OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 27 April 1989 *

My Lords,

1. In this case the Commission contends that the Italian Republic's tax treatment of certain products, including rum, is contrary to Article 95 of the EEC Treaty. The case thus takes its place in a series of cases in which this Court has been called upon to consider different aspects of the tax arrangements applicable to spirits in Italy. In many respects those earlier judgments remain relevant for the purpose of deciding the present case, notwithstanding that they may have concerned other aspects of the tax arrangements than those at issue here and that the Italian tax legislation has been much amended over the years.

2. The present case concerns the 'manufacturing tax' on spirits made in Italy and the corresponding 'frontier surcharge' charged on spirits imported into Italy. Other aspects of the Italian tax arrangements which have come before the Court include the State taxes (now abolished) on spirits, the system of tax banderoles on receptacles containing spirits and value-added tax charged on spirits when they are sold.

3. Case 169/78 *Commission* v *Italy* [1980] ECR 385 concerned the system of tax banderoles to be affixed to receptacles containing spirits intended for retail. The Italian legislation impugned in that case provided that the banderole tax was to be paid at different rates, which were, as far as spirits obtained from cereals and sugar cane were concerned, several times the rates applicable to spirits obtained from wine and marc. The Court found that the main characteristic of that tax system was that the most typical domestic products, spirits obtained from wine and marc, were in the most favoured tax category whereas the two types of product almost all of which is imported from other Member States, i. e. rum and spirits obtained from cereals, were subject to heavier taxation (paragraph 35 of the judgment). The Court therefore ruled that the Italian system of differential taxation in the form of tax banderoles was contrary to Article 95 of the Treaty as regards the taxation of alcoholic beverages which were the result of the distillation of cereals and sugar cane, on the one hand, and spirits obtained from wine and marc on the other.

4. Joined Cases 142 and 143/80 *Amministrazione delle finanze dello Stato* v *Essevi and Salengo* [1981] ECR 1413 concerned an Italian tax which has since been abolished, the ordinary State tax. The case arose from a dispute over the payment of the tax on cognac of French origin imported into Italy.

* Original language: English.

It appeared from the orders for reference that imported spirits were subject to the tax at the full rate whereas domestically produced spirits were exempt from it because only spirits the manufacture of which could be made subject to inspections carried out at the production stage on Italian territory qualified for the exemption (paragraph 20 of the judgment). Since the reduced rate of taxation was available only to national production, the Court held that it was discriminatory in nature and was therefore contrary to Article 95 of the Treaty (paragraph 22 of the judgment). The Court ruled: 'a system of taxation of spirits organised in such a way as to confine exemptions or reduced rates of tax to domestic production alone constitutes discrimination prohibited by Article 95 of the EEC Treaty'.

5. Whereas *Essevi and Salengo* concerned importation of spirits derived from wine (cognac) Case 216/81 *Cogis* v *Amministrazione delle finanze dello Stato* [1982] ECR 2701 concerned the importation into Italy of spirits derived from cereals (whisky), which brings it closer to the issues in the present case. Under the Italian tax arrangements then in force, the whisky imported by the plaintiff from the United Kingdom was subject to State tax (whereas domestic spirits were exempt therefrom) and to the frontier surcharge at the full rate (whereas domestic spirits distilled from wine, whilst liable to the corresponding manufacturing tax, qualified for considerable reductions (at pp. 2703-2704)). The Court held those tax arrangements also contrary to Article 95.

6. Because the dispute in that case and the question referred by the national court concerned only whisky, the Court confined its ruling to whisky, and held: 'Article 95 prohibits a system of taxation affecting differently whisky and other spirits'. However in the body of its judgment, the Court, referring to its findings in Case 169/78 *Commission* v *Italy*, already cited, made broader statements concerning not only whisky but also rum. Thus it held at paragraphs 10 and 11 that 'spirits obtained from cereals and rum, as products of distillation, share with spirits obtained from wine and marc sufficient common characteristics to form, at least in certain circumstances, an alternative choice for consumers. That finding constitutes sufficient ground for holding that such products are in competition with each other and that it is not permissible for taxation imposed on them to have a protective effect in favour of national production. . . . With regard to the protective nature of the tax system in question it was found in the judgment in Case 169/78 that the system was characterized by the fact that the most typical domestic products, namely spirits obtained from wine and marc, were in the most favoured tax category whereas two types of product almost all of which were imported from other Member States, that is to say rum and spirits obtained from cereals, were subject to heavier taxation. The fact that domestic production of those spirits also exists does not alter this assessment, since it is not contested that only minimal quantities are involved. Such differences in taxation affect the market in the products in question by reducing the potential consumption of imported products'.

7. The following year, in Case 319/81 *Commission* v *Italy* [1983] ECR 601, the

Court examined another aspect of the Italian tax arrangements for spirits, value-added tax. Under the Italian legislation then in force VAT was charged at a higher rate on spirits having a designation of origin or provenance regulated or protected in the territory in which they were produced, whereas other spirits were taxed at a lower rate. As there were no rules in Italy protecting designations of origin or provenance as far as domestically produced spirits were concerned, the result was that the bulk of imported spirits were taxed at the higher rate whilst the bulk of domestically made spirits were taxed at the lower rate (paragraphs 4 and 18 of the judgment). The Court found that those tax arrangements discriminated against products imported from other Member States contrary to Article 95. Accordingly it declared that by applying a differential system of taxation to spirits on the basis of the criterion of designation of origin or provenance, the Italian Republic had failed to fulfil its obligations under Article 95 of the EEC Treaty as far as products imported from other Member States were concerned.

8. Following the judgments of the Court in the last two of these cases (to which it referred in its amending legislation) Italy abolished the State tax and fixed the manufacturing tax on spirits made in Italy and the corresponding frontier surcharge on imported spirits at a single rate of LIT 350 000 per anhydrous hectolitre of alcohol by Decree-Law No 232 of 15 June 1984. As a result national and imported spirits would have been subjected to identical tax treatment. When the Decree-Law was converted into a law by Law No 408 of 28 July 1984, however, the amount of the tax and surcharge was raised to LIT 420 000 and, by way of derogation, a provision was inserted whereby until 31 December 1988 the manufacturing tax and the corresponding frontier surcharge on alcohol obtained from the distillation of wine, the by-products of wine-making, potatoes, fruit, sorghum, figs, carobs and cereals were fixed at LIT 340 000 per anhydrous hectolitre (i.e. LIT 80 000 lower). After the commencement of proceedings in the present case, Italy extended the period of application of that provision to 31 December 1992 and increased the full and lower rates of charge respectively to LIT 546 000 and 442 000 per anhydrous hectolitre, by Article 4 of Decree-Law No 9 of 15 January 1988 and Article 8(19) and (20) of Law No 67 of 11 March 1988. (The Commission's application necessarily addresses only the legislation in force at the time when it was lodged, but the legal issues remain the same.)

9. Although the provision for a lower rate of tax took the form of a derogation, it covered spirits obtained from a much wider range of products than the provision laying down the normal (i.e. the higher) rate of tax. In fact it appears that the higher rate of tax applies only to synthetic alcohol or alcohol derived from sugar, whether raw or contained in beverages. The Commission took the view that the differentiated taxation provided for by Law No 408 treated alcohol produced from most agricultural products more favourably than alcohol produced from sugar cane and products containing that alcohol, such as rum, of which it alleges that there is no domestic Italian production (although in *Cogis* the Court found that there was

domestic production of rum, albeit of only minimal quantities). The Commission considered that by imposing tax on alcohol distilled from sugar cane and products containing that alcohol at a higher rate than on domestic products, Italy was infringing Article 95 of the Treaty. It wrote a letter to the Italian Government in those terms on 3 April 1986 and described the alleged infringement in similar terms in its reasoned opinion of 4 March 1987 where it alleged that the Italian legislation was contrary to the provisions of Article 95 because it imposed tax on alcohol distilled from sugar cane and on products containing that alcohol, such as rum, which are not produced in Italy, at a higher rate than on similar or competing national products. By an application lodged at the Court on 16 October 1987 the Commission sought a declaration that, by taxing alcohol distilled from sugar cane and products containing such alcohol more heavily than other types of alcohol and other spirits of agricultural origin, the Italian Republic had failed to fulfil its obligations under Article 95 of the EEC Treaty.

10. It is thus clear that the application is directed at all alcohol distilled from sugar cane and all products containing such alcohol (in so far as they come from other Member States) and not only rum. Rum is cited by the Commission, with one exception, only as an example of products which contain alcohol distilled from sugar cane. The exception to which I allude is a single isolated assertion in the application to the effect that tax at the full rate is essentially charged on rum. That allegation has not been substantiated. On the contrary, according to the subsequent pleadings and the evidence placed before the Court, rum represents only a minor part of the total production caught by the tax at the full rate. That allegation should therefore be left out of account and the case should proceed on the basis on which it was put in the reasoned opinion and elsewhere in the Commission's pleadings, in particular in the form of order sought, i.e. that the Italian tax arrangements are alleged to be contrary to Article 95 of the Treaty on the grounds that the Italian measures at issue tax alcohol distilled from sugar cane and products containing that alcohol more heavily than similar or competing national products.

11. A variety of products come within the category thus alleged to be the victim of discriminatory taxation contrary to Article 95. Rum is one of those products and has been singled out for express mention from the outset of this case. Accordingly I shall deal first with the case of rum.

12. The Commission contends that rum and other spirits are similar products within the meaning of the first paragraph of Article 95 of the Treaty. In the alternative, it contends that they are in any event competing products so as to fall within the second paragraph of Article 95. Italy denies that rum can be considered as a similar product to spirits made from wine and cereals, in view of the respective organoleptic characteristics of those products. It contends that rum and other spirits are at most only competing products within the second paragraph of Article 95. This dispute raises difficult issues, which the Court has examined in particular at paragraphs 11 to 13 of the judgment in

Case 169/78 *Commission* v *Italy* (at pp. 401 to 402). In the cases decided to date, the Court has refrained from deciding whether rum and other spirits were similar products within the meaning of the first paragraph of Article 95. It expressly left the point open in Case 169/78 *Commission* v *Italy* (paragraph 33 of the judgment at pp. 407 to 408), holding that it was not necessary to decide the question, 'since it is impossible reasonably to contest that [the spirituous beverages concerned, i.e. spirits obtained from cereals and sugar cane] are without exception in competition, at least partially, with the domestic products to which the application refers [i.e. spirits obtained from wine and marc]'. It added (in paragraph 34 of the judgment at p. 408) that 'spirits obtained from cereals and rum, as products of distillation, share with spirits obtained from wine and marc sufficient common characteristics to form, at least in certain circumstances, an alternative choice for consumers'. In *Essevi and Salengo* the question did not arise because the imported product, cognac, was also distilled from wine and the similarity of the products within the meaning of the first paragraph of Article 95 was not disputed. In *Cogis* (paragraph 10 of the judgment at p. 2713) and Case 319/81 *Commission* v *Italy* (paragraphs 16 to 17 of the judgment, at p. 621), on the other hand, the Court dealt with the question in the same way as in Case 169/78 *Commission* v *Italy*, i.e. not deciding whether or not the types of spirits concerned were similar but holding that they were in any event in competition with each other so as to fall within the scope of the second paragraph of Article 95.

13. Applying that approach to the present case, it is not necessary for the Court to decide whether rum is a similar product to the types of spirits taxed at the lower rate (in particular spirits made from wine, the by-products of wine-making and cereals), and it is sufficient to hold that those spirits and rum are competing products for the purposes of the second paragraph of Article 95. It seems to me that there can be no doubt that rum and the other types of spirits must be regarded at least as competing products within the second paragraph of Article 95, in the light of the specific findings to that effect in paragraphs 33 and 34 of Case 169/78 *Commission* v *Italy* and paragraph 10 of *Cogis*.

14. The second paragraph of Article 95 provides that 'no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products'. It therefore falls to be considered next whether the Italian tax arrangements in question do afford indirect protection to competing domestic products. In my opinion there can be no doubt as to the protective nature of the Italian tax arrangements. Indeed Italy has clearly stated that the purpose of the differential tax arrangements is to protect Italian production of spirits from wine.

15. Italy states that it costs on average LIT 50 000 to 60 000 per anhydrous hectolitre more to produce alcohol from wine products and fruit than it does to produce alcohol from molasses. If the tax on the two kinds of alcohol were equalized, it would become impossible to sell alcohol made from wine, the distilleries would shut and the vine and wine market would collapse because for a large part it relies on distil-

lation. Thus although the Italian legislator intends ultimately to tax all types of alcohol equally, it became necessary to adopt a temporary measure which would continue to equalize the cost. The Commission points out that, whilst the Italian Government estimates the difference in cost between the two types of alcohol at LIT 50 000 to 60 000, the difference in tax amounts to LIT 80 000 per anhydrous hectolitre. During the course of proceedings, the tax differential was increased to LIT 104 000. Thus, even allowing for inflation, it seems that the measure in question not merely puts the two types of alcohol on a footing of equality but places alcohol derived from sugar at a competitive disadvantage.

16. Since the protective nature of the differential tax arrangements in question is thus admitted and evident, it is clear that those tax arrangements are in breach of the second paragraph of Article 95 as regards rum. In my view a number of arguments advanced by Italy by way of defence fall to be dismissed. I shall deal with those arguments seriatim.

17. Thus the Italian Government has argued that, in order to establish a breach of the second paragraph of Article 95, it is not sufficient merely to compare the respective tax burdens on the products in question but it is necessary to establish concretely that the difference between the burdens is apt to produce protective effects. That argument has already been put to the Court and rejected, in particular in Case 170/78 *Commission* v *United Kingdom* (interlocutory judgment) [1980] ECR 417 where the United Kingdom submitted that in the case of the second paragraph of Article 95 it was insufficient to establish that there was a difference in taxation; the Treaty required that the protective effect of the tax system in question must be actually shown to exist (see paragraph 8 of the judgment, at p. 433). The Court expressly rejected that argument (in paragraph 10 of the judgment, at p. 433) in the following terms: 'It is however appropriate to emphasize that [the second paragraph of Article 95] 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'. A similar argument was advanced by Italy in Case 169/78 *Commission* v *Italy* (see at p. 395) and was tacitly rejected by the Court in the judgment (see in particular paragraph 35, at p. 408); and the Court took a similar approach in *Cogis* (see in particular paragraphs 10 and 11 of the judgment, at p. 2713). Therefore the Italian Government's argument to the effect that the difference in taxation must be proven to produce actual protective effects, falls to be rejected.

18. The Italian Government also seeks to rely on a number of decisions in which the Court has held that: 'In its present stage of

development Community law does not restrict the freedom of each Member State to lay down tax arrangments 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. Such differentiation is compatible with Community law if it pursues economic policy objectives which are themselves compatible with the requirements of the Treaty and its secondary law 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' (e.g. Case 140/79 *Chemical Farmaceutici* v *DAF* [1981] ECR 1, at p. 15; Case 46/80 *Vinal* v *Orbat* [1981] ECR 77, at p. 93; and Case 196/85 *Commission* v *France* [1987] ECR 1597, at p. 1615. The Italian Government argues that the differentiated tax arrangements in question fulfil the conditions thus laid down: the differentiation is based on an objective criterion, namely the raw material from which the alcohol is made; the differentiation pursues an economic policy objective which is compatible with Community law, namely the support of the wine and vine market; and the detailed rules for applying the tax system do not involve protection of competing national products. In my view that line of case-law cannot be relied on in relation to rum in the present case. That matter is already governed by decisions of the Court which are much more directly relevant: Case 169/78 *Commission* v *Italy*, *Essevi and Salengo*, Case 319/81 *Commission* v *Italy* and in particular *Cogis*. Those cases directly cover the issue as regards rum in the present case and in my opinion leave no room for the application of the other line of case-law.

19. That other line of case-law in any event represents an exception to the basic rules of Article 95 of the Treaty because it results in allowing Member States to discriminate in their internal taxation against products from other Member States and in favour of domestic products, albeit subject to certain conditions. In my view the exception cannot easily be reconciled with the terms of Article 95 or with its place in the scheme of the Treaty as a complement to Articles 9 to 16, which have consistently been construed so as to give them their fullest effect. The Court has emphasized that the provisions of Article 95 supplement, within the system of the Treaty, the provisions on the abolition of customs duties and charges having equivalent effect; that 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 result from the application of internal taxation which discriminates against products from other Member States; and that Article 95 must guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products: see e.g. Case 169/78 *Commission* v *Italy*, cited above, at p. 399. In any event, as apparently introducing a derogation from the Treaty, that exception (to which I shall refer as 'the case-law exception') may not be construed extensively. (On this point I am in agreement with the view of Advocate General Reischl in *Cogis* at p. 2720). It follows that, even if there were a choice to be made between the case-law exception and the main stream of case-law (in particular Case 169/78 *Commission* v *Italy* and *Cogis*), it should be resolved against the application of the case-law exception.

20. Indeed, it is noteworthy that in a number of cases in which the Court has

cited the passage in question, the Court has not given effect to the exception in its decision on the case: see e.g. *Essevi* v *Salengo*, Case 319/81 *Commission* v *Italy* and Case 106/84 *Commission* v *Denmark* [1986] ECR 833. Moreover, it is important to bear in mind that the passage refers to Community law 'in its present stage of development'. I consider that as greater European integration is achieved, Community law should evolve so that the case-law exception should cease to apply. That consideration is all the more apposite at the present time as the Community is seeking to establish the single market for 1992.

21. On this basis it does not fall to be decided whether the conditions laid down in the case-law exception are fulfilled in the present case. In that connection I would only say that it may be doubted whether the conditions are in fact fulfilled. In particular, it is arguable that the economic objectives which the Italian Government seeks to attain by the contested measures are a matter for the Community, possibly within the framework of the relevant market organization, and not for the Member States acting unilaterally.

22. The Italian Government also refers in particular to Case 243/84 *Walker* v *Ministeriet for Skatter og Afgifter* [1986] ECR 875 at pp. 884 and 885 where the Court held: 'In the present stage of its development, Community law, and in particular the second paragraph of Article 95 of the EEC Treaty, does not preclude the application of a system of taxation which differentiates between certain beverages on the basis of objective criteria. Such a system does not favour domestic producers where a significant proportion of domestic production of alcoholic beverages falls within each of the relevant tax categories.'

23. That dictum represents a specific development in what I have called 'the case-law exception'. Italy seeks to bring the present case within that dictum by asserting that a large quantity of domestic production is also subject to the contested tax at the higher rate. However, that domestic production is raw alcohol made from molasses. Although it can be used to make beverages, raw alcohol is not itself a beverage. It follows in my view that it is not in a competitive relationship with rum, or at least it is not in such a direct competitive relationship as are other alcoholic beverages and in particular alcoholic beverages made from wine and the by-products of wine-making. Therefore, in my view, it cannot be accepted that the present case comes within the dictum cited.

24. In any event I do not consider that the rule enunciated in that dictum is applicable to a case such as the present, in the light of the ruling at paragraph 21 of the judgment in Case 106/84 *Commission* v *Denmark* at p. 872. There the Court again accepted that at its present stage of development Community law allowed tax arrangements which differentiated between certain products on the basis of objective criteria if they pursued objectives of economic policy which were compatible with the

requirements of Community law and if the detailed rules were such as to avoid discrimination, but the Court went on to hold in paragraph 21 of the judgment: 'However, such differential taxation is incompatible with Community law if the products most heavily taxed are, as in this case, by their very nature imported products'. In my opinion rum can also be regarded as 'by its nature an imported product', notwithstanding that minimal amounts of rum might be produced in Italy. It follows in my view that the differential taxation of rum at issue in the present case is incompatible with Community law.

25. Although much of the discussion, particularly in the early stages of the case, centred on rum, the form of order sought by the Commission covers a wider range of products than rum alone. It became apparent from the Commission's answers to written questions put to it by the Court, that the Commission considers the Italian tax arrangements in question to be contrary to Article 95 not only as regards rum but also as regards three other categories of product: raw alcohol derived from sugar cane (including that derived from molasses and sweet juices of sugar cane); flavoured spirits (such as gin and vodka) to the extent to which they are made out of alcohol derived from sugar cane; and, to that extent also, 'liqueurs and other spirits'.

26. For convenience I shall consider in reverse order the different categories of product which the Commission mentions as being affected by the alleged discrimination. As regards, first, the category which the Commission defines as 'liqueurs and other spirits', it must I think be assumed that the Commission means 'liqueurs and other spirits of the same type' since otherwise it could cover any type of spirits, which would make the Commission's categorization meaningless. In that category the Commission has submitted to the Court figures for the total amount imported into Italy from other Member States. In 1987 the figure was 2 077 300 anhydrous litres or approximately 1.5% of the total amount of products subject to the disputed charge at the higher rate. However, the Commission is unable to provide any figures for the amount of products in the category which are made from or contain alcohol derived from sugar cane. It merely alleges that such products 'often' contain alcohol derived from sugar cane.

27. The position is similar as regards 'flavoured spirits' (gin and vodka). The Commission has submitted figures for the amount of such alcohol imported into Italy from other Member States (in 1987 652 700 anhydrous litres, or approximately 0.5% of the total amount subject to the contested tax at the higher rate), but is unable to indicate what proportion of that alcohol, if any, is derived from sugar cane.

28. The Commission points out that both liqueurs and 'flavoured spirits' can be made from alcohol of any agricultural origin, and adds that the statistics available do not disclose what proportion is made from cane alcohol. That is a difficult matter to

ascertain because, as is common ground in this case, above a certain degree of purity it is no longer possible to determine the raw material from which alcohol is made.

29. Both in relation to liqueurs and in relation to 'flavoured spirits', the Commission has alleged that the Italian taxation in question discriminates, contrary to Article 95, against imports from other Member States to the extent to which they are made out of alcohol derived from sugar cane. However, both those categories of products were first identified by the Commission at a very late stage in the proceedings: after the close of written pleadings, in answer to a written question put by the Court. In consequence, central issues of fact have not been adequately dealt with. Not only is there uncertainty as to what extent, if at all, those products contain cane alcohol; it has also not been established whether, and if so, how, the Italian legislation actually taxes such products at the higher rate. The Commission has not adduced evidence on those matters, and the Italian Government has not had an opportunity to address them in writing. In the absence of evidence and adequate opportunity for argument on those fundamental points, the application should, in my view, be dismissed in so far as it concerns those two categories of product.

30. As regards raw alcohol derived from sugar cane (including that derived from molasses and sweet juices of sugar cane), the position is different. Raw alcohol is not itself a potable beverage. Therefore the question arises whether it can be regarded as a similar or competing product in relation to potable spirits. Raw alcohol can be used to make potable beverages, from which it might be possible to show that it had at least an indirect competitive relationship with potable spirits. On the other hand, raw alcohol may be denatured for industrial use, and from that point of view a competitive relationship with potable spirits might be more difficult to establish. If the matter were fully examined, the conclusion might be that raw alcohol derived from sugar cane is neither a similar product nor a competing product with potable spirits for the purposes of Article 95 but is such in relationship to raw alcohol derived from other agricultural products or synthetic alcohol. This difficult question has hardly been examined in the present proceedings before the Court.

31. From the rejoinder and the answers to written questions put by the Court (but not from any earlier stage of the case) it appears that the largest amount of a single product subject to the contested tax at the higher rate is domestically-produced alcohol produced from molasses (whether beet or cane is not specified, although the Commission estimates the proportions at 50:50). Of the 1987 total of approximately 130 000 000 litres of alcohol subject to tax at the full rate, it appears that 87 000 000 litres (i.e. over half) were domestically produced alcohol made from molasses. Taking this kind of alcohol along with lesser quantities of other kinds of domestically produced alcohol, it appears that Italian domestic products accounted for roughly two-thirds of the total amount subject to the full rate of tax in 1987. The pattern is confirmed, as far as they go, by

the 1986 figures put before the Court: it appears that in 1986, some 83 million anhydrous litres of alcohol made from molasses and some 11 million anhydrous litres of alcohol made from other raw materials were subject to tax at the full rate. The figures therefore appear to bear out the Italian Government's contention that the category of alcohol subject to the full rate of charge is made up mainly of domestic products, in particular alcohol made out of molasses.

32. However, at the hearing the Commission asserted that a large part of the alcohol ostensibly subject to the full rate of tax does not in fact bear it because it is denatured for industrial use or incorporated in beverages which are exported in both of which cases an exemption from the contested tax arises. The Commission estimated that 80% of the spirits ostensibly subject to the full rate of tax were exempted. The Italian Government did accept that a proportion of the products were exempted but did not accept the figure of 80%, which was also unsupported by evidence. The Italian Government, however, has had no opportunity to deal with the points in writing. They were first raised in answer to the Court's written questions, i. e. after the close of written pleadings, and remain only partially explored and unsupported by evidence. In those circumstances it is not in my view open to the Court to accept as a fact the matters asserted by the Commission. On the other hand it remains uncertain to what extent domestically produced raw alcohol derived from molasses actually bears tax at the higher rate.

33. As these questions emerged late in the proceedings, the parties have not had an adequate opportunity to examine them. The Court does not in my view have adequate evidence or argument on which to found a decision on the point. Therefore I consider that it can only dismiss the claim as far as it is directed to raw alcohol derived from sugar cane.

34. In consequence the Commission's application succeeds only in relation to rum. Since, on the view I take, each party succeeds in part, they should bear their own costs, in accordance with Article 69(3) of the Rules of Procedure.

35. Accordingly in my opinion the Court should declare that, by imposing heavier taxation on rum imported from other Member States than on other spirits of agricultural origin, the Italian Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty; for the rest, should dismiss the application; and should order that each party should bear its own costs.