OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 27 January 1987

My Lords,

In this application the Commission asks the Court to declare that by establishing and maintaining a system of differential taxation in respect of wines known as 'natural sweet wines' France has failed to fulfil its obligations under Article 95 of the EEC Treaty.

'Natural sweet wines', as currently defined in Article 416 of the French General Tax Code, have received a more favourable tax treatment in France than other dessert wines (in Regulation No 337/79 called 'liqueur wines' (Official Journal 1979, L 54, p. 1] or similar sweet wines since the enactment of a law of 13 August 1898. The current tax differential is substantial — FF 6 795 consumption duty per hectolitre of alcohol contained in the product plus FF 22 per hectolitre circulation duty on liqueur and other sweet wines (Articles 403 (I) (3) and 438 (1) of the Code); FF 2 545 per hectolitre of alcohol added in the course of preparation by way of consumption duty plus FF 54.80 per hectolitre by way of circulation duty in respect of natural sweet wines (Articles 403 (I) (1) and 438 (1) of the Code).

In 1979, the Commission gave a reasoned opinion under Article 169 of the EEC Treaty to the effect that these provisions were discriminatory against wines from other Member States which could never benefit from the more favourable duty under the French legislation. In 1982, France accordingly extended the benefit of the lower tax to quality liqueur wines produced in specified regions of the Community (Article 417 *bis* of the Code, introduced by Article 37 of the Finance Law for 1982). The benefit was, however, confined to wines,

'the production of which is traditional and customary and which, being subject to controls affording guarantees equivalent to those required of natural sweet wines as regards the conditions of their production and their marketing, have the following characteristics:

are produced directly by producer-growers from their crops, at least 90% of which consist of aromatic grape varieties;

are obtained from vineyards whose yield does not exceed 40 hectolitres per hectare of vines in production;

are obtained from must whose initial natural sugar content is at least 252 grams per litre;

are obtained, to the exclusion of any other method of enrichment, by the addition of vinous alcohol equal in pure alcohol to a minimum of 5% of the volume of the must used, and to a maximum of whichever is the lesser of the following proportions:

(i) either 10% of the volume of the must used; or

(ii) 40% of the total alcoholic strength by volume of the finished product, represented by the aggregate of the actual alcoholic strength plus the equivalent of the potential alcoholic strength calculated on the basis that 1% of pure alco' l by volume corresponds to 17.5 grams of residual sugar per litre;

are transported together with special accompanying documents.'

As a result the Commission in these proceedings, registered at the Court on 25 June 1985, did not challenge the principle that natural sweet wines can receive a preferential tax treatment. It contended, however, that three of the conditions imposed were restrictive so that dessert wines from other Member States similar to these natural sweet wines from France, were still at a disadvantage. One of the conditions challenged was that imported wines must circulate 'together with special accompanying documents'. In the course of the proceedings that requirement was removed by Article 64-VI of the Finance Law for 1986 adopted on 30 December 1985. The Court is thus now concerned only with two matters:

(i) the requirement that the product should come from a region where its production 'is traditional and customary';

(ii) the requirement that such wines are 'subject to controls affording guarantees equivalent to those required of natural sweet wines as regards the conditions of their production and their marketing'.

In earlier decisions the Court has recognized that where harmonization or unification has not taken place, Member States are not prohibited from granting tax advantages, in the form of exemptions from or reduction of duties, to certain types of goods or to certain classes of producers (e. g. Case 148/77 *Hansen* v *Hauptzollamt Flensburg* [1978] ECR 1787, a case concerning spirits where the Court said: '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' (paragraph 16)). In Case 169/78 *Commission* v *Italy* [1980] ECR 385, the Court added: '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' (paragraph 16). (See also Case 26/80 *Schneider Import* v *Hauptzollamt Mainz* [1980] ECR 3469.)

On the other hand those cases and the Court's recent judgments of 4 March 1986 in Case 106/84 *Commission* v *Denmark* [1986] ECR 833 and Case 243/84 *John Walker & Sons Limited* v *Ministeriet for Skatter og Afgifter* [1986] ECR 875 stress that any preferential treatment must not be discriminatory against similar goods from other Member States or protective of local production in such a way as to create barriers to the free movement of goods between Member States. Such differentiation 'on the basis of objective criteria

such as the nature of the raw materials used or the production processes employed' is 'compatible with Community law if it pursues objectives of economic policy which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are 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' (paragraph 20 of Case 106/84).

The explanation given for the tax differential in the present case is that the natural sweet wines in question are made in areas of low rainfall and relatively poor soil, where, since other agricultural products cannot easily be grown, the local economy is heavily dependent on their production. It is said that the restrictions as to yield per hectare, minimum sugar content and as to the maximum amount of alcohol which may be added to the grape must are designed to include wines from these areas, but to exclude other wines where the vines have a higher yield and are grown in areas with a higher rainfall and better soil, such as Pineau des Charentes, itself a sweet wine.

The objective of protecting wine producers in these areas on social and economic grounds seems to me to fall squarely within the principles laid down by the Court and to permit a tax differential between these 'natural sweet wines' and other French wines.

Moreover, the principle that wines of a similar kind from other Member States should be admitted on the same tax basis is accepted. In fact sweet wine from Samos is imported into France in substantial quantities — in 1986 it was estimated that some 38 000 hectolitres would be imported.

Thus far the arguments of the French Government are to be accepted. Whether it is also justified to require the production of natural sweet wines in other Member States to be 'traditional and customary' raises a more difficult question. This, it is said, is designed to include those areas which satisfy the other conditions laid down in so far as concerns France. It is, however, clearly restrictive and places at a disadvantage natural sweet wines which come from an area where production has recently begun or, perhaps, which is produced by means of newly-developed techniques, even if they satisfy all the other conditions laid down. Moreover, there is force in the Commission's argument that 'traditional and customary' is not a wholly objective ground in itself but gives a flexible yardstick capable of being used in a restrictive and discriminatory way. Recognizing these difficulties the French Government's expert stressed that the crucial requirements were yield per hectare, sugar and alcohol content rather than 'traditional and customary' production. The fact remains that this requirement is still part of the legislation.

The 'traditional and customary' test is, it seems, perfectly valid for France where the areas which need protection on justifiable social and economic grounds and which make wines which have a high sugar content, and which come from vines with a low yield, have a traditional and customary production. None the less, why should not wines imported into France which have the

same sugar content, coming from vines with the same low yield, growing in areas where production cannot be maintained without aid or the benefit of a tax reduction, not have the same tax advantage in France, even if their production is not traditional and customary? If, in another Member State, enterprising people with no other ready means of income begin to grow vines in an area having similar characteristics to those in the districts of France in question and produce wines of identical or similar quality, it may be asked why their wine should not be treated in the same way as the French natural sweet wines in question. The really objective criteria are satisfied by the newly developed as by the traditional production.

On the other hand, in cases such as Case 26/80 *supra* [1980] ECR 3469, at for example page 3486, paragraph 15), the Court has accepted that the requirement of non-discrimination contained in Article 95 of the Treaty is fulfilled where the arrangements applicable to spirits imported from other Member States 'may be considered as equivalent to the arrangements applicable to national production so that imported products may in fact enjoy the same advantages as comparable national products'. In this respect it is to be accepted in the present case that imports are treated in the same way as domestic production. In France it is only traditional and customary production which qualifies so that wine makers in new vine-growing areas and producing wines with comparable physical characteristics would not benefit from the lower tax. The same is true of producers in other Member States. If it had been shown here that the areas with customary and traditional production in France were the only areas in the Community which could possibly benefit from the tax advantage, then it might well be that the requirement of 'traditional and customary' production was a disguised form of protection or discrimination. That has not been shown and, despite the difficulties indicated as to the 'traditional and customary' test, it seems to me that the arrangements applicable to domestic production and to imports are in this respect considered as equivalent and the Commission's first ground should be rejected.

The second ground raises different issues. The Commission contends that it is contrary to Article 95 of the Treaty to require as a precondition of the lower tax rate that the wines shall be subject to controls affording guarantees equivalent to those required of domestically-produced natural sweet wines, as regards the conditions of their production and their marketing. France replies that it is entitled to require such controls on the basis of such cases as Case 21/79 *Commission* v *Italy* [1980] ECR 1.

There was a suggestion in the early correspondence between the parties that France had required a bilateral agreement with the Greek Government in respect of wine from Samos. This is not made out. It seems, however, plain that France did require the necessary proof to come from the Greek national authorities as the administrative instruction issued within the Direction générale des impôts on 13 August 1982 indicates, namely: 'Sur demande des autorités grecques et après avoir été mis en mesure par celles-ci de réunir tous les éléments d'information indispensables, une décision du ministre, prise le 1er juin 1982

en application de cette disposition, a prononcé l'assimilation, prévue par la loi, au profit des vins de qualité produits dans des régions déterminées originaires de Grèce et bénéficiant de l'appellation "Samos vin doux naturel grand cru"".

Although it is said that once this authorization was given, subsequent shipments of identical wine would not require the same procedures, it seems to me that to require proof from national authorities goes too far. Assuming that it is permissible to lay down standards as to sugar content, alcohol level and yield, both for French and imported wines, and to give the tax benefits to regions in need of economic support, the French authorities are entitled to require evidence that such conditions are satisfied, 'without being able none the less to set a higher standard of proof than is necessary' (Case 21/79 *supra* at paragraph 21). In that judgment the Court, however, whilst accepting that evidence could be required in a form that removes the risk of tax evasion, cited 'certificates from the authorities or other appropriate bodies of the exporting Member State' merely as examples of the way in which the fulfilment of the conditions can be proved. The judgment does not say that certification by governmental authorities can always be required. Accordingly, other methods of proof may be sufficient, and if sufficient, must be accepted. If the importer or exporter can produce such evidence, independent of national certification, that should be enough.

The further requirement that wines from other Member States should be 'subject to controls affording guarantees equivalent to those required of natural sweet wines' (i. e. those in France and subject to French controls) also seems to me to go too far. Other Member States may not have the same form of controls yet the wines may satisfy all the other conditions laid down. If it can be proved that wines fulfil all those other conditions then, in my view, they are entitled to the same tax advantage.

It is obviously a matter of administrative convenience to lay down strict and clear rules as to national controls and national certification. In the ultimate analysis, however, what matters is that similar wines from comparable regions should have the like tax treatment, the object of Article 95 being to 'guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products' (Case 169/78 *Commission* v *Italy* [1980] ECR 385 at 399, paragraph 4). More flexible rules may cause difficulties of proof (as was recognized in the judgment in Case 21/79) but these must be accepted if the realities are to be given effect.

In my view, accordingly, the French requirements of equivalent supervision are capable of being unduly restrictive even if in fact no comparable wines have so far been refused the tax benefit. On this point I consider that the Commission succeeds.

One other matter calls for comment in the light of the oral hearing. The limitations imposed include two which are relevant to sugar content. One is that the initial natural sugar content is 'at least 252 grams per

litre'. It seems to me to be legitimate to impose a minimum sugar content for the wines qualifying for the tax benefit. The specific requirement does not, however, exclude wines which have a higher sugar content and which may come from other Mediterranean countries with more sun. The other limitation is that the yield must not exceed 40 hectolitres per hectare of vines in production. The reason for this limitation is said to be that the lower the yield the higher the sugar content. It is, however, not improbable that in other Member States climatic conditions, particularly the amount of rain and sun, may produce a higher yield per hectare and yet give naturally wines of the same sugar content, the same quality and the same natural alcohol content. Prima facie, these wines are thus objectively the same and should receive the same tax treatment as French natural sweet wines. It is said in reply that a high yield means that the producer is not in the same need of protection economically. That seems to me to be a *non sequitur*. It may well be that in some countries the normal size of land holdings is smaller than in France and that the small farmer with a higher yield produces from less land a comparable quality to that produced by the smaller French wine producers. The same economic protection is needed. If the French legislation gave the tax benefits on the basis of actual production then it would seem justifiable to apply the same limits to producers in other Member States. Member States are not required by Article 95 'to extend the same advantage to imports coming from undertakings whose production exceeds the production limit thus fixed' (Case 26/80 *supra* at p. 3488) so long at any rate as conditions are not imposed which a 'production unit situated in another Member State cannot fulfil by reason of its geographical situation or of the legislation on production' in force in the other Member State (Case 26/80 and Case 153/80 *Rumhaus Hansen* v *Hauptzollamt Flensburg* [1981] ECR 1165). To fix the limits according to yield per hectare seems to me, however, to be a different matter and to be capable of producing discrimination against other Member States since it is geared peculiarly to protect French yields in the relevant areas. I do not, however, read the application (or the reply) as directly raising this issue.

In my opinion, it is, therefore, appropriate to declare that in requiring that wine from other Member States should be subject to controls affording guarantees equivalent to those required of French natural sweet wines as regards the conditions of their production and their marketing, and in requiring that evidence that the conditions laid down are satisfied should be supplied by national authorities, in order to benefit from the tax advantages granted by French legislation to French natural sweet wine, France has failed to fulfil its obligations under Article 95 of the EEC Treaty.

The Commission and France, in my view, each succeed on one of the two points remaining in issue; the Commission has achieved its objective in relation to the third point since France has amended its legislation since proceedings began. The Commission was thus, in my view, justified in bringing these proceedings and there is some force in the argument that it should have the costs in any event. Since, on the other hand, it has lost on a major point, the appropriate order would seem to be that each side should bear its own costs.