meaning of the second paragraph of Article 95, it is necessary to consider not only the present state of the market but also possible developments regarding the free movement of goods within the Community and the further potential 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.

2. In measuring, for the purposes of the application of the second paragraph of Article 95 of the Treaty, the possible degree of substitution attention must not be confined to consumer habits in a Member State or in a given region. Those habits, which are essentially variable in time and space, cannot be considered to be immutable; the tax policy of a Member State must not therefore crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to respond to them.

3. In view of the substantial differences in the quality and, therefore, in the price of wines, the decisive competitive relationship, for the purposes of the application of the second paragraph of Article 95 of the Treaty, between beer, a popular and widely consumed beverage, and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest varieties. Accordingly, that is the appropriate basis for making fiscal comparisons by reference to the alcoholic strength or to the price of the two beverages in question.

4. A national system of taxation under which excise duty on still light wines made from fresh grapes and imported from other Member States is levied at a higher rate, in relative terms, than on domestic beer production, inasmuch as the latter constitutes the most relevant reference criterion from the point of view of competition between substitute products, is incompatible with the second paragraph of Article 95 of the Treaty since it has the effect of subjecting imported wines to an additional tax burden so as to protect domestic beer production.

   The effect of a system of that kind is to stamp such wines with the hallmarks of luxury products which, in view of the tax burden which they bear, can scarcely constitute in the eyes of the consumer a genuine alternative to the typical domestically produced beverage.

In Case 170/78

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Anthony McClellan, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

supported by the

ITALIAN REPUBLIC, represented by Arnaldo Squillante, President of Section at the Consiglio di Stato [State Council] and Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by Marcello Conti, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

intervener,

v

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, represented by R. N. Ricks, Assistant Treasury Solicitor, acting as Agent, assisted by Peter Archer QC, of Gray's Inn, with an address for service in Luxembourg at the British Embassy,

defendant,

APPLICATION for a declaration that the United Kingdom of Great Britain and Northern Ireland, by failing to repeal or amend its national provisions with regard to excise duty on still light wine, has failed to fulfil its obligations under the second paragraph of Article 95 of the EEC Treaty,

THE COURT,

composed of: J. Mertens de Wilmars, President, P. Pescatore, A. O'Keeffe and U. Everling (Presidents of Chambers), Lord Mackenzie Stuart, G. Bosco, T. Koopmans, O. Due, K. Bahlmann, Y. Galmot and C. Kakouris, Judges;

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

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

I — Recapitulation of the facts and procedure

By a letter of 14 July 1976 the Commission notified the United Kingdom Government of its view that the great difference between the rate of excise duty on still light wine produced in other Member States (UKL 2.955 per gallon) and the rate of excise duty on beer produced in the United Kingdom (UKL 0.557 per gallon) afforded indirect protection to beer and was contrary to the second paragraph of Article 95 of the EEC Treaty. Consequently the Commission, in accordance with the first paragraph of Article 169 of the Treaty, requested the Government of the United Kingdom to submit its observations on this failure to fulfil its obligations.

In its reply dated 6 October 1976 the Government of the United Kingdom disputed in particular the existence of a significant relationship between the beer and wine markets and cast doubt on the incidence of taxation on retail prices of these products as put forward by the Commission.

On 8 November 1977 the Commission delivered to the United Kingdom a reasoned opinion as provided for by the first paragraph of Article 169 of the EEC Treaty. It noted that the excise duty on still light wine of fresh grapes had been increased with effect from 1 January 1977 from UKL 2.955 per gallon to UKL 3.250 per gallon whilst at the same time the rate of excise duty was UKL 17.424 per 36 gallons for beer of an original gravity not exceeding 1 030°, plus UKL 0.5808 per degree in excess of 1 030°, which was equivalent, for beer of an original gravity of 1 038°, to a rate of UKL 0.613 per gallon only. On the basis of volume the excise duty for beer of a gravity of 1 037.71° was thus UKL 0.6084 per gallon against UKL 3.250 per gallon for wine; in relation to alcoholic strength the excise duty on beer of an original gravity of 1 037.71° and an alcoholic strength of 3% by volume was UKL 0.2028 per gallon and per degree, in comparison with an excise duty of UKL 0.2955 or UKL 0.2708 for still light wines of 11 and 12% respectively; in relation to price the excise duty on beer represented on average 25% and the excise duty on the most popular wines at least 38% of the sale price to the consumer.

The Commission's opinion stated that there was a competitive relationship between beer and wine such that the rate of excise duty on wine protected the consumption of beer in the United Kingdom. In these circumstances the United Kingdom was failing to fulfil its obligations under the second paragraph of Article 95 of the Treaty; it was accordingly requested to take within one month the measures necessary to comply with the Commission's reasoned opinion.

By an application lodged on 7 August 1978 the Commission, in pursuance of the second paragraph of Article 169 of the EEC Treaty, brought before the Court of Justice the United Kingdom's alleged failure to fulfil its obligations under the second paragraph of Article 95 of the EEC Treaty in the matter of internal taxation on still light wine.

In its application the Commission claimed that the Court should:

(a) Declare that the United Kingdom, by failing to repeal or amend the disputed provisions with regard to excise duty on still light wine, has failed to fulfil its obligations under the second paragraph of Article 95 of the Treaty;

(b) Order the United Kingdom to pay the costs.

The Government of the United Kingdom contended that the Court should dismiss the Commission's application and order it to pay the costs.

By order of 17 January 1979 the Court, in pursuance of the first paragraph of Article 37 of the Protocol on the Statute of the Court of Justice of the EEC, allowed the Italian Republic to intervene in support of the Commission's conclusions.

The Government of the Italian Republic asked the Court to uphold the application submitted by the Commission against the United Kingdom and to deliver judgment accordingly.

On completion of the written procedure, the Commission replied in writing to the two questions raised by the Court; the United Kingdom Government submitted its written observations on the replies.

The main parties to the dispute and the intervener presented oral argument at the sitting on 9 October 1979; the Advocate General delivered his opinion at the sitting on 28 November 1979.

Before giving judgment on the application lodged by the Commission for a declaration that the United Kingdom had failed to fulfil its obligations, the Court delivered an interlocutory judgment on 27 February 1980 ([1980] ECR 417), in the operative part of which it ordered the parties "to re-examine the subject-matter of the dispute in the light of the legal considerations set out in this judgment and to report to the Court on the result of that examination before 31 December 1980". The Court stated that it would "give final judgment after that date after examining the reports which have been submitted to it or in the absence of those reports". Costs were reserved.

At the joint request of the main parties the time-limit laid down by the Court for submission of the reports was extended on successive occasions to 30 April 1981, 30 September 1981 and 31 January 1982 by orders of the Court dated 17 December 1980, 6 May 1981 and 14 October 1981 respectively.

Reports were submitted by the United Kingdom on 1 December 1981 and by the Commission on 2 December 1981. At the Court's invitation, the Government of the Italian Republic, the intervener, submitted its written observations on the reports on 1 February 1982.

Following the Court's decision to re-open the oral procedure the main parties to the dispute and the intervener again presented oral argument and replied to questions put to them by the Court at the sitting on 19 May 1982.

The Advocate General delivered a further opinion at the sitting on 16 June 1982.

It became apparent, after completion of the oral procedure, that the Court did not have sufficient information concerning certain aspects of the case. In particular, the Court considered it necessary, in order that it might give judgment, to have additional information concerning, first, consumer prices and prices net of tax for wine and beer of popular quality, that is to say wine and beer of the types most commonly sold and consumed in the United Kingdom and, as far as possible, in the other Member States and, secondly, the trend in the total annual consumption of wine and beer since 1972 in the United Kingdom and in the other Member States.

Therefore, by order of 15 July 1982, the Court ordered the United Kingdom:

To submit to it a table setting out the consumer prices and prices net of tax for wine and beer of popular quality in the United Kingdom from 1977 onwards and a table showing the trend of the annual consumption of wine and beer in the United Kingdom from 1 January 1972 onwards.

It also ordered the Commission:

To submit to it a table setting out the consumer prices and prices net of tax in the various Member States for wine and beer of popular quality and a table showing the annual consumption of wine and beer since 1 January 1972 in Member States other than the United Kingdom.

The tables requested by the Court, accompanied by brief observations, were submitted on 30 September 1982 by the Commission and by the United Kingdom.

The Government of the Italian Republic, the intervener in the proceedings, submitted its observations regarding the information in question in a document lodged on 12 November 1982.

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

II — Written observations of the parties following the interlocutory judgment of 27 February 1980

The *Commission* considers that, in the light of the law as stated in the interlocutory judgment of 27 February 1980, the points which remain to be clarified are, first, the nature of the competitive relationship between wine and beer and, secondly, what would be the appropriate tax ratio between the two products from the point of view of the Community as a whole.

A — Characteristics of the competitive relationship

(a) As far as manufacturing processes are concerned there are, of course, differences between the methods of harvesting grapes, on the one hand, and barley or hops on the other; moreover, barley and hops may be stored for over a year, which means that brewing may take place at any time whereas by law wine may be made only from fresh grapes or grape "must" and must therefore be fermented immediately after the grape harvest.

The fermentation processes of wine and beer are largely similar: in each case they consist in the exposure of sugars present

in the vegetable matter to the action of yeast which, in effect, consumes the sugars and produces alcohol and carbon dioxide. In the case of wine, however, the yeast acts directly on the sugars naturally present in the grapes whereas in the case of beer the barley must undergo special treatment before the yeast can act upon it. Generally speaking, wine is as suitable for industrial production as beer. The biggest breweries and the largest, most modern producers of table wine clearly benefit from economies of scale.

The differences between the manufacturing processes of wine and beer are in themselves not, therefore, significant. The difference between a large modern wine-producing establishment and a small traditional vineyard is probably greater than the difference between such a distillery and a brewery.

(b) As to their natural properties, the Advocate General stated in his first opinion on this case that from the point of view of the consumer beer and wine serve the same purpose since they have the same characteristics; they are therefore in competition with each other despite the fact that they differ with regard to alcohol content and manufacturing costs.

The relevant comparison in this case is that between a "classic" table wine imported from within the Community with an alcoholic strength of 10 to 12% by volume and a typical British beer with an alcoholic strength of 3.5 to 3.6% by volume, that is to say, commercial wine and beer of the kind most representative of each of those beverages and most widely consumed by the public at large.

Apart from variations caused by inflation, currency fluctuations and changes in taxation the price of both popular table wines and the most usual kinds of beer remains relatively stable.

The differences in the natural properties of wine and beer are therefore of minor importance for the purposes of this case, which is concerned with the indirect taxation paid by the importer or the domestic producer and subsequently recovered from the consumer as a component of the retail price.

(c) The fact that wine is classed as an agricultural product and beer as an industrial product is of little relevance. Both beverages are obtained by fermentation and their ingredients are themselves agricultural products. The relative stability in the price of popular table wines for both producers and consumers is due, it is true, to the impact of the common agricultural policy, whereas the stability in the price of popular beers is due to the fact that the ingredients, being hardier and more amenable to storage, are processed throughout the year and are themselves subject to the common agricultural policy.

(d) The price structure for popular table wines imported from the Community varies from one vineyard to the next: it includes production costs, which depend on the properties of the soil and the size and degree of modernization of the vineyards, and which are influenced by financial intervention under the common agricultural policy; distribution costs, which include the transport costs requisite for exportation, bottling, and so

forth, and a profit, which is dictated by the foregoing costs and by market forces.

The price structure for a typical British beer also varies to some extent from one brewery to the next: it covers production costs, depending on the size and degree of modernization of the plant; distribution costs, which are mainly dictated by local conditions, and which include a small amount for bottling and canning; and profit, dictated by the foregoing costs and by market forces.

The structure of the market in the United Kingdom creates further disparities:

(i) 90% of beer is sold in public houses which are usually owned by or tied to the breweries which supply them, and in working men's clubs; 75% of beer is sold directly from the cask, thus avoiding bottling costs, whereas almost all wine is sold in bottle.

(ii) 35% of wine is sold in restaurants, where the price is marked up considerably to the profit of the restaurateur.

(iii) 65% of wine is consumed in the home.

(iv) The only retail outlets in which the prices to consumers of wine and beer are of a neutral character and therefore relatively transparent are supermarkets and specialist outlets.

The structure of the British market precludes any meaningful comparison of purchase prices either for typical wines *inter se* or between wine and beer. The only factor permitting a suitable comparison with some degree of objectivity lies, as was pointed out by the Court, in a calculation of the incidence of the tax burden in relation to the alcoholic strength of the beverages in question.

B — The appropriate tax ratio

(a) The conclusive criterion for a comparison between the taxation which is applied to each of the products in question is the incidence of the excise duty per degree of alcohol contained in the same quantity of wine and beer. However, such a criterion is conclusive only in so far as it shows that wine is taxed more heavily than beer and that this internal taxation is of such a nature as to afford indirect protection to beer, contrary to the second paragraph of Article 95 of the Treaty. It is not conclusive as to the appropriate method to be used for taxing all alcoholic products. Taxation based on the degree of alcohol is the only reliable test by which it may be established that the taxation on the two products in question is not equal, thus raising a presumption of protection. However, that does not mean that application of a duty calculated on the basis of alcoholic content is the appropriate method for taxing wine and beer in fact. The Commission applies this standard of comparison in order to establish whether or not the second paragraph of Article 95 has been infringed in the case of Member States where only one of those beverages is produced whilst the other is imported, regardless of the actual method of taxation used.

(b) Where, in a Member State which produces substantial quantities of both

wine and beer, imported wine is taxed at the same rate, or allowed the same exemption, as domestic wine, and imported beer receives the same fiscal treatment as domestic beer, the Commission takes the view that neither of the imported products has been subject to fiscal discrimination under the terms of Article 95. The relationship between the excise duty on wine and excise duty on beer must be established by means of harmonization pursuant to Article 99 of the Treaty.

(c) Where there is no domestic wine and imported wine is in competition with domestic beer, and where the ratio between the excise duty on a given volume of imported wine and the excise duty on the same volume of domestic beer does not exceed the ratio of their respective alcoholic strengths, the imported wine cannot be said to bear a heavier tax burden than the domestic beer. Once that ratio is exceeded, however, so that there is a heavier tax burden on imported wine, there arises the presumption that protection is being indirectly afforded to beer, although the existence of such protection cannot be established on any precisely calculable basis.

(d) From the point of view of the Community as a whole the incidence of excise duty per degree of alcohol contained in the same quantity of each of the two beverages in question provides, for the purposes of the second paragraph of Article 95, an indication of the appropriate ratio on the basis of which it may be established that there is a heavier tax burden on the imported beverage and that it is likely that the heavier tax burden has a protective effect.

C — *Application to this case*

On the facts of this case the ratio between the taxation on typical beer having an alcoholic strength of 3.5% to 3.6% and typical table wine having an alcoholic strength of 10° to 12° is between 1 : 2.8 and 1 : 3.4. Inasmuch as the alcoholic strength of popular table wines is between 9° and 10°, rather than 10° to 12°, an acceptable tax ratio, being that below which there can be no presumption of discrimination, is 1: 2.8. Such a ratio is further justified by the competitive disadvantages to which imported wine is subject.

(b) The fact that in the United Kingdom the ratio is in excess of 1 : 2.8 indicates that wine is there subject to a heavier tax burden than beer, which raises the presumption that indirect protection is being afforded to beer.

(c) Between 1973 and 1981 the tax ratio in the United Kingdom varied as follows: 1 : 4.2, 1 : 3.2, 1 : 4.2, 1 : 5.6, 1 : 5.3, 1 : 4.0 and 1 : 4.2. Even without the existence of "an exact standard of reference" for "establishing the point at which the protective effect comes into play, it is readily apparent that in the United Kingdom that point was well and truly passed at the time the proceedings were commenced. Although the protective trend noted by the Court in its judgment has now been reserved, it has not been eliminated.

The observations submitted by the United Kingdom may be summarized as follows:

A — The criterion for comparison

(a) The Commission has still not indicated what would amount to "the same tax burden" on wine and beer in a normal competitive relationship.

(b) That question was considered by the Fiscal and Financial Committee (the Neumark Committee) which stated in a report submitted to the Commission in 1962 that where the existence of indirect protection for the national product against a product produced in another State is suspected, the two taxes must be compared with the price of the commodities, less the tax.

(c) A comparison based on alcoholic strength is wholly irrelevant to the consumer's preference for one beverage over another; it gives no guidance on the question whether a particular tax ratio affords protection for either beverage. There is no evidence to suggest that beer is indirectly protected by the fact that wine is subject to a heavier tax burden on the basis of its alcoholic strength.

(d) In practice, no Member State imposes duty upon all alcoholic beverages at a constant rate per degree of alcohol. The Commission itself does not recommend such a standard.

(e) The different manufacturing methods and natural properties of the two beverages do not provide the basis for a method of calculating the incidence of taxation upon each. There is no satisfactory basis for answering the question whether the two products are subject to the same tax burden. The least unsatisfactory and misleading standard of comparsion, according to the Neumark Committee, is the incidence of duty on consumer spending.

(f) The range of prices paid by consumers of wine is, admittedly, wide but the range of alcoholic strength is also wide. Duty is charged on wine in the United Kingdom at the same rate per hectolitre for all wines having an alcoholic strength of between 8.5% and 15%. That duty is fully in accordance with the recommendations of the Commission in its proposals for harmonizing duty on alcoholic beverages. The result, however, is that the tax burden measured per degree of alcohol is more than 70% higher for wine containing 8.5% alcohol than for wine containing 15%.

(g) Similarly, value-added tax is generally regarded as the most neutral of all indirect taxes, being based on the price paid by the consumer: the amount of value-added tax charged on a bottle of top quality wine sold in a restaurant is many times more than that charged on a bottle of *vin ordinaire* sold in a supermarket, although their alcoholic strengths may be identical. Since value-added tax is compatible with the EEC Treaty it follows that Article 95 does not require tax burdens to be equal in relation to alcoholic strength.

(h) In order to compare the incidence of duty per unit of price on wine and beer respectively it is necessary to determine the average price charged for wine; but the calculation is equally necessary if the comparison is to be based on alcoholic strength. There is of course a margin of error in any calculation of an average price; it is, however, more precise and less variable than determining an average alcoholic strength.

(i) An equalization of the tax burdens on wine and beer, calculated on the basis of alcoholic strength, is in any case relevant only to the removal of trade barriers arising from the differences

between national tax systems under Article 99 of the treaty; it is not relevant in establishing whether there are discriminatory or protective tax practices within the meaning of Article 95. It has been established by the Court that Articles 95 and 99 pursue quite different objectives.

B — The results of the different methods of comparison

(a) If it is accepted that the least misleading standard of comparison is the incidence of tax per unit of average price the United Kingdom submits that its fiscal policy does not produce a difference such as to afford protection for beer.

During the relevant period the excise duty in question represented 23% of the retail price of beer, and 24% of the price of wine. At present, in the case of wines produced in other Member States it represents an even smaller proportion of the price and, almost certainly, a smaller proportion of consumer expenditure than for beer. In the circumstances the duty charged by the United Kingdom on wine cannot constitute internal taxation "of such a nature as to afford indirect protection to other products".

(b) It was stated by the Advocate General in his first opinion in these proceedings that the statistics produced showed that consumer habits had not been influenced thitherto by the higher tax on wine and therefore showed clearly that neither the consumption of wine nor that of beer had been influenced by the tax up to then.

(c) Even in the unlikely event of the comparison's being based on the incidence of taxation per degree of average alcoholic strength, the present ratio is not to be regarded as inconsistent with obligations arising from the Treaty. Since the average alcoholic strength of table wine is in the region of 12% and that of beer is approximately 3% the ratio of excise duty charged on a given volume ought to be in the region of 4 : 1; at present the ratio in the United Kingdom is about 4.2 : 1. Such a minimal difference cannot be decisive, especially as the Commission itself envisaged a maximum ratio rather than a fixed ratio between the different rates of duty.

(d) The Commission has recommended that spirits should be charged at a higher rate of duty according to alcoholic strength than liqueur wines. It appears, therefore, to have accepted that there are social reasons for imposing a relatively higher rate of taxation on beverages with a higher alcoholic content. It follows that a relatively higher rate of tax on wine than on beer should be acceptable.

(e) Even if on a given criterion the rate of duty on wine were found to be significantly higher than on beer, account should be taken of the point made by the Italian Government in another case before the Court that there is an infringement of Article 95 only if the sole purpose of fixing differentiated rates is to impede production which, for objective reasons, is impossible to carry out within the country: yet it is perfectly possible to produce wine in the United Kingdom.

C — The trend

It is true that between 1972 and 1979 changes in the respective rates of duty showed a proportionately larger increase in the duty on wine than in that on beer. However, on 27 March 1980 the duty on beer not exceeding an original gravity of 1 030° was increased from UKL 10.65 to UKL 13.05 per hectolitre, and the duty on wine not exceeding 15% alcohol was increased from UKL 71.49 to UKL 81.82 per hectolitre. On 11 March 1981 the duty on beer was further increased to UKL 18 per hectolitre and that on wine UKL 95.20 per hectolitre. The increase in the rates of duty since 1972 was, therefore, for typical beer of 1 030°, 168.5%, and for wine 168.4%. The protective trend noted by the Court has therefore been entirely eliminated.

D — Retroactive effect of the judgment

In the unlikely event of the Court's holding that any element in the fiscal policy of the United Kingdom was inconsistent with the second paragraph of Article 95 certain individual rights might be created retroactively unless the Court were to limit such retroactivity applying the principle laid down in its judgment of 8 April 1976 (Case 43/75 *Defrenne* [1976] ECR 455).

The *Government of the Italian Republic*, intervening, takes the view that the judgment of 27 February 1980 established definitively that beer and wine are in competition with each other and that wine is subject in the United Kingdom to a heavier tax burden than beer; thus the only question which remains to be resolved is whether the difference in the tax burden is of such a nature as to be able to afford protection to beer. As to that, the Court found that the trend of the two sets of taxation showed a protective tendency to the disadvantage of wine imported into the United Kingdom; the heavier tax burden imposed on wine in the United Kingdom must therefore now be considered in the light of the criterion of an "appropriate ratio" of tax from the point of the Community as a whole.

A — Observations on the report submitted by the Government of the United Kingdom

(a) The statement that the considerable differences between the manufacturing processes and properties of wine and beer make substitution between the two products unlikely runs directly contrary to the findings contained in the Court's judgment. At best, such differences might be taken into consideration solely in order to establish what would be the appropriate tax ratio so as not to influence the normal operation of competition between the two products.

(b) The argument (a new one) that a relatively higher rate of duty on wine than that on beer might be justified for social reasons is unacceptable and unfounded.

It falls outside the framework outlined by the Court's interlocutory judgment. In any case, once the fact that the products are in competition with each other has been established, a system of taxation designed to protect the domestic product at the expense of the imported one cannot be justified as far as Article 95 of the Treaty is concerned by considerations pertaining to any social objectives which might be pursued by the national legislature. Considerations of that kind, moreover, must be assessed at Com-

munity level; as far as the relationship between an agricultural product such as wine and an industrial product such as beer is concerned the most that might be justified in view of the requirements of the common agricultural policy is the introduction of a rate of duty favouring the agricultural product.

(c) The arguments based on the submissions of the Italian Government in another case are manifestly outside the present area of contention as defined in the judgment of 27 February 1980. In any case although Article 95 undoubtedly permits Member States to retain, on the grounds of legitimate considerations of economic policy, differential taxation on similar or competing products, they may only do so where all the products are, or may be, produced within the country. In that context consideration must be given to the actual geographical, climatic and technological conditions which might make it possible for the commodities in question to be produced on a sound economic basis once the fiscal barriers have been removed. It is not possible to speak, in specific and realistic terms, of a potential production of wine in the United Kindom.

(d) Equally irrelevant is the argument that the protectionist nature of the taxation system in the United Kingdom is belied by the fact that in recent years the tax burden imposed on the two products has increased by the same percentage. The existence of a protective trend, established objectively by the fact that in the past duty on wine has increased progressively at a far greater rate than the duty on beer, cannot be disproved by the mere circumstance that the difference between the rates of increase has recently disappeared. That fact shows merely that the discriminatory measures adopted in the past had already reached a level more than sufficient to guarantee the desired protective effect.

B — The appropriate tax ratio

(a) Discussion must be restricted to the application of Article 95; the issue does not concern any harmonization of national legislation on excise duty in the context of Article 99. All that is relevant, therefore, is the specific characteristics of the system in force in the United Kingdom: in that respect there is no doubt that relying on volume as a standard in taxing wine and beer is in itself perfectly legitimate under Article 95. The question is, under what conditions may the United Kingdom's system, which is based solely on the volume of the product and not its price or alcoholic strength, be considered to satisfy the requirements of Article 95.

Under such a system the only ratio compatible with the second paragraph of Article 95 of the Treaty, according to the Italian Government, is that of equality: a given quantity of wine must bear the same duty as that imposed on the same quantity of beer.

(b) The fact that this fails to take into account the real differences between the wine and beer as far as retail price and alcoholic strength are concerned merely reflects the choice made by the national legislature which adopted volume as the sole criterion. If the duty is not to influence competition then that same criterion must logically be applied likewise to the tax ratio between wine and beer.

(c) The choice between wine and beer is not determined by the desire to procure the maximum quantity of alcohol at the minimum price. The two beverages are in competition because they are both beverages of low alcohol content suitable for accompanying meals or for quenching thirst. The differences in kind which lead the consumer to choose one or the other have to do not with the alcohol content but with the general characteristics (taste and flavour in particular) of the two products. Differential taxation on the basis of average alcohol content, when applied to products in respect of which such content does not play any real or decisive part which the consumer regards as characteristic, can have no reason or purpose other than to place wine at a competitive disadvantage as against beer.

(d) On the assumption that the differences between wine and beer might, even within a system of taxation based on volume, justify a departure from the criterion of parity between the rates of duty applicable to equal volumes of domestic beer and imported wine, the extent of such disparity must in any case be rigorously assessed in the light of all the characteristics, regarded by the consumer as important, which are peculiar to each of the products, and not in the light of one of them alone, selected arbitrarily.

Equality in the rates of duty constitutes at least the "tendency" criterion to be adopted for the purposes of the second paragraph of Article 95; appropriate justification must be given for any departure from such parity.

(e) There can be no justification in any case for a tax ratio between equal quantities of wine and beer which is in excess of the ratio of their respective alcoholic strengths.

(f) A tax ratio equal to the ratio of the respective alcoholic strengths cannot constitute the "appropriate ratio" referred to in the Court's interlocutory judgment: it represents merely the upper limit beyond which there is clearly an infringement of the second paragraph of Article 95. Whatever criterion may be adopted in practice it is difficult to conceive of any reason for further differentiation between the rate of duty chargeable on wine and that chargeable on beer.

(g) The difference in alcoholic strength alone cannot justify a corresponding difference in the rate of duty.

Under a system of taxation based on quantity the qualitative characteristics of the products in question may be regarded as relevant only if they affect the quantities of each consumed in like circumstances. The alcohol content of wine and of beer is in itself not relevant to any of their uses; on the contrary, it is the general characteristics of each product which may explain why in similar circumstances beer consumption is generally greater than wine consumption. Experience based on consumer habits within the Community as a whole shows that that ratio certainly cannot be in excess of 1 : 1.5.

Moreover, the second paragraph of Article 95 precludes protective taxation in any form whatsoever, even if it is detrimental not to all imported competing products but only to some of them. A tax ratio calculated on the basis

of the average alcohol content of wine cannot, therefore, in any event be appropriate; the most that might be said is that such a ratio might make it possible to guarantee the neutrality of the duty as regards competition in the case of wine the alcohol content of which is equal to or above the average; the same neutrality could not be ensured in respect of wines having an alcohol content below the average. It is therefore the minimum alcohol content which must be taken into account in every case in calculating the appropriate tax ratio between wine and beer if it is accepted that alcohol content is the criterion (albeit too restrictive and partial) to be applied.

Beer faces most direct competition from the lighter wines having an alcoholic strength of between 9° and 10°; therefore in view of the normal alcoholic strength of beer (3.7°) the tax ratio may not, even on that basis, differ greatly from the ratio of 2 : 1. Having regard to all the characteristics of the two products that ratio ought to be reduced below that to the ratio of 1.5 : 1.

(h) Even if it were legitimate to select just one of all the characteristic features of wine and beer for use as the sole standard of reference for the appropriate tax ratio, it would be logical to consider not merely the alcohol present in the finished products but all the sugars and other alcohol-producing matter present in the unfermented liquors from which the two beverages are made. That factor is definitely more significant than just the alcohol present in the finished product and it is equally susceptible of accurate measurement.

If the extracts of the unfermented liquors for the most common wines and beers are compared, the ratio is found to be in the region of 1.8 : 1.

(i) On the basis of alcohol content as the sole criterion the appropriate tax ratio cannot exceed 2.8 : 1. In view of the fact that the alcoholic strength of the most usual kind of beer is not less than 3.7°, that ratio must even be slightly reduced, to roughly 2.5 : 1.

(j) The average retail price cannot serve as the sole standard of reference.

The Court rejected that approach in its interlocutory judgment. In any case, under a tax system based on volume, the price or value of the products is, by definition, irrelevant; a single rate of duty is applied both to the most costly wines and to the cheaper wines, just as a single rate of duty is applied equally to the most select beers and the most common ones. It would be inconsistent with the logic of that system to rely on the average retail price solely in order to obtain different levels of taxation by volume of the two competing products.

The adoption of a tax ratio based on the average price for wine would lead to discrimination against cheaper wines priced below the average. Such a situation cannot be regarded as compatible with the requirements of Article 95. The fact that such taxation would be neutral as regards competition in the case of some imported wines neither eliminates nor compensates for the discriminatory and protective character of the duty in the case of other such wines.

The unacceptability of any reference to average price is emphasized by the fact that the cheaper wines, being lighter, are more easily able to compete with beer.

The prices used in calculating the average price are not homogeneous: some relate to direct sales in bars, some to sales in restaurants and some to sales through specialized outlets or supermarkets: in view of the wide difference in costs in each of those cases, an average calculated by such a method would be anything but meaningful.

A purely arithmetical average of retail prices or alcohol content cannot have any meaning. It would, in any case, be necessary to calculate an average weighted to take account of the actual distribution of each of the various types of wine and beer on the basis of their price or alcoholic strength.

(k) A comparison of the system of taxation in force in the United Kingdom, in which the tax ratio between wine and beer is in excess of 5 : 1 for the same volume, and the appropriate ratio determined on the basis of objective criteria shows clearly and without a doubt that it is discriminatory and that its purpose is to protect domestic beer production.

III — Information provided and written observations submitted by the parties following the Order of 15 July 1982

The *Commission* supplied the Court with two series of tables.

(a) The first table shows the consumer prices, the amount of value-added tax and excise duty and the consumer prices net of tax for wine and beer in the Federal Republic of Germany, France, Italy, the Netherlands, Belgium and Luxembourg, expressed in national currencies, for the years from 1977 to 1981. In the case of Denmark, the data relate only to beer, whilst in the case of Greece, no information on tax was available.

It should be borne in mind, as far as those figures are concerned, that the annual consumer prices are averages of the consumer prices recorded each month in a selected number of selling points in different cities throughout the Member State concerned and that they must be regarded as average selling prices.

Moreover, the types and alcoholic strengths of beers and wines consumed in the various Member States vary considerably; the types of beers and wines included in the table are not therefore necessarily comparable.

No prices were notified by the national statistical offices in the United Kingdom and Ireland; the information was derived from non-official sources.

A particular point to emerge from that information is that there are substantial variations in the prices of typical beers (that is to say beers with an original gravity of 1 038°) sold in public houses, according to the geographical region, the nature of the establishment and the bar in which the beer is served, and in the prices of typical beers sold in retail outlets. Therefore it is very difficult to arrive at a single typical price; the price given by the United Kingdom, namely 60 pence per pint (0.568 litres) or UKL 1.6 per litre, can be regarded as falling at the lower end of the possible range of typical

prices for a beer of popular quality, whether sold in a public house or in a retail outlet.

As regards wine, the selection of the prices published in a specialized review offers a very general picture both of the evolution of table wine prices in the United Kingdom over a period of time and of their range, which is frequently considerable, at any one time. A retail price of UKL 3 may reasonably be regarded as typical for a litre of "wine of popular quality".

The duty on a beer with an original gravity of 1 038° is currently UKL 25.84 per hectolitre. The duty on wine is currently UKL 106.80 per hectolitre.

The incidence of excise duty on the price net of tax is 39% for a litre of typical beer selling at UKL 1.6 per litre and 69.3% for a litre of wine selling at UKL 3 per litre.

The incidence of excise duty on wine prices exceeds that on beer prices by a margin of more than two-fifths. In order to achieve the same incidence on both products, the duty on wine would need to be reduced from UKL 106.80 per hectolitre to approximately UKL 60 per hectolitre.

The rates of excise duty used by the Commission for those calculations are those in force in the United Kingdom following the changes in the 1982 budget. The excise ratio between wine and beer is at present 4.175 : 1 rather than the 5 : 1 ratio which obtained at the time when this application was submitted.

The figures given by the Commission confirm the continued existence of a serious breach of Article 95 of the EEC Treaty in the United Kingdom, notwithstanding the adjustments made in successive budgets to the rate of excise duty applied to wine and beer.

However, it must be observed that, in view of the specific nature of the excise duty on wine and beer, the establishment of a ratio between those two duties based on the criterion of price is extremely hazardous and of doubtful validity, owing in particular to the wide range of wine prices. Account must also be taken of the technical impossibility for the tax authorities of monitoring the continual varieties in price due to a wide variety of factors amongst which, for wines, fluctuations in exchange rates, according to the origin of the product, are of special importance.

It was held by the Court in its interlocutory judgment of 27 February 1980 that the appraisal of the incidence of the tax burden in relation to the alcoholic strength of the beverages in question is the only criterion whereby an objective, although imperfect, comparison can be made between the rates of tax applied to wine and beer.

(b) The Commission also provided the Court with tables showing the production, imports, exports, total domestic consumption and *per capita* consumption of beer and wines in all the Member States except Greece, for the years from 1972 to 1981.

The *Government of the United Kingdom* submitted several documents to the Court.

(a) An initial table shows representative prices for a pint of beer, converted into

prices per litre, for the years from 1977 to 1982, as recorded in the reports submitted to Parliament annually by the Commissioners of Customs and Excise. Those prices are reasonably typical of the price charged for draught beer served in a public bar and are not to be regarded as average prices. They are based on observation of price trends among the national brewers.

The table also shows the amount of excise duty and value-added tax included in each price and the prices net of excise duty and value-added tax.

(b) The reports of the Commissioners of Customs and Excise contain no information on representative prices of wine. There is no one class of retail outlet which accounts for the bulk of retail sales of table wines and a substantial proportion of the total sales of many wines, particularly in restaurants, is at prices which are very different from those charged for the same wines in other classes of retail outlets, for example off-licences.

The table wines produced in a Member State and "most commonly sold and consumed in the United Kingdom", are, for the purpose of the Court's order, two wines imported from Germany ("Blue Nun" and "Goldener Oktober"). The United Kingdom submits tables showing, for those two types of table wine, the off-licence prices, the amount of excise duty and value-added tax and the prices net of excise duty and tax.

(c) The information concerning those two brands of wine is not, however, comparable with that concerning beer. The two brands in question account for only a small part of the total United Kingdom market for table wine, whereas the figures for beer relate to numerous brands which together account for a substantial proportion of the total consumption of that commodity.

(d) A fourth table shows the average prices of beer and table wine, taking into account sales to the consumer from all types of outlets, including restaurants, recorded by the Government's Central Statistical Office. That table also contains, for each average consumer price, the amount of excise duty and value-added tax and the price net of excise duty and tax.

(e) The information on beer prices shows that the "average" price for beer is slightly higher than the "typical" price. As far as wine is concerned, table wine "of average price" is as representative of all sales of table wine as the wine "most commonly sold and consumed" in the United Kingdom, referred to in the preamble to the Court's order.

(f) A fifth table states the quantity and value of imports of table wine into the United Kingdom in 1980, the latest year for which comprehensive information is available. That shows that the average value of table wine imported into the United Kingdom for 1980 from other Member States was approximately 10% higher than the average value for all imports, after the values of imports from outside the European Community had been increased to allow for the maximum amounts of customs duty chargeable. The level of mark-ups between import-

ation and sales to consumers does not vary widely according to the source of a table wine; the figures in the fourth table for the prices, net of duty and tax, of all table wines are therefore approximately 10% below the figures which would be appropriate for the average prices of table wines imported from other Member States.

(g) A sixth table shows the net quantities of table wine and beer which attracted duty in the United Kingdom in each year from 1972 to 1981 inclusive. That information is generally accepted as the best available indicator of consumption.

The *Government of the Italian Republic*, the intervener in the proceedings, submits a number of observations concerning the information supplied to the Court by the main parties to the proceedings.

(a) The proper basis of comparison between beer and wine can be obtained only by reference to the level of tax applicable to those products per unit of volume. At most the basis adopted might be the level of tax applicable to the alcoholic strength. Consumer prices, especially in the case of average prices, are influenced by too many uncertain factors to provide a reasonable basis of comparision between the tax burdens borne by the two competing products.

(b) Even if consumer prices are compared, the considerable tax discrimination to the detriment of wine is apparent.

The incidence of excise duty on the price of beer is 39% or 42%, according to whether the consumer price, in a public house, for one litre of typical beer, representative of the major part of the market, is UKL 1.6 or UKL 1.3.

A wide variation is apparent in the case of consumer prices for typical wine of popular quality. According to the information supplied by the Commission, the consumer price for a large number of such wines is approximately UKL 3 per litre or less. The incidence of duty is therefore 69% or more, which is much higher than the incidence of duty on beer.

The two brands of German white wine referred to by the United Kingdom cannot be regarded as typical, popular or representative of the United Kingdom market, particularly in view of the fact that they account for only a small part of that market. Thus the information provided by the United Kingdom Government does not permit a proper comparison to be made.

Very many French and Italian wines are sold in the United Kingdom at prices per litre which are considerably lower than the price per litre of the two German wines to which the United Kingdom Government refers. The prices for those wines are at the upper end of the price range indicated by the Commission.

If the criterion of consumer prices is adopted, reference will have to be made to the price range given by the Commission, from which it is apparent that the consumer price of many table wines drunk in the United Kingdom is approximately UKL 3 per litre or less.

A proper comparison, in relation to Article 95 of the EEC Treaty, can be made only between the price of typical wine and the price of typical beer. If that principle is applied, the incidence of duty on the cheapest wine is approximately 160%, whereas the incidence of duty on beer is only 39% to 42%.

(c) No comparison can be made between average prices. In any event, the average price of wine given by the United Kingdom is in no way representative of the price of a typical, popular wine, if only because it includes the considerable cost of service. The information supplied by the United Kingdom does not provide any basis of assessment which may be relied upon for settlement of the dispute.

(d) The average value given by the United Kingdom for imported table wine is much too high. It corresponds to a consumer price of UKL 2.56 for 1980 and of UKL 2.99 for 1982, prices which are considerably higher than the consumer prices for Italian wines indicated in the tables supplied by the Commission.

In any event, even if the average import value indicated by the United Kingdom is accepted, it cannot have changed significantly between 1980 and 1982. If the average value of UKL 0.7388 is accepted for 1982 as well, the average consumer price for table wine cannot be more than UKL 3 per litre, which reflects an incidence of excise duty on wine of approximately 69.3%, whilst the incidence of duty on beer is approximately 39% to 42%.

The discrimination is therefore evident even if prices to consumers are adopted as the criterion for comparison and even if, in the case of wine, the very high consumer price of UKL 3 per litre is taken as a basis.

(e) In a tax system like that of the United Kingdom, in which duty is charged on wine and beer exclusively on the basis of volume, determination of the exact ratio between the rates applicable for the two products should also logically be based on purely quantitative criteria. Therefore the ratio between the duty charged on a given volume of wine and the duty charged on an identical volume of beer should tend towards parity. A clearly defined and limited departure from that theoretical parity can be justified only if the difference between the two rates is strictly confined within the limits of the ratio existing between the quantities of the two products which are normally consumed in similar circumstances, so that the quantity of wine and the quantity of beer normally consumed must be subject to the same amount of duty. The ratio between the quantities of the two products normally consumed is approximately 1 : 1.5. It may be inferred from the principles laid down in Article 95 of the Treaty that the ratio between the rates applicable, according to volume, to the two products in the United Kingdom must not depart from the ratio between the quantities normally consumed.

IV — Oral procedure

The Commission, represented by A. McClellan, the United Kingdom, represented by P. Archer, and the Italian Republic, represented by M. Conti, presented oral argument and answers to questions put by the Court at the sitting on 15 March 1983.

The Advocate General delivered his opinion at the sitting on 10 May 1983.

Decision

1 By application lodged on 7 August 1978, the Commission instituted proceedings under Article 169 of the EEC Treaty for a declaration that the United Kingdom had failed to fulfil its obligations under the second paragraph of Article 95 of the EEC Treaty by levying excise duty on still light wines made from fresh grapes (hereinafter referred to as "wines") at a higher rate, in relative terms, than on beer.

2 On 27 February 1980, the Court delivered an interlocutory judgment ([1980] ECR 417) in which first of all it resolved several points of law concerning the interpretation of Article 95 and, secondly, undertook a preliminary examination of certain questions which at the time did not yet seem capable of being settled definitively. Before giving judgment on the application lodged by the Commission, the Court ordered the parties to re-examine the subject-matter of the dispute in the light of the legal considerations set out in the judgment and to report to the Court before a specified date either on any solution of the dispute which they had reached or on their respective points of view. The Court reserved the right to give final judgment after that date after examining the reports submitted to it or in the absence of those reports.

3 In the light of that judgment, the parties initially examined the dispute on a bilateral basis. Subsequently, the Commission attempted to resolve it in negotiations within the Council by means of a comprehensive settlement of the problem of the taxation of spirits. Pending the outcome of those negotiations, the parties sought and obtained several extensions of the period prescribed by the Court in its judgment of 27 February 1980. Since they were unable to reach an amicable agreement, they submitted their reports on 1 and 2 December 1981 respectively. The Italian Government, which intervened in the proceedings, was given an opportunity to express its views.

4 The parties presented oral argument at the sitting on 19 May 1982. Since the information provided at that stage was still insufficient to enable it to decide the case, the Court, by order of 15 July 1982, which was made pursuant to Articles 46 and 60 of the Rules of Procedure, ordered the inquiry to be expanded. It sought additional information from the parties regarding consumer prices and prices net of tax for wine and beer of popular quality,

that is to say wine and beer of the types most commonly sold and consumed in the United Kingdom and in the other Member States. It also sought information concerning the trend in the total annual consumption of wine and beer in the Community.

5 The parties replied to those questions and presented further oral argument at the sitting on 15 March 1983.

Substance

6 It may be recalled that the questions which were considered and left partly unanswered in the judgment of 27 February 1980 concerned, first of all, the nature of the competitive relationship between wine and beer and, secondly, the selection of a basis for comparison and the determination of an appropriate tax ratio between the two products. Those two questions must be reconsidered in the light of the information provided during the two further stages of the inquiry.

Competitive relationship between wine and beer

7 In its judgment of 27 February 1980, the Court emphasized that the second paragraph of Article 95 applied to the treatment for tax purposes of products which, without fulfilling the criterion of similarity laid down in the first paragraph of that article, were nevertheless in competition, either partially or potentially, with certain products of the importing country. It added that, in order to determine the existence of a competitive relationship within the meaning of the second paragraph of Article 95, it was necessary to consider not only the present state of the market but also possible developments regarding the free movement of goods within the Community and the further potential 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.

8 As regards the question of competition between wine and beer, the Court considered that, to a certain extent at least, the two beverages in question

were capable of meeting identical needs, so that it had to be acknowledged that there was a degree of substitution for one another. It pointed out that, for the purpose of measuring the possible degree of substitution, attention should not be confined to consumer habits in a Member State or in a given region. Those habits, which were essentially variable in time and space, could not be considered to be immutable; the tax policy of a Member State must not therefore crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to respond to them.

9 The Court nonetheless recognized that, in view of the substantial differences between wine and beer, it was difficult to compare the manufacturing processes and the natural properties of those beverages, as the Government of the United Kingdom had rightly observed. For that reason, the Court requested the parties to provide additional information with a view to dispelling the doubts which existed concerning the nature of the competitive relationship between the two products.

10 The Government of the United Kingdom did not give any opinion on that question in its subsequent statements. The Commission expressed the view that the difference in the conditions of production, to which the Court had attached some importance, was not significant from the point of view of the price structures of the two products, particularly in relation to the competitive relationship between beer and wines of popular quality.

11 The Italian Government contended in that connection that it was inappropriate to compare beer with wines of average alcoholic strength or, *a fortiori*, with wines of greater alcoholic strength. In its opinion, it was the lightest wines with an alcoholic strength in the region of 9°, that is to say the most popular and cheapest wines, which were genuinely in competition with beer. It therefore took the view that those wines should be chosen for purposes of comparison where it was a question of measuring the incidence of taxation on the basis of either alcoholic strength or the price of the products.

12 The Court considers that observation by the Italian Government to be pertinent. In view of the substantial differences in the quality and, therefore, in the price of wines, the decisive competitive relationship between beer, a popular and widely consumed beverage, and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest varieties. Accordingly, that is the appropriate basis for making fiscal comparisons by reference to the alcoholic strength or to the price of the two beverages in question.

Determination of an appropriate tax ratio

13 As regards the selection of a method of comparison with a view to determining an appropriate tax ratio, the Commission considers that the safest method is to use a criterion which is linked both to the volume of the beverages in question and to their alcoholic strength. The Commission considers that taxation in excess of the ratio 1 : 2.8 by reference to volume (which therefore represents a tax ratio of 1 : 1 by reference to alcoholic strength alone) raises a "presumption" that indirect protection is afforded to beer.

14 The Government of the United Kingdom referred to the conclusions of the report submitted to the Commission in 1963 by the Fiscal and Financial Committee (the Neumark report) and emphasized once again that a proper comparison should be based on the incidence of taxation on the prices net of tax of the two products in question. In its opinion, a comparison based on average prices is preferable to a comparison based on average alcoholic strength. There is no question of a discriminatory or protective commercial practice where it is established that the taxes charged on two competing products represent the same proportion of the average prices of those products. The Government of the United Kingdom considers that, according to that criterion, its tax system has no protective effect.

15 On that point, the Italian Government challenges the arguments put forward by the United Kingdom and by the Commission. It emphasizes the importance, for the settlement of the dispute, of the fact that wine is an agricultural product and beer an industrial product. In its opinion, the

requirements of the common agricultural policy should lead to the introduction of a rate of taxation favouring the agricultural product and it would therefore be inconsistent with that policy to eliminate altogether, under a national tax system, the effects of Community intervention in support of wine production.

16 The Italian Government also contests the importance which the Commission attaches to the question of the alcoholic strength of the two beverages in question. In its opinion, the decisive criterion is the assessment of the incidence of taxation in relation to the volume of the two beverages. There are two reasons for this: in the first place, the United Kingdom's system of taxation is based on the volume of the products; secondly, since in both cases the beverages have a low alcohol content and are suitable for accompanying meals or for quenching thirst, the consumer's choice is influenced not by the alcoholic strength of the two products but by their general characteristics such as taste and flavour, with the result that they are consumed for the same purposes and in more or less the same quantities. Experience shows that the consumption ratio between beer and wine, if not exactly equal, is in any event no higher than 1.5 : 1.

17 The Italian Government concludes that the two criteria relating to volume and alcoholic strength should be combined in the sense that, although, in principle, there must be equal taxation by reference to the volume of the two beverages, the existence of higher taxation of wine by reference to alcoholic strength alone would be a reliable indication that there was discrimination and that the tax system in question had a protective effect.

18 The exchange of views between the parties which followed the judgment of 27 February 1980 showed that, although none of the criteria for comparison applied with a view to determining the tax ratio between the two products in question is capable of yielding reliable results on its own, it is none the less the case that each of the three methods used, that is to say assessment of the tax burden by reference to the volume, the alcoholic strength and the price of the products, can provide significant information for the assessment of the contested tax system.

19 It is not disputed that comparison of the taxation of beer and wine by reference to the volume of the two beverages reveals that wine is taxed more heavily than beer in both relative and absolute terms. Not only was the taxation of wine increased substantially in relation to the taxation of beer when the United Kingdom replaced customs duty with excise duty, as the Court has already stated in its judgment of 27 February 1980, but it is also clear that during the years to which these proceedings relate, namely 1976 and 1977, the taxation of wine was, on average, five times higher, by reference to volume, than the taxation of beer; in other words, wine was subject to an additional tax burden of 400% in round figures.

20 As regards the criterion for comparison based on alcoholic strength, the Court has already stated in its judgment of 27 February 1980 that, even though it is true that alcoholic strength is only a secondary factor in the consumer's choice between the two beverages in question, it none the less constitutes a relatively reliable criterion for comparison. It should be noted that the relevance of that criterion was recognized by the Council in the course of its work which is still in progress on the harmonization of the taxation of alcohol and various types of alcoholic beverages.

21 In the light of the indices which the Court has already accepted, it is clear that in the United Kingdom during the period in question wine bore a tax burden which, by reference to alcoholic strength, was more than twice as heavy as that borne by beer, that is to say an additional tax burden of at least 100%.

22 As regards the criterion of the incidence of taxation on the price net of tax, the Court experienced considerable difficulty in forming an opinion, in view of the disparate nature of the information provided by the parties. In particular, the incomplete nature of the information supplied by the Commission, which consisted of lists of selling prices without parallel information revealing, within those prices, the incidence of excise duty, value-added tax and the price net of tax, rendered assessment of that criterion, which the United Kingdom Government considered to be of paramount importance, particularly difficult.

23 In reply to the Order of 15 July 1982, in which the Court requested the parties to provide information on consumer prices and the prices net of tax for the types of wines and beer most commonly sold and consumed in the United Kingdom, the United Kingdom Government merely provided information relating to two German wines (Goldener Oktober and Blue Nun) which are undoubtedly widely consumed but are scarcely representative of the state of the wine market within the Community.

24 The Commission and the Italian Government disputed the relevance of the wines selected by the United Kingdom Government and submitted detailed information relating to Italian wines; the Commission attempted to establish average prices whilst the Italian Government, in accordance with the approach referred to above, compared the incidence of taxation on the price of a typical British beer with the incidence of taxation on the cheapest Italian wine which was available in significant quantities on the United Kingdom market.

25 The Commission's calculations, which relate to the United Kingdom market in its present state and the relevance of which is not challenged by the United Kingdom Government, show that wine is subject to an additional tax burden of around 58% and 77%, whereas the Italian Government's calculations relating to the cheapest wine show that wine is subject to an additional tax burden of up to 286%. Those findings are indirectly confirmed by the United Kingdom Government's analysis of the selling prices of the two German wines. Indeed, one of those two wines represents almost exactly the point of parity between beer and wine, from the point of view of the incidence of taxation on the price. That example shows that all cheaper wines marketed in the United Kingdom are taxed, by reference to price, more heavily in relative terms than beer. It appears from the price lists provided by the Commission that on the United Kingdom market there are an appreciable number of wines falling within that definition, and among them practically all the Italian wines, which are therefore subject to an additional tax burden which increases in inverse proportion to their price.

26 After considering the information provided by the parties, the Court has come to the conclusion that, if a comparison is made on the basis of those wines which are cheaper than the types of wine selected by the United

Kingdom and of which several varieties are sold in significant quantities on the United Kingdom market, it becomes apparent that precisely those wines which, in view of their price, are most directly in competition with domestic beer production are subject to a considerably higher tax burden.

27 It is clear, therefore, following the detailed inquiry conducted by the Court — whatever criterion for comparison is used, there being no need to express a preference for one or the other — that the United Kingdom's tax system has the effect of subjecting wine imported from other Member States to an additional tax burden so as to afford protection to domestic beer production, inasmuch as beer production constitutes the most relevant reference criterion from the point of view of competition. Since such protection is most marked in the case of the most popular wines, the effect of the United Kingdom tax system is to stamp wine with the hallmarks of a luxury product which, in view of the tax burden which it bears, can scarcely constitute in the eyes of the consumer a genuine alternative to the typical domestically produced beverage.

28 It follows from the foregoing considerations that, by levying excise duty on still light wines made from fresh grapes at a higher rate, in relative terms, than on beer, the United Kingdom has failed to fulfil its obligations under the second paragraph of Article 95 of the EEC Treaty.

Costs

29 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. However, under Article 69 (3) the Court may order that the parties bear their own costs in whole or in part where the circumstances are exceptional.

30 It is appropriate to exercise that discretion in this case. It has become clear, in the course of the proceedings, that the Commission brought this action without conducting an adequate preliminary inquiry; that led to repeated requests for information and extensions of the proceedings by the Court. The parties must therefore bear their own costs, except as regards the costs of the Italian Republic, which are to be paid by the United Kingdom .

On those grounds,

THE COURT

hereby:

1. **Declares that, by levying excise duty on still light wines made from fresh grapes at a higher rate, in relative terms, than on beer, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the second paragraph of Article 95 of the EEC Treaty.**

2. **Orders the Commission of the European Communities and the United Kingdom to bear their own costs. The costs incurred by the Italian Republic are to be paid by the United Kingdom.**

Mertens de Wilmars Pescatore O'Keeffe

Everling Mackenzie Stuart Bosco Koopmans

Due Bahlmann Galmot Kakouris

Delivered in open court in Luxembourg on 12 July 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President