In Case 171/78

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Johannes Føns Buhl, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

applicant,

v

KINGDOM OF DENMARK, represented by Per Lachmann, Head of the Secretariat of the Common Market Division at the Ministry for Foreign Affairs, acting as Agent, assisted, on behalf of Poul Schmith, Government Advocate, by Georg Lett, Advocate, with an address for service in Luxembourg at the office of Vagn Ditlev Larsen, Acting Chargé d'Affaires at the Royal Embassy of Denmark,

defendant,

APPLICATION for a declaration that, by not complying with the opinion by which the Commission requested it to introduce uniform taxes on spirits, the Kingdom of Denmark has been in breach of the first paragraph or, alternatively, the second paragraph of Article 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: 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

Danish production of spirits, in other words spirituous beverages obtained by distillation coming within tariff sub-heading 22.09 C of the Common Customs Tariff, has been during recent years of the order of 7 million litres per annum. It consists essentially of aquavit (or schnapps), the yearly production of which is almost 6 million litres, in other words approximately 85% of the total production of spirits for human consumption in Denmark.

Aquavit (or schnapps) represented 67% in 1972 and 63% in 1977 of the total consumption of spirits in Denmark, which is of the order of 9 million litres per annum.

Imports into Denmark of spirits from the other Member States amounted to 2 300 000 litres in 1975; they were made up essentially, in order, of whisky, vodka, cognac, gin and rum.

The Danish legislation (the provisions at present applicable are contained in Co-ordinated Law No 151 of 4 April 1978 on excise duty on spirits and allied products) provides for the levying of an excise duty on spirits, the rate of which is different according to whether aquavit (and schnapps), which benefit from a preferential rate, or other spirits are involved. No difference in taxation on the basis of the origin of the products has been established, whether they are of Danish manufacture or imported.

According to Articles 3 and 4 of the law, aquavit (and schnapps) means products which are manufactured from neutral spirits, contain vegetable flavouring matter, have a minimum alcohol content of 40% and a maximum alcohol content of 49.9% of the original volume, contain less than two grammes per 100 millilitres of vegetable extract and do not have the characteristics of gin, vodka, geneva, wacholder and other liqueurs, punch, bitters and beverages treated as such, aniseed spirit, rum, spirits obtained from fruit and others whose typical taste is produced through distillation or maturation.

On 22 December 1975 the Commission asked the Danish authorities for more detailed information on the national system of taxation on spirits which it considered to be incompatible with Article 95 of the EEC Treaty. That information was supplied to it on 17 February 1976. It confirmed that the excise duty on spirits of Dkr 154.80 per litre of pure ethyl alcohol was reduced to Dkr 108.60 in the case of aquavit (and schnapps).

In a letter sent to the Danish Government on 26 March 1976, the Commission found in particular that aquavit was a product similar to all other spirits for human consumption, that the manufacture of spirits other than aquavit was virtually non-existent in Denmark, that the increased rate of Dkr 154.80 per litre of pure ethyl alcohol affected almost exclusively imported spirits and that that discriminatory taxation constituted an infringement of the first paragraph of Article 95 or, at least, of the second paragraph of Article 95 of the EEC

Treaty. In those circumstances, it found that the Kingdom of Denmark was failing to fulfil its obligations under the Treaty; consequently, in accordance with the first paragraph of Article 169 of the Treaty; it was requested to submit its observations to the Commission.

On 26 April 1976, the Danish Government informed the Commission that the judgment of the Court of Justice of 17 February 1976 in Case 45/75 *(REWE — Zentrale des Lebensmittel-Großhandels GmbH* v *Hauptzollamt Landau/Pfalz)* [1976] ECR 181 confirmed that there was no competition or substitution relationship between aquavit and other spirits and that the Danish system of taxation on spirits was therefore not contrary to Article 95 of the EEC Treaty. The Danish Government suggested to the Commission that that question should form the subject-matter of fresh discussions.

The excise duty on spirits was increased as from 21 August 1976 from Dkr 108.60 to Dkr 130.30 in the case of aquavit (and schnapps) and from Dkr 154.80 to Dkr 185.75 in the case of other spirits.

On 10 December 1976 the Commission delivered to the Kingdom of Denmark the reasoned opinion provided for in the first paragraph of Article 169 of the Treaty. It found in that opinion that by fixing the excise duty on aquavit (and schnapps) at a reduced rate as compared with that applicable to other products, the Kingdom of Denmark had been in breach of the first paragraph of Article 95 or, alternatively, of the second paragraph of Article 95 of the Treaty. The Danish Government was requested to adopt within one month the measures necessary to comply with the Commission's reasoned opinion.

By letter of 23 February 1977, the Danish Government submitted to the Commission certain numerical data showing that the Danish system of taxation on spirits not only did not discriminate against foreign products but in fact imposed on aquavit a higher tax burden than that to which other spirits were subject.

II — Written procedure

By application lodged on 7 August 1968, the Commission, in implementation of the second paragraph of Article 169 of the EEC Treaty, brought before the Court of Justice the matter of the alleged failure of the Kingdom of Denmark to fulfil its obligations under Article 95 of the EEC Treaty as regards taxation on spirits.

The written procedure followed the normal course.

The Court, after 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 requested the Commission however to reply in writing to two questions; that request was complied with within the prescribed periods after those periods had been extended. The Danish Government submitted written observations on those replies.

III — Conclusions of the parties

The *Commission* claims that the Court should:

— Declare that, by not complying with the Commission's opinion requesting it to introduce uniform taxes on spirits, the Government of the Kingdom of Denmark has been in breach of the first paragraph or, alternatively, of the second paragraph of Article 95 of the EEC Treaty;

— Order the Danish Government to pay the costs.

The *Government of the Kingdom of Denmark* contends that the Court should:

— Principally, dismiss the application;

— In the alternative, declare that the Kingdom of Denmark has been in breach of Article 95 of the EEC Treaty solely to the extent to which, in the case of one or several spirits, the Court considers that, together with aquavit, they are similar within the meaning of the first paragraph of Article 95 or that their relationship with that product is such that there is an infringement of the second paragraph of Article 95;

In both cases, order the Commission to pay the costs.

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

The *Commission* states that the excise duty levied in Denmark on spirits, which was Dkr 130.30 in the case of aquavit (and schnapps) and Dkr 185.75 in the case of other alcoholic beverages on 21 August 1976, was increased by Law No 437 of 6 September 1977 to Dkr 167.50 and Dkr 257.15 respectively as from 7 September 1977. By thus fixing the excise duty in the case of aquavit (and schnapps) at a lower rate than in the case of other spirits, the Danish tax legislation is in breach of Article 95 of the EEC Treaty.

The interpretation of Article 95 of the EEC Treaty

(a) The function of Article 95 is to eliminate, after the abolition of customs duties and charges having equivalent effect, the last trade barriers, not only those against identical imported products in relation to domestic products but also those against products which are similar to or in competition with those domestic products. It should operate on the basis of objective criteria which are extraneous to all considerations of economic or social policy. The prohibition on tax discrimination laid down in Article 95 does not allow of any exception and takes precedence over policies which may be followed at a national or Community level. Article 95 is an additional rule of the customs union and leaves no scope for conditional application or application subordinate to criteria for interpretation formulated outside the Community rule. Its aim is to guarantee the transparency of the common market and to protect the principle of the neutrality of taxation at Community level. The tax sovereignty of the Member States has been considerably limited in the interests of intra-Community trade; those limitations relate in particular to the freedom for the national legislature to have recourse to a tax device in order to pursue extra-fiscal objectives. A national tax system should not have secondary effects on the economic activities of traders in the other Member States which are contrary to the attainment of the common market.

The sovereignty of the Member States in tax matters must be exercised in compliance with the provisions of the Treaty, in this case with Article 95 thereof. In cases of conflict, national legislation must be adapted to the Community rules.

(b) The second paragraph of Article 95 extends the prohibition on tax discrimination to competing imported products which may be substituted for domestic products. This provision confirms that barriers to trade expressed by tax measures which are of such a nature as to afford direct or indirect protection to domestic production from competition by imported products are incompatible

with the Treaty. It follows from the case-law of the Court that Article 95 is intended to eliminate all discrimination between imported and domestic products which are in whatever manner in legitimate confrontation within the common market.

(c) It is not appropriate to use the device of harmonization for the purpose of eliminating trade barriers of a tax nature: it is incorrect to make the prohibition on tax discrimination which flows from Article 95, a provision which has direct effect, subject to the adoption of "implementing" rules forming the subject-matter of harmonization directives within Article 99 of the Treaty.

(d) As regards the concept of "similar products", it follows from the case-law of the Court that the relationship of similarity referred to in the first paragraph of Article 95 exists where the products in question must normally be considered as coming under the same tax, customs or statistical classification as the case may be and that it is appropriate to compare products which, at the same stage of production or marketing, have similar characteristics and meet the same needs from the point of view of consumers. The fact that a domestic product and an imported product are or are not classified under the same heading of the Common Customs Tariff constitutes in this respect an important criterion.

Without making classification the only criterion, the Court however showed its preference for criteria which are more certain and easier to apply and are based on formal factors as against other criteria of a material nature which are based in particular on the nature and quality of the products, the raw materials used and the manufacturing processes.

Similarity must be appraised from the point of view of consumers and their needs; the concept of similarity contained in Article 95 is specifically subject to tax requirements, disregarding the physical or chemical properties of the products in question. The point of view according to which similarity must be determined in a more precise manner according to material criteria and to a concrete appraisal of consumer habits amounts in fact to interpreting Article 95 as referring only to "identical" products. However, the concept of "similar" products has a wider meaning: the fact that certain products, by their nature or their characteristics, have similar possible uses is determining as regards the question whether they are similar products. It is also important to know whether the products in question meet the same needs of consumers or satisfy the same tastes; however, most products have several possible uses which they may to a greater or lesser extent have in common with other products.

A very precise definition of similar products is unacceptable; it would give rise to a definition of the concept of similarity within national contexts which would result in nine divergent and contradictory definitions. Precise national definitions might give rise to distortions; thus the result of the precise definition of aquavit by Danish legislation according to taste and alcoholic strength is that the same product originating in another Member State is taxed more heavily than that manufactured in Denmark. It is necessary to use a single uniform definition for all Member States.

The scope of the first paragraph of Article 95 must be defined taking into account the second paragraph of the same article. Having regard to its

substance and to its position, the second paragraph completes the first. It might be difficult to give an exact definition of "similar" products and to distinguish them from the products referred to in the second paragraph; in fact, the legal rules are identical as regards all the products referred to by both paragraphs. The difference between similar products and products which, without being similar, are nevertheless in competition, is only a question of degree.

The relationship between the various spirits

(a) Spirits, whether obtained from cereals or wine and fruit, have, according to the Explanatory Notes to the Brussels Nomenclature, from the point of view of consumption, similar characteristics and meet the same needs of consumers. Those needs may obviously be determined and influenced by various factors: habits, individual preferences, local or national traditions, social, seasonal and climatic conditions, or even fashion; nevertheless, on the market spirits appear, as far as consumers are concerned, to be products which are no longer complementary but parallel, in other words similar products within the meaning of the first paragraph of Article 95.

(b) The difference between aquavit and other spirits such as gin and vodka on the one hand and whisky and cognac on the other is solely a question of flavour. There is therefore no need to take into consideration Danish consumer habits. It seems even less appropriate to make a determining factor the fact that consumer habits may very well be a result of the price of the beverage, that is indirectly of the taxation imposed on it.

(c) The fact that aquavit is essentially consumed with meals is irrelevant as regards the appraisal of the concept of similarity within the meaning of Article 95. That provision prohibits the influencing of the structure of consumption by means of a discriminatory tax policy.

The fact that aquavit normally accompanies food and in particular certain typical Danish dishes does not enable the eating habits of the Community to be considered to be those of Denmark. The German aquavit market is large and the resemblance between the tastes of German consumers and Danish consumers marked; moreover, the consumption of spirits at meals is not a custom which is particularly Danish or Scandinavian but a normal consumer habit in all Northern European countries.

(d) Since 1972 a considerable increase in the range of products offered to consumers has been noted in Denmark; a series of new schnapps products manufactured in Denmark and having a special flavour has appeared on the market. This is schnapps obtained by the addition of special substances, generally plant extracts, which endow the drink with its characteristics and therefore determine its possible uses. The great variety of Danish spirits means that they may be substituted for other spirits such as gin or geneva whose characteristics are similarly endowed by a special plant flavouring.

(e) Aquavit has various possible uses, like other spirits: it may be used in cooking, as a preservative, to accompany coffee and for the preparation of a special drink consumed in winter or of cocktails. It may therefore be treated like other spirits.

The infringement of Article 95 of the Treaty

(a) The preferential taxation from which aquavit (and schnapps) benefit in Denmark as compared with other spirits which are competing or similar products is quite obviously contrary to Article 95 of the EEC Treaty.

The discriminatory taxation takes on special importance in Denmark, which is the country in the Common Market in which the taxation of spirits is heaviest.

(b) It follows from the judgment of the Court of 10 October 1978 in Case 148/77, *Hansen* v *Hauptzollamt Flensburg* [1978] ECR 1787, that Article 95 does not authorize preferential systems based on social or other grounds; this finding also applies as regards systems of discriminatory taxation based on the fact that a spirit is consumed with meals.

It was held in the same judgment that it must be possible to extend to spirits from other Member States in the conditions laid down by Article 95 the preferential systems from which certain types of spirits or certain categories of producers benefit under national legislation.

In the same judgment the Court held in addition that discriminatory taxation is contrary to the Treaty even if domestic taxation favours only a small proportion of national production.

(c) As regards, in the alternative, the second paragraph of Article 95, it is necessary to state that taxes imposed in Denmark on other spirits contain an element intended to protect aquavit. The prohibition on measures intended to protect domestic products against imports from other countries is applicable whatever the extent of the protection; in the present case, the difference in taxation is particularly great and extends over a long period. It is therefore difficult to determine the market share of other spirits if the taxation system had been neutral as required by Article 95.

The second paragraph of Article 95 refers to cases in which there are no "similar" products in a given country but only products which are in competition with imported products. This is certainly the case with aquavit in relation to other spirits.

The *Government of the Kingdom of Denmark* contests that there has not been any infringement of Article 95 of the EEC Treaty within the context of taxation on spirits: the system in question, it claims, treats domestic products and imported products equally; other spirits are not taxed more heavily than aquavit, since the charge was envisaged in relation to the value of the product in question: aquavit and other spirits are not similar products within the meaning of the first paragraph of Article 95; the Danish system of taxation on spirits is not contrary to the second paragraph of Article 95.

It claims, in the alternative, that in any case there can be no breach of Article 95 as regards all spirits other than aquavit but at most as regards the products which the Commission can show fulfil in relation to aquavit the condition of similarity laid down in the first paragraph of Article 95 or that a relationship exists between them and aquavit such that it is necessary to conclude that there has been a breach of the second paragraph of Article 95.

The alleged discrimination against imported products

The object of the first paragraph of Article 95 is to prevent a national system of taxation from discriminating against imported products.

(a) The Danish system of taxation on spirits is not discriminatory: the excise duty levied on spirits applies without regard to the origin of the products. The basic condition for the application of Article 95 is therefore lacking.

The higher taxation on spirits other than aquavit in no way amounts to higher taxation on imported spirits: 33% of the products taxed as "spirits other than aquavit" are of Danish production and, conversely, imported aquavit, in particular from Germany, is taxed at the same rate as Danish aquavit.

Even assuming that aquavit and other spirits should be regarded as similar products, the products of other Member States are not subject to heavier taxation than similar national products because of their importation into Denmark.

Article 95 in no way imposes a duty of general neutrality of taxation; it refers exclusively to discrimination between imported products and domestic products. Discrimination must be linked, in the case of goods, to the crossing of a frontier.

(b) The first paragraph of Article 95 prohibits both "formal" discrimination resulting directly from the tax provision itself and "real" discrimination. However, in both situations the crossing of the frontier constitutes the chargeable event giving rise to a higher tax on imported products; this is not the case of the Danish legislation.

The market shares of the various products are irrelevant for the purpose of judging whether a tax law is in conformity with Article 95. The only decisive point is whether the legislation in question has laid down rules involving for spirits taxation at a higher rate solely because they are imported from other Member States; the Danish tax legislation contains no rule of that kind.

(c) In any case, the situation on the market in spirits provides no support for the Commission's arguments.

Spirits other than aquavit constitute a fifth of Danish production, which cannot be described as negligible. However, having regard to Article 95 the decisive factor is consumption and not production. The proportion of Danish products is approximately 33% of the total Danish consumption of spirits other than aquavit. Even on the basis of market situations, the category of "spirits other than aquavit" cannot therefore be treated in the same way as imported spirits.

The preference of consumers for domestic products is not due to a tax system which discriminates against imported products: a whole series of factors other than price, such as the flavour of the products and the traditions observed by consumers, determine the choice made by them. The strong position on the Danish market of aquavit produced in Denmark has nothing to do with special safeguard measures. The strength of that position in favour of Danish brands of aquavit must be viewed in the light of purely commercial factors linked to certain traditional preferences on the part of consumers. Such a situation may develop without recourse to special measures of tax protection.

Danish producers are not moreover in a dominant position as regards the manufacture of aquavit: throughout Northern Europe there is a highly developed and specialized production of aquavit.

(d) A judgment making the freedom of choice by consumers and producers the decisive criterion for an alleged breach of Article 95 goes well beyond the results of the present state of the case-law of the Court of Justice within the context of Article 95.

The Court attaches exclusive importance to the fact that both domestic products and foreign products are offered the same opportunities: the condition of non-discrimination referred to in Article 95 is fulfilled when the same rules apply to national products and imported products.

(e) To accept the Commission's interpretation would imply a considerable extension of the scope of Article 95. The chapter of the Treaty devoted to tax provisions assumes that the Member States have retained the power themselves to determine tax policy and taxation; this finding results indirectly from Article 99 of the Treaty.

The statement that the structure of taxation must not have any effect on the economic activities of traders in other Member States is excessive; Article 99 presupposes the possibility of such an influence, the effects of which should perhaps be avoided by means of harmonization.

In a case such as this in which Danish legislation contains no discrimination against imported products the effects of the tax system may only be altered by means of harmonization.

(f) The excise duty levied in Denmark on spirits constitutes in fact an adjusted *ad valorem* duty based solely, for reasons of tax practice, on the quantity of alcohol. The element of "value" is taken into account through the gradation of the rates of tax. The fact that, from a purely technical point of view, that tax system takes the form of a specific tax with two rates cannot by itself constitute a breach of the Treaty.

(g) It follows from the judgment of the Court of 10 October 1978 *(Hansen)* that Article 95 does not prevent national tax systems from providing for different rates for different types of spirits. The reasoning underlying that judgment must also apply to the special rate in force in Denmark in the case of aquavit; that cannot be considered to be a system of partial or total exemption but to be a system whose legitimate objective is to create a situation of equality from the point of view of taxation.

According to the same judgment, a preferential national system must apply without distinction also to spirits from other Member States fulfilling the same conditions as the domestic product; the Danish law complies totally with that condition.

The judgment explains the function of Article 95: its aim is to prevent all discrimination against imported products and not to ensure general tax neutrality.

By claiming that all spirits are "similar" and by supporting the idea of taxation at a single rate for alle "similar" products, the Commission reaches the absurd conclusion that the lowest national rate of tax must be applied to all products or at least to all imported products, so that Article 95 not only ensures equal treatment for imported products but gives them a material advantage as against similar or identical domestic products. The definition and use by the

Commission of the concept of similar products is incompatible with the case-law of the Court.

The alleged similarity between aquavit and other spirits

(a) Contrary to the Commission's opinion, the decision whether two products must be considered as similar products must be made on the basis of a material and not a formal criterion.

The relationship of similarity must be appraised in each case on the basis of the actual facts, taking into account certain general considerations relating to the marketing of the products in question. In the recent case-law of the Court of Justice, the appraisal of the facts indeed takes first place whereas the formal criterion, in particular the classification of the products in the Common Customs Tariff, is reduced to the level of a mere factor in the appraisal.

(b) The Brussels Nomenclature did not intend to decide the question whether certain goods must be defined as identical from the point of view of consumers; its object is to establish a precise and unambiguous classification. It does not therefore, as such, contain indications as to whether two products are possibly similar from the material point of view within the meaning of the first paragraph of Article 95.

The reference in certain judgments of the Court to the tariff heading of goods in the Common Customs Tariff, linked moreover to a material criterion, normally fulfils the function of defining the outer limits within which goods may be considered as similar. The classification of two products in two different tariff headings constitutes an essential factor excluding the possibility of their being considered as similar; on the other hand, the fact that two products are classified within the same tariff heading to four figures in no way enables the assumption to be made that they meet the same needs and have the same characteristics from the point of view of consumers.

Nor is the sub-division into tariff sub-headings by itself decisive.

As regards spirits more particularly, it is necessary to state that the fact that aquavit and other spirits come under tariff heading 22.09 of the Common Customs Tariff means only that those products may be similar within the meaning of Article 95; on the other hand, it is impossible to consider, on the basis of their classification under the same tariff heading, that it is established or even probable that they therefore comply with the condition laid down in the case-law of the Court that they should have similar characteristics and meet the same needs.

(c) As it is necessary to examine, on the basis of a concrete approach, whether the two products have the same characteristics and meet the same needs from the point of view of consumers, it should be pointed out that aquavit is almost always and exclusively consumed at meals, which is not so in the case of other spirits. Consumer habits are, in this context, important: there is no other true criterion enabling the opinion of consumers with regard to consumer products to be known.

The consumption in Denmark of spirits other than aquavit amounts to 37% and that proportion is continually increasing; there is therefore nothing enabling the statement to be made that the tax has a dissuasive effect on consumers.

Even if it were necessary to acknowledge that a change in the tax burden imposed on a product has an effect on the consumption of that product, this does not necessarily have the effect of altering the consumption of other products.

Denmark is practically the only country in the Community in which aquavit is consumed; for that reason consumer habits in Denmark may be considered, as regards that product, as Community consumer habits.

(d) Within the context of an "abstract" appraisal of the characteristics of products, the typical characteristics linked to the flavour of the various products form the decisive criterion as regards spirits for human consumption.

It follows from the case-law of the Court that the presence of ethyl alcohol in several products does not make them similar products within the meaning of the first paragraph of Article 95; similarly, the method of manufacture and the raw materials used are without real importance. The completely decisive fact from the point of view of consumers having to choose between spirits of the same kind is the typical characteristic flavour of each of those products.

The various spirits have in Europe well-defined areas of use established on the basis of their characteristic flavour; those special characteristics determine their chosen areas of consumption. In the case of aquavit, the determining factor is that it is consumed preferably at meals.

Objective consumer surveys have shown that aquavit has typical characteristics differentiating it from other spirits, so that consumers do not consider that aquavit can replace other spirits or be replaced by them.

The difference in flavour on which, from a technical point of view, the distinction is finally based expresses a decisive difference between the various products from the point of view of consumers.

From the point of view of consumers, aquavit and other spirits therefore neither meet the same needs nor have the same characteristics.

The alleged infringement of the second paragraph of Article 95

For it to be possible to consider a tax as levied in infringement of the second paragraph of Article 95 it is necessary for the excise duty to be levied on products from other Member States, for it to be possible for those products to be substituted for national products and for the excise duty to involve the protection of domestic production or domestic products. None of these three conditions has been fulfilled in this case.

(a) The volume of Danish production of spirits other than aquavit is not so negligible that the other spirits must be considered as coming from other Member States.

The fact that Danish production of spirits other than aquavit is lower than imports is moreover due in particular to the introduction of the tax system in question which made it unprofitable to maintain the production of various Danish spirits in view of the competition from foreign spirits.

(b) Aquavit and other spirits are not in true competition.

The determining criterion should in this respect be pronounced cross-elasticity between the products in question: two products are considered to be competing if a slight increase in the price of one has the effect of displacing a large proportion of demand towards the other. No evidence has been brought to show that aquavit is in this sense in competition with other spirits.

(c) In the same way, the Commission has in no way shown that the duty levied on spirits other than aquavit is protective in nature in favour of aquavit.

A pure *ad valorem* tax cannot be considered as involving protection against foreign products.

Compared with the wholesale value of the various products, aquavit is not taxed less heavily than cognac, whisky or other spirits.

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

In its written observations to the questions put by the Court, the *Commission* has in particular emphasized that the essential problem concerns competition between spirits obtained from wine and spirits obtained from cereals, in view of the considerable difference between the production costs of those products. This problem is of an economic nature and must be resolved at the Community level, if it arises after the elimination of the tax barriers which exist at present, within the context of the intervention mechanisms already provided for by the rules on the common organization of the market in wine.

The proposal for a directive on the harmonization of excise duty on spirits (Journal Officiel 1972, C 43 p. 45) is based on the principle of the similarity between all spirits and on the need to make the products subject to a tax system with a single rate per hectolitre of pure alcohol. The proposal for a regulation on the common organization of the market in ethyl alcohol of agricultural origin and additional provisions (Journal Officiel 1972, C 43, p. 3 and Official Journal 1976, C 309, p. 2) provides for measures concerning the production of alcohol and intervention systems (price compensation, withdrawal from the market and sale to reserved sectors), measures relating to alcoholic beverages (grant of aid and the imposition of equalization charges), measures of commercial policy and general provisions. Spirits obtained by distilling wine are only partially referred to by that proposal, the intervention measures which are appropriate and necessary for the purpose of maintaining the price of those products being expressly governed by the Community rules on wine (Council Regulation (EEC) No 337/79 of 5 February 1979 on the common organization of the market in wine, Official Journal 1979, L 54, p. 1). The Community already has appropriate economic means for settling the most important problem, that of the compensation for the difference between the production costs of brandy and spirits obtained by distilling wine on the one hand and products based on other agricultural raw materials, in particular cereals, on the other. These mechanisms can only operate correctly if they act on a market which is neutral from a tax point of view. There is no justification for making the abolition of tax barriers subject to the adoption by the Council of the directive or regulation in question. The delay which has been noted in the progress of the Council's work on the proposals put forward by the Commission is largely due to the existence on the internal level of discriminatory national tax measures ensuring domestic products additional protection which is in no way justified against competing products from other Member States.

Taxation which is levied on domestic products and similar and/or competing imported products within the meaning of Article 95 not only at the same rate but

according to the same structure, on the one hand, and internal taxation which, whilst constituting different treatment from a tax point of view as regards rates and the structure of the tax, so as to benefit specific types of domestic product, is imposed on imported products without discrimination, in other words which extends to imported products the more favourable treatment for tax purposes reserved to certain similar and/or competing domestic products within the meaning of Article 95, on the other, is compatible with Article 95. The essential factor is that the principle of the neutrality of taxation in intra-Community trade should be observed unconditionally. These statements are in accordance with the case-law of the Court, in particular in the judgment in Case 148/77 *(Hansen).*

The *Danish Government,* in its written observations on the replies given by the Commission to the questions put by the Court, points out that the Commission, abandoning its previous arguments, now considers that Article 95 merely imposes a duty to apply the national tax system without discrimination to imported products but does not impose any duty as regards the tax system itself. The criteria capable of justifying differentiation in the fixing of the rates of tax for the various alcoholic products are based solely on considerations of economic policy, to the extent to which the Member States have retained their powers in this field and subject to harmonization at the Community level.

The requirement of non-discrimination does not include the duty to extend the most favourable special national system to all imported products.

VI — Oral procedure

The *Commission,* represented by Johannes Føns Buhl, assisted by Mr Maurel, an Expert and Principal Administrator at the Wine, Spirits and Derived Products Division of the Directorate-General for Agriculture, and the *Danish Government,* represented by Per Lachmann and Georg Lett, presented oral argument and replied to questions put by the Court at the hearing on 9 and 10 October 1979.

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

Decision

1 By application of 7 August 1978, the Commission lodged under Article 169 of the EEC Treaty an application for a declaration that the Kingdom of Denmark, by applying discriminatory taxation on spirits, has failed to fulfil its obligations under Article 95 of the EEC Treaty.

2 At the same time, the Commission submitted to the Court of Justice applications against the French Republic and the Italian Republic relating to problems of the same nature. The applications contain, in all three instances, certain general considerations from which it follows that those applications form part of a general action aiming to ensure that the Member States concerned comply with the obligations imposed on them by the Treaty in this respect. It therefore seems appropriate to clarify first of all certain questions of principle common to the three cases as regards the interpretation of Article 95 in the light of the special features of the market in spirits.

The interpretation of Article 95

3 Under the first paragraph of Article 95 "No Member State shall impose, 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 of that article adds as follows: "Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products".

4 The above-mentioned provisions supplement, within the system of the Treaty, the provisions on the abolition of customs duties and charges having equivalent effect. Their aim is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which result from the application of internal taxation which discriminates against products from other Member States. As the Commission has correctly stated, Article 95 must guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products.

5 The first paragraph of Article 95, which is based on a comparison of the tax burdens imposed on domestic products and on imported products which may be classified as "similar", is the basic rule in this respect. This provision, as the Court has had occasion to emphasize in its judgment of 10 October 1978 in Case 148/77, *H. Hansen jun. & O. C. Balle GmbH & Co.* v *Hauptzollamt Flensburg* [1978] ECR 1787, must be interpreted widely so as to cover all taxation procedures which conflict with the principle of the equality of treatment of domestic products and imported products; it is therefore necessary to interpret the concept of "similar products" with sufficient flexibility. The Court specified in the judgment of 17 February 1976 in the *REWE* case (Case 45/75 [1976] ECR 181) that it is necessary to consider as

similar products which "have similar characteristics and meet the same needs from the point of view of consumers". It is therefore necessary to determine the scope of the first paragraph of Article 95 on the basis not of the criterion of the strictly identical nature of the products but on that of their similar and comparable use.

6 The function of the second paragraph of Article 95 is to cover, in addition, all forms of indirect tax protection in the case of products which, without being similar within the meaning of the first paragraph, are nevertheless in competition, even partial, indirect or potential, with certain products of the importing country. The Court has already emphasized certain aspects of that provision in its judgment of 4 April 1978 in Case 27/77, *Firma Fink-Frucht GmbH* v *Hauptzollamt München-Landsberger Straße* [1978] ECR 223, in which it stated that for the purposes of the application of the first paragraph of Article 95 it is sufficient for the imported product to be in competition with the protected domestic production by reason of one or several economic uses to which it may be put, even though the condition of similarity for the purposes of the first paragraph of Article 95 is not fulfilled.

7 Whilst the criterion indicated in the first paragraph of Article 95 consists in the comparison of tax burdens, whether in terms of the rate, the mode of assessment or other detailed rules for the application thereof, in view of the difficulty of making sufficiently precise comparisons between the products in question, the second paragraph of that article is based upon a more general criterion, in other words the protective nature of the system of internal taxation.

8 The application in this instance of the criterion of similarity, which determines the scope of the prohibition laid down in the first paragraph of Article 95, has given rise to differences of opinion between the parties. According to the Commission, all spirits, whatever the raw materials used for their manufacture, have similar properties and in essence meet the same needs of consumers. Therefore, whatever the specific characteristics of the various products coming within that category and whatever the consumer habits in the various regions of the Community, spirits as finished products represent, from the point of view of consumers, a single general market. It is necessary to observe that this concept is expressed in the proposals submitted by the Commission to the Council for the establishment of a common organization of the market in alcohol, based on the application of a single rate of tax for all the products in question on the basis of their pure alcohol content.

9 This concept is contested by the governments of the three defendant Member States. In their opinion, it is possible to distinguish in the case of spirits various categories of product which differ either in terms of the raw materials used or of their typical characteristics or of the consumer habits observed in the various Member States.

10 In this connexion, the Commission points out however that the appraisal of the characteristics of the various alcoholic beverages, in the same way as consumer habits, is variable in time and space and that such factors cannot provide valid criteria as regards the Community taken as a whole. It draws attention moreover to the danger of hardening such habits by means of tax classifications made by the Member States.

11 These arguments prompt the following reply from the Court. The application of the provisions of Article 95 to specific national situations forming the subject-matter of the applications submitted by the Commission must be examined in the context of the general state of the market in alcoholic beverages within the Community. In this respect it is necessary to take into account three lines of thought:

(a) it is impossible, first of all, to disregard the fact that all the products in question, whatever their specific characteristics in other respects, have common generic features. All are the outcome of the distillation procedure; all contain, as a principal characteristic ingredient, alcohol suitable for human consumption at a relatively high degree of concentration. It follows that within the largest group of alcoholic beverages spirits form an identifiable whole united by common characteristics;

(b) in spite of those common characteristics, it is possible to distinguish within that whole products which have their own more or less pronounced characteristics. Those characteristics spring either from the raw materials used (in this connexion it is possible to distinguish in particular spirits distilled from wine, fruit, cereals and sugar-cane), or from manufacturing processes or, again, from the flavourings added. Typical varieties of spirits may in fact be defined by these particular characteristics, so much so that some of them are even protected by registered designations of origin;

(c) at the same time, it is impossible to disregard the fact that there are, in the case of spirits, in addition to well-defined products which are put to relatively specific uses, other products with less distinct characteristics and wider uses. There are, on the one hand, numerous products derived from what are known as "neutral" spirits, in other words spirits of all origins including molasses alcohol and potato alcohol; these products

owe their individuality only to flavouring additives with a more or less pronounced taste. On the other hand, it is necessary to draw attention to the fact that in the case of spirits there are products which may be consumed in very different forms, either neat or diluted or, again, in the form of mixtures. These products may therefore be in competition with a range of varying size of other alcoholic products of more limited use. A characteristic of the three cases brought before this Court is however the fact that in each there are, in addition to well-defined spirits, one or several products with a broad range of uses.

12 Two conclusions follow from this analysis of the market in spirits. First, there is, in the case of spirits considered as a whole, an indeterminate number of beverages which must be classified as "similar products" within the meaning of the first paragraph of Article 95, although it may be difficult to decide this in specific cases, in view of the nature of the factors implied by distinguishing criteria such as flavour and consumer habits. Secondly, even in cases in which it is impossible to recognize a sufficient degree of similarity between the products concerned, there are nevertheless, in the case of all spirits, common characteristics which are sufficiently pronounced to accept that in all cases there is at least partial or potential competition. It follows that the application of the second paragraph of Article 95 may come into consideration in cases in which the relationship of similarity between the specific varieties of spirits remains doubtful or contested.

13 It appears from the foregoing that Article 95, taken as a whole, may apply without distinction to all the products concerned. It is sufficient therefore to examine whether the application of a given national tax system is discriminatory or, as the case may be, protective, in other words whether there is a difference in the rate or the detailed rules for levying the tax and whether that difference is likely to favour a given domestic production. It will be necessary to examine within this framework the economic relationships between the products concerned and the characteristics of the tax systems which form the subject-matter of the disputes in the case of each of the applications lodged by the Commission.

14 In the various procedures, the parties have relied, with regard to the distinction between several categories of alcoholic product, upon certain statements made by the Court of Justice in the judgment in the *Hansen & Balle* case, *supra*, which was delivered at a time when these applications were pending. Reference has been made more particularly to a passage in that judgment which states as follows: "At the present stage of its development and in the absence of any unification or harmonization of the relevant

provisions, Community law does not prohibit Member States from granting tax advantages, in the form of exemption from or reduction of duties, to certain types of spirits or to certain classes of producers. Indeed, tax advantages of this kind may serve legitimate economic or social purposes, such as the use of certain raw materials by the distilling industry, the continued production of particular spirits of high quality, or the continuance of certain classes of undertakings such as agricultural distilleries".

15 Since certain of the defendant Governments have relied upon these statements in order to justify their tax system, the Court has asked the Commission questions as to the compatibility with Community law of the differences in the rates of tax applied to various categories of alcoholic beverages and as to its intentions in that respect within the context of the harmonization of tax legislation. The Commission, after re-stating its view that all spirits are similar and its intention to propose the introduction, at least in principle, of a single rate of tax in future Community regulations, draws attention to the fact that the problems linked to the use of certain raw materials, continued high-quality production and the economic structure of manufacturing undertakings to which the Court referred in the above-mentioned judgment may be resolved by means of aid to producers or systems of compensation between producers, taking into account the difference in the cost of the raw materials used. It draws attention to the fact that this objective has already been attained within the context of the common organization of the market in wine as regards spirits obtained by distilling wine. According to the Commission, such mechanisms might safeguard the marketing chances of certain products which are handicapped by production costs, without its being necessary to have recourse for this purpose to the procedure of variation in the rates of tax.

16 In view of these observations, the Court points out that although it acknowledged in the judgment in the *Hansen & Balle* case, taking into account the state of development of Community law, that certain tax exemptions or tax concessions are lawful, this is on condition that the Member States using those powers extend the benefit thereof without discrimination to imported products in the same conditions. It is necessary to emphasize that it was acknowledged that those practices were lawful in particular so as to enable productions or undertakings to continue which would no longer be profitable without these special tax benefits because of the rise in production costs. On the other hand, the considerations expressed in that judgment cannot be understood as legitimating tax differences which are discriminatory or protective.

The legislation applicable and the framework of the dispute.

17 The Danish legislation, as in force at the date of the dispute, in other words Article 2 of Co-ordinated Law No 151 of 4 April 1978 on excise duty on spirits, provides that excise duty shall be fixed as follows:

(1) in the case of aquavit and schnapps (hereinafter referred to solely as "aquavit" because the two words are synonomous) at Dkr 167.50 per litre of pure ethyl alcohol and

(2) in the case of "other products" at Dkr 257.15 per litre of pure alcohol.

18 Under Article 3 of the same law, products benefiting from the rate of tax fixed by the first paragraph of Article 2 are defined as being "manufactured from neutral spirits and containing in their composition vegetable flavouring extracts" and moreover as "not resembling gin, vodka, geneva, wacholder, etc., liqueur, punch, bitters, etc; aniseed spirits, rum, spirits distilled from fruit and other spirits whose typical taste is produced through distillation or maturation".

19 As a preliminary, the Danish Government examines the relationship between Article 95, on which the Commission has based its application, and Article 99 on the harmonization of tax legislation. It asks whether the implementation of that harmonization should not take priority over the application of Article 95. It claims that since the Member States have retained the power themselves to determine tax policy and taxation, the effects which a tax system might have on the normal functioning of the common market should be eliminated by virtue of the harmonization of legislation provided for by Article 99. The Commission should not arbitrarily seek to impose such harmonization under Article 95 instead of following the procedure laid down by Article 99.

20 There is no doubt that the disparity in the national tax systems and in particular the differences in the rates of tax which are particularly pronounced as regards taxation on spirits constitute an obstacle to the free movement of goods and to the development of trade between the Member States. However, the implementation of the programme of harmonization laid down by Article 99 cannot constitute a preliminary to the application of Article 95. Whatever in fact the disparities between the national tax systems, Article 95 lays down a basic requirement which is directly linked to the

prohibition on customs duties and charges having an equivalent effect between the Member States in that it intends to eliminate before any harmonization all national tax practices which are likely to create discrimination against imported products or to afford protection to certain domestic products. It therefore appears that Articles 95 and 99 pursue different objectives, since Article 95 aims to eliminate in the immediate future discriminatory or protective tax practices, whilst Article 99 aims to reduce trade barriers arising from the differences between the national tax systems, even where those are applied without discrimination.

21 This argument must therefore be rejected, with the result that the application must be examined exclusively within the context in which it was lodged by the Commission, in other words, within that of Article 95.

The appraisal of the contested tax system

22 The Commission considers that the Danish tax system is discriminatory as regards spirits imported from the other Member States because the bulk of domestic production, constituted by aquavit, benefits from a reduced rate of tax whereas similar or competing alcoholic beverages imported from the other Member States are subject to the highest rate of tax, apart from insignificant quantities which have the specific characteristics of aquavit as defined by the law.

23 In this respect the Commission puts forward the following figures which are not contested by the Danish government: during 1977, chosen as the reference year, of a total consumption of 9 240 000 litres of pure alcohol, 5 787 000 litres benefited from a reduced rate of tax; of that quantity, 5 728 000 litres were produced in Denmark, whereas 59 000 litres only were imported, in other words approximately 34 000 litres from the Federal Republic of Germany and the rest from third countries. As for other spirits, the consumption of which, expressed in pure alcohol content, was 3 452 000 litres during the reference year, 1 118 000 litres were of domestic production whereas 2 334 000 litres were imported.

24 According to the Commission, those figures show that the reduced rate of tax benefits almost exclusively a type of spirit which represents the bulk of domestic production whereas the heaviest rate of tax applies to all other alcoholic beverages of which the majority are imported products (in other words, approximately two-thirds thereof). As a whole, this tax system therefore clearly discriminates against imported spirits. As such, this system is contrary to the first paragraph of Article 95 of the Treaty, according to which a Member State cannot impose on the products of other Member States internal taxation in excess of that imposed on similar domestic products. If the similarity between aquavit and other spirits referred to by the Danish law is not acknowledged, the Commission considers that the difference created by that law is in any case of such a nature as to afford indirect protection to the domestic production of aquavit within the meaning of the second paragraph of Article 95.

25 The Danish Government contests the opinion put forward by the Commission according to which all spirits for human consumption produced by distillation must be considered as "similar" products within the meaning of the first paragraph of Article 95. It considers that the Treaty does not prevent the Member States from making classifications between the various alcoholic products so as to apply to those products different rates of tax. The Court of Justice itself, it claims, acknowledged in its judgment in the *Hansen & Balle* case, *supra*, the power for Member States to create certain differences as regards taxation on spirits. The defendant Government considers that the Danish State is therefore entitled to maintain a difference in the rates of tax on the basis of the special properties which are characteristic of the products listed in both categories laid down in its tax legislation. The Danish Government is of the opinion that consumer habits provide a criterion whereby aquavit may be differentiated from other alcoholic beverages. In support of that statement it produces market surveys showing that aquavit, by virtue of Danish eating and drinking habits, is consumed principally at meals as an accompaniment to typical dishes so that it cannot be considered as a product equivalent to other spirits.

26 Moreover, the Danish Government draws attention to the fact that the contested tax system makes no distinction between imported products and domestic products. According to their classification in comparison with the categories of tax laid down by the law, the products are taxed at the corresponding rate, whatever their origin; thus imported aquavit benefits from the rate of tax levied on domestic aquavit, whilst other domestic alcoholic beverages are subject to the same rate of tax as imported products.

The shares held by the various products on the market are of no importance for the purposes of appraising whether the law is compatible with Article 95. It thus appears that in the system of the Danish law there is no relationship between the fact that goods cross a frontier and the application of a higher rate of tax.

27 The Danish Government recalls in addition that for a certain period alcoholic beverages were subject to a mixed tax system which involved, in addition to a specific duty, the application of an *ad valorem* duty. The excise duty levied under the present legislation is in fact nothing more than an adjusted *ad valorem* duty. This fact explains why aquavit, as an inexpensive product, benefits from a more favourable rate of tax than other spirits whose production costs are higher. Moreover, there is nothing to prevent Denmark from re-introducing the old system; a tax applied according to that method would amount to reducing the tax on aquavit even further whereas spirits with a high production cost, such as whisky and cognac, would be taxed even more heavily.

28 As for the application of the second paragraph of Article 95, the Danish Government states that the real consumer choice is between aquavit and beer, on the one hand, and wine, on the other; the possibilities of substituting aquavit for other spirits and vice versa are on the other hand negligible. For the purposes of the application of the second paragraph of Article 95 the determining criterion is a "marked cross-elasticity" between products so that a slight increase in the price of one product has the effect of displacing a high proportion of demand to another. The Danish Government recalls in this respect the criteria which the Court applied in order to delimit the markets concerned with a view to the application of the competition rules contained in the Treaty. For its part, the Commission, it claims, has not produced any evidence to establish the existence of a protective effect which is the condition for the application of the second paragraph of Article 95.

29 In the alternative conclusions listed in its defence, the Danish Government requests the Court to limit, if necessary, the declaration that it has failed to fulfil its obligations under the Treaty to those products which, because they have a special affinity with aquavit, must be treated in the same way as aquavit from the tax point of view, and to dismiss the application with regard to the remainder.

30 In the defence put forward by the Danish Government, it is necessary to reject, as a preliminary, the argument based on the fact that the system in question is nothing other than a transformed system of *ad valorem* taxation. In fact, every tax system must be appraised in the light of Article 95 on its own merits and not in terms of a tax system which preceded it or which

might if necessary be substituted for it. Moreover, it is necessary to emphasize the contradictory nature of the argument put forward in this respect by the Danish Government.

In fact, of the spirits which are subject to the highest rate of tax under Article 3 of the Danish law, there are several products which, being manufactured on the basis of neutral alcohol, may be considered as inexpensive spirits, like aquavit. In a system of *ad valorem* taxation, they should therefore benefit from the same tax advantage as aquavit. The fact that those products are treated as regards taxation in the same way as products with a higher production cost shows that the tax system at present in force does not have the characteristics of *ad valorem* taxation.

31 The appraisal of the compatibility of the Danish tax system with Article 95 raises a special problem in that the preferential rate laid down by the Danish legislation benefits a single product defined precisely by the law to the exclusion of all other spirits. It is therefore necessary to appraise the existence of either a relationship of similarity or competition between a single product and an indeterminate number of products some of which are identified by the law whereas others are not specified.

32 In this connexion, it is necessary to point out, first, that of the products subject to the highest rate of tax there are several named beverages the characteristics of which are akin to aquavit in that they are normally manufactured from neutral alcohol and owe their characteristic flavour to added flavouring extracts. It is necessary to assume that those products have been listed expressly among the spirits subject to a higher rate of tax precisely because of their similarity. In the case of those beverages there can therefore be no doubt that there has been an infringement of the first paragraph of Article 95.

33 As regards most of the other alcoholic beverages subject under the Danish legislation to the highest rate of tax, it is impossible to establish with certainty how many of them are spirits which may be classified as "similar" to aquavit within the meaning of the first paragraph of Article 95 and how many of them are products which, although they cannot be classified as similar, are in competition or in the substitution relationship with aquavit which is referred to by the second paragraph of the same article.

34 The Court considers that it is not necessary to give a ruling on this matter in order to resolve the present dispute. In fact, even if doubts remain as to the question to what extent the numerous alcoholic products classified by Danish legislation in the most heavily taxed tax category must be considered as products similar to aquavit within the meaning of the first paragraph of

Article 95, it is impossible reasonably to contest that all those beverages are without exception in at least partial competition with the product benefited by the Danish legislation.

35 In fact, as indicated above, the spirituous beverages referred to by the Danish legislation as products obtained by distillation have sufficient characteristics in common with aquavit to constitute at least in certain circumstances an alternative choice for consumers. Because of their very varied properties, these beverages are likely to be in competition with aquavit at times. The fact that aquavit is preferred in Denmark by consumers as an accompaniment to certain typical meals does not prevent that beverage from still being used for other purposes or from thus being in at least a partial substitution relationship with an indeterminate number of other types of spirit. It may therefore be said that to the extent to which the spirituous beverages on which the highest tax burden is imposed are not beverages which are similar to aquavit within the first paragraph of Article 95 they are in any case in competition with aquavit as referred to in the second paragraph of Article 95.

36 Viewed by itself, the tax system introduced by the Danish legislation contains incontestable discriminatory or protective characteristics. Although it does not establish any formal distinction according to the origin of the products, it has been adjusted so that the bulk of the domestic production of spirits comes within the most favourable tax category whereas almost all imported products come within the most heavily taxed category. These characteristics of the system are not obliterated by the fact that a very small fraction of imported spirits benefits from the most favourable rate of tax whereas, conversely, a certain proportion of domestic production comes within the same tax category as imported spirits. It therefore appears that the tax system is devised so that it largely benefits a typical domestic product and handicaps imported spirits to the same extent.

37 In conclusion, it is necessary to state that the system of taxation applied to spirits in the Kingdom of Denmark, as follows most recently from the Co-ordinated Law of 4 April 1978, is incompatible with the requirements of Article 95 of the Treaty, without its being necessary to make a distinction in this respect between the first and the second paragraph of that provision. It follows that the alternative conclusions put forward by the Danish Government in its defence are purposeless.

Costs

38 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

39 Since the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by the application of a discriminatory tax on spirits as follows from Co-ordinated Law No 151 of 4 April 1978, the Kingdom of Denmark has failed, as regards products imported from the other Member States, in its obligations under Article 95 of the EEC Treaty;**

2. **Orders the Kingdom of Denmark to pay 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