fulfilling the criterion of similarity, are nevertheless in competition, either partially or potentially, with certain products of the importing country. That provision, precisely in view of the difficulty of making a sufficiently precise comparison between the products in question, employs a more general criterion, in other words the indirect protection afforded by a domestic tax system.

2. In order to determine the existence of a competitive relationship under the second paragraph of Article 95, 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.

   Where there is such a competitive relationship between an imported product and national production, the second paragraph of Article 95 prohibits tax practices "of such a nature as to afford indirect protection" to the production of the importing Member State.

   For the application of that provision it is impossible to require in each case that the protective effect should be shown statistically. It is sufficient 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 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, in proceedings which it has brought under Article 169 of the Treaty, to supply statistical data on the actual foundation of the protective effect of the tax system complained of.

3. For the purpose of measuring the possible degree of substitution between two products for the application of the second paragraph of Article 95 of the EEC Treaty, it is impossible to restrict oneself to consumer habits in a Member State or in a given region. Such habits, which are essentially variable in time and space, cannot be considered to be a fixed rule; 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 comply with them.

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 its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

applicant,

supported by the

ITALIAN REPUBLIC, represented, for the purpose of the written procedure, by its Ambassador, Adolfo Maresca, acting as Agent, assisted by Mario Fanelli, Avvocato dello Stato, and, for the purpose of the oral procedure, by Ivo Maria Braguglia, 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. D. Munrow, Assistant Treasury Solicitor, acting as Agent, assisted by Harry K. Woolf, Barrister of the Inner Temple, and Mr Peter Archer, Q. C. of Gray's Inn, with an address for service in Luxembourg at the Embassy of the United Kingdom,

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

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

gives the following

JUDGMENT

Facts and Issues

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

I — Facts

Under Article 32 of the Act of 22 January 1972 concerning the Conditions of Accession and the Adjustments to the Treaties (the "Act of Accession"), customs duties on imports between the Community as originally constituted and the new Member States and between the new Member States themselves were to be progressively abolished in accordance with a fixed timetable between 1 April 1973 and 1 July 1977. That provision was, by virtue of Article 38 (1) of the said Act of Accession, applicable to customs duties of a fiscal nature.

According to Article 38 (2), the new Member States were to retain the right to replace a customs duty of a fiscal nature or a fiscal element of any such duty by an internal tax in conformity with Article 95 of the EEC Treaty. If the Commission were to find that in a new Member State there was serious difficulty in replacing a customs duty of a fiscal nature or the fiscal element of any such duty it was required, in conformity with Article 38 (3), by a decision to be taken before 1 March 1973, to authorize that State, following a request made before 1 February 1973, to retain that duty or fiscal element provided that the State abolished it by 1 January 1976 at the latest.

In pursuance of that provision, the Commission, by Decision No 73/199/EEC of 27 February 1973 authorizing the United Kingdom of Great Britain and Northern Ireland to retain the customs duties of a fiscal nature or the fiscal element of those duties on certain products (Official Journal No L 197, p. 7), *inter alia* authorized the United Kingdom to retain until 1 January 1976 for still light wines the fiscal element of a customs duty on import amounting to £1.4875 per gallon.

Until 1 January 1976, the duties charged in the United Kingdom on imported wines were customs duties comprising a fiscal element and a protective element; since that date the fiscal element has become an excise duty and the protective element a customs duty.

Duties imposed in the United Kingdom on still light wine imported from other Member States of the EEC have evolved as follows:

Date	Customs duty	Excise duty	Total duty charged per gallon
1. 1. 1973	£ 1.6125	—	£ 1.6125
1. 1. 1976	£ 0.025	£ 2.625	£ 2.650
7. 4. 1976	£ 0.025	£ 2.955	£ 2.980

By comparison excise duties charged on beer brewed in the United Kingdom of an original gravity of 1 038° (the average density of beers consumed in the United Kingdom in 1975/1976 being 1 037.71°), according to the Commission, was fixed at the following rates, the fiscal unit of charge being the bulk barrel of 36 gallons of worts:

Date	Unit rate for worts not exceeding 1 030°	Unit rate per degree in excess of 1 030°	Unit rate for 1 038°	Rate per gallon
1. 1. 1973	£ 10.37	£ 0.44	£ 13.89	£ 0.3858
7. 4. 1976	£ 15.84	£ 0.528	£ 20.064	£ 0.557

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 (£2.955 per gallon), produced in other Member States and the rate of excise duty on beer (£0.557 per gallon), produced in the United Kingdom, 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 in particular disputed 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 £2.955 per gallon to £3.250 per gallon whilst at the same time the rate of excise duty was £17.424 per 36 gallons for beer of an original gravity not exceeding 1 030°, plus £0.5808 per degree in excess of 1 030°, which was equivalent, for beer on an original gravity of 1 038°, to a rate of £0.613 per gallon only. On the basis of volume the excise duty for beer of a gravity of

1 037.71° was thus £0.6084 per gallon against £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 £0.2028 per gallon and per degree, in comparison with an excise duty of £0.2955 or £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 states that there is a competitive relationship between beer and wine such that the rate of excise duty on wine protects the consumption of beer in the United Kingdom. In these circumstances the United Kingdom is 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.

II — Procedure

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.

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 written procedure followed the normal course.

The Court, on hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry. It did however ask the Commission to reply in writing to two questions; the Commission complied with that request within the time prescribed. The Government of the United Kingdom submitted written observations on those replies.

III — The conclusions of the parties

1. The *Commission* claims that the Court should:

— 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 Article 95 of the EEC Treaty;

— Order the United Kingdom Government to pay the costs.

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

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

IV — Submissions and arguments of the parties put forward during the written procedure.

The *Commission* notes the low level of exports of wine from other Member States of the Community to the United Kingdom. This is partly to be explained

by local consumer preferences; however, the tax system to which wine is subjected in the United Kingdom prevents preferences from evolving from the consumption of beer towards that of wine and, in breach of Article 95 of the EEC Treaty, favours national production of beer, a product which is in competition with wine.

The United Kingdom has maintained in force fiscal provisions in respect of still light wine which conflict with the rules laid down in the second paragraph of Article 95. Since early 1974 the United Kingdom has consistently aggravated the fiscal discrimination between wine and beer and continued to do so even after the publication of the Commission Recommendation of 5 December 1975 to the Member States concerning the taxation of wine (Official Journal 1976 No L 2, p. 13), in which the Member States were recommended to reduce appreciably the rate of excise duties levied by them on wine and to forego any planned or recently introduced increase in the rate of such excise duties.

(a) The interpretation of Article 95 of the Treaty

The function of Article 95 is to abolish, after the elimination of customs duties and taxes having an equivalent effect, the residual obstacles to exchanges not only of imported identical products but also of products which are similar to or competitive with domestic products. The prohibition of fiscal discrimination in Article 95 suffers no exception and has primacy over contingent policies at the national or Community level. It has the rank of a fundamental principle complementing the customs union and permits no argument for either conditional application or for subordinating it to interpretative criteria outside Community rules. The purpose of Article 95 is to guarantee the transparence of the Common Market and to establish the principle of the neutrality of taxation at Community level. The fiscal sovereignty of the Member States had been substantially limited in the interests of Community trade; this limitation bears in particular on the freedom of the national legislature to have recourse to a fiscal instrument to pursue extrafiscal objectives. A national tax structure must not generate, on the activities of producers and exporters in other Member States, secondary effects which are contrary to the establishment of the Common Market.

The concept of competing products within the meaning of the second paragraph of Article 95 must be understood in a fairly wide sense as embracing a series of products which, without being identical or similar, are distinguished only by the degree and breadth of the differences separating them, which implies an appreciation of economic facts based on concrete factors. These factors may usefully be deduced from the essential characteristics of the products concerned, in particular their function and distribution, their possibilities for use and the substantial price differences between them, as well as the economic link between the respective sectors of production.

Habits or preferences of consumers naturally constitute a serious criterion; these preferences however cannot be generalized and may vary regionally; they are not constant, being subject to various influences.

Account may be taken of a substitution relationship which is not only real

but also potential. The substitution relationship may be real for certain consumers and potential for others. This situation is confirmed particularly when the interpenetration of the markets is conditioned by fiscal systems which obstruct the free movement of goods; the obstruction is a major one when the taxation is so high that the imported products become luxury goods and their consumption is thus limited to the social strata of the population which are the best off. For these reasons the concept of "substitution products" must be defined at Community and not at regional level. Economic definitions made in the light of individual preferences limited to selected regions and appreciations arrived at by reference to a market not yet fully benefiting from free movement of goods are not in accordance with the principles of uniformity of treatment laid down by the EEC Treaty.

(b) The relationship between wine and beer

It is accepted that wine is not produced in significant quantities in the United Kingdom and for the present purpose may be regarded as a product of other Member States.

There is a competitive relationship between wine and beer both in the unified Common Market and on the British market.

The statement that wine is produced principally in the south whereas beer is a drink produced essentially in northern regions of Europe is irrelevant: the geographical distribution of production of beer and wine in the various regions of the Community should facilitate and develop trade. The place of production may of course exercise an influence in favour of the consumption of local products but it does not prevent an evolution of consumer preference towards other products coming from other regions.

The habits of consumers vary in terms of the opportunities open to them to get to know and appreciate products other than beer. As regards wine there has been a remarkable increase in sales in the United Kingdom, among what used to be called the working classes.

Wine and beer share the same characteristics: not only are they alcoholic drinks obtained by fermentation but they have the same uses (table-drinks and thirst-quenching drinks).

Wine, which has been one of the national alcoholic drinks of the United Kingdom for at least nine centuries, is consumed in increasing quantities at home (10.58 million gallons during the year 1966/1967, 25.20 million gallons during the year 1976/1977). It has become, at home, a substitute for beer and is in actual competition with it.

As regards beer consumption in public houses it must be noted that consumer habits have long been conditioned by the fact that public houses are run by tenants or managers of the breweries and have no interest in facilitating a change in drinking habits. In spite of these obstructions to the spontaneous equilibrium in the public house market, wine has become, particularly in the London area, a substitute for beer and is already to some degree in competition with it. Above all the potential for more competition is considerable.

In order to assess the situation correctly account must be taken of the evolution

of the substitution relationship between wine and beer over the past 20 years.

(c) The incidence of the duty on wine

Wine is clearly taxed more heavily in the United Kingdom than beer: on 1 July 1977 it bore an exicse duty of £3.250 per gallon whereas on the same date beer of an original gravity of 1 038° bore an excise duty of only £0.613 per gallon.

The basis of comparison proposed by the United Kingdom between, on the one hand, a glass of wine of 4.5 liquid ounces, or 12.75 centilitres, subject to an excise duty of 8.3 pence, and on the other hand a pint, or 58.6 centilitres, of draught beer of average gravity, subject to an excise duty of 7.5 pence, is no more valid than the comparison based on the gallon unit. In its proposals for directives, presented to the Council on 7 March 1972, concerning harmonized excise duty on wine (Official Journal No C 43, p. 32) and the harmonization of excise duty on beer (Official Journal No C 43, p. 37), the Commission provided for a rate of excise duty on both being fixed per hectolitre (22 gallons). Both methods show that the duty on wine exceeds that on beer.

The incidence of duty per degree of alcohol cannot be made correctly for the purpose of making a comparison between alcoholic drinks except by reference to the same quantities. The comparison proposed by the Government of the United Kingdom between excise duties per degree of alcohol (11.5° Gay-Lussac) per glass of wine of 12.75 centilitres and excise duties per degree of alcohol (4° G. L.) per pint of beer, (56.8 centilitres) cannot be accepted. However, even in that case the incidence of duty per degree of alcohol is considerably greater on wine than on beer.

As regards price, it must be noted that the excise duty on still light wine represents 38% of the selling price to the consumer on 70 centilitre bottles of the most popular wines in supermarkets and 35% of the price of wine sold by retail specialists, whilst, in the case of beer, it represents roughly 22% of that price per pint bottle of the most popular beers sold in supermarkets and by retail specialists. The method of comparison based on the tax incidence on total consumer expenditure cannot be accepted: the prices to be taken into account for an effective comparison of the tax charge are influenced by too many heterogeneous factors.

The Government of the Italian Republic takes the view that all the conditions exist for considering wine and beer as being in direct competition with each other or at least as mutual substitutes.

(a) The United Kingdom's practice of levying excise duty on wine is the most telling proof of the fact that even the United Kingdom has always in fact considered wine and beer to be competing beverages. It has always used the fiscal instrument as a way of protecting certain nationally-produced commodities from competition, in this case beer.

(b) Former import duties have become in the United Kingdom excise duties. For this change to be lawful, the excise duties must form part of a system of internal taxation based on a criterion of normality; the excise duty on wine is at least five times greater than that levied

on beer and hence considerably exceeds the "general limits" of the national taxation system.

(c) It is clear that discrimination is being practised in the United Kingdom to the detriment of wine. That discrimination has been aggravated by the fact that between 1972 and 1977 the excise duty on wine has gradually risen by 102% whereas for beer the increase has only been 59%. The increases in excise duty on wine have thus been imposed purely for protectionist purposes. The fact that until 1972 wine was subject only to customs duty and not to excise duty of any kind — since this was deemed to be meaningless in the absence of any domestic wine production — is an additional proof.

The incidence of tax on the price of the product is considerable and is in itself sufficient to discourage the consumption of wine and to encourage that of beer.

(d) In the absence of harmonization as regards fiscal measures linked to alcohol content a comparison on that basis cannot be accepted; it is based on mathematical averages and does not take account of the necessity to apply a weighted average taking account of all the alcoholic strengths of the types of wine and beer which are actually consumed. Having regard to the fact that the cost of production of table wines having a low alcohol content is manifestly less than that of wines having a strong content and that the tax on the two wines is identical, it becomes clear that the incidence of tax on the retail price is even more dicriminatory in the case of common table wines, in other words on those very wines which might appeal to the broadest sections of the population.

(e) Moreover it may be noted that the consumption of wine increased sharply in the United Kingdom during 1973 and 1974 when the tax on wine was reduced but that it declined considerably in subsequent years, coinciding with the increases in excise duty.

(f) It is thus clearly shown that the tax on wine has had and continues to have the effect of protecting other products within the meaning of the second paragraph of Article 95 of the Treaty. That is sufficient to show that that article has been infringed.

The *Government of the United Kingdom* is of the opinion that the Commission has by no means established the failure to comply with the second paragraph of Article 95 of which it complains. In any case the Commission is not entitled to ask the Court to declare that the United Kingdom must repeal or amend certain national provisions: it is for the State in question to determine the measures required to put an end to any failure to fulfil obligations.

(a) The interpretation of Article 95 of the Treaty

The second paragraph of Article 95 must be read in accordance with the principles of the Community as stated in Articles 2 and 3 of the Treaty: the tax provisions are complementary to the customs rules and are designed to prevent their circumvention by the imposition of discriminatory internal taxes. It does not prohibit Member States from imposing internal taxation on imported products when there is no similar domestic product or other domestic products capable of being protected.

A fiscal measure can have a protective effect only if the products concerned are in competition with each other and if the difference between the tax on the two competing products is sufficiently great to influence the consumer in his choice.

Article 17 (3) of the Treaty specifically permits Member States to substitute for customs duties of a fiscal nature an internal tax which complies with the provisions of Article 95. The latter prohibits only protective taxation and leaves Member States otherwise free to decide the level of internal taxation.

The Commission's statement to the effect that the concept of products of substitution or competitive products must be defined at Community level and not at the regional level is inconsistent with the case-law of the Court of Justice. It may also be seen from the case-law that even if there is a domestic product in competition with the imported product and a higher tax on the imported product the contravention of the Treaty is not automatic. The first paragraph of Article 95 prohibits, for imported products, any tax which is in any way in excess of that imposed on the similar domestic product; the second paragraph of Article 95 prohibits internal taxation such as to afford indirect protection to the domestic product. In this case it is therefore for the Commission to prove that in the United Kingdom wine has imposed upon it a tax which is sufficiently high to afford direct or indirect protection to beer.

(b) The relationship between wine and beer

It is indisputable that beer and wine have certain characteristics in common; however, that fact is insufficient to establish the necessary relationship required by the second paragraph of Article 95.

The fact that wine on average has an alcoholic content three times as high as that of beer is sufficient in itself to make the two drinks fundamentally different; the fact that wine, because of its costs of production, will always be more expensive than beer (quite apart from tax) emphasizes the difference.

To state that wine and beer are alcoholic drinks obtained by fermentation and have the same uses amounts to selecting arbitrarily certain characteristics and arbitrarily ignoring others. In particular it is not logical to ignore the degree of alcoholic content; it appears legitimate to distinguish between drinks with markedly different alcoholic content. A distinction should also be drawn between relatively cheap and relatively expensive alcoholic drinks.

In the United Kingdom beer is the national alcoholic drink and has historically always been so. This has been the position as a matter of choice irrespective of price and incidence of taxation; it came about by reason of a variety of social, historical and geographic but not fiscal, reasons.

In the United Kingdom wine is not regarded as being a substitute for or in competition with beer.

The present position in the United Kingdom has come about despite the fact that for most of this century the United Kingdom has taxed wine less heavily than beer, having regard to alcoholic strength. Moreover wine was

taxed less heavily than beer for virtually the whole of the century when the comparison is based upon the amount of duty as a proportion of consumer expenditure.

Statistics drawn up on the basis of alcoholic strength of 3% for beer and 11 or 12% for wine, as quoted by the Commission, show that until 1914 the duty on beer was less than that on wine, that in 1914 the beer duty was raised substantially and was higher than the wine duty (apart from a brief spell in 1948/1949) until 1969 and that since 1969 (apart from one year) the duty on wine has been higher than that on beer.

A comparison on the basis of duty as a proportion of consumer expenditure would undoubtedly show that wine was taxed less heavily than beer for virtually the whole of the century and that the more lenient fiscal treatment of wine did not result in its being regarded as a substitute for beer.

No evidence has been produced that the alleged high level of taxation of wine in the United Kingdom has had any effect on the consumption of beer. The statistics show a fairly regular long-term increase in beer consumption, which is by no means affected by changes in the relative level of the two duties.

The recent rapid increase in the consumption of wine in the United Kingdom must be noted. That change in consumer choice shows clearly that factors other than taxation are involved.

A comparative analysis of the consumption of wine and beer and of the taxation of these two products in the different Member States of the Communtiy confirms that wine and beer are not substitution products.

(c) The effect of the taxation of wine

The comparisons drawn by the Commission in support of its contention that wine is taxed more highly than beer, which are based on volume, alcoholic strength and price, are all to a greater or lesser degree unsatisfactory.

The fact, which is not disputed, that excise duty per gallon of wine exceeds that on beer is of no significance. Such a comparison ignores the difference between the strength of wine and beer and the difference apart from tax in their price. It also ignores the different manner in which they are consumed: because of the different strength, the quantities of beer consumed by an individual in the United Kingdom on a single occasion are normally greater than the quantities of wine consumed.

A comparison by way of strength may legitimately be drawn by reference to a glass of wine of 4½ fluid ounces (12.75 centilitres) and a pint of beer (58.6 centilitres): as wine and beer are different drinks with different qualities the consumer buys them for their particular qualities and not solely for the quantity of alcohol which they contain. A comparison between the duties charged on quantities normally

purchased at a bar where the two drinks are sold alongside each other is therefore justified.

When it is borne in mind that, even without the tax element, wine is considerably more costly than beer, a comparison of the rates of tax on any basis apart from the pure volume basis shows that the difference in the rate of tax is not sufficient to afford direct or indirect protection to beer.

As regards the effect of tax on prices, the Commission has based its comparison on retail selling prices in off-licences and supermarkets. Such a comparison gives quite an unrepresentative picture of the effect of duty on prices in the beer and wine market in the United Kingdom: only about 10% of beer is sold in this way, whilst 35% of wine is sold from other outlets. Because of the widely differing ways in which the two drinks are sold and the resulting range of prices, the only valid method of comparison relates to the total consumer expenditure on beer and wine and on this basis duty represents 23% of the price of beer and 24% of that for wine. This difference is insignificant.

(d) The arguments put forward by the Italian Government

The existence of an excise duty on wine is evidence of a fiscal decision and nothing else; it by no means establishes that wine and beer are competing products.

The protective element in the customs duty on wine was by no means intended to protect beer; the protection was basically in relation to Commonwealth wine.

The requirement that a rate of taxation should remain within the general framework of the national system of taxation was laid down by the Court of Justice in cases concerning a tax on goods not produced within the national territory and not competing with other national products. In this case the taxation of beer and wine in the United Kingdom forms part of the normal structure of taxes on alcoholic drinks. Moreover, Article 95 cannot be infringed since wine and beer are not in competition with one another and the tax on wine is not at a level to afford protection to beer.

The Italian Republic has drawn a comparison of duties on beer and wine on the basis of volume alone; that basis of comparison is wholly inappropriate. The fact, which is not contested, that the duty on wine bears more heavily on weaker and cheaper wines does not help to establish that the method of imposing duty on wine is protective of beer.

The tax on wine was not reduced during 1973 and 1974 but partially replaced by VAT. The fact that wine consumption may rise or fall without any related reaction on beer consumption confirms that there is no competition between wine and beer consumption.

V — Replies to the question put by the Court and written observations

The *Commission* observes that as beer and table wine are subject to two different tax systems, comparison of the relative tax burden on the two products by reference to any single standard could

be arbitrary; in order fully to establish its case it demonstrated the existence of a heavier tax burden on wine than on beer by reference to three standards, namely volume, price and alcoholic strength.

With regard to the criterion of volume, it is necessary to state that comparison of the incidence of taxation by reference to identical volumes alone is misleading; comparison of the excise duty on wine and beer by reference to two volumes selected at random or by reference to presumed traditions may also be arbitrary or also misleading.

A valid comparison between the actual prices of beer and wine for the purposes of calculating the incidence of taxation is faced with difficulties arising in particular from the structure of the market, differences in containers and costs of distribution, packing and services. A comparison between the tax levied on consumer expenditure on beer and that levied on consumer expenditure on wine is in effect a comparison based on an "average beer" and an "average wine"; such a comparison ignores the fact that the price range for wines is manifestly much greater than that for beers.

A comparison based on alcoholic strength for two different volumes also demonstrates that wine is more heavily taxed than beer. The calculation of the incidence of duty per degree of alcohol can only be made objectively with reference to the same volume of wine and beer. This comparison clearly demonstrates that in the United Kingdom wine is more heavily taxed than beer.

The determinative standard in establishing a neutral relationship between the excise on beer and on wine is, in the last analysis, the incidence of the excise duty per degree of alcohol contained in the same quantity of wine and of beer.

Determined on the basis of the measures of capacity normally used in the United Kingdom, their metric equivalent and the respective alcohol contents, the ratio of the excise levied by the United Kingdom on a typical wine to the excise levied on the same quantity of typical beer undeniably exceeds the ratio obtained by comparing the alcoholic strength of the two beverages.

The *Government of the United Kingdom*, in its written observations on the replies by the Commission to the questions put by the Court, insists that the Commission has not shown that beer and wine are substitutable products or that the structure of United Kingdom excise duty affords protection, actual or potential, to beer.

The inconclusive nature of any of the standards suggested by the Commission is clear; in particular, alcoholic content is not the only nor the principal factor governing consumer preference; taste, quality and social attitudes are more important than strength and price. The incidence of duty per degree of alcohol contained in the same volume of fluid is therefore not relevant as a means of measuring the relationship between wine and beer.

The onus is on the Commission to prove that indirect protection of beer is a potential consequence of the duty on wine and that it has in fact had this effect; however, no figures relating to the effect on consumption have been

submitted to the Court which in any way demonstrate these propositions.

VI — Oral procedure

The *Commission*, represented by Anthony McClellan, the *Government of the Italian Republic*, represented by Ivo Maria Braguglia and the *Government of the United Kingdom*, represented by Peter Archer, presented oral argument at the hearing on 9 October 1979.

The Advocate General delivered his opinion at the hearing on 28 November 1979.

Decision

1 By application of 7 August 1978, the Commission brought an action under Article 169 of the EEC Treaty for a declaration that, by imposing on still light wine higher excise duty than on beer, the United Kingdom has failed to fulfil its obligations under the second paragraph of Article 95 of the EEC Treaty.

2 The Commission recalls that before its accession to the Community the United Kingdom levied a customs duty on imports of wine and beer. By Decision No 73/189/EEC of 27 February 1973 (Official Journal No L 197, p. 7) adopted in pursuance of Article 38 of the Act of Accesssion the Commission had authorized the United Kingdom to retain for an additional period until 1 January 1976 the fiscal element of the customs duties in question. Those duties were subsequently transformed into excise duties applicable without distinction as to the origin of the product. During that transitional stage, the rates of duty underwent changes, owing both to amendments to the tax legislation of the United Kingdom and to the accompanying introduction of value-added tax. The Commission considers that as a result of those successive amendments the rate of duty on wine is clearly higher than the level of the fiscal element authorized in 1973 and that it has moreover undergone a marked increase in comparison with the rate of duty applicable to beer. In view of the competitive relationship between those two products, the Commission considers that the tax system applied by the United Kingdom is discriminatory and that as such it is of such a nature as to afford indirect protection to national beer production.

3 Essentially, the Government of the United Kingdom does not call in question the facts put forward by the Commission, especially as regards the evolution in the rates of duty. It contests however that the application of the tax

provisions in question can be considered contrary to the requirements of the Treaty. First, it claims that wine and beer cannot be considered to be competing beverages and that there is therefore no substitution relationship, which is the condition for the application of the second paragraph of Article 95. Secondly, even supposing that it were accepted that the two beverages referred to may be substituted for one another, the Government of the United Kingdom maintains that the tax system applied to wine is not protective in nature under the second paragraph of Article 95.

4 As the arguments put forward by the parties have disclosed certain differences of opinion as to the scope and the interpretation of Article 95, the Court will as a preliminary examine those questions before discussing the submissions of the parties.

The interpretation of Article 95

5 The aim of Article 95 as a whole is to eliminate the adverse effects on the free movement of goods and on normal conditions of competition between Member States of the discriminatory or protective application of internal taxation. To this end, the first paragraph of Article 95 prohibits any tax provision whose effect is to impose, by whatever tax mechanism, higher taxation on imported goods than on similar domestic products. The second paragraph of Article 95 applies to the treatment for tax purposes of products which, without fulfilling that criterion of similarity, are nevertheless in competition, either partially or potentially, with certain products of the importing country.

6 In order to determine the existence of a competitive relationship under the second paragraph of Article 95, 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.

7 Where there is a competitive relationship between an imported product and national production characterized as stated above, the second paragraph of Article 95 prohibits tax practices "of such a nature as to afford indirect protection" to the production of the importing Member State.

8 It follows from the arguments put before the Court that the parties are not fully in agreement as to the conditions for the application of that provision to this case. The Commission has above all been concerned to show the difference between the tax burden imposed on the products in question. For its part, the Government of the United Kingdom points out that in the case of the second paragraph of Article 95 it is insufficient to establish that there is a difference in taxation; the Treaty requires that the protective effect of the tax system in question must be shown actually to exist. It considers however that this has not been shown.

9 It is true that the first and second paragraphs of Article 95 lay down different conditions as regards the characteristics of the tax practices prohibited by that article. Under the first paragraph of that article, which relates to products which are similar and therefore hypothetically broadly comparable, the prohibition applies where a tax mechanism is of such a nature as to impose higher taxation on imported products than on domestic products. On the other hand, the second paragraph of Article 95, precisely in view of the difficulty of making a sufficiently precise comparison between the products in question, employs a more general criterion, in other words the indirect protection afforded by a domestic tax system.

10 It is however appropriate to emphasize that the above-mentioned 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.

11 It is appropriate to appraise the facts of the case and the arguments put forward by the parties in the light of this interpretation of Article 95.

The question of competition between wine and beer

12 According to the Commission, there is a competitive relationship between wine and beer; in the case of certain consumers they may therefore actually be substituted for one another and in the case of others they may, at least

potentially, be so substituted. The two beverages in fact belong to the same category of alcoholic beverages which are the product of natural fermentation; both may be used for the same purposes, as thirst-quenching drinks or to accompany meals.

13 The Government of the United Kingdom contests this attitude. Without denying the common characteristics of the two beverages, it emphasizes that they are both the products of entirely different manufacturing processes. The alcoholic content of wine is three times (11° to 12°) that of beer (3° on average). The price structure of the two products is entirely different, since wine is appreciably more expensive than beer. As regards consumer habits, the Government of the United Kingdom states that in accordance with long-established tradition in the United Kingdom, beer is a popular drink consumed preferably in public-houses or in connexion with work; domestic consumption and consumption with meals is negligible. In contrast, the consumption of wine is more unusual and special from the point of view of social custom.

14 The Court considers that the Comission's argument is well-founded in that it is impossible to deny that to a certain extent the two beverages in question are capable of meeting identical needs, so that it must be acknowledged that there is a certain degree of substitution for one another. For the purpose of measuring the possible degree of substitution, it is impossible to restrict oneself to consumer habits in a Member State or in a given region. In fact, those habits, which are essentially variable in time and space, cannot be considered to be a fixed rule; 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 comply with them.

15 At the same time it is however necessary to recognize, together with the Government of the United Kingdom, the great differences between wine and beer from the point of view of the manufacturing processes and the natural properties of those beverages. Wine is an agricultural product which is the outcome of intensive farming methods and is closely linked to the properties of the soil and climatic factors; for that reason its characteristics are extremely variable, whereas beer, which is produced from raw materials less susceptible to risks of that nature, is at the same time better suited to

methods of industrial manufacture. The difference between the conditions of production leads, in the case of both products, 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.

16 These differences between the two products disclose an aspect of the problem which forms the prerequisite for any legal appraisal and which has not been taken into consideration. In fact, according to the arguments which it put before the Court, the Commission seems to admit by implication that in a normal competitive relationship wine and beer should be subject to the same tax burden. This is also the concept which seems to be enshrined in a proposal for a directive on a harmonized excise duty on wine which the Commission submitted to the Council in 1972 (Journal Officiel No C 43, p. 32). In the preamble to that proposal, the Commission found that there were "competition disturbances" owing to the absence of excise duty on wine in certain Member States. More recently, in the reply given by the Commission on 4 January 1978 (Official Journal No C 42, p. 35) to Written Question No 756/77 by Mr Pisoni, it produced a comparative table showing that in the wine-growing countries of the Community wine production is entirely exempt from purchase tax or subject to a purely nominal excise duty, whereas it seems that in the Member States in question beer is subject to tax. The Commission did not indicate what it considers to be the appropriate tax ratio between two products which it regards as competing. However, it seems that an attitude on this preliminary question in terms enabling the effects of a decision of the Court on the treatment for tax purposes of the two products throughout the Community to be measured with sufficient certainty is a prerequisite for the solution of the proceedings brought against the United Kingdom.

The method of comparison of the two products

17 In its reasoned opinion and when it lodged its application, the Commission emphasized above all the fact that by equal volume wine is subject in the United Kingdom to a tax burden approximately five times that of the burden imposed on beer. Since this criterion for comparison was keenly contested by the Government of the United Kingdom because the products involved have a different alcoholic strength, the Commission put forward other criteria for comparison: first, the alcoholic content by unit of volume which once more shows heavier taxation on wine of the order of 50%; secondly, the relationship between the fiscal element and the price of the goods offered to

consumers. The latter method of comparison also shows discrimination against wine. All these criteria of comparison are contested by the Government of the United Kingdom which considers that when relying simply upon volume it is necessary to compare the measures in which the two types of beverage are usually offered to consumers, in other words a "glass of wine" and a "pint of beer"; in fact, those two typical units of consumption carry a tax burden which is approximately identical.

18 At the end of the written procedure, the Court asked the parties to specify their own views and their observations on the other party's views as to the basis of calculation by which a comparison may be made between the tax burdens imposed on both products in question. The explanations supplied show that neither simply taking into consideration the volume of the two beverages nor a comparison between the typical units of consumption can provide a suitable basis for comparison. The same applies to a comparison based on the effect of the tax burden on the selling price of the two types of beverages in view of the fact that although it is relatively easy to ascertain an average price in the case of beer it is difficult to determine a representative basis for comparison in the case of wine, a characteristic of which is the wide range of prices.

19 Of the criteria put forward by the parties, the only factor which may enable an appropriate and somewhat objective comparison to be made consists therefore in the appraisal of the incidence of the tax burden in relation to the alcoholic strength of the beverages in question. By taking into consideration that criterion it may be ascertained that wine is at present subject in the United Kingdom to a tax which is approximately 50% higher than that on beer, assuming that the alcoholic strength of the beverages is respectively 11° to 12° and 3° to 3.7°. It therefore seems that the tax burden imposed on those two products is not equal although the disparity is, according to that criterion, smaller than it seemed from the Commission's first statements which were based on a simple comparison by volume. It is necessary to observe however that, according to the Italian Government, the difference is in fact greater since normal table wines, in other words precisely those which are likely to be in competition with beer, generally have an alcoholic strength of only 9° or 10°, which increases the margin of discrimination to approximately 125% or 100%.

20 In conclusion, and subject to the preceding observations on the ascertainment of an appropriate tax ratio between the two products, it may therefore be stated that according to the only criterion whereby an objective,

although imperfect, comparison can be made between the rates of tax applied to wine and beer, it seems that wine is subject in the United Kingdom to a tax burden which is relatively heavier than that imposed on beer.

The question of the protective nature of the tax system in question

21 In this respect, the Government of the United Kingdom claims that according to the second paragraph of Article 95 the Commission should have examined the question whether the tax system complained of affords protection to national beer production. Instead of showing this, the Commission has been exclusively concerned to show the disparity between the tax burden imposed on those two products. However, according to the Government of the United Kingdom, the tax system complained of did not prevent an increase in imports of wine during the period under consideration and the changes in the rates of duty have had no perceptible repercussions on the consumption figures, so that it is impossible to accept that the system of taxation applied is protective in effect.

22 For its part, the Commission claims that a comparison with the volume of wine sales on other markets, especially in the Benelux countries, shows that the marketing of the same product has been curbed in the United Kingdom by the effect of the tax system in question. However, it criticizes above all from this point of view the fact that, after its accession to the Community, the United Kingdom, when transforming the former customs duties into excise duties, gradually increased the tax applicable to wine by a proportion higher than the tax imposed on beer whereas previously wine had long benefited from a certain tax advantage and the two products were approximately on a par from the point of view of taxation at the time when the United Kingdom acceded to the Community. Comparing the rates of duty on the two products on 1 January 1973 and on the date on which the application was lodged, on the basis of data supplied by the Government of the United Kingdom itself, the Commission found in the case of wine a relative increase in the rate of duty of 102%, whereas in the case of beer it was only 59%.

23 According to the Commission, this development corresponds moreover to a trend found in several other Member States. In order to curb this development the Commission issued on 5 December 1975 Recommendation No 76/2/EEC concerning the taxation of wine (Official Journal 1976, No L 2, p. 13), drawing attention to the harmful repercussions of that development on the marketing of wines in the Community and calling upon

the Member States concerned to reduce appreciably the rates of excise duties introduced and at the least to forgo any increase in the duties currently levied. The United Kingdom took no notice of that recommendation. The Commission added during the procedure that it is concerned to see that, through the effects of exaggerated taxation applied in certain Member States, a product which is an ordinary consumer product in other Member States is thus branded as a "luxury product".

24 The Court considers that a comparison of the development of the two tax systems in question shows a protective trend as regards imports of wine in the United Kingdom. However, in view of the uncertainties remaining both as to the characteristics of the competitive relationship between wine and beer and as to the question of the appropriate tax ratio between the two products from the point of view of the whole of the Community, the Court considers that it is unable to give a ruling at this stage on the failure to fulfil its obligations under the Treaty for which the United Kingdom is criticized. It therefore requests the Commission and the United Kingdom to resume examination of the question at issue in the light of the foregoing considerations and to report to the Court within a prescribed period either on any solution of the dispute which they have reached or on their respective viewpoints, taking into consideration the legal factors arising from this judgment. The intervener will be able to present its observations to the Court at the appropriate time.

On those grounds,

THE COURT,

before giving judgment on the application lodged by the Commission for a declaration that the United Kingdom has failed to fulfil its obligations, hereby:

1. **Orders 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 will give final judgment after that date after examining the reports which have been submitted to it or in the absence of those reports.**

2. Reserves the costs.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 27 February 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 28 NOVEMBER 1979 [1]

Mr President,
Members of the Court,

In this procedure for a declaration that a Member State has failed to fulfil its obligations under the Treaty, the Commission claims that the United Kingdom of Great Britain and Northern Ireland has infringed the second paragraph of Article 95 of the EEC Treaty by imposing a higher excise duty on wine than on beer.

Articles 32 and 38 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties provide that customs duties on imports and customs duties of a fiscal nature between the Community as originally constituted and the new Member States themselves are to be progressively abolished between 1 April 1973 and 1 July 1977. Under Article 38 (2) of the Act concerning the Conditions of Accession and the Adjustments to the Treaties the new Member States retain the right to replace a customs duty of a fiscal nature or the fiscal element of any such duty by an internal tax which is in conformity with Article 95 of the EEC Treaty. Under Article 38 (3) of the Act concerning the Conditions of Accession and the Adjustments to the Treaties, where the Commission finds that in a new Member State there is serious difficulty in replacing a customs duty of a fiscal nature or the fiscal element of any such duty, it may authorize that State to retain the duty or fiscal element, provided the State abolishes it by 1 January 1976 at the latest.

In pursuance of that provision, the Commission, by Decision No 73/199/EEC of 27 February 1973 (Official Journal No L 197 of 17 July 1973, p. 7) *inter alia* authorized the United Kingdom to retain until 1 January 1976 for still light wines a protective element of up to £0.25 and a fiscal element of £1.4875 per gallon.

1 — Translated from the German.