In Case 104/79

Reference to the Court under Article 177 of the EEC Treaty by the Pretura [District Court], Bra, for a preliminary ruling in the action pending before that court between

PASQUALE FOGLIA, San Vittoria d'Alba,

and

MARIELLA NOVELLO, Magliano Alfieri,

on the interpretation of Articles 92 and 95 of the EEC Treaty

THE COURT

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

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

The Foglia undertaking (hereinafter referred to as "Foglia") trades in wines and alcoholic beverages.

On 1 February 1979 Mrs Novello requested Foglia to send certain cases of Italian liqueur wine as a gift to a person living in France. In giving her order Mrs Novello paid only the amount for the bottles of wine to be sent to France at the prices charged by Foglia for sale on its premises.

Since Foglia does not directly undertake the dispatch and transport of goods it had recourse to a specialist undertaking, Danzas S.p.A.

The costs of dispatch and transport were to have been paid on the basis of the bill made out by the consignor after delivery of the goods to the consignee.

At the time when the contract between Foglia and Mrs Novello was concluded the latter stated that she would bear only the costs of dispatch and transport and expressly excluded various charges, in particular both French and Italian taxes (cf. the observations of Foglia). When Foglia entrusted delivery of the goods to Danzas it had regard to that stipulation and expressly made it a condition of the contract for the carriage of the goods.

In the bill for the dispatch and transport of the goods sent by Danzas to Foglia on 31 March 1979 appears amongst other items that of taxes amounting to Lit 148 300. Foglia asked Mrs Novello for reimbursement of the amount of the bill which it had paid to Danzas.

Mrs Novello maintained that amongst the charges set out in the bill was a duty which she considered had been unlawfully paid to the French customs when the goods crossed the frontier and she refused payment, relying on the express stipulation in the contract.

By an initial writ served on 7 April 1979 Foglia summoned Mrs Novello to appear before the Pretura di Bra. That court found that there was a specific agreement restricting Mrs Novello's liability to those taxes authorized by the Community provisions in force guaranteeing the free movement of goods. It considered that both the existence of a liability to reimburse the charge paid by the defendant and the appropriateness of extending the scope of the case to include the joinder of Danzas depended upon an examination of the lawfulness or otherwise of the duties imposed in this matter by the French authorities.

By an order of 6 June 1979 which was received at the Court Registry on 29 June 1979, the Pretura di Bra stayed the proceedings and submitted the following preliminary questions to the Court of Justice:

1. Having regard to the provisions of the Treaty of Rome and the measures in implementation thereof must it be considered that the taxation applied in France to liqueur wines with or without a designation of origin, whether quality wines or not, imported from Member States of the EEC, such as the taxation of sweet wines having a naturally high alcoholic content with or without a designation of origin, imported from such countries, constitutes a serious discrimination under Article 95 of the Treaty in view of the fact that:

   Similar French liqueur wines, or at any rate wines in direct competition with the said wines are favoured under that system by much lower taxation than sweet wines having a naturally high alcoholic strength imported from Member States of the EEC;

Even certain liqueur wines imported from non-member countries in fact benefit in France from lower taxation than that applied to liqueur wines of Community origin.

2. Are such reductions in duty covered by Article 92 of the Treaty, and if so, subject to what limitations and conditions?

3. Must it be considered that a tax which is contrary to Community law is thereby unlawful and accordingly that the imposition of the higher duty on the imported products constitutes improper taxation and is therefore an undue payment?

4. Must it be considered that such unlawfulness may be relied upon throughout the entire Community before the national courts of all the Member States, even in the course of proceedings between private persons?

5. If the answer to Question 2 is in the affirmative:

   How are persons who have paid the heavier tax affected by the fact that it is not justified under Article 92 of the Treaty?

In giving the reasons on which its order making the reference was based the Pretura di Bra stated the following:

"In fact the so-called French natural sweet wines are undoubtedly liqueur wines as defined in paragraph 12 of Annex II to Council Regulation (EEC) No 337/79 of 5 February 1979 on the common organization of the market in wine since the said natural sweet wines, like very many others, are distinguished only by particular methods of preparation and by their production in a specified region. It must further be observed that the wines dispatched by the defendant should be classified under the above-mentioned Community definition of liqueur wines, the more so since certain of them are also distinguished by specific areas and production characteristics under that definition.

Another factor of no small importance is that the wines dispatched by the defendant were considered in France as liqueur wines and treated as such for tax purposes.

It must then be observed with regard to the excise duty that almost all liqueur wines of French production consist of products termed in France 'natural sweet wines' which are subject to the same taxation as normal wines (which is extremely advantageous compared to that of wines of high alcoholic content) and to an excise duty on the alcohol used in their preparation at a much lower rate than the duty imposed on the final total alcoholic strength of the imported liqueur wines.

It must then be recorded that on the other hand liqueur wines imported into France from Italy are liable to the excise duty on their total alcoholic content and moreover, at a rate much higher than that applicable to the alcohol added during the preparation of natural sweet wines, which means that the taxation on Italian liqueur wines imported into France is undoubtedly very much heavier than that on natural sweet wines.

Furthermore liqueur wines imported from Italy are subject to heavier taxation than is applied to certain well-known wines, equivalent to the Italian wines, with specific territorial origins, such as Greek and Portuguese wines which, although they come within the same tax system as liqueur wines, qualify for special reductions granted under bilateral international agreements as is provided for in Article 406 of the French Code des Impôts [Tax Code]."

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by Foglia, represented by Emilio Cappelli and Paolo De Caterini, of the Rome Bar, by Mrs Novello, represented by Giovanni Motzo, of the Rome Bar, by the Government of the French Republic, represented by Yves Cousin, acting as Agent, and by the Commission of the European Communities, represented by its Legal Adviser, Antonio Abate, acting as Agent.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. It nevertheless requested the parties in their oral observations to go further into the problem raised by the fourth question submitted by the Pretura di Bra.

II — Summary of the written observations submitted to the Court

With regard to the first question the *Commission* first of all outlines the French system of taxation on liqueur wines.

The system was established in 1898. Since then much legislation has been enacted amending it: At the present time following recent amendments enacted under Article 24 of the Finance Law No 78-1239 approved on 29 December 1978 (Journal Officiel de la République Française No 304 of 30 December 1978) the rates applied — on the basis of the pure spirit used in the manufacture of such wines — are as follows:

	Production Tax	Consumption Tax
(a) Vermouths and aromatized wines	FF 710	FF 4 270
(b) Liqueur wines without a registered designation of origin	FF 710	FF 4 270
(c) Liqueur wines with a registered designation of origin, port, madeira and Samos wines and Samos muscat	—	FF 4 270
(d) Sparkling wines and liqueur wines known as "natural sweet wines" [1]	—	FF 1 790

1 — Liqueur wines known as "natural sweet wines" are covered by the tax system for wines (the excise duty is very low, FF 22.50 per hectolitre of wine, since they are treated as a finished product and the alcoholic content is disregarded).

The Commission states that practically all the French production of liqueur wines is covered by the tax category at (d) amounting to FF 1 790 (consumption tax) per hectolitre of pure spirit added during the preparation of such wines.

On the other hand liqueur wines imported from other Member States are covered by the tax category at (b), that is to say, FF 710 for the production tax and FF 4 270 for the consumption tax imposed on the basis of the hectolitres of spirit therein contained (natural spirit and added spirit). Such products do not in fact qualify for the more advantageous category reserved for French wine with regard to the excise duty of FF 22.50 imposed on the basis of the number of hectolitres of the finished product.

Consequently, liqueur wines imported from other Member States are at a clear disadvantage in tax matters since they bear an increase in the duty amounting in all to FF 3 190 per hectolitre of spirit content (natural spirit and spirit added in the course of processing liqueur wines).

Furthermore, with specific regard to production tax, liqueur wines imported from other Member States are at a disadvantage even compared to certain similar products imported into France from non-member countries (for example port, madeira and Samos wines and Samos muscat). In accordance with bilateral international agreements concluded with Portugal and Greece respectively, such wines are treated as equivalent to French liqueur wines with a registered designation of origin; they thus qualify for total exemption from the production tax as set out at (c) of the above table.

In order to achieve this result French legislation resorted to sub-categories of liqueur wines and used them for tax purposes. The most important of those sub-categories is that of *natural sweet wines* governed by the Code Général des Impôts [General Tax Code] (cf., for example, Articles 416, 417 and 418).

The products in question constitute liqueur wines with a total alcoholic content (natural spirit plus added spirit) not less than 14% obtained from grape must or from wine by the addition of pure spirit. They must be made from vines having an annual yield of not more than 40 hectolitres per hectare.

The same legislation also provides for natural sweet wines having a registered designation of origin. That designation is reserved exclusively for French liqueur wines produced in the following four departments: Pyrénées-Orientales, Aude, Hérault and Vaucluse. Such wines must have a total alcoholic content of not less than 21.5% and must be obtained from grap must or wine having a natural alcoholic content of not less than 14%. The processing is invariably carried out by the addition of pure spirit.

The liqueur wines originating in the above-mentioned departments (706 622 hectolitres produced in 1977) constitute almost the entire French production.

French legislation, by adopting the criterion of the registered designation of origin, has created protection both geographic and fiscal for its domestic products. Consequently liqueur wines imported into France from other Member States cannot qualify for such preferential tax treatment although they have been manufactured by the same process and display the same characteristics. The Commission emphasizes that such wines, just like the French liqueur wines, have a natural alcoholic content not less than 14%.

With regard to the Community system for liqueur wines the Commission observes that the definition of liqueur wines is contained in 12 of Annex II to Council Regulation (EEC) No 337/79 of 5 February 1979 (Official Journal 1979 L 54, p. 1) on the common organization of the market in wine which replaced Regulation No 816/70.

That definition classifies as liqueur wines products having a natural alcoholic content of not less than 12%. The processing takes place by adding pure spirit of vinous origin and/or concentrated grape must or by concentration through cooling.

Liqueur wines are classified under tariff heading 22.05 C of the Common Customs Tariff. Additional Note 4 (c) inserted into Chapter 22 of the Common Customs Tariff (Official Journal 1978 L 335, p. 105) contains a definition of liqueur wines which is almost identical to that contained in Regulation No 337/79.

Pursuant to the fifth indent of the third subparagraph of Article 17 (1) and subsequent paragraphs of the said Regulation No 337/79 the Community production of liqueur wines obtains special protection against similar competing products from non-member countries. Thus the prices charged by exporters from non-member countries must comply with the reference prices fixed each year by the Community; if not a compensatory amount is applied to imports.

This system is applied to all liqueur wines of the Community and does not take account af special features of the various national legal systems.

It follows from the foregoing that the definition of liqueur wines adopted in the Community provisions is wider than that applied in France. Since the definition in question is a Community not a national one it of necessity disregards the criterion concerning the quality or designation of origin and is based on the characteristic feature of liqueur wines, namely the addition of pure spirit to a natural wine.

According to the Commission the conclusion must thus be that, as regards Community law, the products known as natural sweet wines are none other than liqueur wines — even though they are produced in France — and correspond to the definition set out in the abovementioned Community provisions.

The foregoing considerations leave no doubt as to the similarity of French and Italian liqueur wines. In this matter there is a "similarity *ex lege*" confirmed by Regulation No 337/79.

Member States may not establish or use for tax purposes sub-categories — within the framework of similar products — unless they comply with the prohibition of discrimination for tax purposes against similar or competing products imported from other Member States.

The French taxation in question fails to fulfil that condition. On the contrary it employs subjective criteria, imposed unilaterally, more restrictive than the criteria laid down by Council Regulation No 337/79 and as such at variance with Community law.

It is true that the Member States may define for domestic purposes the conditions governing the issue of a designation of quality or origin for their liqueur wines but they may not employ such classifications — which correspond to the needs of commercial protection of the products and of the safeguarding of the interests of consumers — in order to create distinctions in tax treatment (judgment of 10 October 1978 in Case 148/77 Hansen [1978] ECR 1787).

From as early as 1968 the Commission has been vainly endeavouring to persuade the French authorities to extend the more favourable tax treatment reserved for domestic liquer wines to similar products imported from other Member States. In 1975 it instituted proceedings under Article 169 of the Treaty for failure to fulfil an obligation. That procedure was subsequently brought up to date in 1978. When the Commission found that liqueur wines imported into France from other Member States continued to suffer discrimination in matters of taxation it issued to the French Republic on 14 August 1979 the reasoned opinion provided for in Article 169.

The Commission states that it has good reason to believe that the French law in question will soon have the amendments called for incorporated into it.

In conclusion the Commission considers that:

— without prejudice to the requirements to which the objectives of the procedure based on Article 177 of the Treaty give rise (in accordance with which there must be no express reference to the Member State whose legislation creates problems concerning the interpretation of Community law) the *first question* should be answered in the affirmative since the products in question constitute liqueur wines within the definition contained at 12 of Annex II to Council Regulation No 337/79; they constitute similar products for the purposes of the first paragraph of Article 95 of the Treaty and the system of duties applied to them thus may not be discriminatory;

— the reply to be given to the *second question* should be in the negative since the discrimination described comes within the scope of Article 95 (cf. in this matter paragraph 14 of the above mentioned judgment in Case 148/77 *Hansen*;

— the *third question* may be answered in the sense that it is for the national court to apply the decision given by the Court of Justice under Article 177 in such a way as to ensure complete protection for the rights of individuals in particular with regard to the reimbursement of taxes wrongly paid (because such taxes are contrary to the Community rules) in accordance with the general principles in force in the national legal system (cf. the judgments of 16 December 1976 in Cases 33/76 *Rewe* and 45/76 *Comet* [1976] ECR 1989 and 2043);

— the reply to the *fourth question* should be in the affirmative;

— the *fifth question* is devoid of purpose in view of the reply given to the second question.

Foglia recalls first of all that it may not in any case be adversely affected by the outcome of the ruling on interpretation and its consequences for the lawfulness of the payment of the duty. Two possibilities may be envisaged: one in which the duty was lawfully imposed, in which case Mrs Novello must reimburse it to Foglia; the other in which the duty is unlawful. In that case it will have to be borne by the carriers, Danzas, who failed to exercise due caution and paid it. Another and better course would be for it to claim repayment of the duty from the French financial authorities and, if they refused, to take proceedings for recovery of the amount wrongly paid.

With regard to the first question it observes that Regulation No 337/79 does not make any distinction between the various liqueur wines. On the other hand the relevant French legislation applies different treatment in the form of tax discrimination.

First, the "natural sweet wines" are covered by the tax provisions applicable to wines (consumption tax of FF 1 790 per hectolitre and excise duty of FF 22.50 per hectolitre) whilst liqueur or indeed non-liqueur wines, "quality wines produced in specified regions" (quality wines p.s.r.) with a total alcoholic strength of not less than 15% imported from other Member States, are subject to the more burdensome provisions applicable to spirits (consumption tax of FF 4 270 and production tax of FF 710 per hectolitre).

Secondly, special treatment is reserved for Pineau des Charentes (a liqueur wine with a registered designation of origin which nevertheless is not one of the natural sweet wines) and for the wines of two non-member countries, Portugal and Greece, namely port, madeira and Samos muscat. The above-mentioned products are in fact exempted from the production tax of FF 710 per hectolitre of spirit.

A third case of different tax treatment exists with regard to the French non-liqueur quality wines produced in specified regions which are naturally sweet and have a total actual alcoholic strength of not less than 15% and not more than 18 % (for example, Sauternes) and the non-liqueur Italian quality wines produced in specified regions which are naturally sweet and have an identical degree of alcoholic strength and are produced by similar methods (for example, moscato di Pantelleria).

The former are liable only to the excise duty on wine of FF 22.50 per hectolitre of the finished product (this is furthermore the general excise duty on wines) whilst the latter are required to pay the consumption tax of FF 4 270 and the production tax of FF 710 per hectolitre. The same difference recurs finally in the treatment of French unsweetened table wines having an actual alcoholic strength of between 15 and 17% and Italian liqueur wines of almost identical composition.

Article 95 of the Treaty consists of three distinct paragraphs of which only the first two are relevant to this case. The first prohibits Member States from imposing "directly or indirectly", on the products of other Member States any "internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products". The second paragraph extends the prohibition to "any internal taxation of such a nature as to afford indirect protection to other products".

The subject-matter of the first paragraph of Article 95 is more restricted (it relates exclusively to "similar" products) but lays down a very stringent prohibition, whilst the second paragraph affects a wider group of products but, for that very reason, may be applied only where specific conditions are fulfilled. Such conditions can only be the "protectionist aim" of the taxation and the actual and particular competitive or substitutable character of the products. This is so because, since the situations in question call in principle for less stringent protection than that provided for "similar" products, it is necessary to establish in each case whether, by reason of their objectives and of the characteristics of the products in question, the contested taxation actually and significantly affects the free movement of goods.

In this case the similarity of the products in question is in fact indicated by the provisions of Regulation No 337/79. Furthermore, from the point of view of the consumer, all such wines are similar because the actual composition is identical and uniform.

However, if there were adopted as a criterion not the similarity but simply the competitive nature of the products in question, the difference in treatment set out above benefiting French wines must be based at least on reasons which exclude any protectionist intent. That does not appear to follow from a system which on the contrary has as its fixed objective the protection of national products.

Accordingly, the difference in the treatment reserved for French products (or indeed that for products of non-member countries) in relation to those of other Member States appears difficult to explain other than by an intention, in this case too, to favour specified domestic products at the expense of products of other countries which have wholly similar characteristics.

According to Foglia the use of registered designations of origin or of quality for the purpose of applying different tax treatment appears inadmissible above all when it results in an advantage for the domestic products having a particular designation of origin or quality and in a penalty on imported products which likewise have specified designations of origin or quality.

However if the tax system in question results in an arrangement the objective whereof is the resolute support and promotion of almost all of the national production it in fact displays the characteristics of a protectionist measure against competition from imported products.

With regard to the second question Foglia observes that any loss of revenue resulting from exemption from taxes must be considered from the point of view of the public finances as expenditure since that concept frequently coincides with the concept of support.

Under Article 59 of Regulation No 337/79, Articles 92, 93 and 94 of the Treaty apply to the production of and trade in the products in question "save as otherwise provided in this regulation". Accordingly a sufficient reply to the question asked consists in recalling the judgment of 13 March 1979 and the relevant opinion in Case 91/78 *Hansen* [1979] ECR 935.

With regard to the third question Foglia observes that the case-law of the Court of Justice shows that financial charges imposed in Member States in breach of the Community provisions constitute an unlawful charge and entitle private persons to claim reimbursement in full.

With regard to the fourth question Foglia maintains that it originates in the fact that the tax provisions of another

Member State of the Community are at issue in proceedings between Italian parties before an Italian court.

Viewed in that light it is clear that the question can only be answered within the framework of Article 177 of the EEC Treaty and in accordance with the settled case-law as to the effect of judgments of the Court of Justice given pursuant to that provision.

Regardless of the nationality and nature of the national court making the reference and of the parties to the proceedings before it the judgment delivered by the Court of Justice under Article 177, and accordingly within the limits of its jurisdiction laid down by that provision, is fully binding in its effect for the purposes of settling in the main action the question asked.

The last question envisages a ruling to the effect that aid in the form of a reduction of, or exemption from, taxation is incompatible with Community law according to the procedures prescribed in the said Articles 92, 93 and 94.

Foglia, referring to Case 78/76 *Steinike* (judgment of 22 March 1977 [1977] ECR 595), maintains that a private person may challenge the compatibility of an aid with Community law before national courts where the provisions referred to in Article 92 have been applied by the acts of a general nature provided for in Article 94 or by specific decisions under Article 93 (2).

Mrs Novello, the defendant in the main action, makes the same analysis of the discrimination alleged by the plaintiff in the main action.

She maintains that "natural sweet wines" are liqueur wines fortified by spirit. That argument is confirmed by French case-law. It is a feature of the French tax system that a privileged position is reserved for national products by means of varied exemptions from, or reductions in the consumption tax and the production tax.

The criterion of the designation of origin and of the high quality accorded to products coming exclusively from a clearly-defined zone must be considered from the outset as discrimination for the purposes of taxation.

In fact only on the basis of purely formal characteristics can it be claimed that the French tax system attributes to French liqueur wines their own distinct character. The formally different character makes it possible to bring the wines in question under a special sub-category of the tax classification and to rule out the "similarity" or identity of the products which constitutes the condition for the application of the uniform treatment required by the Community provisions in force. Mrs Novello refers in this connexion to Case 148/77 (*Hansen* [1978] ECR 1787, at p. 1808) and to Case 91/78 (Hansen [1979] ECR 935).

Furthermore the measures in dispute show clearly the existence of a State aid properly so-called in the form of an incentive exclusively for specified French products. However the abovementioned judgment in Case 148/77 shows that the protection granted by a Member State for products through the very precise definition of their place of origin and by conferring upon them a purely formal identity may not be intended to prevent the similar products of other Member

States obtaining a share of the market in question on equal terms.

The *French Government* observes that the Italian wines, which attain a high alcoholic strength without the addition of alcohol, do not correspond either to the Community definition of wine or to the French definition since they have a total alcoholic strength in excess of 15%. They accordingly cannot be considered as wines and since they compete directly with other spirits to which alcohol has been added they must necessarily come under the same tax system for such products, which applies *inter alia* to liqueur wines.

In France the consumption tax and the production tax are imposed on liqueur wines. Nevertheless French liqueur wines having a registered designation of origin and certain foreign liqueur wines which are treated as their equivalent under the provisions of agreements (port, madeira and Samos muscat) only bear the consumption tax.

This relief is justified by the desire to maintain fair conditions of competition between products without particular characteristics and subject to very few rules and other products having a specified origin and subject to strict requirements as to production which ensures high quality but at a higher cost price.

The very general definition of liqueur wines contained in the Community system, which applies to products whose qualities, conditions of production and tastes are very different, precludes by its very generality the satisfactory attainment of that fairness in matters of taxation.

In this connexion although in the absence of any international agreements on the equal treatment of French and foreign liqueur wines, it is correct that no Community liqueur wine has hitherto met the requirements of the system devised for liqueur wines having a registered designation of origin, the French Government has always declared its readiness to bring within that system the liqueur wines of Member States which establish comparable conditions of production with regard to the varieties of vines, limits of the areas of production and the yield per hectare, together with equivalent methods of supervision and which can thus claim to be treated as equivalent to French wines.

The French Government remarks that the Finance Law of 1979 abolished the reduced rate of the consumption tax introduced by the Finance Law of 1977 in favour of liqueur wines having a registered designation of origin.

It is clear from the foregoing observations that the taxation applied in France to liqueur wines having a registered designation of origin is not contrary to Article 95 of the Treaty.

With regard to natural sweet wines the French Government recalls the attitude of the Commission. The Commission has stated that the particular tax system applicable to natural sweet wines constitutes an aid and that it is accordingly not covered by the provisions of Article 95. The Commission considers that it therefore falls under Article 93 (1) of the Treaty. (Answer by the Commission to Written Question No 78/69 by Mr Vredeling, Journal Officiel 1969 C 102, p. 2).

In this connexion the French Government observes that the provisions of the Treaty concerning aids do not create for private persons rights which the national courts are bound to uphold.

Natural sweet wines are defined very precisely in Article 416 of the Code Général des Impôts. According to that provision natural sweet wines are obtained from the must of four prescribed varieties of vine having a maximum yield of not more than 40 hectolitres per hectare with a natural alcoholic strength of not less than 14% and with an addition of spirit amounting to between 5 and 10% by volume. In fact the average yields actually found are between 25 and 30 hectolitres per hectare.

This means that natural sweet wines are basically different from products of an industrial nature for which the yield may be as much as 150 hectolitres per hectare.

The French Government states that in 1978 the French delegation to the group of experts at the Council put forward a suggestion to reflect this difference by graded rates in the excise duty on alcohol which prompted the legal departments of the Commission and of the Council to issue an opinion. According to that opinion such graded rates could only escape the provisions of Article 95 of the Treaty:

— if they were based on Community provisions defining a category of products possessing such characteristics that they might be considered dissimilar to other wine-based spirits; and

— if that category were not restricted exclusively to French products, the application of the system remaining of course subject to the appraisal of the Court of Justice.

III — Oral procedure

At the hearing on 12 December 1979 the plaintiff in the main action, represented by Emilio Cappelli, of the Rome Bar, the defendant in the main action, represented by Giovanni Motzo, of the Rome Bar, the Government of the French Republic, represented by N. Museux, acting as Agent, and the Commission of the European Communities, represented by Antonio Abate, acting as Agent, submitted their oral observations.

The Advocate General delivered his opinion at the sitting on 23 January 1980.

Decision

1 By an order of 6 June 1979 which was received at the Court on 29 June 1979 the Pretura die Bra referred to the Court pursuant to Article 177 of the EEC Treaty five questions on the interpretation of Articles 92, 95 and 177 of the Treaty.

2 The proceedings before the Pretura di Bra concern the costs incurred by the plaintiff, Mr Foglia a wine-dealer having his place of business at Santa Vittoria d'Alba, in the province of Cuneo, Piedmont, Italy in the dispatch to Menton, France of some cases of Italian liqueur wines which he sold to the defendant, Mrs Novello.

3 The file on the case shows that the contract of sale between Foglia and Novello stipulated that Novello should not be liable for any duties which were claimed by the Italian or French authorities contrary to the provisions on the free movement of goods between the two countries or which were at least not due. Foglia adopted a similar clause in his contract with the Danzas undertaking to which he entrusted the transport of the cases of liqueur wine to Menton; that clause provided that Foglia schould not be liable for such unlawful charges or charges which were not due.

4 The order making the reference finds that the subject-matter of the dispute is restricted exclusively to the sum paid as a consumption tax when the liqueur wines were imported into French territory. The file and the oral argument before the Court of Justice have established that that tax was paid by Danzas to the French authorities, without protest or complaint; that the bill for transport which Danzas submitted to Foglia and which was settled included the amount of that tax and that Mrs Novello refused to reimburse the latter amount to Foglia in reliance on the clause on unlawful charges or charges which were not due expressly included in the contract of sale.

5 In the view of the Pretura the defences advanced by Novello entail calling in question the validity of French legislation concerning the consumption tax on liqueur wines in relation to Article 95 of the EEC Treaty.

6 The attitude of Foglia in the course of the proceedings before the Pretura may be described as neutral. Foglia has in fact maintained that he could not in any case be liable for the amount corresponding to the French consumption tax since, if it was lawfully charged, it should have been borne by Novello whilst Danzas would be liable if it were unlawful.

7 This point of view prompted Foglia to request the national court to increase the scope of the proceedings and to summon Danzas as a third party having an interest in the action. The court nevertheless considered that before it could give a ruling on that request it was necessary to settle the problem whether the imposition of the consumption tax paid by Danzas was in accordance with the provisions of the EEC Treaty or not.

8 The parties to the main action submitted a certain number of documents to the Pretura which enabled it to investigate the French legislation concerning the taxation of liqueur wines and other comparable products. The court concluded from its investigation that such legislation created a "serious discrimination" against Italian liqueur wines and natural wines having a high degree of alcoholic strength by means of special arrangements made for French liqueur wines termed "natural sweet wines" and preferential tax treatment accorded certain French natural wines with a high degree of alcoholic strength and bearing a designation of origin. On the basis of that conclusion the court formulated the questions which it has submitted to the Court of Justice.

9 In their written observations submitted to the Court of Justice the two parties to the main action have provided an essentially identical description of the tax discrimination which is a feature of the French legislation concerning the taxation of liqueur wines; the two parties consider that that legislation is incompatible with Community law. In the course of the oral procedure before the Court Foglia stated that he was participating in the procedure before the Court in view of the interest of his undertaking as such and as an undertaking belonging to a certain category of Italian traders in the outcome of the legal issues involved in the dispute.

10 It thus appears that the parties to the main action are concerned to obtain a ruling that the French tax system is invalid for liqueur wines by the expedient of proceedings before an Italian court between two private individuals who are in agreement as to the result to be attained and who have inserted a clause in their contract in order to induce the Italian court to give a ruling

on the point. The artificial nature of this expedient is underlined by the fact that Danzas did not exercise its rights under French law to institute proceedings over the consumption tax although it undoubtedly had an interest in doing so in view of the clause in the contract by which it was also bound and moreover of the fact that Foglia paid without protest that undertaking's bill which included a sum paid in respect of that tax.

11 The duty of the Court of Justice under Article 177 of the EEC Treaty is to supply all courts in the Community with the information on the interpretation of Community law which is necessary to enable them to settle genuine disputes which are brought before them. A situation in which the Court was obliged by the expedient of arrangements like those described above to give rulings would jeopardize the whole system of legal remedies available to private individuals to enable them to protect themselves against tax provisions which are contrary to the Treaty.

12 This means that the questions asked by the national court, having regard to the circumstances of this case, do not fall within the framework of the duties of the Court of Justice under Article 177 of the Treaty.

13 The Court of Justice accordingly has no jurisdiction to give a ruling on the questions asked by the national court.

Costs

14 The costs incurred by the Government of the French Republic and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by the Pretura di Bra, by an order of 6 June 1979, hereby rules:

The Court of Justice has no jurisdiction to give a ruling on the questions asked by the national court.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 11 March 1980.

A. Van Houtte

Registrar

H. Kutscher

President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 23 JANUARY 1980

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Pretore of Bra, in Piedmont. The case was presented to us as raising, in the main, questions of a familiar kind as to the interpretation of Article 95 of the EEC Treaty and as to the relationship between that Article and Articles 92 and 93 of the Treaty. In my opinion it raises *in limine* questions of more general importance as to the scope af Article 177 of the Treaty.