OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 26 February 1987 *

Mr President,
Members of the Court,

1. **A** — In these proceedings, the Commission asks the Court to declare that the Kingdom of Belgium has not fulfilled its obligations under Article 95 of the EEC Treaty, in so far as it applies a higher rate of VAT to wines made from fresh grapes, which are imported, than to beer, which is for the most part produced in Belgium.

2. The Belgian legislation at issue is Arrêté royal (Royal Decree) No 20 of 20 July 1970, [1] as amended by the Arrêtés royaux of 25 March 1977 [2] and 16 November 1982, [3] which laid down the rates of VAT and the manner in which such rates apply to products and services.

3. Under that legislation, beer is subject to tax at the rate of 19%, whereas a rate of 25% is applied to various beverages intended for domestic consumption, including wine made from fresh grapes.

4. **B** — Considering that, following the judgment of the Court of Justice of 12 July 1983 in Case 170/78, [4] wine and beer are competing products as regards consumer preference, the Commission drew the attention of the Belgian authorities, by letter of 22 October 1983, to the fact that the application of a lower rate to beer than to wine made from fresh grapes infringed the second paragraph of Article 95 of the Treaty.

5. There was no reaction from the Belgian Government and on 20 June 1984 the Commission sent it a letter calling on it to submit its observations.

6. In its reply, the Belgian Government put forward a number of reasons to support its view that it was not in breach of the second paragraph of Article 95, claiming that there was no proof that the difference in rates — which did not reflect any wish to favour a domestic product at the expense of an imported product — had in practice had any protective effect.

7. The Commission was not convinced by the arguments put forward by Belgium and therefore sent it a reasoned opinion, reiterating its view that Belgium was in breach of the second paragraph of Article 95 of the Treaty and inviting it to take the necessary measures to comply with the opinion within one month.

8. In the absence of any reply to the reasoned opinion, the Commission brought the present action, by application dated 15 November 1985.

9. **C** — The arguments put forward by the parties — and those of the French Government, which was permitted to intervene in support of the Commission — are summarized in the Report for the Hearing.

* Translated from the Portuguese.

1 — *Moniteur belge*, 31. 7. 1970.

2 — *Moniteur belge*, 26. 3. 1977.

3 — *Moniteur belge*, 20. 11. 1982.

4 — *Commission* v *United Kingdom* [1983] ECR 2265.

10. At this stage, it should merely be pointed out that the Commission bases its arguments on the view — which it derives from previous decisions of the Court — that, once it has been established that there is a competitive relationship between two products, any difference in the rates of tax applied to the same taxable base (in this case, the value added) is contrary to the second paragraph of Article 95.

11. In the Commission's view, as a result of the Court's earlier finding that there is a competitive relationship between wine and beer,[5] for further evidence, that the difference in the rates applied to the two products in Belgium infringes the second paragraph of Article 95, and the extent of the difference merely provides a basis for assessing the seriousness of the infringement.

12. In Belgium's view, on the other hand, if the second paragraph of Article 95, as opposed to the first paragraph thereof, is to be applied, a further condition must be fulfilled, namely that the difference in tax must be likely to afford protection to domestically produced products which are in competition with the imported products.

13. However, in this case, the difference in VAT rates as between wine and beer — which affects only a proportion of the quantity of those products consumed — is not likely significantly to influence the sale price or, therefore, consumers' choices.

14. **D** — The interpretation of the second paragraph of Article 95 is therefore of great importance to the decision in this case.

15. To determine the correct interpretation it is necessary, in the first place, to consider that paragraph in the context of Article 95 as a whole, having regard to the general function of that article, and its relationship with the provisions of the first paragraph.

16. For its part, Article 95, in its entirety, cannot be viewed otherwise than in the context of the chapter in which it appears — specifically in relation to Article 99 — and indeed in the light of the general objectives of the Treaty.

17. **E** — The Court has already made it clear[6] that the first and second paragraphs of Article 95 'supplement the provisions on the abolition of customs duties and charges having equivalent effect', since their aim is 'to ensure free movement of goods between Member States in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation which discriminates against products from other Member States'.

18. Summarizing, the Court stated that Article 95 is intended to 'guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products'.

19. There is no doubt of course, at the present stage of development of Community law, as to 'the freedom of each Member State to lay down tax arrangements which differentiate between certain products on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed'.[7]

5 — Judgment of 12 July 1983 in Case 170/78 *Commission* v *United Kingdom* [1983] ECR 2265, at p. 2288, paragraph 12.

6 — Judgments of 27 February 1980 (Tax arrangements applicable to spirits) in Case 168/78 *Commission* v *French Republic* [1980] ECR 347, at p. 359, and in Case 169/78 *Commission* v *Italian Republic* [1980] ECR 385, at p. 399; in Case 171/78 *Commission* v *Kingdom of Denmark* [1980] ECR 447, at p. 462; judgment of 15 July 1982 in Case 216/81 *Cogis* v *Amministrazione delle finanze dello Stato* [1982] ECR 2701, at p. 2712; judgment of 4 March 1986 in Case 106/84 *Commission* v *Denmark* [1986] ECR 833, paragraph 10.

7 — Judgment of 27 May 1981 in Joined Cases 142 and 143/80 *Amministrazione delle finanze dello Stato* v *Essevi SpA and Carlo Salengo* [1981] ECR 1413, at p. 1434; see also judgments of 14 January 1981 in Case 140/79 *Chemial Farmaceuticici SpA* v *DAF SpA* [1981] ECR 1, at p. 14, and *SpA Vinal* v *SpA Orbat* [1981] ECR 77, at p. 93; and judgment of 15 March 1983 in Case 319/81 *Commission* v *Italian Republic* [1981] ECR 601, at p. 620.

20. In fact, such differentiation 'is compatible with Community law if it pursues objectives of economic policy which are themselves compatible with the requirements of the Treaty and its secondary legislation and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products'.

21. In other words, 'the freedom which must ... be left to Member States in the field of domestic taxation cannot justify any departure from the fundamental principle of non-discrimination in taxation matters laid down in Article 95 but must be exercised within the confines of that provision and observe the prohibitions contained therein'. [8] That was the position in Case 243/84 *John Walker & Sons Ltd,* in which the Court ruled in its judgment of 4 March 1986 [9] that a system of taxation which differentiates between certain beverages which are not similar products is not incompatible with the second paragraph of Article 95 'where a significant proportion of domestic production of alcoholic beverages falls within each of the relevant tax categories'.

22. As regards the relationship between Article 95 and Article 99, the Court has also already indicated the precise difference between the aims of those two provisions. Finding that the differences between the various national laws 'constitute an obstacle to the free movement of goods and to the development of trade between the Member States', it considered, however, that the implementation of the programme of harmonization provided for in Article 99 could not in any way constitute a preliminary to the application of Article 95: that provision 'lays down a basic requirement which is directly linked to the prohibition on customs duties and charges having an equivalent effect between the Member States in that it intends to eliminate before any harmonization all national tax practices which are likely to create discrimination against imported products or to afford protection to certain domestic products'. Hence, the Court took the view that Articles 95 and 99 pursue different objectives: 'Article 95 aims to eliminate in the immediate future discriminatory or protective tax practices, whilst Article 99 aims to reduce trade barriers arising from the differences between the national tax systems, even where those are applied without discrimination'. [10]

23. Confirming that difference, the Court has also stated that the second paragraph of Article 95 establishes a prohibition which is 'self-sufficient and legally complete and is thus capable of having direct effects on the legal relationships between Member States and those subject to their jurisdiction'. [11]

24. F — However, in interpreting each of the rules laid down in Article 95 in the light of the function and of the general objectives which the Court has attributed to that provision, a clear distinction must be drawn between the obligations laid down in the first and second paragraphs respectively.

25. The first paragraph applies to similar products, that is to say, to those which, in the Court's definition, [12] have 'similar characteristics and meet the same needs from the point of view of the consumers'. The Court has thus adopted a broad interpretation of the concept of similarity,

8 — *Commission* v *Italian Republic, supra,* pp. 620-621.

9 — Case 243/84 [1986] ECR 875.

10 — Judgment of 27 February 1980 in Case 171/78 *Commission* v *Denmark, supra,* at p. 447, paragraph 20.

11 — Judgment of 4 April 1968 in Case 27/67 *Fink-Frucht* v *Hauptzollamt München* [1968] ECR 223, at p. 232.

12 — Judgment of 17 February 1976 in Case 45/75 *Rewe* v *Hauptzollamt Landau* [1976] ECR 181, at p. 194, paragraph 12; judgments of 27 February 1980, *supra*; judgment of 4 March 1986 in Case 106/84, *supra,* paragraph 12.

whereby the similarity of products is to be assessed 'not according to whether they were strictly identical, but according to whether their use was similar and comparable'. [13]

26. With regard to such products, the conditions laid down in the first paragraph prohibit the imposition, directly or indirectly, on the products of other Member States of any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. In short, 'any tax provision whose effect is to impose, by whatever mechanism, higher taxation on imported goods than on domestic products' [14] is prohibited.

27. For its part, the second paragraph of Article 95 'applies to the treatment for tax purposes of products which, without fulfilling that criterion of similarity laid down in the first paragraph of [Article 95], are nevertheless in competition, either partially or potentially, with certain products of the importing country'. [15]

28. For such products, that provision prohibits any Member State from applying internal taxes to the products of other Member States in such a way as indirectly to protect other products.

29. In other words, the second paragraph of Article 95 applies to products which, even if not similar to imported products, are likely to be indirectly protected by differential taxes, to the extent to which the former are in competition with the latter 'by reason of one or more economic uses' (judgment in *Fink-Frucht*, *supra*, [1968] ECR 232).

30. In that connection, the Court went out of its way to emphasize that 'even if there is no direct competition of any sort with a domestic product, such protection would still exist if it were established that the imported product bore a specific fiscal charge because of its state of manufacture or distribution or because of any other economic circumstance in such a way as to protect certain activities distinct from those used in the manufacture of the imported product' (*Fink-Frucht* [1968] ECR 232 and 233).

31. As is stated in the *Fink-Frucht* judgment ([1968] ECR 233), 'whereas the first paragraph of Article 95 only prohibits taxation in so far as it exceeds a clearly defined level, the prohibition laid down in the second paragraph is based on the protective effect of the taxation in question to the exclusion of any exact standard of reference'.

32. In the case of the first paragraph, the standard of reference is, of course, the level of taxation directly or indirectly affecting the similar domestic products; this having been established, the applicability of the provision will follow from a mere arithmetical operation comparing the tax burdens 'whether in terms of the rate, the mode of assessment or other detailed rules for the application thereof'. [16]

33. 'The prohibition applies where a tax mechanism is of such a nature as to impose higher taxation on imported products than on domestic products' (judgment of 27 February 1980 *Commission* v *United Kingdom* *supra*, [1980] ECR 433, paragraph 9).

34. In the case of the second paragraph of Article 95, 'in view of the difficulty of making sufficiently precise comparisons between the products in question', the

13 — Judgment of 4 March 1986 in Case 106/84, *supra*, paragraph 12.

14 — Judgment of 4 March 1986 in Case 106/84, *supra*, paragraph 10.

15 — Interlocutory judgment of 27 February 1980 in Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417, at p. 432; judgment of 12 July 1983 in the same case, [1983] ECR 2265, at p. 2286.

16 — Judgment of 27 February 1980 in Case 171/78 *Commission* v *Denmark* [1980] ECR 463, paragraph 7.

criterion is necessarily 'a more general criterion', in other words the protective nature of the system of internal taxation.[17] It is therefore necessary to determine that a particular kind of tax burden 'is capable of having the effect referred to above' (judgment in *Fink-Frucht* [1968] ECR 233) in order to be considered incompatible with the Treaty.

35. A clear distinction between similar products and competing products for the purpose of applying one or other of the paragraphs of Article 95 can only be dispensed with where, as held by the Court in its judgment of 15 March 1983 with respect to the taxation of Italian spirits,[18] recourse is had to 'a criterion for the charging of higher taxation, such as designation of origin or provenance which by definition cannot ever be fulfilled by domestic products similar to or in competition with products imported from other Member States ... Such a system has the effect of excluding domestic products in advance from the heaviest taxation since they will never fulfil the conditions on which the higher rate is charged ...'.

36. In the same way, without it being necessary to consider whether the first or the second paragraph was applicable, the Court concluded in its judgment of 11 July 1985 in Case 278/83 *Commission* v *Italy*[19] in connection with the rates of VAT applicable to domestic and imported sparkling wines (in particular champagne), that there was 'a manifest breach of the rule laid down in Article 95 prohibiting tax discrimination', since it was 'obvious that the definition given by Italian legislation of the category of sparkling wines subject to the highest rate of taxation is conceived so as to apply only to imported products and is intended to protect the corresponding domestic products by applying appreciably lower rates of tax to them'.

37. But these, in my opinion, are exceptional cases in which discriminatory intent and effects are clearly in evidence.

38. **G** — The first question to be resolved regarding the application of the second paragraph of Article 95 is, therefore, whether or not a domestic product and an imported product are in competition with each other, having regard to their respective possible economic uses and the existing degree of substitution as between them for the purpose of satisfying identical needs.

39. As has already been stated, the Court considers[20] that the competition involved may be simply 'partial' or 'potential'.

40. The Court went on to say[21] that, in order to determine the existence of a competitive relationship, 'it is necessary to consider not only the present state of the market but also the possibilities for development within the context of free movement of goods at the Community level and the further potential for the substitution of products for one another which may 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'.

17 — *Commission* v *Denmark* [1980], *supra*, paragraph 7; *Commission* v *United Kingdom* [1980], *supra*, paragraph 9.

18 — Case 319/81 *Commission* v *Italy*, *supra*, at p. 621.

19 — Case 278/83 [1985] ECR 2503.

20 — Judgment of 27 February 1980 *Commission* v *United Kingdom*, *supra*, at p. 432, paragraph 5.

21 — *Commission* v *United Kingdom* [1980], *supra*, paragraph 6; *Commission* v *United Kingdom* [1983], *supra*, paragraph 7.

41. A forward-looking approach must therefore be adopted in assessing the competitive relationship between products, having regard to the new possibilities of substitution deriving from intra-Community trade and changes in consumers' tastes.

42. That is why the Court emphasized in its judgment of 12 July 1983 *Commission* v *United Kingdom*, at p. 2287, paragraph 8, that 'for the purpose of measuring the possible degree of substitution, attention should not be confined to existing 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'.

43. H — A competitive relationship having been established between two products, it is then necessary to resolve a second problem.

44. The second paragraph of Article 95 prohibits tax practices 'of such a nature as to afford indirect protection' to products of the importing Member State.

45. In view of the difference between the provisions of the first and second paragraphs of Article 95, this condition essentially means that it must be decided whether the taxation levied on the competing products is of such a nature as indirectly to protect the domestic product. [22]

46. However, it must be emphasized — as the Court has done [23] that 'the abovementioned provision is linked to the *nature* of the tax system in question so that it is impossible to require in each case that the protective effect should be shown statistically. 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. Without therefore disregarding the importance of the criteria which may be deduced from statistics from which the effects of a given tax system may be measured, it is impossible to require the Commission to supply statistical data on the actual foundation of the protective effect of the tax system complained of'.

47. In the light of the decisions of the Court to which I have just referred, the problem whether the difference in tax rates must be such as to produce a protective effect which is appreciable, or of a given extent, becomes *irrelevant.* In other words, that does not appear to me to be a further precondition for the application of the second paragraph of Article 95, in such a way that 'minor' tax differences would automatically be excluded.

48. What is important is that the difference in tax treatment between domestic products and competing imported products must be *likely* to produce a protective effect of the kind referred to by the Court.

49. In my view, the greater or lesser extent of the difference in rates, in conjunction with the other relevant details — relating to the range of products covered, the composition thereof and their relationship with consumer habits, price differences, the intensity of the competitive relationship, trends in consumption and imports, and so

22 — See judgment of 27 February 1980 *Commission* v *United Kingdom*, *supra*, at p. 433, paragraph 9.

23 — See judgment of 27 February 1980, *supra*, paragraph 10.

forth — is one of the factors on the basis of which it can be determined in each case whether or not a tax system is of such a nature as to protect domestic products.

50. This means that — by contrast with the first paragraph — the second paragraph of Article 95 does not require, as Mr Advocate General VerLoren van Themaat[24] stated, that the tax rates for domestic products and imported products should be exactly the same.

51. And the Court has already stated, in its judgment in *Fink-Frucht* in reply to a question submitted by the Finanzgericht, Munich, that 'the Treaty does not prevent the national courts from deciding, where necessary, the level below which the tax in question would cease to have the protective effects prohibited by' the second paragraph of Article 95.

52. Be that as it may, the Court stated *expressis verbis*[25] with regard to the first paragraph of Article 95 that the criterion 'consists in the comparison of tax burdens, whether in terms of the rate, the mode of assessment or other detailed rules for the application thereof'.

53. In the same way it seems to me that in the second paragraph as well it is an appraisal of the *tax burdens* — and not merely of the rates — which is important; in the present case the question is not relevant since it is only the difference in applicable rates which is at issue.

54. Put simply, the appraisal of the tax burdens must now be concerned with their impact on the competitive relationships between the products involved, establishing what protective effect, if any, is afforded to domestic production.

55. Such a protective effect, as stated by Mr Advocate General Reischl in his Opinion in Case 170/78[26] 'does not however necessarily exist if a higher tax is imposed on the imported products than on the interchangeable products since because of the cost and price differences in the case of substitute products a higher tax must not necessarily produce an effect on the market'.

56. To put it another way, in the case of similar products, the Treaty appears, by requiring equal treatment, to make a presumption, *juris et de jure*, that different tax burdens lead to discrimination; as regards competing products, it must be shown that the difference of taxation is likely to (is 'of such a nature as to') afford indirect protection to domestic products.[27]

57. I — Let us see how these conclusions apply to the present case.

58. In the first place, let us examine the competitive relationship between the two products at issue, wine and beer.

59. In the interlocutory judgment of 27 February 1980 in Case 170/78 *Commission* v *United Kingdom* it was stated, in paragraph 14 of the decision (in terms which were reiterated subsequently in the final judgment of 12 July 1983), 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'. And the Court added, as we have seen, that the assessment of the extent to which products can be substituted for one another must take account of the possible

24 — Opinions in Cases 106/84 and 243/84. Similar views are expressed in the Opinion of Mr Advocate General Reischl in Case 170/78 *Commission* v *United Kingdom* [1980], *supra*, ECR 417, at p. 441.

25 — Judgment of 27 February 1980 in Case 171/78 *Commission* v *Denmark*, *supra*, paragraph 7.

26 — *Commission* v *United Kingdom* [1980] ECR 417, at p. 441.

27 — Similar views are expressed in the Opinion of Mr Advocate General Reischl in Case 170/78 *Commission* v *United Kingdom* [1980], *supra*, ECR 417 at p. 441 and [1983] ECR 2265 at p. 2299.

changes in consumer habits against the background of a single Community market.

60. However, the Court recognized that there exist as between the two drinks 'great differences ... from the point of view of manufacturing processes and ... natural properties' which give rise to 'price structures which are so extremely different that in spite of the competitive relationship between the finished products it seems particularly difficult to make comparisons from the tax point of view' (paragraph 15).

61. Following the further inquiries needed for it to reach its final decision, the Court held, in its final judgment of 12 July 1983, that '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', the Court concluded, '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' (paragraph 12).

62. The Court thus accepted the relevance of the observations submitted by the Italian Government — which intervened in that case — to the effect that it was 'inappropriate to compare beer with wines of average alcoholic strength or, *a fortiori*, with wines of greater alcoholic strength'. In the Italian Government's view, the wines which were genuinely in competition with beer were, specifically, 'the lightest wines with an alcoholic strength in the region of 9°, that is to say the most popular and cheapest wines', and therefore those wines should be chosen for purposes of comparison in order to measure the incidence of taxation (paragraph 11).

63. To what extent do these considerations apply to an assessment of the competitive relationship between the wine and beer involved in the present case?

64. It should be remembered that the tax system with which we are concerned here is the Belgian and not the British system.

65. However, the English Channel does not in itself substantially change all popular habits. The Belgians, like the British, are, it appears, traditional beer drinkers. According to the Belgian Government, beer consumption is an integral part of the customs and usages of the Belgian population, even though in recent years it has been seen that beer is giving some ground to wine and spirits.

66. It is, however, recognized — and both parties to these proceedings agree — that in principle there is a competitive relationship between wine and beer.

67. If that competitive relationship is to be correctly defined, it seems to me that only things which are comparable may be compared with each other.

68. In these proceedings it is not only evident that the range of wines imported into and consumed in Belgium is varied and that there are ample supplies, but also that Belgium has a wealth of beers of the most diverse qualities and prices.

69. As far as beers are concerned, the Commission points out that about 300 qualities of beer are produced in Belgium. Some of them are sold for more than BFR 100 per litre, and can be classified as luxury beers.

70. It would not seem to be correct to compare such beers with ordinary cheap wines, with which they are not in any obvious competitive relationship — the difference in prices is great, but so are the methods by which they are produced, their gastronomic qualities, the tastes which they satisfy, the occasions on which they are drunk and the classes of people by whom they are consumed.

71. It would appear more logical to treat such 'luxury' beers in the same way as the great quality wines, which are also at the top of the range and are also consumed on special occasions by connoisseurs with substantial purchasing power and refined tastes.

72. But I would not go so far as to say unreservedly that the tastes of consumers of that type would normally be such as to treat an excellent vintage wine as interchangeable with a high quality beer produced by artisans.

73. Preferences in that area are generally so exclusive that any 'mixing' might be regarded as sacrilegious.

74. The factors which contribute to the production of a good wine are the composition of the soil, exposure to the sun, the rainfall regime, the choice of varieties and the method of production.

75. In each wine, the aroma, the colour, the taste and the body distinguish one year from another.

76. In each bottle, the temperature, light, position and cork are of importance.

77. In the case of beers, the conditions for achieving excellence and the combination of such conditions are very different.

78. However, that does not exclude the possibility that in certain countries, as a result of particular consumer habits, there may be a competitive relationship between products of this kind.

79. In any event, it is preferable, as both parties suggest ultimately, to disregard such qualities for the purposes of this discussion.

80. The Belgian Government states that 'luxury' beers are manufactured by artisanal methods and in very small quantities: one of the brands is even produced by only three persons (a doctor, an engineer and an architect), who devote part of their leisure time to brewing. Such beers are not readily available to the public at large, since they are sold only in very specialized establishments.

81. The statistics provided by Belgium indicate that the highest-priced beers represent less than 15% of total Belgian production, there being included in that group a number of special beers produced in small quantities whose ingredients include various types of fruit. Thus, 84% of Belgian production is made up of lager-type beers and table beers.

82. Furthermore, the Commission suggests that the 'grands crus' and exceptional vintages, which represent only a small fraction of purchases, should be disregarded.

83. Belgium supports this view, stating that — according to statistics provided by a company which is regarded as representative — sales of wines priced in excess of BFR 1 000 represent no more than 2.8% of the total value of sales (27% being accounted for by wines costing more than BFR 200).

84. Moreover, as is suggested by the Belgian Government, that approach seems

to be in line with the Court's reasoning in its judgment of 12 July 1983 in *Commission* v *United Kingdom*, where wines 'of which several varieties are sold in significant quantities on the United Kingdom market' were taken as the basis of comparison.

85. In those circumstances, it does not seem logical to exclude one of those categories and retain the other — in both cases the products concerned are of an exceptional type. In the last analysis they are products which are differentiated by their quality and utility and it would not make sense to compare them with ordinary products consumed on a large scale or, *a fortiori*, with products of mediocre quality.

86. As far as the other wines and beers are concerned, Belgium suggests that the comparison should be made essentially between 'ordinary beers' and 'ordinary wines' which, in its opinion, are those whose price is between BFR 80 and BFR 200 per litre, and which, on the basis of the sample taken, account for 57.17% of the total value of sales.

87. As regards wines priced at less than BFR 80 per litre, according to the information provided by the Belgian Government, they account for 15.59% of sales, 2.28% being wines priced at less than BFR 60 and the remaining 13.31% being wines priced at between BFR 60 and 80.

88. The wines priced at less than BFR 80 (which, it appears, include wines sold in 5-litre plastic containers and wines used only for cooking) should, in the opinion of the Belgian Government, be compared with table beer (BFR 17 per litre and above) or with lager-type beers sold under distributors' trade-marks (for example Carapils, at BFR 21.5 per litre) and not with beers consumed in large quantities or, *a fortiori*, with expensive beers. That applies also to the wine costing BFR 61 which should not, contrary to the Commission's view, be regarded as the most usual wine: in fact, in Belgium's view, it is one of the cheapest wines which it is possible to find in the shops, and it accounts for as low a proportion of consumption as the wines priced at over BFR 1 000.

89. It seems to me to be reasonable to conclude that the most intense competitive relationship exists between the most commonly consumed wines and beers, which are representative of the widest sector of the market.

90. It is in that sector that most of the 'light wines made from fresh grapes' for everyday consumption are doubtless to be found.

91. It does not however seem to me, as Belgium itself concedes, that no competitive relationship exists in the lower part of the range. It will however be more tenuous and less well defined, particularly in view of the diversity of possible uses (as a beverage or for culinary purposes) and the differences of presentation and packaging (for example the use of 5-litre plastic containers).

92. J — Having established the competitive relationship between wine and beer, I shall now consider whether the second condition laid down in the second paragraph of Article 95 is fulfilled. The question is whether or not the difference in taxation is likely to have a protective effect favouring domestically produced beer.

93. For that purpose, it is necessary to analyse the other relevant information furnished during the proceedings.

94. The fact that the tax in this instance is an *ad valorem* tax makes the analysis simpler than was the case in *Commission* v *United Kingdom*. The difference in tax derives simply, in this case, from the application of different rates to the price of each of the products.

95. That fact does not however — contrary to the Commission's view — make it unnecessary to consider the protective effect of that system of taxation.

96. The starting point for such an examination is of course the difference in rates.

97. That difference is at present six percentage points, since wine is subject to a tax at the rate of 25%, as opposed to only 19% for beer.

98. The Belgian Government also makes it clear that the difference in rates affects only retail sales of wine and beer, since in the catering sector (hotels, restaurants and bars) a uniform rate of 17% is applied.

99. However, in order to analyse the protective effect it does not seem to me to be correct to adopt the macroeconomic approach — adopted by Belgium — of reducing the difference in rates to four percentage points. The fact that the difference in rates relates only to consumption in the home does not mean that, in this context, the difference is not six percentage points.

100. It should, however, be acknowledged that that fact limits the scope of any protective effect; it is the same as saying that the investigation of that effect does not extend to the whole wine and beer market, but covers only part of it.

101. Since the respective prices of wine and beer are different (even where the two products are most clearly in competition, that is to say wines and beers other than those classified as 'luxury' products), it is necessary to consider those price differences to determine what influence the difference in tax is likely to exert on the market.

102. In that respect, the Belgian Government states that, on average, the price of a litre of ordinary wine, including tax, is around BFR 125 (which corresponds to BFR 87.5 for a 70-cl bottle) whilst the corresponding price for a litre of beer is BFR 29.75 (BFR 178.5 for a crate of 24 25-cl bottles). After deduction of VAT, those amounts are BFR 100 and BFR 25 respectively.

103. Thus, if a commonly consumed wine and a commonly consumed beer of average price and quality are adopted as a reference point, the price of wine exclusive of VAT will be four times that of beer (4.2 times if VAT is included).

104. These are values which are not contested by the Commission.

105. If the tax structure for the two beverages were standardized, the prices would — as the Belgian Government states — become, respectively:

106. With a rate of 19%:

BFR 119 per litre of wine;

BFR 29.75 per litre of beer;

107. With a rate of 25%:

BFR 125 per litre of wine;

BFR 31.25 per litre of beer.

108. In other words, standardization of the rate at 25% would reduce the difference in prices by only BFR 1.5 (from BFR 95.25 to BFR 93.75); standardization at 19% would

reduce it by BFR 6 (from BFR 95.25 to BFR 89.25).

109. The difference is not very great in either case. However, it is less where a rate of 25% is applied, and the Belgian Government was careful to point out that, for budgetary reasons, it is more probable that any equalization would involve an upward rather than a downward adjustment.

110. If the comparison were made on the basis not of average-priced products but of the cheapest products (in respect of which it may presumed, for reasons specific to them, that the competitive relationship is less well defined), we should find that the price relationship between wine and beer does not change substantially, being around 3: 1 or 4: 1, account being taken of the existence of beers priced at BFR 17 per litre (table beer) and BFR 21.5 per litre (Carapils) and of wines priced between BFR 60 and BFR 80 per litre.

111. In other words, the difference in the prices of these two beverages — which, of course, reflects their different characteristics and production costs — whilst itself constituting a factor liable to attenuate the competitive relationship between them is nevertheless something which must be taken into account in assessing to what extent the difference in rates distorts consumer preferences.

112. For that purpose, it does not seem to me to be necessary to embark upon a discussion — which would inevitably be conjectural and devoid of accurate information — regarding the different quantities of wine and beer consumed. Moreover, as Belgium endeavours to show in its rejoinder, there is no evidence that the conclusion drawn from the difference of unit prices would be substantially different if that factor were taken into account.

113. And that, together with the difference of six percentage points in the applicable rates, does not seem to make any decisive contribution towards showing that the tax system at issue is likely to bring about a protective effect. In any event, the pointers which can be derived from a price relationship of that kind for the purpose of forming an opinion are very different from those which would result from a comparison of competing products with equivalent prices. However, if other factors were conclusive in that respect, one might possibly be persuaded to acknowledge that the system is more protectionist in character than is apparent from the difference of rates and the difference of prices.

114. However, that is not the case. On the one hand, it appears that the pattern of consumption of the two products shows an increase in the average consumption of wine from 14.9 litres per inhabitant in 1976 to 16.7 litres in 1977 (the year in which the 25% rate was introduced) and 20.2 in 1982 and 1983; at the same time, beer consumption fell from 137.6 litres per inhabitant in 1976 to 125 litres in 1978 and 1981 and 128 litres in 1983.

115. The conclusions which can be drawn from those statistics must be considered very carefully, in so far as the difference of tax rates is far from being the only factor likely to influence the pattern of consumption.

116. What can be said is that the increase in the rate applied to wine from 14 to 25% did not have the effect, in the medium term, of curbing the increase in consumption of wine per inhabitant. Wine consumption may have remained practically at the same level — there was in fact a slight drop — between 1977 and 1978, but the increase in the rate at that time was 11 percentage points (from

14 to 25%, representing an increase of 78.6% over the previous rate).

117. During the same period (from 1977 to 1978), average beer consumption per inhabitant fell.

118. However, it must be stated that precisely in 1978 the rate of VAT on beer was increased from 14 to 16%. There were further increases in 1981 (to 17%) and in 1983 (to 19%); and each time that the rate of tax on beer increased a reduction was noted in consumption per inhabitant, with a recovery in the following years (particularly in 1979 and 1980, when it rose to 126 and 131 litres and in 1982 when it rose to 133 litres).

119. This fact appears to confirm a phenomenon known to economists: consumption is affected by a variation in relative prices resulting from changes in the tax burden not so much because the rate of tax is high as because the rate is raised at a particular time. After the increase, consumers, depending on their consumption habits and provided that the increase is not very severe or the new rate is not prohibitive, tend to become accustomed to the new price and, as time goes on, recover from the impact of the change of rate.

120. It is not therefore rash to take the view that a major distortion of competition would have occurred in 1977 and 1978 as a result of the steep increase in the rate applicable to wine — which, moreover, was from then on adjusted separately from the rate applicable to beer — if it had not been tempered by the effects which, in all probability, followed from the increase of the rate applicable to beer, which took place almost at the same time.

121. The conclusion which may be drawn from this is that today (by contrast with what could certainly have been said 10 years ago) it does not seem that the Belgian VAT system is such as to distort competition between wine and beer, to the advantage of the latter.

122. The effect on competition of an increase in the price of one of two products, resulting from a rise in the rate of taxation, without any accompanying equivalent increase in the rate applied to the other product depends, moreover, on the cross-elasticity of demand for the two products which, in turn, (if it is assumed that consumers' incomes and other prices remain constant) depends in particular upon the greater or lesser extent to which the products are substitutable for each other.

123. In the absence of any information relating directly to the extent of such elasticity, all that can be said is that the statistics submitted by Belgium are not such as to show conclusively that there is any great cross-elasticity of demand as between wine and beer in Belgium.

124. It is a fact that the rates applicable to the two products have changed divergently, giving rise to the difference of treatment as between them which is at issue in this case. It might be said that the maintenance of that difference is likely to interfere with the normal development of consumer habits in Belgium and, in an open market, that situation might be to the advantage of the imported product.

125. It should, however, be borne in mind that the difference of rates — which reached 11 percentage points — became progressively smaller, falling first to 9, then to 8 and subsequently to 6 points, as a result of the increase in the rate applicable to beer whilst the rate applicable to wine remained

constant. In those circumstances, if there was any dissuasive effect on consumption, it would operate to a greater extent against beer than against wine.

126. It does not therefore seem to me that it can be said that in this case the difference in taxation is likely to cause wine to become a luxury product, particularly since it is not subject to the additional surcharge of 8%, which results in a VAT rate of 33% for certain products which are regarded as luxury products.

127. Finally, it should be borne in mind that — for the reasons I have mentioned and because the changes of rates were in general made by Belgium in the context of wider-ranging reforms of the VAT system which, according to the Belgian Government, took account of certain budgetary and social preoccupations — there is no evidence of any protectionist intent, whereas the position would have been different if the changes had been introduced for wine and beer alone.

128. K — The circumstances were different in the *United Kingdom* case (Case 170/78) and it is not therefore surprising that the Court's judgment in that case differs from that which I propose here. Let us consider the principal differences:

129. By comparison with beer, wine was subject to a fiscal surcharge which, depending on the basis of comparison adopted, was either 58% or 77%, or even 286% according to the Italian Government (by reference to the criterion of the incidence of tax on the price of the products net of tax), or 100% (according to the criterion of the alcoholic content) or 400% (by reference to the volume of the two beverages);

130. The additional tax burden on wine in Great Britain was regarded by the Court as liable to 'stamp wine with the hallmark 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';

131. A comparison with the volume of wine sales in other markets, particularly in the Benelux countries, showed — at least according to the Commission — that the marketing of wine had been adversely affected by the contested tax system in the United Kingdom;

132. By contrast with the position before the United Kingdom's accession to the EEC (wine had for a long time enjoyed a certain tax advantage, and the two products were more or less on an equal footing at the time of accession), the tax applicable to wine was gradually increased by a percentage greater than that applied to beer; thus, between 1 January 1973 and the time when the action was brought, the tax on wine increased by 102%, as against only 59% in the case of beer;

133. The tax on wine in the United Kingdom was brought in and increased in order to offset the elimination of the customs duties applicable at the time of accession, which, moreover, were increased before 1 January 1976, the date on which the new specific tax was introduced.

134. None of those circumstances is present to a comparable degree in this case or is even relied upon as proof of a protective effect (that being the third aspect of the *United Kingdom* case to which I have just referred).

135. It is not incumbent upon the Commission to furnish 'statistical proof of a protective effect', that is to say proof that the tax system in question *actually* discriminates against an imported product to the advantage of its domestically produced competitor.

136. All that is necessary, as we have seen, is that it should be shown that such a tax system is, *by its nature, capable* of protecting domestic products; and, in my opinion, that has not been proved in relation to the tax system in force in Belgium under which different rates of VAT are applied to wine and beer.

137. L — I should point out that the conclusion which I reach here does not in any way preclude a finding that it would be appropriate to harmonize the rates of tax on wine and beer in the various Member States, under Article 99 of the Treaty, as is proposed by the Commission.

138. But that is a decision which can be taken only by the Member States within the competent institution and which, as things stand at the moment, does not take away the freedom of those States under the Treaty regarding tax matters.

139. M — Having regard to the foregoing considerations, I am of the opinion that it has not been proved that, by applying to wine, an imported product, a higher rate than that applied to beer, essentially a domestic product, the Belgian VAT legislation is capable of affording indirect protection to beer.

140. Accordingly, it has not been shown that the Kingdom of Belgium has thereby infringed the second paragraph of Article 95 of the Treaty and I therefore propose that the Court should dismiss the application and order the Commission to pay the costs.