2. Reserves the costs.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 27 February 1980.

A. Van Houtte
Registrar

H. Kutscher
President

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

Mr President,
Members of the Court,

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

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

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

1 — Translated from the German.

The development of the customs and excise duties on wine in the United Kingdom, which as you know has no national production worth speaking of, may be described as follows, disregarding other taxes: at the date of accession only a customs duty, consisting of a protective element and a fiscal element of £1.6125 per gallon was imposed, but no excise duty. This customs duty was increased until 1 January 1976 to £2.675 per gallon. From 1 January 1976 the customs duty was reduced to £0.025 per gallon and at the same time an excise duty of £2.625 per gallon was introduced, which resulted in total taxation of £2.65 per gallon. Shortly afterwards, on 7 April 1976, the excise duty was increased to £2.955 per gallon, whilst retaining the customs duty, and on 1 January 1977 increased once more to £3.25 per gallon. On 1 July 1977 the customs duty was abolished in accordance with Article 36 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties and only an excise duty of £3.25 per gallon was still imposed.

In contrast to this beer brewed in the United Kingdom is taxed before fermentation according to the specific gravity of the worts. At the date of accession a rate of duty of £0.3858 was imposed per gallon of an original gravity of 1 038° — this is the average density of the beer consumed in the United Kingdom. On 7 April 1976 this rate was £0.557 and on 1 July 1977 £0.613 per gallon.

By letter of 14 July 1976 the Commission informed the Government of the United Kingdom, in accordance with the first paragraph of Article 169 of the EEC Treaty, that the great difference between the excise duty on domestic beer and that on wine chiefly imported from the Member States afforded in its view indirect protection to beer and was therefore contrary to the second paragraph of Article 95 of the EEC Treaty. In its reply of 6 October 1976 the Government of the United Kingdom disputed the existence of a significant relationship between the beer and wine markets and at the same time cast doubt on the incidence of taxation on the retail prices of those products put forward by the Commission.

As a result the Commission delivered to the United Kingdom on 8 November 1977 a reasoned opinion in accordance with Article 169 of the EEC Treaty. It stated therein that on the basis of volume the excise duty for beer of an original gravity of 1 037.71° — this is the exact average of the gravity of beer consumed in the United Kingdom in 1975 and 1976 — was £0.6084 per gallon as against £3.250 per gallon for wine. In relation to alcoholic strength the duty on the corresponding beer with an alcoholic strength of 3% by volume was £0.2028 per gallon in comparison with £0.2955 per gallon on still light wine which had an alcoholic strength of 11%. In relation to the retail price the excise duty on beer was on average less than 25% whilst the duty on the most popular wines represented 35%. Since these values showed that the United Kingdom was protecting domestic beer against imported wine, there was an infringement of the second paragraph of Article 95 of the EEC Treaty which had to be put to an end within a period of one month.

Since the United Kingdom did not react within that period, the Commission lodged an application received at the Court of Justice on 7 August 1978

requesting that the Court of Justice should declare that the United Kingdom of Great Britain and Northern Ireland was in breach of Article 95 of the EEC Treaty by failing to repeal or amend the disputed provisions with regard to excise duty on still light wine and should order the Government of the United Kingdom to pay the costs. The United Kingdom contends, on the other hand, that the application should be dismissed and that the plaintiff should be ordered to pay the costs. The Italian Government has intervened in the proceedings in support of the Commission.

In contrast to Cases 168/78, 169/78, 171/78 and 55/79, on which I delivered observations just now, this application is not based on the first paragraph of Article 95 of the EEC Treaty but only on the second paragraph thereof. As we have seen in the above-mentioned cases, the first paragraph of that article contains primarily a requirement of equal treatment, whilst the second paragraph of that article concentrates, from its wording alone, on the protective nature of the import tax, by prohibiting the Member States from imposing on the products of other Member States taxation of such a nature as to afford indirect protection to other products. The question when a protective effect arises in favour of a domestic product on account of a tax on an imported product depends upon the extent to which both those products are in competition with one another, in other words the extent to which they may be substituted for one another. Such interchangeability exists, according to the case-law of the Court of Justice in Case 27/67 *(Firma Fink-Frucht GmbH* v *Hauptzollamt München-Landsberger Straße,* judgment of 4 April 1968 [1968] ECR 223) when the imported product is, "by reason of one or more economic uses to which it may be put, in competition, even though the condition of similarity for the purposes of the first paragraph of Article 95 is not fulfilled". In the interests of legal certainty however it is necessary "for the various economic relationships covered by the second paragraph of Article 95 to be not merely fortuitous, but lasting and characteristic".

As I have in addition shown already, the first and second paragraphs of Article 95 of the EEC Treaty differ not only as regards the conditions described but also as regards their effects.

The principle of equality laid down in the first paragraph in fact applies whenever unequal treatment as regards the amount of taxation exists, whereas in the case of the second paragraph the unequal treatment must in addition give rise to a protective effect. Such a protective effect does not however necessarily exist if a higher tax is imposed on the imported products than on the interchangeable products since because of the cost and price differences in the case of substitute products a higher tax must not necessarily produce an effect on the market. The case-law of the Court of Justice is in accordance with this when the Court declares in the above-mentioned judgment in Case 27/67 *(Fink-Frucht)* that not all cases in which a higher tax is imposed on imported goods also indicate an infringement of the second paragraph of Article 95 and that for that reason national courts must decide the level below which the tax would cease to have any protective effect.

As a result I must first of all examine, having regard to this case-law, whether beer and wine are in competition with one another by reason of the economic uses to which they may be put. If the answer to this question is in the affirmative it will then be necessary in

addition to broach the problem whether the different taxation imposed on the imported wine is of such a nature as to afford indirect protection to the domestic beer production. The decisive factor as regards the question whether a competitive relationship under the second paragraph of Article 95 of the EEC Treaty exists between the above-mentioned products depends upon whether the characteristics of a national market must be taken into account or whether the Common Market must be viewed as a whole.

In contrast to the Commission's view, the Government of the United Kingdom is of the opinion in this connexion that the question of whether there is a competitive relationship between the above-mentioned goods depends only on the situation on the national market. In the United Kingdom however beer is the national drink for social, historical and geographical reasons. Drinking habits alone, which are unconnected with taxation, show that wine and beer cannot be regarded as interchangeable products.

It is however impossible to agree with these arguments. As I have already shown in detail in my opinion in Case 168/78, the function of Article 95 of the EEC Treaty, which is one of the foundations of the Community, is to close the gaps which might remain for the Member States to introduce fresh obstacles after the abolition of customs duties and charges having equivalent effect and the elimination of quantitative restrictions. The Member States should be prevented from protecting their own goods by applying tax discrimination to imported products. It follows merely from this principle, which also forms the basis of the second paragraph of the above-mentioned provision, that in the determination of lasting and characteristic competition within the meaning of the case-law of the Court of Justice it is necessary to concentrate not on the special situation in one Member State but on the general situation in the Community. The drinking habits and the preferences of consumers may in fact, as the Commission correctly emphasizes and as I have also explained in the above-mentioned opinions, be influenced by a variety of factors such as habit, local or national tradition and social position, and also to a large extent by the fact that foreign products are deliberately excluded from the internal market by protective tax measures.

Accordingly, it is important to determine whether beer and wine may be put to the same uses in *all* Member States according to the habits of consumers. If two products may be or better still are put to the same use it is also quite certain at the same time that they are in competition with one another on the market and thus interchangeable under the second paragraph of Article 95 of the EEC Treaty.

Beer and wine however from the point of view of consumers are put to the same purpose since they have the same characteristics, as the Commmission correctly emphasizes. Beer and wine, which are both made on the basis of a fermentation process, differ from the other thirst-quenching beverages listed in Chapter 22 of the Common Customs Tariff in that they contain alcohol. The relatively small alcohol content in turn distinguishes both drinks from spirits which come under tariff heading 22.09 C of the Common Customs Tariff and are obtained by distillation. The result of these common and objectively quantifiable criteria is

that both beer and wine meet essentially the same needs of consumers. Thus both are used as table drinks both in restaurants and in homes and quite generally to quench the thirst. Nor is this same use, the result of which is that both products are in competition with one another, compromised, as the Government of the United Kingdom considers, by the fact that both drinks differ with regard to the alcohol content and the manufacturing costs. Both factors may as you know very simply be evened out by diluting the wine with water. In addition this difference leads to the fact that in spite of the same use the two drinks cannot be regarded as similar products within the meaning of the first paragraph of Article 95. Such a finding does not however, as we have seen, make it impossible for both products to be included in the broader group of substitute products covered by the second paragraph of Article 95 of the EEC Treaty. It is therefore quite certain in my view that tax measures in favour of one of the products may in principle lead to a shift in the market position in favour of the same product.

This finding leads me to the much more difficult question of whether the tax on wine in the United Kingdom is in fact of such a nature as to have a protective effect in favour of domestic beer in relation to the behaviour of consumers.

Since it is difficult to produce such evidence because of the different method of taxation of the products in question — in the case of wine the taxation depends upon the volume of the final product and in the case of beer, on the other hand, according to the weight of the worts, the Commission proposes that three different bases of assessment should be examined. If the taxation is related to a specific volume, it follows, according to the Commission's statements, that in January 1974 the tax on wine was three times higher than on beer, whereas the ratio deteriorated to 5:1 in 1978. This difference however diminishes considerably to a ratio of approximately 1.5:1 if the tax, as is customary in the case of spirits, is related to the alcoholic strength of a specific volume. Finally, if the tax is considered in relation to the selling price of the products, the tax on a normal bottle of wine is 35 to 38% whereas a tax of only 22% is imposed on a normal bottle of beer. These examples show, in the view of the Commission, even if the obvious weaknesses of the individual bases of assessment are taken into account, that a higher tax is imposed on wine than on beer and that the excise duty on wine is therefore of such a nature as to afford protection to domestic beer.

In the view of the Italian Government too the development of the excise duty imposed on the products in question shows that beer and wine are competing products and that domestic beer is intended to be protected by the higher tax on wine. This may already be deduced from the fact that the excise duty on wine was increased from 1972 to 1977 by 102%, whereas in the same period the excise duty on beer went up by only 59%. Further evidence of discrimination against wine may be deduced from the fact that the United Kingdom imposed only a customs duty on wine until 1972, but not an excise

duty, which would have been purposeless because of the absence of any national production worth speaking of. The example of the tax related to the alcoholic strength is not significant since it does not take into account the different alcoholic strength of the types of wine and beer actually consumed. Finally, it is also necessary to bear in mind that the consumption of wine in the United Kingdom greatly increased in the years 1973 to 1974 in which the tax on wine was reduced, whilst in the subsequent years a smaller increase may be recorded.

The Government of the United Kingdom counters the submissions of the Commission and the Italian Republic by pointing out that the examples calculated and referred to by the Commission are rather arbitrary and incomplete. Thus for example in the calculation of the duty according to the volume of the drinks the fact that beer and wine have a different alcohol content and different manufacturing costs was not taken into account. In addition the fact that the consumption of beer per person in the United Kingdom is normally higher than the corresponding consumption of wine was not taken into account. It is only permissible to make a comparison as regards the alcohol content of the drinks if the volume of a wine glass and the volume of a pint of beer are taken as the basis, having regard to drinking habits. In the calculation of the duty according to the selling price, finally, the fact that the products in question are sold in very different ways was not taken into account. For this reason it is only permissible to take into account the total selling price of beer and wine and on this basis the duty on beer must be evaluated at 23% and that on wine at 24% of the selling price. In contrast to the submissions of the Italian Government the Government of the United Kingdom points out that it is impossible to conclude from the existence of an excise duty that beer and wine are competing products. Such a duty is a component of the normal taxation on alcoholic drinks which is permissible in accordance with the case-law of the Court of Justice. It is impossible to conclude from the fact that the duty is higher on cheap light wines than on heavy wines that the system of taxation protects beer. Finally, the duty on wine was not, as the Italian Government considers, reduced in 1973 and 1974 but only partially replaced by value-added tax.

I too am of the opinion, together with the Government of the United Kingdom, that the arguments put forward by the Commission and the Italian Government are not sufficient to show that the excise duty has on wine a protective effect prohibited by the Treaty in favour of the domestic competing product of beer. The new Member States were entitled under Article 38 (2) of the Act concerning the Conditions of Accession and the Adjustments to the Treaties to replace a customs duty of a fiscal nature or a fiscal element of any such duty by an internal tax in conformity only with Article 95 of the EEC Treaty. In contrast to the first paragraph of Article 95 the second paragraph thereof does not, as we have seen, prohibit higher taxes being imposed on imported competing products so long as the different taxation does not result in protection for domestic products. In examining whether such a protective

effect exists, it is certainly necessary to bear in mind that the tax on wine in the form of customs duties and excise duties since the accession of the United Kingdom has increased more than the corresponding tax on beer. However the faster increase in the tax burden on wine as such does not yet show whether the level reached is of such a nature as to afford indirect protection for domestic beer. Likewise the numerical examples put forward by the Commission in which this tax is related to the alcoholic content and the selling price are not capable of showing such a protective effect. Apart from the deficiencies of this method of calculation, which were also admitted by the Commission, these examples in fact show, it is true, a slightly higher tax on wine which as such is not however in my opinion such as to influence consumer behaviour, having regard to the manufacturing costs of wine, which are already higher. Only the conversion of the tax to a specific volume shows a considerably higher tax on wine. However such a method of conversion, as the Commission itself admits, leads to misleading results since neither the different alcohol content nor the different manufacturing costs of beer and wine are thereby taken into consideration. Finally, the statistics produced show that consumer behaviour has not been influenced hitherto by the higher tax on wine and in my opinion they show clearly that neither wine consumption nor beer consumption has been influenced by the tax up to now.

Since neither the Commission nor the Italian Government has succeeded in showing that the tax on wine imported from the Member States is of such a nature as to afford indirect protection to the competing product of beer, the application is unfounded and must be dismissed. The Commission must accordingly be ordered to pay the costs of the action.