 16 June 1982, Mr Advocate General Reischl, in connection with determining whether products may be substituted for one another, refers to the judgments in Cases 45/75 *REWE* v *Hauptzollamt Landau* [1976] ECR 181, and 27/67 *Fink-Frucht* v *Hauptzollamt München-Landsberger-straße* [1968] ECR 223, as well as to the interlocutory judgment of the Court. With regard to the proper tax ratio between wine and beer he considers on the basis of the judgments of the Court of 27 February 1980 on the tax arrangements applicable to spirits in Cases 168/78, 169/78, 171/78, 55/79 and 68/79, [1980] ECR 347, 385, 447,

481 and 501 respectively, that differential taxation — which he also regards as permissible in principle on the basis of the judgment of the Court cited by the Commission — should not dicriminate or afford protection against imported products. In his detailed examination of the excise duty applied to wine in relation to the various criteria for comparison, he questions *inter alia* "whether and how far alcoholic content has a decisive effect on consumer behaviour, in view of the other considerable differences between wine and beer, and whether that is not ultimately influenced only by the selling price of the beverages in question." Finally, he concludes "that the relatively heavier tax burden on wine in relation to that on beer ... does not in itself justify with sufficient certainty the assumption that those tax arrangements are of such a nature as to afford indirect protection to domestic beer production." I should probably have reached the same conclusion on the basis of the information available at that time. In my own examination I shall therefore concentrate on examining the new facts which have since become available as a result of the questions put by the Court in its order of 15 July 1982. As the Court is aware, those questions related in particular to the consumer prices and the fiscal element therein in the various Member States since 1977 and also to the trend in the consumption of wine and beer in the various Member States since 1972.

2. Supplementary remarks

2.1. *Summary of the starting-points for my own analysis*

I now pass to my own analysis of the problems raised by this case. For that purpose I have chosen as the starting-points for the definition of my view the following points, already referred to, in the Court's interlocutory judgment:

(a) The interchangeability of wine and beer;

(b) The comments on the various criteria for comparison, in the light, however, of the statements contained in the Court's decision of 15 July 1982 and also in the light of the parties' replies to that decision;

(c) The protective trend identified in paragraph 24.

2.2. *The interchangeability of wine and beer*

With regard to the interchangeability of wine and beer, I have nothing to add at this stage to the remarks contained in the Court's judgment and the two Opinions of Mr Advocate General Reischl. If it is accepted that there is a competitive relationship, it is at the same time recognized that the second paragraph of Article 95 may be applicable. In my closing remarks, however, I shall return to a number of characteristics of the competitive relationship between wine and beer.

2.3. *The criteria for comparison for the determination of the tax burden*

The Court concluded in paragraphs 19 and 20 of its interlocutory judgment that

on the basis of the alcoholic strength, which was regarded by the Court as the most objective, although imperfect, criterion, the wines considered to be relevant for puposes of comparison were subject to a tax which was approximately 50% higher than that on the relevant beer. I shall later return to the question of the proper tax ratio, which was left open. According to the Commission and the Italian Government (which take into account lower percentages of alcohol), the tax advantage on the basis of that criterion is substantially higher. Precisely because the Court itself regarded the criterion of alcoholic strength as imperfect I consider it desirable to make also a few remarks on the other criteria applied by the Commission.

First of all, as the Italian Government has rightly observed in its various observations, the use of the criterion of volume is logical, inasmuch as the United Kingdom's tax arrangements are themselves based on the criterion of volume. Moreover, Mr Advocate General Reischl rightly observed in his first Opinion that the interchangeability of wine and beer results in particular from the fact that both are thirst-quenching drinks of low alcoholic content and, as is well-known, the volume of a drink is one of the decisive factors in the quenching of thirst. The Italian Government admits that a corrective factor of 1.5 must be applied here, that is to say that 1 litre of wine must be compared with 1.5 litres of beer. It rightly remarked in its observations on the replies given by the Commission and the United Kingdom that the information provided on the consumption of wine and beer in the most important wine- and beer-consuming countries justifies even a somewhat lower corrective factor of 1.35. On the basis of that criterion, taxation on wine would be more than three times as high as that on beer. The margin of discrimination would therefore amount to at least 200%.

So far as the criterion of the comparison of prices is concerned, I agree with the United Kingdom and Mr Advocate General Reischl that it is certainly relevant in principle. First, I agree with the United Kingdom that the Neumark Committee's view, which it cites at page 3 of it report of 1 December 1981, is in fact still authoritative. That is in spite of the fact that, as the Commission somewhat disparagingly remarked, 20 years have now passed since the publication of that report. Secondly, with reference to the Further Opinion of Mr Advocate General Reischl, I take the view that differences in production costs, alcoholic strength and other differences in cost and quality, together with consumers' preferences, ultimately find expression in the price of the various products. It is not without reason that the terms "competitive mechanism" and "price mechanism" are often regarded as synonymous. The competive relationship between wine and beer is in fact expressed in their price ratio. If the United Kingdom had imposed upon beer and wine taxation calculated on the basis of the same percentage of their respective prices to the consumer net of tax, there could in my view be no question of an infringement of the second paragraph of Article 95.

The difficulties in applying the criterion of price in this case, however, arise out of the fact that in its tax system the United Kingdom applies the criterion of volume as the basis for the taxation of wine and beer, rather than that of price. The comparison of price is further hampered by the very divergent structures of the sales markets for wine and beer and by the very different prices which are charged for different types of wine as a result of *inter alia* differences in quality.

The difficulty relating to the structures of the sales markets may be overcome by comparing prices on one market in which both products are sold, that is to say supermarkets and other retail traders which sell both beer and wine to the consumer. In its reply to the Court's order of 15 July 1982, the Commission in my view rightly adopted that basis for its comparison of prices.

The difficulty arising out of the wide range of wine prices may in my view be overcome either by comparing taxation on the cheapest table wines with taxation on beer (as the Italian Government recommended in its observations on the information furnished by the Commission) or by calculating the maximum price of the cheapest table wines which together have a share of the market considered to be sufficient (as the Commission in fact suggests). The relevant price of table wines, according to which of the two solutions is chosen amounts to UKL 2 or UKL 3 per litre.[1] The margin of discrimination against wine thus amounts to between 30 and 120% of the price net of tax (± 70 to 300% of the excise duty on beer).

The Italian Government argues, in defence of the comparison which it favours between the tax burden on beer and the tax burden on the *cheapest* table wine, that Article 95 prohibits protective tax discrimination affecting *any* imported product. However, I consider that as in cartel law for the purpose of determining whether fair competitive relationships exist particular products with a negligible share of the market may be disregarded and that the calculation by the Commission of a maximum price for cheap table wine therefore offers a more secure basis for the comparison of prices. According to the United Kingdom's own explanation at the most recent sitting, the relatively cheap Italian table wines have a 20% share of the British market, which certainly represents a sufficiently important share of the market to apply the comparison of taxation. In that

1 — It should naturally be borne in mind that this calculation of the margin of discrimination related to 1982. The tax ratio between wine and beer at that time was substantially less unfavourable to wine than at the material time for the purposes of the judgment, namely the time at which the application was lodged. On the basis of the criterion of price, at the material time the tax mechanism applied in the United Kingdom was, on account of the characteristics already referred to, protective in nature with regard to beer production, as defined in paragraph 10 of the Court's interlocutory judgment, in relation to all wines with a consumer price (net of tax) which was less than five times the consumer price (net of tax) of beer. The margin of discrimination could then, on the basis of the more unfavourable tax ratio, certainly rise to far above the highest margin of protection for 1982, calculated at 120% of the price net of tax.

connection I recall that in the Commission Notice on agreements of minor importance in the field of cartel policy (Official Journal 1977, C 313, p. 3) restrictions on competition in relation to market shares of only 5% are regarded as relevant from the point of view of maintaining fair competitive relationships. On the other hand, I again agree with the Italian Government that the average import price for wine imported into the United Kingdom indicated by the United Kingdom itself in Annex E to its reply of 30 September 1982 makes it unlikely that the two types of German wine referred to by the United Kingdom for the purposes of the comparison of prices may in fact be regarded as representative. Certainly that applies to supermarket chains which import their own wine.

The information set out by the Italian Government is also of importance inasmuch as it appears from it that the most relevant Italian wines for purposes of assessing appreciable restrictions on competition have an alcoholic strength of only 9 to 10°. As appears from the information provided by the Commission at pages 16 and 17 of its report of 1 December 1981, the margin of discrimination against the most relevant wines at the material time for the determination of an infringement of the Treaty amounts to at least 90% for those wines by application of the criterion of alcoholic strength. Moreover, there is a clear connection between the criteria for comparison of alcoholic strength and price in so far as, by virtue of the regulation relevant to this case, Regulation (EEC) No 816/70 of the Council (Official Journal, English Special Edition 1970 (I), p. 234), replaced only in 1979 by Council Regulation (EEC) No 337/79 (Official Journal, L 54, p. 1), the guide price is laid down per degree of alcohol per hectolitre. For table wines with a lower alcoholic strength proportionately lower guide prices apply as compared with table wines with a higher alcoholic strength.

At the most recent sitting of the Court in this case, the United Kingdom put forward another legal argument which may not remain unchallenged in this connection. From Article 97 of the EEC Treaty it inferred that a Member State may establish average rates of taxation for wine and that for the purpose of the application of Article 95 the taxation burden on average wine prices must be compared with the taxation burden on average beer prices. That argument is untenable, Article 97 is clearly a derogative provision which, like all such provisions, must be interpreted restrictively. Article 97 applies exclusively in relation to turnover taxes calculated on a cumulative multi-stage tax system. The discrimination, in particular in favour of integrated domestic undertakings, which resulted from Article 97 was in fact, together with the opportunities of manipulating trade offered by that provision and the other distortions of competition arising out of the old turnover tax system, one of the main reasons for replacing turnover tax calculated on a cumulative multi-stage tax system by value-added tax. As a derogative provision, Article 97 cannot in any event be extended to cover excise duties. Indeed, that article underlines the fact that in principle Article 95 must be interpreted as meaning that taxation on specific imported products (thus in this case, for example, on cheap table wines) must be compared with taxation on similar domestic products (by application of the first taxation on similar domestic products (by application of the first paragraph of Article 95) or with competing substitute products (by

application of the second paragraph of Article 95). Thus that argument may in fact be used *against* the view of the United Kingdom and tends to provide support for the view of the Italian Government that the cheapest types of wine must serve as the criterion for comparison, although I, on the grounds of general competition policy which I have set out, would not wish to go so far.

2.4. *Conclusions based on the application of the various criteria for comparison*

In short, it is clear from an analysis of the documents received after the Court's decision of 15 June 1982 that the tax burden on the wines most relevant from the point of view of competition, was at the material time for the purpose of determining a possible infringement of the Treaty, at least 70 to 100% higher than that on beer on the basis of *all* the defensible criteria. I, like Mr Advocate General Reischl (who did not possess sufficient information on this point at the time when he delivered his Further Opinion), consider that the criterion of the influence on prices is the most relevant criterion from the point of view of competition. However, I have at the same time pointed out that under the common organization of the market in wine there is a direct relationship between wine prices and alcoholic strength, which also confirms the relevance of the criterion of alcoholic strength, for which the Court expressed a preference in its interlocutory judgment. A difference of 70 to 100% in the tax burden is in my opinion, without prejudice to the question of the proper tax ratio to be discussed next, itself a clear indication that the excise duty levied by the United Kingdom on wine affords indirect protection to the production of beer in that country, since the burden thereof may, as appears from the information provided, increase the retail price net of tax to as much as 160% of that price.

2.5. *The question of the proper tax ratio*

I agree with the Commission that a proper tax ratio between wine and beer can be established only by means of harmonization of legislation on excise duty under Articles 99 and 100 of the Treaty. It will then be possible, if the harmonizing directive is also based on Article 43 of the Treaty, also to take account of considerations relating to the common agricultural policy. Because of the vagueness of the very term "indirect protection" in the second paragraph of Article 95 no precise limit can be established on the basis of that provision of the Treaty. However, in the case of a tax burden as high in absolute terms as that concerned in this case, a difference in the tax burden of at least 70 to 100% compared with the substitute product, beer, is on the basis of all elementary experience concerning the competitive mechanism bound to result in a very appreciable restriction of competition to the detriment of wine. Even in the case of a difference in tax burden of 50%, as was accepted by the Court in its interlocutory judgment, I would still consider that to be the case, if, as in this case, other factors indicate that there is an even greater difference. Thus in my opinion an appreciable restriction on competition to the detriment of wine *ipso facto* means that there is indirect protection of the competing product, beer, within the meaning of the second paragraph of Article 95.

Although the question is of course not an issue in these proceedings and therefore cannot be answered definitively, I understand, however, that the Court is also concerned that its judgment in this case may establish a precedent in the determination of tax ratios in Member States which produce both wine and beer. I agree with Mr Advocate General Reischl that the Commission's arguments in favour of allowing taxation on beer to be higher than that on wine in those countries are strong, partly in the light of the case-law of the Court of Justice cited by the Commission. From the point of view of the competition in prices, which as I have stated earlier I consider essential for the application of the second paragraph of Article 95, I would add that wine production is not in my opinion afforded indirect protection by higher taxation on beer provided that the price of beer including tax is no higher than the price of the competing wines. Once the price of beer becomes appreciably higher than the price of comparable wines as a result of the taxation levied upon it, I would *not a priori* exclude the possibility that there is an infringement of the second paragraph of Article 95. However, I consider that for reaching a final decision the development of the volume of domestic beer production and beer importation in the countries concerned should also play a part. The legal uncertainty naturally increases the desirability of determining once and for all the tax ratio between wine and beer for all Member States by means of harmonization of legislation. Especially by use of price as the relevant criterion, it seems to me in principle that the symmetrical application of the second paragraph of Article 95 with regard to countries producing mainly beer and those producing mainly wine does not, on the grounds given, lead to consequences which are unacceptable for the Community. I therefore consider that the problem of the proper tax ratio between wine and beer does not call for a conclusion on the basis of a comparison of the tax burden different from that reached above.

2.6. The protective trend

The information which became available after Mr Advocate General Reischl delivered his Further Opinion also clearly confirms the protective trend identified in paragraph 24 of the Court's interlocutory judgment. On the basis of Articles 169 and 171 of the Treaty, as interpreted in the case-law of the Court cited above, for the application of that criterion the way in which the tax ratio between beer and wine has developed in the United Kingdom between the date of accession and the date on which the application was lodged is decisive.

As appears from the information provided by the Commission and not contested by the United Kingdom in relation to the trend during the relevant period of 1973 to 1978, the tax ratio between beer and wine rose from 1 : 3.2 on 1 January 1974 to 1 : 4.2 on 27 March 1974 and to 1 : 5.6 on 16 April 1975. On 1 July 1977 the tax ratio began to fall slightly to 1 : 5.3, which is the decisive tax ratio for purposes of these proceedings. From the information on consumption provided by the provided by the Commission it is clear that the

increase in excise duty in 1975 was coupled with a fall in the consumption of wine per head of the population. The connection between a rise in the excise duty and consumption per head of the population is, however, even more clearly demonstrated by the information on developments after 1978. In 1980 the tax ratio between beer and wine fell to 1 : 4.9 and in 1981 to the 1974 level of 1 : 4.2. At the same time the consumption of wine per head of the population rose substantially (from 5.41 litres per head in 1977 to 7.8 litres per head in 1981), while the consumption of beer fell between 1979 and 1981 for the first time since 1972, from 122.1 litres to 111.5 litres per head of the population. The United Kingdom confirms those developments by means of its own figures. It also recognizes the relationship which exists between the tax burden and consumption and in its report of 1 December 1981 and during the most recent sitting of the Court in this case it concluded from the developments after 1978 that the protective trend identified in the Court's interlocutory judgment had *now* been wholly eliminated. Apart from the fact that that conclusion is incorrect in comparison with the tax ratio on 1 January 1974, I have already observed that in these proceedings the developments between 1973 and 1978 alone are relevant for the purpose of determining a protective trend. In relation to that period, the existence of a protective trend is also confirmed by the said report of the United Kingdom.

To those remarks I would further add that the establishment of a protective trend over a material period of time may indeed constitute important evidence in relation to an infringement of the second paragraph of Article 95, but none the less such evidence cannot in itself be decisive for purposes of the application of that provision. Instead it is ultimately a question of deciding whether, at the material time for the purpose of determining an infringement of the Treaty, the tax burden on imported products is so much higher than the tax burden on domestic substitute products that it must be assumed that domestic production of the substitute products is indirectly protected by the taxation on the imported products. Conclusions on the latter point may certainly be supported by a simultaneous increase over that time in the difference in tax burden.

3. Final remarks and conclusion

3.1. Characteristics of the competitive relationship between wine and beer

In relation to the cheap types of wine which are relevant from the point of view of competition, I agree with the Commission and Mr Advocate General Reischl that differences in the manufacturing structures of wine and beer are ultimately of no great importance. First, differences in production costs will, as stated above, be expressed in differences in price, so that in the use of the criterion of price they are automatically taken into account in the comparison of the tax burden. Secondly, the most relevant cheap wines and beer are both usually produced by large-scale production processes, as the Commission and Mr Advocate General Reischl have already observed.

The great differences in the structures of the markets in wine and beer I also consider ultimately to be no impediment to a clear comparison of the tax burdens. From the very fact that Article 97 is not applicable it follows that in the

application of the second paragraph of Article 95 average rates of taxation may not be applied to all imported wine. From the objective of the second paragraph of Article 95 together with the general scheme of the Treaty it in fact follows that proof of a clear restriction of competition with regard to imported products which separately or collectively have an appreciable share of the market in those products is of itself sufficient to establish an infringement of that provision. Such an appreciable share of the market is, as appears from the information provided by the United Kingdom itself, already constituted by the fact that wine is sold in supermarkets and by other retailers who sell wine and beer, whereas the market share of the relevant cheap wines in the total supply of wine may, as appears from the information provided by the two parties during the proceedings and by the Italian Government, be assessed at at least 20%. A market share of only 5 to 10% would, as has already been stated, in my view have been sufficient.

Finally, the information provided on prices and consumption of wine and beer confirms that in the competitive relationship between wine and beer price ratios and the tax included therein for the consumer play a part which may be clearly demonstrated and which has also been acknowledged by the United Kingdom.

I therefore consider that the uncertainties regarding the competitive relationship between wine and beer referred to in paragraph 24 of the Court's interlocutory judgment may now be regarded as having been satisfactorily removed.

3.2. *The legal consequences of a finding that the United Kingdom has infringed the Treaty*

As, for example, is also frequently the case with the judgments of the Court on infringements of Article 30 of the EEC Treaty, the precise legal consequences which judgment against the United Kingdom in this case entails under Article 171 of the Treaty cannot be ascertained. In that regard there is certainly a much wider area of uncertainty in relation to a judgment on the second paragraph of Article 95 than a judgment on the first paragraph thereof. In this case it is in any event in my view certain that the United Kingdom may not after judgment has been given against it return to a protective trend in the development of the tax relationship. I consider that that that conclusion in itself makes it clear that the Commission retains a legitimate interest in continuing its action even after the reversal of the trend in the United Kingdom between 1977 and 1981. In that connection I also refer to the detailed consideration given to the question of legitimate interest in the Opinion of Mr Advocate General Lagrange in Case 7/61, already cited.

However, it must also in my opinion be concluded from general experience with regard to the competitive mechanism and from the information provided by the parties that there is still indirect protection of the production of beer at least as long as the tax burden on the relevant cheap wines, as measured by reference to the price net of taxation, remains at least 30% higher than the tax

burden on beer. Indeed it cannot in my opinion be ruled out that even in the case of a lesser difference in tax burdens there may still be indirect protection of beer, but that would nevertheless have to be demonstrated by means of more evidence than has been produced up to now.

Inasmuch as the excess taxation will in fact be passed on to the consumer, the reclaiming of such tax feared by the United Kingdom seems in this case to be ruled out by the exclusion of that possibility in the Court's judgment in Case 68/79 *Just* v *Danish Ministry for Fiscal Affairs* [1980] ECR 501.

3.3. Conclusion

In conclusion I propose that the Court should declare, in accordance with the Commission's application, that the United Kingdom of Great Britain and Northern Ireland has failed on the grounds stated to fulfil its obligations under the second paragraph of Article 95 of the Treaty. So far as the costs of the action are concerned, the fact that the Commission furnished all the information necessary for the determination of its application only after repeated action on the part of the Court in my view constitutes an exceptional circumstance, as provided for in the first paragraph of Article 69 (3) of the Rules of Procedure, so that the United Kingdom should be ordered to bear only its own costs.