REPORT FOR THE HEARING
delivered in Case 356/85 *

I — Facts and written procedure

1. By Royal Decree No 20 of 20 July 1970 laying down the rates of value-added tax and defining the goods and services to which the rates apply (*Moniteur belge* of 31. 7. 1970), as amended by the Royal Decrees of 25 March 1977 (*Moniteur belge* of 26. 3. 1977) and 16 November 1982 (*Moniteur belge* of 20. 11. 1982), the Kingdom of Belgium subjects the supply of certain beverages intended for private consumption, in particular wine of fresh grapes, to value-added tax at the rate of 25%. Beer, in contrast, is subject to value-added tax at the rate of 19%.

Belgium does not produce wine but has a large brewing industry.

2. By a letter dated 22 October 1983, the staff of the Commission drew the attention of the Belgian authorities to the fact that since wine and beer are competing products the imposition of a lower rate of value added tax on beer than on wine of fresh grapes constituted an infringement of the second paragraph of Article 95 of the EEC Treaty.

Since it received no reply to that communication, the Commission, by a letter dated 20 June 1984, requested the Belgian Government to submit its observations regarding the alleged infringement.

By a letter dated 1 August 1984 the Belgian Government replied in essence that the difference in tax rates at issue has little effect on retail prices and consequently is not the determining factor in the consumer's choice. Moreover, developments in the patterns of consumption of wine and beer in Belgium show that the difference in tax rates does not have the effect of restraining the consumption of wine and encouraging the consumption of beer.

On 16 May 1985 the Commission delivered a reasoned opinion in accordance with the first paragraph of Article 169 of the EEC Treaty setting out the above allegation and requesting the Kingdom of Belgium to adopt the measures necessary to comply with the opinion within one month.

Since no action was taken in response to the reasoned opinion, the Commission brought this action by an application dated 15 November 1985.

3. The application was lodged at the Court Registry on 19 November 1985.

By an order dated 29 April 1986 the Court granted the French Republic leave to intervene in support of the Commission's submissions.

Upon 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.

II — Conclusions of the parties

The *Commission* claims that the Court should:

1. Declare that by introducing and applying a higher rate of value-added tax to wine

* Language of the Case: French.

of fresh grapes, an imported product, than to beer, a domestic product, the Kingdom of Belgium has failed to fulfil its obligations under Article 95 of the EEC Treaty;

2. Order the Kingdom of Belgium to pay the costs.

The *Kingdom of Belgium* contends that the Court should:

Declare the Commission's application unfounded.

III — Submissions and arguments of the parties

1. The *Commission* points out that Article 95 of the Treaty is intended to ensure the free movement of goods between Member States according to normal conditions of competition by eliminating all forms of protection which may result from the imposition of discriminatory domestic taxes on products of other Member States and by ensuring that domestic taxes are completely neutral with regard to competition between national products and imported products. Once it is established that there is a difference in taxation the prohibition contained in the second paragraph of Article 95 is applicable provided the two products are in competition (judgment of 4 April 1968 in Case 27/67 *Fink-Frucht* v *Hauptzollamt München-Landsbergerstraße* [1968] ECR 223), and there is no need for the protective effect to be shown statistically in each case (judgment of 27 February 1980 in Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417).

The Commission considers that the aforementioned elements are present in this case. In the first place wine is subject in Belgium to a higher rate of value-added tax than beer (25% as opposed to 19%), and there is no wine production in Belgium. Secondly, the Court has established in a line of decisions that wine and beer are competing products (judgment of 27 February 1980, referred to above; judgment of 12 July 1983 in Case 170/78 *Commission* v *United Kingdom* [1983] ECR 2265).

It argues that the Belgian Government's view to the effect that the difference in tax rates between wine and beer has only a slight effect on retail prices and is therefore not the determining factor in the consumer's choice must be rejected. Since it is established that the two products are in competition any difference in rates of taxation imposed on the same basis of assessment, in this case the value added, is contrary to the second paragraph of Article 95. Moreover, a difference of 6% is certainly capable of affecting the consumer's choice.

In that connection the Commission states that the consumption of beer in Belgium reached a peak in 1973 and has been falling since then. In contrast, the consumption of wine has tripled during the last 20 years. However, the increase in the consumption of wine has slowed down during the past five years and in 1982 and 1983 consumption levelled off. It may therefore be suggested that the gradual increase in the consumption of wine was checked and finally brought to an end by the imposition of a higher rate of tax on wine. In any event, it cannot be denied that the consumption of wine might well have increased further if the rate of value-added tax on wine had not been raised.

Moreover, the Commission states that the Belgian Government's argument that wine, unlike beer, is a luxury product cannot be accepted. It states, in the first place, that it is precisely as a result of excessive taxation in certain Member States that a product which is part of daily consumption in some

Member States may be given the character of a 'luxury product' in other Member States. Moreover, from the point of view of the interpenetration of markets the treatment as a 'luxury' of something which is an everyday product in another Member State has a dissuasive effect on the consumer's choice. Finally, disregarding very high quality wines and exceptional vintages, which represent only a small fraction of purchases, there is in Belgium a range of ordinary and superior quality wines and a corresponding range of beers for ordinary consumption and special beers known as 'luxury' beers, the prices of which also vary according to their quality.

According to the Commission the Belgian Government is also wrong to conclude that only light and cheap wines are in competition with beer within the meaning of the second paragraph of Article 95. The judgment of 12 July 1983, which merely stated that the competitive relationship between beer and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say the lightest and cheapest varieties, contains no justification for that view. That judgment relates to all light wines of fresh grapes. The Belgian Government's view is all the more erroneous, in the opinion of the Commission, inasmuch as Belgium produces 300 different types of beer, several of which are sold at a price of more than BFR 100 per litre, whereas the most common wines are sold at a lower price.

Finally, the Commission refers to its proposal of 24 April 1985 for a directive laying down certain rules on indirect taxes which affect the consumption of alcoholic drinks (Official Journal 1985, C 114, p. 6). Article 3 (1) of the proposal states that, within a Member State, the same rate of value-added tax is to be applied to still wine and to beer.

2. The *French Government* refers to the judgment of 27 February 1980, according to which the aim of Article 95 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 that end the second paragraph of Article 95 applies to the treatment for tax purposes of products which, without fulfilling the criteria of similarity, 'are nevertheless in competition, either partially or potentially, with certain products of the importing country'. The judgment of 12 July 1983 established that such a competitive relationship exists between wine and beer.

The Member States are of course free to lay down tax arrangements which differentiate between certain products on the basis of certain objectives. However, those arrangements must be such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products (judgment of 27 May 1981 in Joined Cases 142 and 143/80 *Amministrazione delle Finanze dello Stato* v *Essevi and Salengo* [1981] ECR 1413).

The French Government considers, in conclusion, that the imposition of a uniform rate of tax on wine, an imported product, which is markedly higher than the uniform rate imposed on beer, a product produced in Belgium, has the effect of protecting domestic products and therefore constitutes an infringement of the prohibition of fiscal discrimination contained in Article 95.

3. The *Belgian Government* explains in the first place that the rates of value-added tax on wine and beer are different only in connection with their supply to the consumer. With regard to consumption in public premises (hotels, restaurants, cafés, etc.), the rates of tax on wine and beer are identical, namely 17%. In 1977, when the

rate of tax on wine was increased from 14 to 25%, the rate applicable to the supply of numerous types of services necessarily provided by domestic businesses (for example hairdressers, beauticians, hotels, restaurants and cafés) was also increased. That shows that the reason for the increase was solely budgetary and was not based on protectionism. Moreover, since 1977 the rate of value-added tax on wine has remained constant whilst the rate on other beverages, in particular beer, has increased. It follows that since 1977 the difference in the rate of value-added tax on beer and on wine has been constantly reduced.

Secondly, the Belgian Government states that the second paragraph of Article 95, which relates to competing products, does not apply to every difference in tax rates but only to those differences which have the effect of protecting domestic products. That provision therefore requires an assessment from an economic point of view of the possible effects of the domestic tax in question; such an assessment must include the question whether the level of the tax is in fact likely to have the protective effect prohibited by the Treaty.

With regard to the question whether or not the legislation at issue has a protective effect, it is necessary, in the Belgian Government's view, to determine first of all the field in which there may be free competition between wine and beer, then the degree of competition between the two products, and finally the effect which differential taxation may have on the consumer's choice.

With regard to the field in which the two products compete, it follows from the judgment of 12 July 1983 that only light and cheap wines compete with beer. It was recognized in that judgment that, in view of the substantial differences in the quality and, therefore, in the price of wines, the competitive relationship between beer, a popular and widely consumed beverage, and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest wines. Consequently, there is no competitive relationship between wine in general and beer in general but merely between the lightest and cheapest wines on the one hand and beer on the other.

With regard to the degree of competition between wine and beer, the Belgian Government emphasizes that, generally speaking, the degree of competition between two products varies according to their nature, consumer habits and price. Belgium is a country where beer is a traditional product. Even if the consumption of beer has given way a little in recent years to the consumption of wine and spirits, the consumption of beer still forms an integral part of the habits and customs of the Belgian population. Consequently, the nature of the product and consumer habits mean that competition between wine and beer is very limited.

The competitive relationship is reduced even further by reason of the significant price difference between the two products. The average price of a litre of ordinary wine, inclusive of all taxes, is about BFR 125 (BFR 100 exclusive of value-added tax) whereas the average price of a litre of beer is about BFR 29.75 (BFR 25 exclusive of value-added tax). The price of wine is therefore, on average, four times higher than the price of beer.

In that connection it is not possible, according to the Belgian Government, to take into account luxury beers manufactured on a small scale and in small quantities which therefore do not represent a significant share of the market. Similarly, the competitive relationship between wine and beer cannot be extended to all light wines of fresh grapes, including very high quality wines and exceptional vintages, since the latter represent only a small fraction of purchases. Furthermore, it is not possible to compare beer of high gastronomical value with wine of mediocre quality; to do so would be to compare the most expensive beer on the Belgian market with the cheapest wines on that market.

With regard to the effect on the consumer's choice of a difference in rates of taxation on beer and wine, the Belgian Government points out that merely two-thirds of the total consumption of wine, that is to say consumption other than in hotels, restaurants and cafés, is taxed at a rate which is higher than the rate for beer. The difference between the rate of tax on wine and on beer is therefore not 6% (25% — 19%) but only, from a macroeconomic point of view, two-thirds of 6%, that is to say 4%. That difference in tax rates has only a slight effect on prices.

In any event, since the two products differ as regards their composition and production costs, it is difficult to determine at what point any effect on selling prices causes consumer habits to change. At most a comparison enables the proposition to be advanced that if the price of wine were the same as or lower than the price of beer there would certainly be a change in consumer habits. However, that is not the position in this case since, even exclusive of value-added tax, wine costs on average four times as much as beer.

Consequently, the Belgian Government states that the only method for assessing the protective effect of differential taxation is to compare the average selling price of the two products, inclusive of value-added tax, first when two different rates are applied to them and secondly when a single rate is applied to them, in this case 25%. If that is done the price difference between wine and beer is reduced by only BFR 1.50 (BFR 31.25 in comparison with BFR 29.75 per litre of beer against BFR 125 per litre of wine). It follows that even if both products are subject to the same rate of tax the price difference between them is still BFR 93.75 per litre; no one will be influenced in making a choice by such a small reduction in the price difference.

The Belgian Government considers, in conclusion, that in view of the limited degree of competition between the two products, the minimal impact on the prices of the two products of the differential taxation and the fact that the legislation in question has no effect on consumer habits it must be concluded that the legislation has no protective effect, even of an indirect nature.

U. Everling
Judge-Rapporteur