The Law of the EUROPEAN UNION

Teaching Material

DISCRIMINATORY TAXATION AND MEASURES HAVING AN EFFECT EQUIVALENT TO CUSTOMS DUTIES

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TABLE OF CONTENTS

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1. RELEVANT TREATY PROVISIONS

NOTE AND QUESTIONS

1. Why has Amsterdam repealed what were Articles 13 and 16 TEC?

2. Compare the pre-Amsterdam version of Article 25 (ex Article 12) TEC with its post-Amsterdam version. What consequences, if any, may this change entail?

Article 23 (ex 9) TEC

1. The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

2. The provisions of Chapter 1, Section 1, and of Chapter 2 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

Article 25 (ex Article 12) TEC pre-Amsterdam version

Member States shall refrain from introducing between themselves any customs duties on imports or exports or any charge having equivalent effect, and from increasing those which they already apply in their trade with each other.

Article 25 (ex Article 12) TEC post-Amsterdam version

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

Old Article 13 TEC (repealed by Amsterdam)

1. Customs duties on imports in force between Member States shall be progressively abolished by then during the transitional period in accordance with Article 14 and 15.

2. Charges having an effect equivalent to customs duties on imports, in force between Member States, shall be progressively abolished by them during the transitional period. The Commission shall determine by means of directives the timetable for such abolition. It shall be guided by the rules contained in Article 14 (2) and (3) and by the directives issued by the Council pursuant to Article 14 (2).

Old Article 16 TEC (repealed by Amsterdam)

Member States shall abolish between themselves customs duties on exports and charges having equivalent effect by the end of the first stage at the latest.

Article 90 (ex Article 95) TEC pre-Amsterdam version

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.

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.

Member States shall, not later than at the beginning of the second stage, repeal or amend any provisions existing when this Treaty enters into force which conflict with the preceding rules.

Article 90 (ex Article 95) TEC post-Amsterdam version

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.

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.

2. CHARGES HAVING AN EFFECT EQUIVALENT TO A CUSTOMS DUTY

2.1 Case 24/68: Commission v Italy (Statistical levy)

Commission of the European Communities v Italian Republic

Case 24/68

1 July 1969

Court of Justice

[1969] ECR 193

http://www.curia.eu.int/en/content/juris/index.htm

Summary of the facts and procedure:

Italy had levied, since before the entry into force of the EEC Treaty, on all goods exported and imported a charge known as a "statistical levy." It, at the time of this case, was payable at a fixed rate of 10 lire on every 100 kilograms or every metric ton of goods or on every animal or vehicle with a 10 lire minimum payable for goods in the smallest quantities.

The Commission took the view that the statistical levy constituted a charge having an effect equivalent to a customs duty contrary to Article 16 of the EEC Treaty and several Council regulations emanating from Articles 9 to 13. When the Italian government contested this view, the Commission instituted this Article 169 action.]

Judgement:

[…]

The concept of a charge having equivalent effect

3. According to Article 9 of the EEC Treaty, the Community shall be based upon a customs union founded upon the prohibition between Member States of customs duties and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

   Article 12 prohibits the introduction of new customs duties on imports or exports or any charges having equivalent effect. Under Articles 13 and 16 customs duties and charges having equivalent effect on both exports and imports in force between Member States are to be abolished in the manner laid down in those articles.

4. The position of these articles at the beginning of that Part of the Treaty reserved for the foundations

of the Community, Article 9 being the first provision appearing at the very beginning of the Title dealing with the free movement of goods and Articles 12, 13 and 16 at the beginning of the section on the elimination of customs duties between Member States, is sufficient to show the fundamental role of the prohibitions laid down therein.

The importance of these prohibitions is such that in order to prevent their circumvention by means of various customs and fiscal measures, the Treaty was intended to prevent any possible failure in their implementation.

5. Article 17 therefore specifies that the prohibitions in Article 9 shall also apply to customs duties of a fiscal nature.

   Article 95, which appears both in that Part of the Treaty which deals with the 'Policy of the Community' and in the Chapter on tax provisions, is intended to fill in any breaches which a fiscal measure might open in the prohibitions laid down, by prohibiting the imposition on imported products of internal taxation in excess of that imposed on domestic products.

6. In prohibiting the imposition of customs duties, the Treaty does not distinguish between goods according to whether or not they enter into competition with the products of the importing country.

   Thus, the purpose of the abolition of customs barriers is not merely to eliminate their protective nature, as the Treaty sought on the contrary to give general scope and effect to the rule on the elimination of customs duties and charges having equivalent effect, in order to ensure the free movement of goods.

7. It follows from the system as a whole and from the general and absolute nature of the prohibition of any customs duty applicable to goods moving between Member States that customs duties are prohibited independently of any consideration of the purpose for which they were introduced and the destination of the revenue obtained therefrom.

   The justification of this prohibition is based on the fact that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the movement of such goods.

8. The extension of the prohibition of customs duties to charges having equivalent effect is intended to supplement the prohibition against obstacles to trade created by such duties by increasing its efficiency.

   The use of these two complementary concepts thus tends, in trade between Member States, to avoid the imposition of any pecuniary charge on goods circulating within the Community by virtue of the fact that they cross a national frontier.

9. Thus, in order to ascribe to a charge an effect equivalent to a customs duty, it is important to consider this effect in the light of the objectives of the Treaty, in the Parts, Titles and Chapters in which Articles 9, 12, 13 and 16 are to be found, particularly in relation to the free movement of goods.

   Consequently, any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12, 13 and 16 of the Treaty, even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product.

10. It follows from all the provisions referred to and from their relationship with the other provisions of the Treaty that the prohibition of new customs duties or charges having equivalent effect, linked to the principle of the free movement of goods, constitutes a fundamental rule which, without prejudice to the other provisions of the Treaty, does not permit any exceptions.

11. In this respect, it follows from Articles 95 et seq that the concept of a charge having equivalent effect does not include taxation which is imposed in the same way within a State on similar or comparable domestic products, or at least falls, in the absence of such products, within the

framework of general internal taxation, or which is intended to compensate for such internal taxation within the limits laid down by the Treaty.

Although it is not impossible that in certain circumstances a specific service actually rendered may form the consideration for a possible proportional payment for the service in question, this may only apply in specific cases which cannot lead to the circumvention of the provisions of Articles 9, 12, 13 and 16 of the Treaty.

The disputed charge

12. The defendant emphasizes in the first place that the Commission is wrong in dividing the statistical levy into two distinct concepts, one relating to imports and the other to exports, when the legal nature of the disputed charge should be determined by taking account of its true nature and not by breaking it down into two distinct charges.

According to the defendant the circumstance that the statistical levy is imposed whenever goods cross the frontier without distinguishing between exports and imports or between domestic and foreign goods ipso facto precludes any possibility of considering it as a charge having an effect equivalent to customs duties since any protection of domestic production or discrimination is eliminated.

13. On the other hand the Commission breaks down the disputed levy into two distinct charges having effects equivalent respectively to a customs duty on imports and to a customs duty on exports and with protective or discriminatory effects although to a very slight degree.

14. It is of no consequence for its designation under the Treaty whether the disputed charge is treated as a general charge or as two distinct charges, one on exports and the other on imports.

As it is imposed universally on goods crossing the frontier, the charge in question hampers the interpenetration at which the Treaty aims and thus has an effect on the free circulation of goods equivalent to a customs duty.

The very low rate of the charge cannot change its character with regard to the principles of the Treaty which, for the purpose of determining the legality of those charges, do not admit of the substitution of quantitative criteria for those based on the nature of the charge.

15. The Italian Government further maintains that the disputed charge constitutes the consideration for a service rendered and as such cannot be designated as a charge having equivalent effect.

According to the Italian Government the object of the Statistics in question is to determine precisely the actual movements of goods and, consequently, changes the state of the market. It claims that the exactness of the information thus supplied affords importers a better competitive position in the Italian market whilst exporters enjoy a similar advantage abroad and that the special advantages which dealers obtain from the survey justifies their paying for this public service and moreover demonstrates that the disputed charge is in the nature of a quid pro quo.

16. The statistical information in question is beneficial to the economy as a whole and inter alia to the relevant administrative authorities.

Even if the competitive position of importers and exporters were to be particularly improved as a result, the statistics still constitute an advantage so general, and so difficult to assess, that the disputed charge cannot be regarded as the consideration for a specific benefit actually conferred.

17. It appears from the abovementioned considerations that in so far as the disputed charged is levied on exports it is contrary to Article 16 of the Treaty.

18. With regard to the statistical levy on the import from other Member States of products subject to regulations relating to the common organizations of the markets the abovementioned provisions of such regulations prohibit the levying of any customs duty or charge having equivalent effect on trade between the Member States.

The concept of a 'charge having equivalent effect' accessory to that of 'customs duty' was re-enacted in the abovementioned regulations from Articles 9, 12 and 13 of the Treaty.

Nothing in the said regulations justifies the conclusion that they are intended to confer on this concept a scope different from that which it has within the framework of the Treaty itself, especially as, when those regulations take account of the particular conditions for establishing a common market in agricultural products, they pursue the same objectives as Articles 9 to 13 of the Treaty which they implement.

[…]

2.2 Case 77/72: Capolongo

Carmine Capolongo v Azienda Agricola Maya

Case 77/72

19 June 1973

Court of Justice

[1973] ECR 611

http://www.curia.eu.int/en/content/juris/index.htm

Summary of the facts and procedure:

Carmine Capolongo paid a tax of 1.75% known as "Contributo Ente Nazionale per la Cellulosa e per la Carta" when buying eggs in cardboard containers. The funds raised by this tax went to a public corporation comprised of producers of paper and cellulose, as well as, users of cellulose. The corporation's aim was to promote the production of cellulose and paper in Italy by using the funds raised by the tax to finance subsidies. The charge applied equally to imported and domestically produced paper or cellulose. Capolongo brought this action before the Pretore di Conegliano claiming that the tax was contrary to the EEC Treaty. The Pretore referred several questions to the European Court of Justice pursuant to Article 177.

Judgement:

[…]

As to the third question

7. It is asked whether the collection of a financial charge on the basis of a percentage calculated by reference to the value of the product imported from other Member States constitutes an infringement of Article 13 (2) of the Treaty or any other rule of the Treaty prohibiting the application of special taxation on imports coming from other Member States.

8. In the absence of accurate information relating to the objectives, nature and methods of collection of the duty in dispute, it must be stated that, in exercise of the powers conferred by Article 177, the Court, having to limit itself to giving an interpretation of the provisions of Community law in question, cannot consider legal acts and provisions of national law, the risk being that the reply will correspond only imperfectly to the circumstances of the case.

9. Article 13 (1) provides that customs duties on imports applying between Member States at the date of the entry into force of the Treaty, shall be progressively abolished during the transitional period in accordance with Articles 14 and 15.

   Articles 14 and 15 contain the provisions necessary to this end, so that by the end of the transitional period all customs duties on imports between Member States will have disappeared.

Article 13 (2) complements Article 13 (1) by enacting that charges having an effect equivalent to customs duties on imports, in force between Member States, shall be progressively abolished during the transitional period.

10. Thus the provisions relating to the elimination of customs duties between Member States, which form the first section of the first chapter, entitled 'The Customs Union', are designed to ensure that the objective set out in Article 9 of the Treaty will be realized by the end of the transitional period.

Although such provisions make certain adjustments and allowances during the transitional period, it follows from their wording that such laws and taxes must in any event be entirely abolished at the latest by the end of the said period.

11. Article 13 (2), therefore, comprises a clear and precise prohibition, as from the end of the transitional period at the latest and for all charges having an effect equivalent to customs duties, on the collecting of said charges, which prohibition has no reservation allowing States to subject its implementation to a positive measure of domestic law or to an intervention by the institutions of the Community.

This prohibition lends itself, by its nature, to producing direct effects in the legal relations between Member States and their subjects.

12. It is aimed at any tax demanded at the time of or by reason of importation and which, being imposed specifically on an imported product to the exclusion of the similar domestic product, results in the same restrictive consequences on the free movement of goods as a customs duty by altering the cost price of that product.

Even pecuniary charges intended to finance the activities of an agency governed by public law can constitute taxes having equivalent effect within the meaning of Article 13 (2) of the Treaty.

On the other hand, financial charges within a general system of internal taxation applying systematically to domestic and imported products according to the same criteria are not to be considered as charges having equivalent effect.

13. In the interpretation of the concept 'charge having an effect equivalent to a customs duty on imports', the destination of the financial charges levied must be taken into account.

In effect, when such a financial charge or duty is intended exclusively to support activities which specifically profit taxed domestic products, it can follow that the general duty levied according to the same criteria on the imported product and the domestic product nevertheless constitutes for the former a net supplementary tax burden, whilst for the latter it constitutes in reality a set-off against benefits or aids previously received.

14. Consequently, a duty within the general system of internal taxation applying systematically to domestic and imported products according to the same criteria, can nevertheless constitute a charge having an effect equivalent to customs duty on imports, when such contribution is intended exclusively to support activities which specifically benefit the taxed domestic product.

[…]

2.3 Case 46/76: Bauhuis

W. J. G. Bauhuis v The Netherlands State

Case 46/76

25 January 1977

Court of Justice

[1977] ECR 5

http://www.curia.eu.int/en/content/juris/index.htm

Summary of the facts and procedure:

Bauhuis, the plaintiff, in accordance with Dutch law paid fees for veterinary and public health inspections when he imported from Member States and exported to Member States swine for breeding, bovine animals, and horses. The plaintiff brought an action for a refund in the Arondissementsrechtbank, The Hague contending that the fees charged were contrary to Community law because they had an effect equivalent to a customs duty. The court ordered the Dutch government to refund of the amount paid in connection with the imports but, as to the fees levied on the exports, the court, pursuant to Article 177, referred the following questions to the European Court of Justice:

Is the phrase 'charges having an effect equivalent to customs duties on exports' to be interpreted as including pecuniary charges which are imposed by a Member State in respect of the veterinary and public health inspection of livestock which is intended to be exported to another Member State in so far as such pecuniary charges suffice to cover, and do not exceed, the actual costs of a veterinary and public health inspection which is carried out by authority of the Government:

- *(a) (as regards bovine animals and swine) in compliance with obligations imposed on the exporting Member State by the Council of the European Economic Community in its Directive No 64/432/EEC of 26 June 1964; or*
- *(b) (as regards bovine animals and swine) in compliance with the obligations referred to at (a) above, and in addition to ensure that the bovine animals and swine concerned satisfy the particular conditions laid down for the importation thereof by the importing Member State; or*
- *(c) (as regards animals other than bovine animals or swine) in order to ensure that the animals concerned satisfy the conditions laid down for the importation thereof by the importing Member State?*

Judgment:

[…]

6. It is however advisable to specify first of all the legal framework within which the questions referred have to be answered.

7. Article 9 of the EEC Treaty prohibits between Member States customs duties on imports and exports and all charges having equivalent effect.

8. Under Article 16 Member States shall abolish between themselves customs duties on exports and charges having equivalent effect by the end of the first stage of the transitional period at the latest.

9. The justification for the prohibition of charges having an effect equivalent to customs duties lies in the fact that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the movement of goods, which is aggravated by the resulting administrative formalities.

10. consequently, any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12, 13 and 16 of the Treaty, even if it is not imposed for the benefit of the State.

11. The position would be different only if the charge in question is the consideration for a benefit provided in fact for the exporter representing an amount proportionate to the said benefit or if it related to a general system of internal dues applied systematically in accordance with the same criteria to domestic products and imported products alike.

12. Although Article 36 of the Treaty provides that 'The provisions of Articles 30 to 34 shall not preclude prohibitions or quantitative restrictions on imports (...) justified on grounds of (...) the protection of health and life of humans, animals (...)', this provision constitutes a derogation from the basic rule that all obstacles to the free movement of goods between Member States shall be eliminated and must be interpreted strictly and thus cannot be understood as authorizing measures of a different nature from those referred to in Articles 30 to 34.

13. Consequently, although Article 36 does not prevent veterinary and public health inspections it cannot nevertheless be interpreted as thereby permitting the imposition of charges levied on imported goods subjected to the said inspections and intended to cover the costs thereof.

14. In fact this charge is not intrinsically necessary for the exercise of the power laid down in Article 36 and is thus capable of constituting an additional barrier to intra-Community trade.

15. It is appropriate to examine the questions referred in the light of these considerations.

I The fees charged for the veterinary and public health inspections prescribed by Directive No 64/432/EEC

16. With a view to eliminating obstacles to intra-Community trade in bovine animals and swine the Council by Directive No 64/432 of 26 June 1964 harmonized the animal health measures in force in the Member States by making it obligatory for the latter to standardize domestic provisions in this field in accordance with the requirements of this directive.

17. According to the second and third recitals of the directive of 26 June 1964 its aim is to increase the effectiveness of the regulations on the organizations of the markets in beef and veal and pigmeat by substituting 'for the numerous traditional means of protection at the frontier a single system designed in particular to facilitate intra-Community trade'.

18. According to the third and fourth recitals this objective can only be attained by eliminating differences between national laws by 'approximating the animal health provisions of Member States'.

19. This approximation consists mainly in imposing upon Member States exporting cattle the obligation to ensure compliance with certain veterinary and public health measures intended, inter alia, to guarantee that the exported animals are not a source of contagious disease.

20. It is apparent from all these considerations that the harmonized system of veterinary and public health inspections introduced by the directive is based on the principle that the veterinary and public health guarantees required by each of the Member States have equivalent effect and it is this principle which guarantees both the protection of health and equal treatment of products.

21. Seen in this light the aim of the system is to transfer supervision to the exporting Member State and to replace in this way the systematic measures of protection at the frontier with a uniform system so as to make multiple frontier inspections unnecesssary and at the same time to give the Member state of destination the opportunity of ensuring that the guarantees provide by the system of inspections thus standardized are in fact given.

22. This system is based on the trust with Member States should place in each other as far as concerns the guarantees provided by the inspections carried out initially by the veterinary and public health departments of the Member States from which the animals are exported.

23. With a view to making these guarantees effective the directive harmonized the provisions adopted by Member States by making unusually strict methods of supervision of universal application.

24. It therefore frequently happens that some at least of the inspections prescribed by the directive will be similar to the inspections carried out when the same animals are marketed and transported in the territory of the Member State concerned.

25. In the fees for these inspections are demanded in the case of internal marketing as well as in the case of exportation then they form part of a general system of domestic charges and are not charges having an effect equivalent to a customs duty on exports but fall within the prohibition of discrimination under Article 95 of the Treaty.

26. Therefore the first question referred relates to the interpretation of the concept of a charge having an effect equivalent to a customs duty on exports with reference to the fees charged only for inspections of animals intended for export to another Member State and for the purpose of fulfilling the obligations of Council Directive No 64/432.

27. Although the organization of these inspections and exporting to another Member State are correlated, this organization by the exporting State has been made obligatory in the directive so that inspections at the frontier organized unilaterally by the importing Member State become unnecessary or are at least reduced to an occasional check that the veterinary and public health measures which are required to be taken in the exporting Member State have been complied with.

28. These measures are laid down unilaterally by each Member State but have been made obligatory and uniform in the case of all the products in question whichever the exporting Member State or the Member State of destination may be.

29. On the other and they are not prescribed by each Member State in order to protect some interest of its own but by the Council in the general interest of the Community.

30. They cannot therefore be regarded as unilateral measures which hinder trade but rather as operations intended to promote the free movement of goods, in particular by rendering ineffective the obstacles to this free movement which might be created by the measures for veterinary and public health inspections adopted pursuant to Article 36.

31. In these circumstances fees charged for veterinary and public health inspections, which are prescribed by a Community provision, which are uniform and are required to be carried out before despatch within the exporting country do not constitute charges having an effect equivalent to customs duties on exports, provided that they do not exceed the actual cost of the inspection for which they were charged.

32. The reasons for the prohibition of any obstacle to intra-Community trade, whether such obstacles takes the form of charges having an effect equivalent to customs duties or of measures having an effect equivalent to quantitative restrictions, do not apply to this case.

33. Moreover, as far as the question whether it is lawful to demand a fee is concerned, a distinction must be made between the inspections prescribed by the directive and those occasional inspections which, according to its provisions, only Member States are permitted to carry out at the frontier, because the former are obligatory and of general application so that they affect all the goods concerned, whereas the fees charged for the latter, which are only carried out in a random manner, are only borne by the goods which are inspected.

34. It is a question moreover of the compensation, justified on economic and financial grounds, for an obligation imposed by Community law on all the Member States equally.

35. The costs of the inspection may well vary from one Member State to another so that the fees may prove to be different according to the Member State where the inspection is carried out

36. Although it may be desirable to see these charges harmonized, the fact that, if they are not to be designated as charges having an effect equivalent to customs duties, they must not exceed the actual costs of the operation, removes them from the category of prohibited aids to exports and precludes them from being regarded as obstacles to the movement of goods.

II The fees charged for the special veterinary and public health inspections of bovine animals and swine on the occasion of their exportation

37. With a view to promoting the free movement of bovine animals and swine Directive No 64/432 has made veterinary and public health inspections intended to protect the health and life of humans and animals generally applicable and uniform in the whole of Community territory.

38. The mutual confidence, which Member States must have in the inspections carried out, under the prescribed conditions, by the competent authorities of the other Member States, constitutes a basic element of the system introduced by the directive, without which it would have no purpose.

39. If follows that bovine animals and swine which have undergone inspections prescribed by this directive must be able to be transported from one Member State to the others without additional health and veterinary requirements.

40. Consequently, apart from the exceptions laid down by the directive itself, any additional inspection of bovine animals or swine for export to another Member State imposed unilaterally by a Member State, either on its own initiative or in order to meet the requirements of another Member State, which are no longer justified, would constitute a measure having an effect equivalent to a quantitative restriction and any fee charged on this occasion would, for that reason, be incompatible with Community law.

41. The position would be different only if this inspection and an identical fee were also prescribed and charged under domestic regulations in connexion with the sale and transport of bovine animals and swine on the territory of the Member State concerned.

42. Moreover, if there were additional inspections carried out in the exporting country in the circumstances and subject to the conditions referred to in the special provisions of Directive No 64/432, such as Article 8, the fees would conform with those analysed above and would not constitute charges having an effect equivalent to customs duties on exports, provided that they do not exceed the actual costs of the operation.

III Fees charged for veterinary and public health inspections of animals other than bovine animals and swine carried out in exporting countries

43. The inspections referred to in the last part of the question are carried out by Member States unilaterally and in a way which has not been standardized and are in no way connected with any Community rules.

44. In so far as these are inspections of animals intended only for export and differ from those carried out when the same animals are marketed or transported in the territory of the Member State concerned they are measures having an effect equivalent to quantitative restrictions.

45. These measures which are intended to protect the veterinary and public health interests of the importing country comply with the Treaty subject to the conditions laid down in Article 36 thereof.

46. Article 36 does not prohibit the replacement of the inspections carried out by the importing State on the occasion of the crossing of the frontier by inspectioins initially carried out by the Member States.

47. However the transfer of these inspections which continue to be carried out in the interest of the importing State does not in fact their nature.

48. As it has been noted above that, although Article 36, in accordance with the conditions which it prescribes, does not prevent the retention of certain restrictions, in particular those which take the form of veterinary and public health inspections, it does not however permit the collection of duties charged on the goods subjected to these inspections, since this collection is not necessary for the exercise of the powers provided for by Article 36 and therefore constitutes an additional obstacle to intra-Community trade.

49. The reasons which render lawful the collection of appropriate duties for the carrying out of uniform Community inspections of general application cannot be applied to situations which continue to consists of obstacles set up unilaterally.

50. This is the case even if the domestic inspections are measures for the promotion of exports.

51. It is therefore necessary to reply that fees charged by the exporting State for veterinary and public health inspections carried out by the authorities of that State, which are not required a Community regulation or directive but which have been prescribed for the purpose of checking whether the conditions to which the Member State of destination has made the importation subject have been complied with, constitute charges having an effect equivalent to customs duties.

[…]

On those grounds, THE COURT in answer to the questions referred to it by the Arrondissementsrecht-bank, The Hague, by order of 10 May 1976, hereby rules:

1. Fees charged for veterinary and public health inspections which are prescribed by a Community provision, which are uniform and are required to be carried out before despatch within the exporting country, do not constitute charges having an effect equivalent to customs duties on

exports, provided that they do not exceed the actual cost of the inspection for which they were charged.

2. Consequently, apart from the exceptions laid down by Directive No 64/432/EEC itself, any additional inspection of bovine animals and swine intended for export to another Member State, which is prescribed unilaterally by a Member State, either on its own initiative or in order to meet the requirements of another Member State which are no longer justified, constitutes a measure having an effect equivalent to a quantitative restriction and any fee charged on that occasion would, for that reason, be incompatible with Community law.
3. Fees charged by the exporting Member State for veterinary and public health inspections carried out by the authorities of that State, which are nor required by a Community regulation or directive but which have been prescribed for the purpose of checking whether the conditions to which the Member State of destination had made the importation subject have been complied with, constitute charges having an effect equivalent to customs duties.

2.4 *Case 18/87: Commission v Germany (Animals inspection fees)*

2.4.1 Opinion of AG Mancini

Commission of the European Communities v Federal Republic of Germany

Case 18/87

21 June 1988

AG Mancini

[1988] ECR 5427

http://www.curia.eu.int/en/content/juris/index.htm

1. The Commission of the European Communities has brought an application for a declaration that the Federal Republic of Germany has failed to fulfil its obligations under Articles 9 and 12 of the EEC Treaty. The Federal Republic of Germany permits the authorities of certain Laender to charge a fee for inspections carried out on the transportation of live animals imported into Germany or in transit to other destinations within the Community.

It is apparent from the documents before the Court that the administrations of the Laender Bremen, Hessen, Niedersachsen, Nordrhein-Westfalen and Rheinland-Pfalz charge transporters a fee for the inspections carried out by the Laender with regard to the conditions of transport under which live animals are in transit in their territories or are imported into those territories. On 19 February 1985 the Commission informed the German Government, pursuant to Article 169 of the EEC Treaty, of its view that that practice was incompatible with the aforementioned Community prohibitions and requested it to bring the practice to an end. As the German Government firmly refused to adopt the measures necessary for that purpose, the Commission brought proceedings before the Court of Justice by application lodged on 26 January 1987.

2. I shall begin with a brief reference to the relevant rules. At the Community level the rules relating to the protection of animals during international transport are contained in Council Directive 77/489 of 18 July 1977 (Official Journal 1977, L 200, p. 10) and Council Directive 81/389 of 12 May 1981 (Official Journal 1981, L 150, p. 1). Articles 2 and 3 of Directive 81/389 are of particular importance. Article 2 empowers the authorities of the Member States of transit and of destination to check the manner in which the persons responsible for transport comply with the obligations and conditions laid down in Directive 77/489. Article 3 provides that those authorities are to prescribe the measures required to remedy any irregularities discovered by them, and to carry out such measures if they are not complied with.

However, they contain no provisions regarding the manner in which such checks are to be financed and, in particular, the possibility of the national administrations charging a fee to recoup part of the costs incurred. In that respect the Verordnung (order) of 29 March 1983 by which the Bundesminister fuer Ernaehrung, Landwirtschaft und Forsten (Federal Minister for Food, Agriculture and Forestry) implemented the Community provisions in Germany is also silent. It is the five Laender which are alleged to have introduced a fee and to have laid down rules governing the manner in which it is collected and the amount thereof.

3. The Commission maintains that since the fees at issue are levied solely in respect of intra-Community trade they constitute a charge having an effect equivalent to a customs duty and are therefore contrary to the prohibition laid down in Article 12 of the EEC Treaty. It states that the fees do not form part of a general system of dues also applied to livestock transported within Germany and that since the sole purpose of the inspections in respect of which they are charged is protection of the animals the fees do not constitute the consideration for a benefit provided for the person concerned.

The German Government disputes those contentions and bases its defence on the principles laid down by the Court in its judgment of 25 January 1977 in Case 46/76 Bauhuis v Netherlands State ((1977)) ECR 5 and the subsequent line of consistent decisions. It states that, as in that case, the fees at issue are intended to finance a system of uniform health inspections established by a directive in order to satisfy one of the general interests of the Community, namely the protection of animals transported within its territory. Far from constituting a charge having an effect equivalent to a customs duty the fees therefore contribute to the realization of Community objectives.

4. What view should be taken of those submissions? It follows from the Court' s judgment in the Bauhuis case that the fees charged on the imported goods or on goods in transit to other Member States by reason of the fact that they cross a frontier do not fall under the prohibition in Article 12 of the EEC Treaty if : (a) they constitute the consideration for a benefit actually provided for the transporter or the importer, (b) they form part of a general system of internal dues applied in accordance with the same criteria to domestic goods and to imports and exports, (c) they are charged in connection with inspections prescribed by a Community directive. It is evident that in all such cases the amount charged must not exceed the actual cost of the inspection.

In the case before the Court it is clear that the German regional authorities are acting in accordance with the provisions of Directives 77/489 and 81/389 and in fact for the purpose of ensuring compliance therewith. The purpose of the two directives is namely to protect livestock during international transport. It is evident that such an objective may be attained solely by the establishment of a system of inspections aimed at determining whether the transporter holds the health certificate for the animals in question and is complying throughout the course of the journey with the conditions of transport laid down by the Community provisions.

The method of transport and the surrounding circumstances may vary during the course of the journey. In order to be able to check that the necessary requirements are being complied with at every stage it is therefore necessary that the aforementioned inspections should not be limited to the countries of departure and arrival but should extend to the countries of transit. Article 2 of Directive 81/389 itself provides, moreover, that it is for the authorities of the "Member States of transit and of destination" to check that the transport is effected properly.

Consequently, intermediate inspections are in complete accordance with the general interests of the Community in this area. The Commission’s submission that the interest of the Community consists solely in the facilitation of intra-Community trade and that it is served by the elimination or reduction of inspections cannot be accepted. Such a requirement undoubtedly exists, but it cannot set aside or even take precedence over the specific need to ensure adequate protection for animals in the course of transportation. I would add, furthermore, that the requirement cannot have such an effect even in the absence of rules harmonizing the fees charged by the Member States for the checks carried out by them (see paragraph 36 of the decision in the Bauhuis case).

5. In the light of the foregoing comments the Commission’s application appears unfounded. Although the fees charged by the five Laender are not directly provided for by the Community rules, they are in fact levied in respect of inspections required by those rules and, consequently, may not be regarded as a charge having an effect equivalent to a customs duty.

Moreover the level of the fees does not exceed the actual cost of the inspections and the inspections are carried out only once on the territory of the Federal Republic of Germany. The former was accepted by the Commission; the latter information was supplied by the German Government in reply to a question put by the Court and dispels the suspicion of abuse expressed by the Commission in the course of the proceedings.

6. In view of all the foregoing considerations I propose that the action brought by the Commission of the European Communities on 26 January 1987 against the Federal Republic of Germany should be dismissed and that the unsuccessful party should be ordered to pay the costs.

2.4.2 Judgement of the Court of Justice

Commission of the European Communities v Federal Republic of Germany

Case 18/87

27 September 1988

Court of Justice

[1988] ECR 5427

http://www.curia.eu.int/en/content/juris/index.htm

1 By an application lodged at the Court Registry on 26 January 1987, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that the Federal Republic of Germany had failed to fulfil its obligations under Articles 9 and 12 of the EEC Treaty in so far as some Laender charge a fee on the importation of live animals from other Member States to cover the costs of veterinary inspections carried out under Council Directive 81/389/EEC of 12 May 1981 (Official Journal 1981, L 150, p. 1).

2 In the Federal Republic of Germany, the authorities in the Laender Bremen, Hessen, Niedersachsen, Nordrhein-Westfalen and Rheinland-Pfalz charge a fee, payable on the importation and transit, even in the course of intra-Community trade, of live animals, to cover the costs of official veterinary inspections carried out only once on the territory of the Federal Republic of Germany in accordance with Article 2(1) of Council Directive 81/389/EEC of 12 May 1981 establishing measures necessary for the implementation of Directive 77/489/EEC on the protection of animals during international transport (Official Journal L 150, p. 1).

3 According to the Commission, this fee is a charge having an effect equivalent to a customs duty and as such prohibited under Articles 9 and 12 of the Treaty. The Federal Republic of Germany disputes this.

4 Reference is made to the Report for the Hearing for the facts of the case, the course of the procedure and the arguments of the parties which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

5 It should be observed in the first place that, as the Court has held on a number of occasions, the justification for the prohibition of customs duties and any charges having an equivalent effect lies in the fact that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier, constitutes an obstacle to the movement of goods which is aggravated by the resulting administrative formalities. It follows that any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier and is not a customs duty in the strict sense constitutes a charge having an equivalent effect to a customs duty within the meaning of Articles 9, 12, 13 and 16 of the Treaty.

6 However, the Court has held that such a charge escapes that classification if it relates to a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported products alike (judgment of 31 May 1979 in Case 132/78 Denkavit v France ((1979)) ECR 1923), if it constitutes payment for a service in fact rendered to the economic operator of a sum in proportion to the service (judgment of 9 November 1983 in Case 158/82 Commission v Denmark ((1983)) ECR 3573), or again, subject to certain conditions, if it attaches to inspections carried out to fulfil obligations imposed by Community law (judgment of 25 January 1977 in Case 46/76 Bauhuis v Netherlands ((1977)) ECR 5).

7 The contested fee, which is payable on importation and transit, cannot be regarded as relating to a general system of internal dues. Nor does it constitute payment for a service rendered to the operator, because this condition is satisfied only if the operator in question obtains a definite specific benefit (see judgment of 1 July 1969 in Case 24/68 Commission v Italy ((1969)) ECR 193), which is not the case if the inspection serves to guarantee, in the public interest, the health and life of animals in international transport (see judgment of 20 March 1984 in Case 314/82 Commission v Belgium ((1984)) ECR 1543).

8 Since the contested fee was charged in connection with inspections carried out pursuant to a Community provision, it should be noted that according to the case-law of the Court (judgment of 25 January 1977 in Bauhuis, cited above; judgment of 12 July 1977 Commission v Netherlands ((1977)) ECR 1355; judgment of 31 January 1984 in Case 1/83 IFG v Freistaat Bayern ((1984)) ECR 349) such fees may not be classified as charges having an effect equivalent to a customs duty if the following conditions are satisfied:

(a) they do not exceed the actual costs of the inspections in connection with which they are charged;
(b) the inspections in question are obligatory and uniform for all the products concerned in the Community;
(c) they are prescribed by Community law in the general interest of the Community;
(d) they promote the free movement of goods, in particular by neutralizing obstacles which could arise from unilateral measures of inspection adopted in accordance with Article 36 of the Treaty.

9 In this instance these conditions are satisfied by the contested fee. In the first place it has not been contested that it does not exceed the real cost of the inspections in connection with which it is charged.

10 Moreover, all the Member States of transit and destination are required, under, inter alia, Article 2(1) of Directive 81/389/EEC, cited above, to carry out the veterinary inspections in question when the animals are brought into their territories, and therefore the inspections are obligatory and uniform for all the animals concerned in the Community.

11 Those inspections are prescribed by Directive 81/389/EEC, which establishes the measures necessary for the implementation of Council Directive 77/489/EEC of 18 July 1977 on the protection of animals during international transport, with a view to the protection of live animals, an objective which is pursued in the general interest of the Community and not a specific interest of individual States.

12 Finally, it appears from the preambles to the two abovementioned directives that they are intended to harmonize the laws of the Member States regarding the protection of animals in international transport in order to eliminate technical barriers resulting from disparities in the national laws (see third, fourth and fifth recitals in the preamble to Directive 77/489/EEC and third recital in the preamble to Directive 81/389/EEC). In addition, failing such harmonization, each Member State was entitled to maintain or introduce, under the conditions laid down in Article 36 of the Treaty, measures restricting trade which were justified on grounds of the protection of the health and life of animals. It follows that the standardization of the inspections in question is such as to promote the free movement of goods.

13 The Commission has claimed, however, that the contested fee is to be regarded as a charge having equivalent effect to a customs duty because, in so far as fees of this type have not been harmonized, such harmonization, moreover, being unattainable in practice - their negative effect on the free movement of goods could not be compensated or, consequently, justified by the positive effects of the Community standardization of inspections.

14 In this respect, it should be noted that since the fee in question is intended solely as the financially and economically justified compensation for an obligation imposed in equal measure on all the Member States by Community law, it cannot be regarded as equivalent to a customs duty; nor, consequently, can it fall within the ambit of the prohibition laid down in Articles 9 and 12 of the Treaty.

15 The negative effects which such a fee may have on the free movement of goods in the Community can be eliminated only by virtue of Community provisions providing for the harmonization of fees, or imposing the obligation on the Member States to bear the costs entailed in the inspections or, finally, establishing that the costs in question are to be paid out of the Community budget.

16 It follows from the foregoing that the Commission' s application must be dismissed.

[…]

2.5 *Case 132/78: Denkavit*

2.5.1 Opinion of AG Warner

SARL Denkavit Loire v État français, administration des douanes

Case 132/78

29 March 1979

AG Warner

[1979] ECR 1923

http://www.curia.eu.int/en/content/juris/index.htm

The Plaintiff in the proceedings before that Court is the SARL Denkavit Loire, which carries on business at montreuil Bellay in the Departement of Maine-et- Loire as a manufacturer of animal feeding stuffs. The Defendant is the French State, in the form of the "Administration des Douanes".

On 7 October 1977 the Plaintiff imported from the Federal Republic of Germany and cleared through customs at Lille a consignment of 22 400 kgs of lard intended for the manufacture of a product used mainly for feeding young calves. The lard was of CCT Heading 15.01, which comprises "Lard, other pig fat and poultry fat, rendered or solvent- extracted".

The Plaintiff was required to pay on that importation a sum of FF 672 in respect of a "tax for the protection of public health and for the organization of the markets in meat" ("taxe de protection sanitaire et d'organisation des marches des viandes") introduced by a French Statute, No 77-646, of 24 June 1977. In the proceedings before the Tribunal d'Instance the Plaintiff seeks to recover that sum with interest, on the ground that the imposition of that tax on lard imported from another Member State was contrary to Community law. The sum at stake is small, but we are told on behalf of the Plaintiff that this is a test case, the outcome of which will determine that of other cases both pending and future.

The tax in question was, it appears, instituted in substitution for two taxes previously imposed by French legislation, a "public health tax" ("taxe sanitaire") and an "inspection and stamp tax" ("taxe de visite et de poinconnage"), the compatibility of which with Community law had been challenged by the Commission under Article 169 of the EEC Treaty.

Article 1 of Statute No 77-646 provides that the tax thereby instituted is to be levied in private slaughterhouses and on imports for the benefit of the State, and in public slaughterhouses for the benefit, in prescribed proportions, of the State and of the local authorities owning them. Article 2 provides that the rate of the tax is to be fixed annually per kg net weight of meat on the basis of certain prescribed guide prices.

Article 3 deals with the levying of the tax on meat from animals slaughtered in France. It provides that the tax is to be paid by or for the account of the owner of each slaughtered animal at the time of its slaughter; that the slaughtering process constitutes the chargeable event ("le fait generateur de la taxe"); and that the tax shall be assessed and collected in the same way as VAT.

Article 4 on the other hand deals with imports. It provides that the tax shall be charged on the importation of meat, whether or not prepared; that it shall be payable by the importer or other person entering the goods, at the time of their clearance for home use; that it shall be levied by the customs authorities; and that it shall be assimilated to customs duties for purposes of collection and of all legal proceedings.

A Decree, No 77-899, of 27 July 1977 lays down certain detailed provisions for the implementation of the Statute.

Articles 1 to 6 of that Decree prescribe how the net weight of meat is to be established for the purposes of levying the tax in French slaughterhouses. In the case of swine, Article 3 provides that the net weight shall be that of the slaughtered animal, bled and gutted, with the tongue, bristles, hooves and genital organs removed, but including the head and trotters. Article 6 requires weighing to take place within an hour of the animal having ben stunned and provides for certain deductions to be made from the actual net weight found.

Articles 9 and 10 of the Decree deal with imports. Article 9 lists, by reference to CCT Headings, the imported products on which the tax is to be charged. That list not only includes meat, fresh, chilled, frozen, salted, in brine, dried or smoked, as well as pig and poultry fat not rendered or solvent-extracted (again fresh, chilled, frozen, salted, in brine, dried or smoked), all of which products are comprised in various Headings in Chapter 2 of the CCT (entitled "Meat and Edible Meat Offals"); it also includes the products of Heading 15.01, to which I have already referred, and certain products of Headings 16.01 and 16.02 such as sausages and other prepared and preserved meats. Article 10 provides for the tax to be assessed on the net weight of the meat less any offal and for products of headings 16.01 and 16.02 consisting of meats of different species of animals for which the rates of tax differ to be taxed at the lowest relevant rate.

Decree No 77-899 was itself followed by a ministerial Order ("Arrête") dated 9 August 1977 stating the rates at which the tax should be charged for the year 1977. For meat from swine the rate was to be 0.0394 FF per kg. The rate actually charged by the Customs office at Lille on the importation here in question appears to have been, owing to a mistake, only 0.03 FF per kg, but nothing turns on that.

The questions referred to this Court by the Tribunal d'Instance, which reflect the contentions advanced before the Tribunal on behalf of the Plaintiff, are these:

"1. Is it contrary to the prohibition on charges having an effect equivalent to customs duties on imports within the meaning of Articles 9, 12 and 13 of the Treaty establishing the European Economic Community to apply to imports from another Member State of lard intended for use in animal feeding stuffs a tax to compensate for the levying of an internal tax on the slaughter of swine?

2. If the answer to Question 1 is in the negative, is the levying of the tax referred to in that Question contrary to the prohibition of tax discrimination under Article 95 of the Treaty?

3. If the answers to Questions 1 and 2 are in the negative, should the levying of the tax referred to in Question 1 be held contrary to Council Regulation No 2759/75 of 29 October 1975 on the common organization of the market in pigmeat?"

The Commission invited us to consider the question whether the tax instituted by Statute No 77-646 was as a whole compatible with Community law. That is however a much wider question than any asked by the Tribunal d'Instance. Nor is it a question that needs to be answered in order to enable the present case to be decided. I therefore propose to leave it aside, and to consider only the compatibility with Community law of the imposition of the tax on lard imported from other Member States.

As so that the crucial fact is, in my opinion, that the tax is not imposed on lard produced in France.

On behalf of the French Government it was submitted that that was immaterial because such lard was extracted from carcasses that had borne the tax at the slaughterhouse, so that the tax should properly be regarded as a single tax chargeable uniformly on domestic and imported products. It was chargeable at the same rate on the same basis (net weight) in both cases. The French Government concluded that the tax formed part of the general internal taxation system of France and could not be considered a charge having an effect equivalent to a customs duty.

It has however been held by this Court that for an impost to be regarded as forming part of the general internal taxation system of a Member State, and not, in so far as it affects imports, as a charge having an effect equivalent to a customs duty, it must be levied on domestic products and on imports according to the same criteria and at the same stage of production. The circumstance that domestic products may be subjected to a burden similar to that affecting imports in some other way is not enough. See in particular Case 87/75 the Bresciani case [1976] 1 ECR 129 (paragraph 11 of the Judgment). Manifestly lard produced by rendering or by solvent-extraction is not at the same stage of production as the carcass of a freshly slaughtered pig.

I am therefore of the opinion that the Plaintiff and the Commission are right in saying that the imposition of the tax here in question on imports of lard from other Member States was incompatible with the provisions of the Treaty forbidding charges having an effect equivalent to customs duties on trade between Member States.

The conclusion makes it unnecessary to express any view on a subsidiary argument that was put forward on behalf of the Plaintiff on Question 1, to the effect that, since charges are made in most countries for public health inspections at slaughterhouse, the extension of the tax to imports was likely to lead to double taxation.

The conclusion also makes it unnecessary to express a view on an alternative submission made on behalf of the Plaintiff on that Question, which rested on the principle laid down in a number of Judgments of the Court that a duty falling within a general system of internal taxation applying to domestic products as well as to imported products can constitute a charge having an effect equivalent to a customs duty on imports it it has the sole purpose of financing activities for the specific advantage of the taxed domestic product. The Plaintiff submitted, on the strength of what was said in the "Expose des Motifs" of the Bill for Statute No 77-646 and in the course of the debates on that Bill in the French Parliament, that the revenue from the tax here in question was to be used wholly and exclusively to finance activities benefiting French meat production, namely the creation of detailed records of French cattle herds, the grading and marking or carcasses and the supervision of slaughterhouses by the State. The Commission expressed doubt as to be soundness of the submission, partly because, whatever the French Parliament may have been told, there was no legal requirement that the revenue from the tax should be devoted to those activities and partly because they appeared to be activities conducted in the general public interest rather than in the specific interests of meat producers.

Be that as it may, I am, for the reason I stated earlier, of the opinion that, in answer to Question I in the Order for Reference, Your Lordships should rule that the imposition on imports of lard from another Member State of a tax to compensate for the levying of an internal tax on the slaughter of swine is contrary to the prohibition of charges having an effect equivalent to customs duties under Articles 9, 12 and 13 of the EEC Treaty.

If that is correct, Questions 2 and 3 do not arise.

2.5.2 Judgement of the Court of Justice

SARL Denkavit Loire v État français, administration des douanes

Case 132/78

31 May 1979

Court of Justice

[1979] ECR 1923

http://www.curia.eu.int/en/content/juris/index.htm

1. By judgment of 25 May 1978, received at the Court on 12 June and completed by a corrective judgment of 6 July 1978, received at the Court on 18 July 1978, the Tribunal d'Instance, Lille, referred to the Court of Justice under Article 177 of the EEC Treaty three questions on the interpretation of Articles 9, 12 and 13 of the Treaty (first question) and Article 95 of the Treaty (second question) and of Regulation No 2759/75 of the Council of 29 October 1975 on the common organization of the market in pigmeat (third question).

2. These questions have been raised within the context of a dispute between the French customs authorities and a French cattle-feed manufacturer who imported a consignment of lard from the Federal Republic of Germany; the reply to those questions should enable the national court to decide whether the above-mentioned provisions of Community law prohibit the levying on that consignment, when it is imported, of a charge introduced by the French Law No 77-646 of 24 June 1977 introducing a charge for the protection of public health and for the organization of the markets in meat and abolishing the public health charge and the charge for inspections and stamps (Journal Officiel de la République Française of 25 June 1977, p. 3399).

3. It follows from the information on the file transmitted by the national court that the charge in question is levied on the one hand on the meat of certain animals slaughtered in French slaughterhouses and, from animals of the same kind.

4. As regard meat slaughtered on French territory, the chargeable event giving rise to that charge is the slaughtering operation and the charge is levied in public or private slaughterhouses for the account, as the case may be, of the State or of local authorities or groups of local authorities which own slaughterhouses, when the animals listed in Article 2 of the law are slaughtered, the rate being fixed per kilogramme net weight of meat per calendar year and the charge being payable by the owners of animals slaughtered with a view to the sale thereof. As regards imported meat, Article 4 of the Law provides that the charge "is imposed on the importation of the meat, whether or not prepared, of the animals mentioned in Article 2" and that it is payable by the importer or by the person making the customs declaration when the goods are given customs clearance for release to the market. It is collected according to the same rules and under the same guarantees as those relating to customs duties.

5. Under Order No 77-899 of 27 July 1977 (Journal Officiel de la République Française of 9 August 1977, p. 4136) laying down conditions for the application of Law No 77-646, the charge, as regards indigenous products, is imposed on fresh meat on the basis of the net weight of the meat as defined in Articles 2 to 5 of the order. As regards imported products, the charge is imposed on a certain number of meat-based preparations and the fats listed in Article 9 of the order by reference to tariff heading or subheading numbers of the Common Customs Tariff as well as on fresh meat. Lard and other pig fat are referred to in particular under tariff heading 15.01. The charge is imposed on the net weight of the meat -- in the present case the lard -- and the amount thereof is identical per kilogramme to that of the charge imposed on indigenous pigmeat when it is slaughtered.

6. In its first question the national court asks whether it is "contrary to the prohibition on charges having an effect equivalent to customs duties on imports within the meaning of Articles 9, 12 and 13 of the Treaty establishing the European Economic Community to apply a charge imposed on the imports of lard from another Member State intended for use in animal feeding-stuffs in order to compensate for the levying of a domestic charge on the slaughter of swine". This question asks in substance whether the concept of a charge having an effect equivalent to a customs duty -- which is prohibited in intra-Community trade -- extends to a national charge of the kind referred to by the national court, in so far as that charge is imposed on products imported from other Member States when they are imported, and in particular on those coming within tariff heading 15.01 (lard and other pig fat (...)).

7. As the Court has acknowledged several times, and in particular in its judgment of 25 January 1977 in Case 46/76, W.J.G. Bauhuis v The Netherlands State [1977] ECR 5, any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier and which is not a customs duty in the strict sense, constitutes a charge having an equivalent effect within the meaning of Articles 9, 12, 13 and 16 of the Treaty. Such a charge however escapes that classification it is constitutes the consideration for a benefit provided in fact for the importer or exporter representing an amount proportionate to the said benefit. It also escapes that classification if it relates to a general system of internal dues supplied systematically and in accordance with the same criteria to domestic products and imported products alike, in which case it does not come within the scope of Article 9, 12, 13 and 16 but within that of Article 95 of the Treaty.

8. It is however appropriate to emphasize that in order to relate to a general system of internal dues, the charge to which an imported product is subject must impose the same duty on national products and identical imported products at the same marketing stage and that the chargeable event giving rise to the duty must also be identical in the case of both products. It is therefore not sufficient that the objective of the charge imposed on imported products is to compensate for a charge imposed on similar domestic products -- or which has been imposed on those products or a product from which they are derived -- at a production or marketing stage prior to that at which the imported products are taxed. To exempt a charge levied at the frontier from the classification of a charge having equivalent effect when it is not imposed on similar national products or is imposed on them at different marketing stages or, again, or the basis of a different chargeable event giving rise to duty, because that charge aims to compensate for a domestic fiscal charge applying to the same products -- apart from the fact that this would not take into account fiscal charges which had been imposed on imported products in the originating Member State -- would make the prohibition on charges having an effect equivalent to customs duties empty and meaningless.

9. It is therefore necessary to reply to the first question that a charge which is imposed on meat, whether or not prepared, when it is imported, and in particular on consignments of lard, even though no charge is imposed on similar domestic products, or a charge is imposed on them according to different criteria, in particular by reason of a different chargeable event giving rise to the duty, constitutes a charge having an effect equivalent to a customs duty within the meaning of Articles 9, 12 and 13 of the Treaty.

10. The other two questions have been submitted by the court making the reference only if the Court of Justice rules that a charge of the kind referred to escaped the classification of a charge having an effect equivalent to a customs duty. It follows that the reply to those questions has, having regard to the reply given to the first question, become purposeless.

[…]

2.6 Joined Cases C-441, 442/98: Kapniki Mikhailidis

Kapniki Mikhailidis AE and Idrima Kinonikon Asphaliseon (IKA)

Joined Cases C-441/98 and C-442/98

21 September 2000

Court of Justice

[2000] ECR I-07145

http://www.curia.eu.int/en/content/juris/index.htm

1. By two orders of 29 October 1998, received at the Court on 4 December 1998, the Diikitiko Protodikio (Administrative Court of First Instance), Thessaloniki, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions, identical in each of the two cases before it, relating to the interpretation of Articles 9 and 12 of the EC Treaty (now, after amendment, Articles 23 EC and 25 EC) and Article 16 of the EC Treaty (repealed by the Treaty of Amsterdam) concerning charges having equivalent effect to customs duties and the conditions in which a charge which has been collected in breach of Community law may be refunded.

2. The questions were raised in two sets of proceedings between Kapniki Mikhailidis AE ('Mikhailidis) and Idrima Kinonikon Asphaliseon (Social Security Institution in Greece, 'the IKA) concerning the refund, as unduly paid, of charges paid on tobacco exports to other Member States and non-member countries between 1990 and 1995 by Mikhailidis and the two companies to which it succeeded.

National law

3. Article 6 of Law No 2348/1953 concerning the amendment, supplementation and repeal of provisions on the processing of tobacco leaves and concerning the amalgamation of the Tamio Asfaliseos Kapnergaton (Tobacco Workers' Insurance Fund; 'TAK) with the IKA (FEK (Greek Official Journal) A' 75; 'the 1953 Law) introduced a charge on tobacco products; under that provision:

'For the purpose:

(a) of continuing to pay pensions to persons already entitled to a pension from the TAK and to persons who become entitled to a pension in accordance with the provisions of this Law as well as, on their death, to persons entitled through them in accordance with the above, and
(b) of paying compensation to any employees of the TAK not affiliated to the IKA and not entitled to a pension until this Law enters into force, a special account with the National Bank of Greece and Athens called Special account for the benefit of pensioners of the Tobacco Workers' Insurance Fund, as amalgamated with the IKA is hereby set up.

The revenue of that account shall be:

(a) ...
(b) the proceeds of the levy applied to the single tax on tobacco under Article 2(4)(b) of Law No 3460/28;
(c) the proceeds of the contribution, in accordance with the following article, on the value of exported tobacco.

...

4. Article 7 of the 1953 Law, as replaced by Article 2 of Legislative Decree 2519/1953 (FEK A' 220), states:

'1.A special contribution shall be imposed on the value of tobacco exported outside the borders of the country:

(a) at 5% for exported tobacco from the 1952 harvest and
(b) at 3% for exported tobacco from the 1953 and 1954 harvests ...

Those contributions shall be paid by the exporters immediately on export and collected by the State customs office through which the export takes place; every month the customs office shall pay the contributions into the special account set up under Article 6 of this Law ....

5. Article 7 of the 1953 Law was extended so as to apply to harvests after 1954 by Article 9(1) of Legislative Decree 4104/1960 (FEK A' 147), which provides:

'The special contribution on the value of tobacco from the 1952, 1953 and 1954 harvests exported outside the borders of the country, laid down by Article 7 of Law No 2348/1953 ... as replaced by Article 2 of Legislative Decree 2519/1953, shall be extended to harvests after 1954, reduced to 1.5% in respect of tobacco from the 1955 and 1956 harvests, to 1% for the 1957 and 1958 harvests and to 0.5% for the harvests from 1959 onwards.

6. Furthermore, Article 11(4) of Legislative Decree 4104/1960 provides:

'The Special account for tobacco workers set up under Article 6 of Law No 2348/1953 shall be abolished on promulgation of this decree; the rights and obligations in respect of the account are henceforth assumed by the Pensions Branch of the IKA, and the acts of the administration on the basis of which the IKA paid pensions and lump-sum compensation to insured persons and pensioners of the Tobacco Workers' Insurance Fund amalgamated with the IKA, shall have legal force.

The disputes in the main proceedings and the questions referred for a preliminary ruling

7. Mikhailidis is a Greek-law public limited company which carries on business in the tobacco sector and which came into being on the merger of two public limited companies, namely Kapniki A. Mikhailidis AE and M. Bogiatzoglou-Exagogikos Ikos Kapnon AE. On 18 and 21 August 1995 it applied to the local branch of the IKAseeking to obtain refunds of, respectively, GRD 336 068 769 and GRD 30 113 030 as unduly paid.

8. Those amounts represented charges which had been paid under Article 7 of the 1953 Law both by Mikhailidis and by the two companies to which it had succeeded. The charges were paid on the export of tobacco to Member States and non-Member countries between 1990 and 1995.

9. Following the rejection of both Mikhailidis' claims by the Director of the IKA, Mikhailidis lodged an objection before the local administrative committee of the same IKA branch in respect of both decisions. Those objections were also rejected by decisions of 15 and 20 November 1996.

10. Mikhailidis brought two actions in the Diikitiko Protodikio, Thessaloniki, for annulment of the second set of decisions, claiming that the charge levied under Article 7 of the 1953 Law ('the disputed charge), which is paid to the customs office on the export of tobacco and then credited to the IKA for the benefit of the Tobacco Workers' Pension Branch, is a charge having equivalent effect to a customs duty on export and is incompatible with Community law inasmuch as it is imposed unilaterally on domestic tobacco products when they cross the frontier.

11. In those circumstances, the Diikitiko Protodikio, Thessaloniki, decided to stay proceedings and refer the following questions, identically formulated in both cases, to the Court of Justice for a preliminary ruling:

'1.Does a charge which is levied by a Member State on domestic goods exported to another Member State in proportion to their value constitute a charge having equivalent effect to customs duties on exports, having regard to the fact that that charge, which is invariably imposed on a particular category of domestic goods, in accordance with objective criteria and within the framework of a general system of taxation, is not imposed on domestic products which are distributed in the home market or on like goods which are imported into the country from another Member State? Alternatively is the abovementioned proportional contribution payable by tobacco exporters - which is levied and credited as income of the IKA, a social security institution, for the benefit of the Tobacco Workers' Pensions Branch - by reason of its objective, that is to say boosting the financial resources of the particular insurance branch, not inconsistent with Community law, in that it constitutes in a broader sense a contribution in favour of an insurance body for the purpose of achieving the social security objectives in respect of the particular group of workers, who may be employed in undertakings like the plaintiff's, and are in any event entitled, even by means of the imposition of charges such as the one in this case, to social security, in accordance with the appropriate provisions of the Constitution of the particular Member State?

2.If the first part of the first question is answered in the affirmative, is a Member State in principle obliged to refund to a trader financial charges on the value of exported goods which must be regarded as levied in breach of Community law, on the basis that it is established that the person who was required to pay the charges at issue in fact passed them on to other persons, namely the purchasers of the goods, and it does not follow, nor does the trader claim, that that charge caused an increase in the price of the products and a reduction in the volume of his sales with the result that he suffered subsequent loss?

12. By order of the President of the Court of Justice of 12 January 1999, the two cases C-441/98 and C-442/98 were joined for the purposes of the written and oral procedure and of the judgment.

The first question

13. By its first question, the national court is asking essentially whether an ad valorem charge on exported tobacco products, which is not imposed on the same products when they are distributed in the domestic market or imported from another Member State, may, because of its social objective, escape classification as a charge having an effect equivalent to a customs duty on exports which is incompatible with Articles 9, 12 and 16 of the Treaty.

14. It follows from the general and absolute nature of the prohibition of all customs duties applicable to goods moving between Member States that customs duties are prohibited regardless of the purpose for which they were introduced and the destination of the revenue from them (see, inter

alia, Joined Cases 2/69 and 3/69 Sociaal Fonds voor de Diamantarbeiders v Brachfeld [1969] ECR 211, paragraph 13).

15. As the Court has frequently held, any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12 and 16 of the Treaty, even if it is not imposed for the benefit of the State (see Sociaal Fonds voor de Diamantarbeiders v Brachfeld, paragraph 18; Case 158/82 Commission v Denmark [1983] ECR 3573, paragraph 18; Case C-426/92 Germany v Deutsches Milch-Kontor [1994] ECR I-2757, paragraph 50; and Case C-347/95 Fazenda Pública v Ucal [1997] ECR I-4911, paragraph 18).

16. In addition, although Community law does not detract from the powers of the Member States to organise their social security systems, they must nevertheless comply with Community law when exercising those powers (see, to that effect, Case C-120/95 Decker v Caisse de Maladie des Employés Privés [1998] ECR I-1831, paragraphs 21 and 23).

17. It follows that neither the social purpose for which the disputed charge was introduced nor the fact that its proceeds are paid to the IKA can prevent the charge from beingclassified as a charge having equivalent effect to a customs duty for the purposes of Articles 9, 12 and 16 of the Treaty.

18. The Greek Government and the IKA claim, however, that the disputed charge cannot be classified as a charge having equivalent effect to a customs duty given that it constitutes a revenue of a social character and that it is levied not only on exported tobacco but also on tobacco for domestic consumption. Therefore, the disputed charge is an integral part of a general system of internal taxation and is consistent with Community law by virtue of Article 95 of the EC Treaty (now, after amendment, Article 90 EC).

19. In that regard, it should be observed that, according to the case-law of the Court, a charge such as the disputed charge escapes classification as a charge having equivalent effect to a customs duty if it relates to a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported or exported products alike (see, in particular, Case 132/78 Denkavit v France [1979] ECR 1923, paragraph 7).

20. Even though it appears from the question referred that the national court considers that the disputed charge is imposed only on exported tobacco products, the submissions of the Greek Government and the IKA should nevertheless be taken into account and consideration should be given to the conditions in which the charge might be capable of falling within the scope of Article 95 of the Treaty.

21. Although it falls to the national court to assess, on the basis of an examination of the scope of the domestic provisions referred to by the Greek Government and the IKA, whether the relevant conditions are satisfied, the Court of Justice has jurisdiction to provide the national court with all the guidance of interpretation which will enable it to carry out such an assessment for the purposes of deciding the case before it.

22. In that regard, it should be noted, first, that it is settled case-law that the essential feature of a charge having an effect equivalent to a customs duty which distinguishes it from an internal tax is that the former is borne solely by a product which crosses a frontier, as such, whilst the latter is borne by imported, exported and domestic products (see, to that effect, Case 90/79 Commission v France [1981] ECR 283, paragraph 13; and Case C-109/98 CRT France International v Directeur Régional des Impôts de Bourgogne [1999] ECR I-2237, paragraph 11).

23. Secondly, in order to relate to a general system of internal taxation, the charge to which the exported tobacco product is subject must impose the same duty on both domestic products and identical exported products at the same marketing stage and the chargeable event triggering the duty must also be identical in the case of both products. It is therefore not sufficient that the objective of the charge imposed on the exported products is to compensate for a charge imposed on similar domestic products - or which has been imposed on those products or a product from which they are derived- at a production or marketing stage prior to that at which the exported products are taxed. To exempt a charge levied at the frontier from being classified as a charge having equivalent effect when it is not imposed on similar national products or is imposed on them at different marketing stages, because that charge aims to compensate for a domestic fiscal charge applying to the same products, would make the prohibition on charges having an effect equivalent to customs duties empty and meaningless (see, to that effect, Denkavit v France, paragraph 8).

24. Therefore, a charge such as the disputed charge, which is levied at the frontier when the export operation takes place, is deemed to be a charge having equivalent effect to a customs duty, unless the allegedly comparable charge levied on national products is applied at the same rate, at the same marketing stage and on the basis of an identical chargeable event.

25. In that regard, although it is for the national court alone to determine the exact effect of the national legislative provisions at issue in the main proceedings, it should be pointed out, as the Advocate General has done in points 28 to 32 of his Opinion, that the Greek Government and the IKA have not succeeded in removing serious doubts as to whether the allegedly comparable charge levied on domestic products, as described by the Greek Government, is applied at the same rate, at the same marketing stage and on the basis of a chargeable event identical to that giving rise to the disputed charge.

26. Therefore, the answer to be given to the first question must be that an ad valorem charge on exported tobacco products, which is not levied either on the same tobacco products when they are sold on the domestic market or on those imported from another Member State, cannot escape, by reason of its social objective, classification as a charge having equivalent effect to a customs duty on exports that is incompatible with Articles 9, 12 and 16 of the Treaty, unless the allegedly comparable charge levied on domestic products is applied at the same rate, at the same marketing stage and on the basis of a chargeable event which is identical to that giving rise to the disputed charge.

[…]

3. DISCRIMINATORY TAXATION

3.1 Case 148/77: Hansen & Balle

H. Hansen jun. & O. C. Balle GmbH & Co. v Hauptzollamt de Flensburg

Case 148/77

10 October 1978

Court of Justice

[1978] E C R 1787

http://www.curia.eu.int/en/content/juris/index.htm

[…]

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 continued production of particular spirits of high quality, or the continuance of certain classes of undertakings such as agricultural distilleries. However, according to the requirement of Article 95, such preferential systems must be extended without discrimination to spirits coming form other Member States.

[…]

3.2 Case 168/78: Commission v France (Alcoholic beverages)

Commission of the European Communities v French Republic

Case 168/78

27 February 1980

Court of Justice

[1980] ECR 347

http://www.curia.eu.int/en/content/juris/index.htm

Summary of the facts and procedure:

French production of alcoholic beverages coming within tariff subheading 22.09C of the Common Customs Tariff, at the time of this case was close to 1 230 000 hectolitres per annum. The alcoholic beverages produced in France are divided into three categories

- *(a) The first category includes spirits which are obtained from wine or fruit and have a controlled and regulated designation of origin; it contains well-known spirits such as cognac, armagnac and calvados. Cognac production is the largest; it increased from 1955 to 1975 from 100 000/125 000 hectolitres to 546 000 hectolitres per annum. Other spirits obtained from wine amount to almost 120 000 hectolitres and those obtained from fruit to 140 000 hectolitres.*
- *(b) The second category includes spirits obtained from wine or fruit produced by small-holders by the distillation of their own production (known as "bouilleurs de cru" = home distillers). This production, which is of the order of 100 000 hectolitres per annum, is not subject to the rules governing registered designation of origin.*
- *(c) The third category covers spirits obtained from cereals. Genevas constitute a limited production, subject to quota, of approximately 8 000 hectolitres per annum; the production of other spirits (whisky, gin and vodka) is negligible. The overseas departments have a rum production of the order of 312 000 hectolitres.*

French legislation (Articles 403 and 406 A of the Code General des impots [General Tax Code] and the annual finance law) imposed a purchase tax and a manufacturing tax at different rates for each category. The draft finance law of 1980 provided for a total excise duty and manufacturing tax of FF 7 655 for spirits obtained from cereals, FF 5 975 for genevas, and FF 5 125 for spirits obtained from wine.

The Commission viewed the French tax scheme relating to spirits as inconsistent with Article 95 of the EEC Treaty. In the Commission's view, the tax system discriminated against spirits obtained from cereal in favor of geneva. The Commission also considered that the tax system afforded wine derived spirits protection vis-à-vis cereal based spirits.

After the French government refused to comply with a reasoned opinion, the Commission, pursuant to Article 169, brought this application before the Court of Justice. At the same tine the Commission brought similar action against the Kingdom of Denmark and the Italian Republic.

Judgement:

[…]

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 of 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 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 [in Hansen & Balle GmbH v. Hauptzollamt Flensburg], 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 [a previous] judgment (...) 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 [a previous] judgment (...) , 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 reasons of one or several economic uses to which it may be put, even though the condition of similarly 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 connection, 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 connection 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 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 so 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 subject-matter and the background of the dispute in question

17. The terms in which the Commission brought its action against the French Republic call for certain preliminary observations concerning the subject matter of the dispute. Whereas, according to the conclusions contained in the application, the Commission asks the Court for a declaration that the French Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty "by applying a discriminatory tax system on spirits", it appears from the wording itself of the application and from subsequent developments in the case that the application in fact concerns only certain elements of the French legislation thereon, in other words the discriminatory taxation imposed on geneva and other alcoholic beverages resulting from the distillation of cereals on the one hand and on spirits obtained from wine and fruit on the other. More specifically, the Commission refers above all to the difference in the taxation on two typical and well-known products, whisky and cognac.

18. The French Government contested this way of putting the problem when, they claim, the categories of taxation adopted by the Commission do not correspond either to the terminology of the French legislation or to French tax practice.

19. This preliminary objection raised by the French Government is justified. It is necessary therefore to recall the wording of the provisions at issue in the Commission's application, in other words Articles 403 and 406 of the Code General des Impôts [General Taxation Code], so as to ascertain the subject matter of the dispute in terms adapted to the state of French legislation. This legislation is subject to annual amendments through successive finance legislation, so that it is quoted hereinafter in the state in which it was at the date of the hearing by the Court.

20. Under Article 403 of the Code General des Impôts, all spirits are subject to a "purchase tax" the rate of which is fixed per hectolitre of pure alcohol. The amounts are fixed by the same article, first of all for certain named products (none of which is at issue in this procedure) then for "all other products". The rate fixed for this general category is FF 4 270 per hectolitre.

21. According to Article 406 of the same Code, certain alcoholic products are subject in addition to a "manufacturing tax", the rate of which is fixed at the following amounts per hectolitre of pure alcohol:

FF 2 110 "for alcoholic beverages resulting from the distillation of cereals and spirits sold under the same name as those beverages, except genevas"; and

FF 710 "for all other alcohol-based beverages which are capable of being consumed as aperitifs and for wine-based aperitifs, vermouth, liqueur wines and wines treated as such which do not benefit from a registered designation of origin, and natural sweet wines subject to the tax system applicable to spirits and genevas".

22. It follows from the foregoing that although all spirits including spirits obtained from wine and fruit are subject uniformly to the same "purchase tax", geneva and other spirits obtained from cereals are in addition subject to the "manufacturing tax".

23. It therefore seems that the Commission's application concerns only three types of product which, albeit both important and representative, far from exhaust the whole range of alcohol products referred to by the tax code. In particular, as the French Government pointed out, the application covers neither "anise spirits", the treatment for tax purposes of which is equivalent to that of alcoholic beverages resulting from the distillation of cereals, nor the category of "aperitif" which is subject to the same system as genevas.

24. Although it may have seemed more appropriate to examine the system of taxation on alcoholic beverages in France as a whole, in particular so as to be able to appraise from a general point of view the question of the similarity of the various products, it is however impossible to contest the objectivity of the Commission's presentation of the facts of the case as regards the treatment for tax

purposes applied to the three categories of products which it chose to adopt, in other words spirits obtained from cereals, geneva and spirits obtained from wine and fruit.

25. It follows from this that all the alcoholic beverages referred to by the Commission are uniformly subject to the same purchase tax but that genevas and other alcoholic beverages resulting from the distillation of cereals are subject in addition to a manufacturing tax which is not applicable to spirits derived from wine and fruit. It is also not contested that there is no significant production of geneva and other spirits obtained from cereals in France. The Commission considers, in these circumstances, that the tax system is contrary to the provisions of Article 95 in that it gives a tax advantage to certain spirits produced in France whereas similar or competing products imported from other Member States are subject to an additional tax.

26. The French Government puts forward two lines of argument for the purpose of defending the tax system complained of:

First, it contests that the products referred to in the application are similar within the meaning of the first paragraph of Article 95;

Moreover, it contests that there is between those products sufficiently marked competition to justify the application of the second paragraph of Article 95.

27. In the opinion of the French Government, the classifications laid down by French legislation and tax practice are therefore justified from the point of view of the Treaty and the fixing of different rates of tax for the various categories cannot be criticized from the point of view of the requirements flowing from Article 95.

The application of the contested tax system

28. In accordance with the viewpoint recalled above, the Commission considers that all the spirits in question are "similar" products within the meaning of the first paragraph of Article 95. The detailed rules on taxation applied under the French tax legislation are therefore incompatible with the prohibition against discrimination laid down in the first paragraph of Article 95. The Commission considers that the customs classification of the products in question, which are all grouped under "spirituous beverages" in tariff subheading 22.09 C of the Common Customs Tariff and covered in a common definition by the relevant Explanatory Note to the Brussels Nomenclature, supports its argument. That note in fact describes as "spirits" products obtained "by distilling wine, cider or other fermented beverages or fermented grain or other vegetable products". The Commission recalls moreover the terms in which the Court of Justice defined the concept of similarity in its judgment in the above-mentioned REWE case.

29. From the point of view of the second paragraph of Article 95, the Commission observes that the French tax system is adjusted so as to place at a disadvantage spirits obtained from cereals which are almost exclusively imported from other Member States, whereas domestic production of those products is insignificant. On the other hand, the main domestic product, in other words spirits obtained from wine and fruit, are favoured in that they are not subject to the payment of the "manufacturing tax". It thus seems that this tax system, even if it were necessary to state that spirits obtained from wine and fruit on the one hand and spirits obtained from cereals on the other are not similar, is of such a nature as to afford an indirect competitive advantage to national production.

30. The French Government, for its part, states that in the absence of a definition of the concept of similarity in the Treaty and pending harmonization at the Community level, the national authorities have the power to make a tax classification subject, of course, to compliance with the obligations flowing from Article 95. It considers that the effects of the classification made by the French tax legislation are compatible with those requirements.

31. As regards the indications which may be deduced from the Common Customs Tariff, the French Government draws attention to the fact that tariff heading 22.09 C in its turn contains subdivisions the effect of which is to treat differently products such as gin and whisky on the one hand and "other" spirituous beverages, including spirits obtained from wine and fruit, on the other. The classification laid down by the Common Customs Tariff therefore rather supports the opinion that spirits are not all similar products.

32. As regards the criteria which may be used for the classification of the products, the French Government considers that it is the "flavour" of the distillate, in other words, a number of organoleptic properties combining taste, aroma and smell, which, from the point of view of satisfying the needs of the consumer, forms the basis of the classification of products which are neither similar nor even interchangeable or competing within Article 95. The relevance of that criterion has been expressly acknowledged, it claims, in [a previous] judgment (...) , in which in order to distinguish between tariff subheading 22.09 A (ethyl alcohol) and tariff subheading 22.09 C V (other spirituous beverages), the Court referred to the presence in spirituous beverages "of flavouring substances or distinctive properties of taste".

33. More particularly, the defendant Government states that the French tax legislation is based on the distinction between "digestives" on the one hand, in other words beverages consumed at the end of the meal including in particular spirits obtained from the distillation of wine and fruit, such as cognac, armagnac and calvados, and "aperitifs" on the other, which are beverages drunk before meals including above all grain-based spirits, most frequently consumed diluted with water, such as whisky, gin and aniseed spirits. As regards the latter category of beverages, the French Government points out that although this is a typically French product it is subject to the "manufacturing tax" in the same way as spirits obtained from cereals so that it is impossible to speak in this respect of discriminatory treatment. In the same context, the French Government draws attention in addition to the fact that, from the tax point of view also registered designations of origin, of which the Commission took no account at all in lodging its application, form an identifying criterion.

34. As regards the application of the second paragraph of Article 95, the French Government claims that there is no competition between the products coming within both tax categories laid down by the French legislation so that there cannot be a shift in consumption from one category of spirits to another as the result of a difference in taxation. True competition exists between whisky and anissed spirits which in fact come within the same tax category. The system contested by the Commission has, moreover, had no protective effect as shown, according to the French Government, by the comparative statistics on the consumption of cognac and whisky in France from which it is clear that although the consumption of cognac increased only moderately in the period from 1963 to 1977 (from 33 361 hectolitres to 44 745 hectolitres), the consumption of whisky increased spectacularly during the same period (from 34 104 hectolitres to 117 379 hectolitres).

35. The arguments based by the parties on the wording of tariff subheading 22.09 C cannot, in this case, provide a conclusive indication. It is true that this subheading covers all spirits in the same general category under the name of "spirituous beverages". In its turn, it contains several subdivisions (rum, gin, whisky and vodka), followed by a residual category covering the "other" spirituous beverages. These subdivisions, which were designed with Community foreign trade in mind, cannot however constitute an appropriate classification from the point of view of the application to the present case of Article 95 of the Treaty, especially since the French Code General des Impots is based on a system of classification which is entirely different from that of the Common Customs Tariff. Nor, finally, can an argument be based on the judgment of the Court in the Hauptzollamt Bielefeld v Offene Handelsgesellschaft in Firma H. C. Konig case since that case involved making a general distinction between spirits, grouped together in tariff subheading 22.09 C, and pure ethyl alcohol, which comes within tariff subheading 22.09 A. This judgment therefore provides no indications as to the scope of any classifications within spirits as a whole.

36. Nor does the Court think it is possible to adopt as a relevant classification the distinction advocated by the French Government between "aperitifs" and "digestives". It is necessary to point out that even Article 406 of the Code General des Impôts does not classify spirits obtained from the distillation of cereals as "aperitifs" but merely places these two types of beverages side by side in the group of products subject to the same manufacturing tax. In fact, the distinction between aperitifs and digestives does not take into account many circumstances in which the products in question may be consumed before, during or after meals or even completely unrelated to such meals; it seems, moreover, that, according to consumer preferences the same beverage may be used indiscriminately as an "aperitif" or "digestive". Therefore it is impossible to recognize, for the purposes of the application of Article 95 of the Treaty, the objective value of the distinction upon which French tax practice is based.

37. The same observation applies to the criterion for distinction based on the flavour of the various spirits for the purpose of determining the properties of the products in question with regard to the application of tax legislation. There is no question of denying the reality of and the shades of difference in the flavour of the various alcoholic products; it is necessary however to bear in mind that this criterion is too variable in time and space to supply by itself a sufficiently sound basis for distinction for the definition of categories which may be recognized throughout the Community. The same applies to consumer habits which also differ from region to region and even according to social environment, so that they cannot supply appropriate differentiating criteria for the purpose of Article 95.

38. Classifications based on the flavour of the products and consumer habits are all the more difficult to lay down since the products in question, such as whisky and genevas, may be consumed in very varied circumstances, either neat or diluted or in the form of mixtures. Owing in particular to this flexibility of use, those brings may be considered as similar to a particularly large number of other alcoholic beverages or as in at least partial competition which those beverages.

39. After considering all these factors the Court deems it unnecessary for the purposes of solving this dispute to give a ruling on the question whether or not the spirituous beverages concerned are wholly or partly similar products within the meaning of the first paragraph of Article 95 when it is impossible reasonably to contest that without exception they are in at least partial competition with the domestic products to which the application refers and that it is impossible to deny the protective nature of the French tax system within the second paragraph of Article 95.

40. In fact, as indicated above, spirits obtained from cereals, including genevas, have, as products obtained from distillation, sufficient characteristics in common with other spirits to constitute at least in certain circumstances an alternative choice for consumers. Because of their characteristics, spirits obtained from cereals and genevas may be consumed in very varied circumstances and at the same time compete with beverages described as "aperitifs" and "digestives" according to French tax practice whilst, moreover, serving purposes which do not come within either of those two categories.

41. As the competitive and substitution relationships between the beverages in question are such, the protective nature of the tax system criticized by the Commission is clear. A characteristic of that system is in fact that an essential part of domestic production, in other words spirits obtained from wine and fruit, come within the most favourable tax category whereas at least two types of product, almost all of which are imported from other Member States, are subject to higher taxation under the "manufacturing tax." The fact that another domestic product, aniseed spirits, is similarly placed at a disadvantage does not rule out the protective nature of the system as regards the treatment for tax purposes of spirits obtained from wine and fruit or the existence of at least partial competition between those spirits and the imported products in question. As for the fact that the market share of whisky has increased in spite of the tax disadvantage which it suffers, this fact does not prove that there is no protective effect.

42. It is necessary to state in conclusion from the foregoing that the tax system applied in the French Republic under the provisions of the Code General des Impots is incompatible with the requirements laid down in Article 95 of the Treaty as regards taxation on the one hand on genevas and other alcoholic beverages obtained from the distillation of cereals and, on the other, on spirits obtained from wine and fruit.

[…]

3.3 Case 46/80: Vinal

S.p.A. Vinal v S.p.A. Orbat

Case 46/80

14 January 1981

Court of Justice

[1981] ECR 77

http://www.curia.eu.int/en/content/juris/index.htm

Summary of the facts and procedure:

This case came to the Court by way of a contract dispute in front of the Pretura Civile [Civil Court] Casteggio between SpA Vinal, a producer and importer of alcohol, and SpA Orbat concerning the reimbursement of taxes levied on a shipment of denatured synthetic oil from France.

Under Italian tax law, denatured synthetic ethyl alcohol is taxed at a higher rate than denatured ethyl alcohol obtained from fermentation.

The contract between the parties required SpA Orbat to reimburse SpA Vinal, the plaintiff, the taxes imposed on the shipment. SpA Orbat was willing to pay SpA Vinal the LIT. 1,000 per hectoliter special charge levied on denatured synthetic alcohol obtained through fermentation, but claimed that it did not have to pay the plaintiff the LIT. 12,000 special charge levied on the denatured synthetic alcohol because such differential taxation constitutes tax discrimination and, therefore, is prohibited by Article 95 of the EEC Treaty.

The Pretura, in order to decide the dispute, submitted the following three questions to the Court of Justice:

- *(a) Must the first paragraph of Article 95 of the Treaty of Rome be interpreted as meaning that two products derived from different raw materials but capable of being put to the same uses and having the same practical application must be considered to be "similar"?*
- *(b) If the reply to Question 1 is in the affirmative:*

  Must the first paragraph of Article 95 of the Treaty of Rome be interpreted as meaning that it must be considered to be prohibited to impose charges which, whilst appearing to place an identical burden on the Community product and the similar domestic product, in fact amount to discrimination in tax matters to the detriment of similar products from other Member States in that the products subject to heavier taxation are exclusively imported and the products subject to lighter taxation are principally domestic?

- *(c) If the reply to either of the foregoing questions is in the negative:*

Must the second paragraph of Article 95 be interpreted, in relation to the facts of this case, as meaning that that provision prohibits the imposition of heavier taxation on a product which principally comes from other Member States, thereby affording protection to competing national production?]

Judgement:

[…]

The jurisdiction of the Court

[The Court quickly rejected the Italian Government's argument that the Court lacked jurisdiction because the case concerned a fictitious dispute raised by the parties to test the Italian law.]

Substance

8. It appears from the order making the reference for a preliminary ruling that the defendant in the main action contends that the Italian tax arrangements are incompatible with Article 95 of the Treaty in reliance on two facts. It is maintained, first, that denatured synthetic alcohol should be considered as similar or indeed identical to denatured alcohol obtained by fermentation and, secondly, that synthetic alcohol is only imported into Italy whereas the denatured alcohol obtained by fermentation which is marketed in Italy comes exclusively from domestic production. Thus despite the formal identity of tax treatment a similar product from other Member States is in fact taxed more heavily than the domestic product.

9. That position is supported in principle by the Commission which has expressed the opinion that, despite the different origins of the two products in question - namely synthetic alcohol, which is derived in particular from petroleum, and alcohol obtained by fermentation, which is produced by distilling products of the soil (cereals, wine, fruit, potatoes, beet and molasses) - the two kinds of alcohol in question are chemically identical and fully interchangeable in their uses. There is thus not only similarity between these two products but actual identity in regard to the needs which the two products are called upon to fulfil. Furthermore, the two kinds of alcohol fall within the same tariff subheading, 22.08 A, under the description "denatured spirits (including ethyl alcohol and neutral spirits) of any strength". In the absence of production of synthetic alcohol in Italy, the difference in the rate of tax prescribed by Italian law for denatured synthetic alcohol on the one hand and denatured alcohol obtained by fermentation on the other has the result of preventing practically all imports of synthetic alcohol from other Member States and of directly favouring national production of alcohol by fermentation. The Commission thus considers that, being a product similar to denatured alcohol obtained by fermentation, denatured synthetic alcohol imported from other Member States should qualify for the same rate of tax as the former.

10. The plaintiff in the main action on the other hand claims that the Italian system of taxes is compatible with the requirements of Article 95. It points out that Italy has a considerable production of ethylene, a petroleum derivative which is used in the manufacture of synthetic alcohol. It is accordingly impossible to accept that there is discrimination against imported synthetic alcohol when there is at least a potential for production of the same product in Italy. With regard to alcohol obtained by fermentation, S.p.A Vinal is concerned to show that there is no tax discrimination between alcohol produced in Italy and imported alcohol. Thus it appears that the Italian system of taxes is applied on the basis of objective conditions which are applicable without distinction to Italian products and to the products of other Member States. In this case there is a specific justification for these differing tax arrangements in that they are intended to promote types of

production deserving of particular protection, namely the processing of a number of agricultural products, and to reduce correspondingly the consumption of petroleum products.

11. The argument advanced by S.p.A. Vinal was further developed by the Italian Government. It recalls that in a number of judgments the Court has recognized that the Member States may lay down differing tax arrangements, even for identical products, on the basis of objective criteria such as the conditions of production and the raw materials used [citations omitted]. According to the Court, such arrangements are compatible with the Treaty if they are laid down on the basis of objective factors and are not discriminatory or protective in their nature.

12. The arrangements challenged before the national court meet these requirements. In fact the different taxation of synthetic alcohol and of alcohol produced by fermentation in Italy is the result of an economic policy decision to favour the manufacture of alcohol from agricultural products and, correspondingly, to restrain the processing into alcohol of ethylene, a derivative of petroleum, in order to reserve that raw material for other more important economic uses. It accordingly constitutes a legitimate choice of economic policy to which effect is given by fiscal means. The implementation of that policy does not lead to any discrimination since although it results in discouraging imports of synthetic alcohol into Italy, it also has the consequence of hampering the development in Italy itself of production of alcohol from ethylene, that production being technically perfectly possible.

13. As the Court has stated on many occasions, particularly in the judgments cited by the Italian Government, in its present stage of development Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law if it pursues economic policy objectives which are themselves compatible with the requirements of the Treaty and its secondary law 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.

14. Differential taxation such as that which exists in Italy for denatured synthetic alcohol on the one hand and denatured alcohol obtained by fermentation on the other satisfies these requirements. It appears in fact that that system of taxation pursues an objective of legitimate industrial policy in that it is such as to promote the distillation of agricultural products as against the manufacture of alcohol from petroleum derivatives. That choice does not conflict with the rules of Community law or the requirements of a policy decided within the framework of the Community.

15. The detailed provisions of the legislation at issue before the national court cannot be considered as discriminatory since, on the one hand, it is not disputed that imports from other Member States of alcohol obtained by fermentation qualify for the same tax treatment as Italian alcohol produced by fermentation and, on the other hand, although the rate of tax prescribed for synthetic alcohol results in restraining the importation of synthetic alcohol originating in other Member States, it has an equivalent economic effect in the national territory in that it also hampers the establishment of profitable production of the same product by Italian industry.

16. Having regard to the foregoing, the questions submitted by the Pretura, Casteggio, should be answered as follows.

17. With regard to the first and second questions, taken together, the reply should be that tax arrangements which impose heavier charges on denatured synthetic alcohol than on denatured alcohol obtained by fermentation on the basis of the raw materials and the manufacturing processes employed for the two products are not at variance with the first paragraph of Article 95 of the EEC Treaty if they are applied identically to the two categories of alcohol originating in other

Member States. Such tax arrangements are justified even though the products in question, whilst derived from different raw materials, are capable of being put to the same uses and have the same practical application.

18. With regard to the third question the reply should be that where, by reason of the taxation of synthetic alcohol, it has been impossible to develop profitable production of that type of alcohol on national territory, the application of such tax arrangements cannot be considered as constituting indirect protection of national production of alcohol obtained by fermentation within the meaning of the second paragraph of Article 95 on the sole ground that their consequence is that the product subject to the heavier taxation is in fact a product which is exclusively imported from other Member States of the Community.

[…]

On those grounds, THE COURT, in answer to the questions referred to it by the Pretura, Casteggio, by order of 30 January 1980, hereby rules:

1. Tax arrangements which impose heavier charges on denatured synthetic alcohol than on denatured alcohol obtained by fermentation on the basis of the raw materials and the manufacturing processes employed for the two products are not at variance with the first paragraph of Article 95 of the EEC Treaty if they are applied identically to the two categories of alcohol originating in other Member States. Such tax arrangements are justified even though the products in question, whilst derived from different raw materials, are capable of being put to the same uses and have the same practical application.
2. Where, by reason of the taxation of synthetic alcohol, it has been impossible to develop profitable production of that type of alcohol on national territory, the application of such tax arrangements cannot be considered as constituting indirect protection of national production of alcohol obtained by fermentation within the meaning of the second paragraph of Article 95 of the EEC Treaty on the sole ground that their consequence is that the product subject to the heavier taxation is in fact a product which is exclusively imported from other Member States of the Community.

3.4 Case 21/79: Commission v Italy (Mineral oil products)

Commission of the European Communities v Italian Republic

Case 21/79

Court of Justice

8 January 1980

[1980] ECR 1

http://www.curia.eu.int/en/content/juris/index.htm

Summary of the facts and procedure

In order to promote the recycling of petroleum products, Italy,implemented a tax scheme which differentiated between petroleum products of primary distillation and those which were recycled or regenerated.

Recycling and Regeneration are two different processes. Recycling consists of recovery and reuse of oils for the same or different purposes, as they are, or after cleaning and purifying them. Regeneration is a chemical process requiring industrial installations which restores to the oils all the properties they had before they were used. Regenerated oils are indistinguishable from oils of primary distillation.

Italy levied an "imposta interna di fabbricazione" [internal production tax] on all mineral oil products. It also levied a similar tax, known as the "sovraimposta di confine" [frontier charge], on imported goods.

In 1962 Italy enacted legislation granting a reduction in the "imposta interna di fabbricazione" on petroleum products that were recycled or regenerated. The tax advantages differed for the two processes. The tax was completely waived for products that were both recycled and re-used on the premises of original use. On regenerated oils, the imposta di fabbricazione was 25 percent of the full rate. This rate applied regardless of where the regenerated oils were used.

Claiming that it would be impossible to determine through inspection whether oil being imported was regenerated or of primary distillation, Italian authorities refused to reduce the sovraimposta di confine for imported regenerated oil,

The Commission raised the issue with the Italian Government, and in a reasoned opinion given on January 10, 1978 the Commission stated its view that the Italian Government was not in compliance with Article 95 of the EEC Treaty. Italy responded that it would comply with the reasoned opinion by replacing its system of tax incentives for regenerated oil to a grant of subsidies, as it claimed it was authorized to do by Council Directive 75/439 of June 16, 1975 on disposal of waste oils.

In the beginning of the dispute, the tax treatment given to recycled oil was also in issue. In the present case, the Court only had to deal with the issue of the differential taxation of regenerated oil.

Judgment:

[…]

The tax rules applicable to regenerated oils

13. During the oral procedure the Commission stressed the fact that regenerated oils and oils of primary distillation "are not only similar products within the meaning of Article 95 but are also identical". The identical nature of the products is not disputed by the Italian Republic. Nevertheless the Commission's observation seems to suggest that the tax rules applicable to imported oils, whether they be oils of primary distillation or regenerated oils, should be the same as the rules applicable to Italian regenerated oils. This appears to explain the position taken up and developed by the Commission during the oral procedure, namely that the Italian Government, in order to comply with Article 95, should abolish the tax advantage accruing to Italian regenerated oils rather than extend that advantage to regenerated oils imported from the other Member States.

14. [That point of view] cannot be shared by the Court. It is in fact clear from the judgment [in Hansen & Balle GmbH v Hauptzollamt Flensburg] that at the present stage of the development of Community law 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 products or to certain classes of producers. The Treaty does not therefore forbid, as far as domestic tax laws are concerned, the taxation at differential rates of products which may serve he same economic ends, especially if, as in the case of regenerated mineral oils, it appears that the cost of production, objectively speaking, differs considerably from that of oils of primary distillation.

15. On the other hand pursuant to the first paragraph of Article 95 the tax advantages in question must also be granted without any discrimination to products from the other Member States which satisfy the same conditions as the domestic products which qualify for the exemptions or reductions allowed by national law. The first paragraph of Article 95 -- the purpose of which is to ensure that the Treaty provisions relating to the abolition of customs duties and charges having equivalent effect cannot be evaded or rendered nugatory by the introduction of internal taxation discriminating against imported products in comparison with domestic products -- implements a fundamental principle of the Common Market. Consequently the disparities prohibited by it must be eliminated in spite of the difficult problems of comparison which may arise when assimilating the imported product to the various domestic products (which are subject to different taxes) and to which it may have some similarity.

16. Although the first paragraph of Article 95 therefore places Member States under an obligation to extend the tax advantages accruing to domestic products to similar products imported from the other Member States as well provided that the latter products satisfy the conditions to which a reduced rate or an exemption have been made subject, it does not however impose upon the Member States the duty to abolish as regards internal taxes on domestic products differences which are objectively justified and which may be introduced by domestic legislation unless such abolition is the only way of avoiding direct or indirect discrimination against the imported products.

17. It is also necessary to reject the Commission's argument that the abolition of the tax advantages at issue is the only way of applying the first paragraph of Article 95 of the Treaty correctly, having regard to the fact that the above-mentioned Council Directive No 75/439/EEC provides that undertakings which collect, dispose of or regenerate waste oils must have a licence and may be granted indemnities by the authorities of the Member States for the service rendered, provided that these indemnities are not such as to cause "any significant distortion of competition or to give rise to artificial patterns of trade in the products".

18. The purpose of this directive, prompted by ecological considerations and also considerations relating to a supply policy for fuel, is not to harmonize the Member States' rules concerning excise duties and other forms of indirect taxation mentioned in Article 99 of the Treaty. Consequently the directive in no way affects the Member States' powers in relation to internal taxation provided that the obligations contained in Articles 95 to 98 of the Treaty have been complied with.

19. It is an established fact, which the Italian Republic does not dispute, that imported and home-produced regenerated oils are not only like products but are even identical so that the relationship between them is undeniably covered by the first paragraph of Article 95 of the Treaty.

20. The Government of the Italian Republic, in order to justify the retention of the rules disqualifying imported regenerated oils from the benefit of the lower rates of tax allowed on home-produced regenerated oils, relies in substance on the following three arguments: (1) it is impossible to distinguish, by means of the experimental testing methods, regenerated oils from oils of primary distillation, and this would be likely to lead to tax evasion when the products in question are imported; (2) the tax exemption is justified by the very high production cost of regenerated oils with the result that without the tax reduction at issue these oils could not compete with oils of primary distillation; (3) the aims of the exemption correspond to the aims of Council Directive No 75/439/EEC and the exemption is in actual fact the indemnity which Articles 13 and 14 of the directive authorize the Member States to grant.

21. The first argument cannot be accepted as justification of the alleged differential treatment. It is for the importers of mineral oils from the other Member States who wish to qualify for the reduced rate to produce evidence that the oils imported by them into Italy are regenerated oils and the Italian administration, without being able nonetheless to set a higher standard of proof than is necessary, is entitled to require in particular that the evidence be adduced in a form that removes the risk of tax evasion, for example by producing certificates from the authorities or other appropriate bodies of the exporting Member State permitting the regenerated oil to be identified as from the premises where it was regenerated. The practice in the Community, especially in relation to the discontinuance of public health inspections at the frontiers between Member States, offers numerous examples of such forms of permissible inspection.

22. The foregoing considerations also answer the Commission's argument that the alleged infringement of the first paragraph of Article 95 can be remedied only by abolishing the reduced rate on a national level. The Italian Republic has the choice between abolishing the reduced rate and retaining it provided only that, if it opts for the latter solution, it must allow regenerated oils from the other Member States, in respect of which evidence of regeneration has been produced, to benefit from the same reduced rate so as to avoid any form of discrimination between the imported product and the similar domestic product.

23. The second and third arguments are related and must be considered together. The conclusion to be drawn in the light of that examination is that they must be rejected.

24. Although it is true that the reductions of the imposta di fabbricazione are justified by the high cost of regeneration compared with primary distillation, the more favorable tax treatment is not in any way jeopardized by the obligation to apply it with due regard to Article 95 of the Treaty. The tax reductions which thus accrue to undertakings engaged in the regeneration of mineral oil are not in fact endangered by the obligation to allow regenerated oils imported from the other Member States to benefit from them.

25. On the other hand it is impossible to accept the contention on which the Italian Government relies that the system introduced by the Italian Law of 1962 (...) is in actual fact advance application of Council Directive No 75/439/EEC of 16 June 1975 and that the reduction of the imposta di

fabbricazione is the indemnity which, under Article 13 of the Directive, Member States may grant to undertakings engaged in the recovery, disposal or regeneration of used oils.

26 There is no need to decide the question whether the Italian Republic has applied Council Directive No 75/439/EEC or not and it is sufficient to point out that this directive does not affect the rights of Member States to introduce a system of internal taxation involving reduced rates of tax. Article 13 of the directive authorizes Member States to grant indemnities without however making it obligatory for them to do so, but has made sure that if indemnities are granted they do not constitute obstacles to the free movement of goods. Consequently when Member States implement the directive they are free either to grant the indemnities directly to the undertakings in question or to allow regenerated oils to benefit from more favorable tax treatment, or even to combine the two systems. Nevertheless, if in the exercise of their discretion in this field they opt for a system of lower internal taxation, they must accept the consequences of that choice and ensure that the system chosen complies with the fundamental principle laid down in Article 95 of the EEC Treaty that there must be no tax discrimination against imported products.

27. It follows from the foregoing considerations that by maintaining, pursuant to Law No 1852 of 31 December 1962 modifying the tax system applicable to petroleum products, different rates for the imposta di fabbricazione [internal production tax] on regenerated mineral oils produced in Italy and for the sovraimposta di confine [frontier surcharge] on regenerated oils from other Member States, the Italian Republic has failed to fulfil its obligations under the first paragraph of Article 95 of the EEC Treaty.

[…]

3.5 Case 196/85: Commission v France (Natural sweet wines)

Commission of the European Communities v French Republic

Case 196/85

7 April 1987

Court of Justice

[1987] ECR 1597

http://www.curia.eu.int/en/content/juris/index.htm

1. By an application lodged at the Court Registry on 25 June 1985 the Commission of the European Communities brought an action under Article 169 EEC for a declaration that by establishing and maintaining a system of differential taxation in respect of 'natural sweet wines' and liqueur wines, the French Republic has failed to fulfil its obligations under Article 95 EEC.

2. The Commission, in essence, asserts that the provisions of the Code General des Impôts (General Taxation Code, hereinafter referred to as 'the Code') governing the consumption duty (droit de consommation) and circulation duty (droit de circulation) levied on liqueur wines and similar wines are not compatible with Article 95 of the Treaty. Under the Code, liqueur wines and similar wines are generally subject to a consumption duty of 6,795 FF per hectolitre of pure alcohol and also to a circulation duty of 22 FF per hectolitre. However, certain such wines, namely natural sweet wines, are taxed at a rate of 2,545 FF and 58.80 FF, respectively. According to the Commission, the scheme is discriminatory inasmuch as it makes entitlement to preferential taxation subject to conditions which are less favourable to products imported from other member-States than to comparable domestic (French) products.

3. Reference is made to the Report for the Hearing for the details of the French legislation in question, an account of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Criterion of 'traditional and customary production'

4. The Commission asserts that discrimination contrary to Article 95 of the Treaty arises from the fact that French legislation confines the preferential tax scheme to those liqueur wines whose production is 'traditional and customary'. Although it ostensibly applies without distinction to domestic products and to imports from other member-States, that requirement can be fulfilled only by domestic products. Furthermore, the Commission claims that 'traditional and customary production' is not an objective criterion since it leaves the authorities a margin of discretion in its application.

5. The French Government denies the existence of any discrimination. It contends that the concept of 'traditional and customary production' has both a historical aspect, alluding to time-honoured products closely associated with a particular locality, whose long ancestry is part of their fame, and a technical meaning, referring to oenological rules and practices which codify fair and traditional

practices. Moreover, the concept is also used in Community legislation on the common organisation of the market in wine.

6. It should first be pointed out that, as the Court has consistently held (see, most recently Case 106/84, EC COMMISSION V DENMARK ([1986] ECR 833, [1987] 2 CMLR 278)), at its present stage of development Community law does not restrict the freedom of each member-State to lay down tax arrangements which differentiate between certain products, even products which are similar within the meaning of Article 95(1), on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation 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 law, 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.

7. More specifically, the Court has held on several occasions that in the present state of Community law Article 95 EEC does not prohibit member-States, in the pursuit of legitimate economic or social aims, from granting tax advantages, in the form of exemptions from or reduction of taxes, to certain types of spirits or to certain classes of producers, provided that such preferential systems are extended without discrimination to imported products conforming to the same conditions as preferred domestic products.

8. The above criteria are satisfied in this instance.

9. With regard to the aims pursued by the contested tax scheme, the French Government explained during the oral procedure that natural sweet wines are made in regions characterised by low rainfall and relatively poor soil, in which the difficulty of growing other crops means that the local economy depends heavily on their production. The French Government maintains that the tax advantage enjoyed by those wines thus tends to offset the more severe conditions under which they are produced, in order to sustain the output of quality products which are of particular economic importance for certain regions of the Community. Such economic policies must be regarded as compatible with the requirements of Community law.

10. Furthermore, with regard to the extension of the preferential scheme to imported products, it must be concluded that the criterion of 'traditional and customary production' applies without distinction to domestic and imported products. There is nothing in the evidence before the Court to suggest that the application of the scheme in fact gives preference to French wines at the expense of wines with the same characteristics from other member-States. In particular, it has not been demonstrated that because of physical factors or patterns of production the tax advantage in question operates solely, or even preponderantly, to the benefit of the French product. It should be added that national provisions which cover both domestic and imported products without distinction cannot be regarded as contrary to Community law merely because they might lend themselves to discriminatory application, unless it is proved that they are actually applied in that way.

11. Consequently, the objection based on the fact that the benefit of the preferential tax scheme is confined to liqueur wines whose production is 'traditional and customary' must be rejected.

Requirement of controls in the member-State of exportation

12. The Commission further maintains that there is discrimination contrary to Article 95 of the Treaty inasmuch as wines imported from other member-States qualify for the preferential tax scheme only if they are subject to controls in the member-State of exportation which afford guarantees equivalent to those required of natural weet wines produced in France. According to the Commission, that requirement has the effect of disqualifying products from other member-States which make no provision for analogous controls, and is thus contrary to the principle that national

legislation may not impose administrative procedures which cannot be complied with by producers in other member-States.

13. The French Government contests the general thesis of the Commission. It contends that the member-State of importation is entitled to require evidence to enable it to ascertain whether imported products potentially qualifying for a preferential tax scheme do in fact fulfil the necessary conditions.

14. As to the Court has consistently held (see Case 153/80, HANSEN V HAUPTZOLLAMT FLENSBURG ([1981] ECR 1165)), a member-State may not deny a tax advantage to products from another member-State on the basis of conditions laid down by its legislation which the imported products cannot fulfil by reason of their geographical situation or of the legislation of the State of production. That principle cannot, however, prevent a member-State from making the availability of a tax advantage, whether for imported products or domestic ones, subject to proof that the conditions for granting it have been fulfilled, with the proviso that the evidentiary requirements may not be stricter in respect of imported products than they are for similar national products or disproportionate to the goal pursued, namely to eliminate the risk of fraud.

15. It follows that the member-State of importation is free to require evidence enabling it to ascertain that the imported products do indeed meet the standards laid down by its national legislation. Such evidence may be furnished, for example, by certificates issued by the authorities or other appropriate bodies of the member-State from which the products originate. Since a certificate such as that can only be issued on the basis of control procedures, the requirement of controls affording guarantees equivalent to those provided under French legislation may also be imposed on liqueur wines imported from other member-States as a condition of their qualifying for the preferential tax scheme.

16. Nevertheless, if they are to be compatible with the principle of proportionality, such provisions must leave the exporting member-State free to choose control methods and to designate the authority responsible for the controls, and they must not make recognition of equivalence dependent on the prior negotiation of an agreement between the national authorities concerned.

17. The evidence before the Court does not suggest that the French provisions in question are in breach of those overriding obligations. The Commission initially stated that the French authorities had decided to treat the wines known as 'Samos vin doux naturel grand cru' (fine natural sweet wine of Samos) in the same way as natural sweet wines grown in France on the basis of an agreement concluded with the Greek authorities. However, the French Government denied the existence of such an agreement and explained that the sole purpose of contacting the Greek authorities in that connection had been to obtain the information needed by the French authorities in order to establish whether the conditions for allowing the tax advantage were actually fulfilled in that instance. Since the Commission has not adduced any evidence in support of its contentions to the contrary, it must be concluded that the allegations of an agreement have not been substantiated.

18. Consequently, the submission based on the fact that liqueur wines imported from other member-States qualify for the preferential tax scheme only on condition that there is a system of controls affording equivalent guarantees must also be rejected.

[…]

3.6 Case 170/78: Commission v UK (Wine and beer)

Summary of the facts and procedure:

The United Kingdom taxed still light wine at a higher rate than beer. According to the Commission, the excise duty on light wine, after an increase of the excise duty on wine had gone into effect on January 1, 1977, was UKL 3.250 per gallon, where as, beer of a gravity of 1 037.71 degrees was assessed an excise duty of UKL 0.6084 per gallon.

The Commission, on November 8, 1989, delivered a reasoned opinion in which it notified the United Kingdom of the great disparity in the tax rate, and of its opinion that wine and beer are in a competitive relationship, and that the higher rate of tax on wine affords protection to beer. The Commission considered that the United Kingdom was failing to meet its obligations under the second paragraph of Article 95 of the EEC Treaty and requested that the United Kingdom take within a month the necessary steps to comply with the opinion. The United Kingdom, however, maintained from the outset of the dispute that there was no significant competitive relationship between wine and beer.

On August 7, 1978, the Commission commenced this action in front of the Court of Justice under Article 169 of the EEC Treaty. The Italian Government intervened supporting the Commission's application, and on February 27, 1980 the Court issued an interlocutory judgment. On July 15, 1982 the Court requested more information in the form of tables outlining the consumer prices and prices net of tax for wine and beer of popular quality for the United Kingdom and the other Member States. After this additional information was obtained the Court issued the following judgment:

I - Written observations of the parties following the interlocutory judgment of 27 February 1980

[The Commission's submissions]

A -- Characteristics of the competitive relationship

(a) [The Commission noted the differences in harvesting, storing, and fermentation in the production of wine and beer but concluded that generally speaking, wine is as suitable for industrial production as beer. The biggest breweries and the largest, most modern producers of table wine clearly benefit from economies of scale.

The differences between the manufacturing processes of wine and beer are in themselves not, therefore, significant (...) .

(b) As to their natural properties, the Advocate General stated in hs first opinion on this case that from the point of view of the consumer beer and wine serve the same purpose since they have the same characteristics; they are therefore in competition with each other despite the fact that they differ with regard to alcohol content and manufacturing costs.

The relevant comparison in this case is that between a "classic" table wine imported from within the Community with an alcoholic strength of 10 to 12% by volume and a typical British beer with an alcoholic strength of 3.5 to 3.6% by volume, that is to say, commercial wine and beer of the kind most representative of each of those beverages and most widely consumed by the public at large.

Apart from variations caused by inflation, currency fluctuations and changes in taxation the price of both popular table wines and the most usual kinds of beer remains relatively stable.

The differences in the natural properties of wine and beer are therefore of minor importance for the purposes of this case, which is concerned with the indirect taxation paid by the importer or the domestic producer and subsequently recovered from the consumer as a component of the retail price.

(c) The fact that wine is classed as an agricultural product and beer as an industrial product is of little relevance. Both beverages are obtained by fermentation and their ingredients are themselves agricultural products. The relative stability in the price of popular table wines for both producers and consumers is due, it is true, to the impact of the Common Agricultural Policy, whereas the stability in the price of popular beers is due to the fact that the ingredients, being hardier and more amenable to storage, are processed throughout the year and are themselves subject to the Common Agricultural Policy.

(d) The price structure for popular table wines imported from the Community varies from one vineyard to the next (…) .

The price structure for a typical British beer also varies to some extent from one brewery to the next (...) .

The structure of the market in the United Kingdom creates further disparities:

(i) 90% of beer is sold in public houses which are usually owned by or tied to the breweries which supply them, and in working men's clubs; 75% of beer is sold directly from the cask, thus avoiding bottling costs, whereas almost all wine is sold in bottle.

(ii) 35% of wine is sold in restaurants, where the price is marked up considerably to the profit of the restaurateur.

(iii) 65% of wine is consumed in the home.

(iv) The only retail outlets in which the prices to consumers of wine and beer are of a neutral character and therefore relatively transparent are supermarkets and specialist outlets.

The structure of the British market precludes any meaningful comparison of purchase prices either for typical wines inter se or between wine and beer. The only factor permitting a suitable comparison with some degree of objectivity lies, as was pointed out by the Court, in a calculation of the incidence of the tax burden in relation to the alcoholic strength of the beverages in question.

B -- The appropriate tax ratio

(a) The conclusive criterion for a comparison between the taxation which is applied to each of the products in question is the incidence of the excise duty per degree of alcohol contained in the same quantity of wine and beer. However, such a criterion is conclusive only in so far as it shows that wine is taxed more heavily than beer and that this internal taxation is of such a nature as to afford indirect protection to beer, contrary to the second paragraph of Article 95 of the Treaty (...). Taxation based on the degree of alcohol is the only reliable test by which it may be established that the taxation on the two products in question is not equal, thus raising a presumption of protection. However, that does not mean that application of a duty calculated on the basis of alcoholic content is the appropriate method for taxing wine and beer in fact. The Commission applies this standard of comparison in order to establish whether or not the second paragraph of Article 95 has been infringed in the case of Member States where only one of those beverages is produced whilst the other is imported, regardless of the actual method of taxation used.

(b) Where, in a Member State which produces substantial quantities of both wine and beer, imported wine is taxed at the same rate, or allowed the same exemption, as domestic wine, and imported beer receives the same fiscal treatment as domestic beer, the Commission takes the view that neither of the imported products has been subject to fiscal discrimination under the terms of Article 95. The relationship between the excise duty on wine and excise duty on beer must be established by means of harmonization pursuant to Article 99 of the Treaty.

(c) Where there is no domestic wine and imported wine is in competition with domestic beer, and where the ratio between the excise duty on a given volume of imported wine and the excise duty on the same volume of domestic beer does not exceed the ratio of their respective alcoholic strengths, the imported wine cannot be said to bear a heavier tax burden than the domestic beer. Once that ratio is exceeded, however, so that there is a heavier tax burden on imported wine, there arises the presumption that protection is being indirectly afforded to beer, although the existence of such protection cannot be established on any precisely calculable basis.

(d) From the point of view of the Community as a whole the incidence of excise duty per degree of alcohol contained in the same quantity of each of the two beverages in question provides, for the purposes of the second paragraph of Article 95, an indication of the appropriate ratio on the basis of which it may be established that there is a heavier tax burden on the imported beverage and that it is likely that the heavier tax burden has a protective effect.

C -- Application to this case

(a) On the facts of this case the ratio between the taxation on typical beer having an alcoholic strength of 3.5% to 3.6% and typical table wine having an alcoholic strength of 10 degrees to 12 degrees is between 1:2.8 and 1:3.4. Inasmuch as the alcoholic strength of popular table wines is between 9 degrees and 10 degrees, rather than 10 degrees to 12 degrees, an acceptable tax ratio, being that below which there can be no presumption of discrimination, is 1:2.8. Such a ratio is further justified by the competitive disadvantages to which imported wine is subject.

(b) The fact that in the United Kingdom the ratio is in excess of 1:2.8 indicates that wine is there subject to a heavier tax burden than beer, which raises the presumption that indirect protection is being afforded to beer.

(c) Between 1973 and 1981 the tax ratio in the United Kingdom varied as follows: 1:4.2, 1:3.2, 1:4.2, 1:5.6, 1:5.3, 1:4.9 and 1:4.2. Even without the existence of "an exact standard of reference" for establishing the point at which the protective effect comes into play, it is readily apparent that in the United Kingdom that point was well and truly passed at the time the proceedings were commenced. Although the protective trend noted by the Court in its judgment has now been reversed, it has not been eliminated.

The observations submitted by the United Kingdom may be summarized as follows:

A -- The criterion for comparison

(a) The Commission has still not indicated what would amount to "the same tax burden" on wine and beer in a normal competitive relationship.

(b) That question was considered by the Fiscal and Financial Committee (the Neumark Committee) which stated in a report submitted to the Commission in 1962 that where the existence of indirect protection for the national product against a product produced in another State is suspected, the two taxes must be compared with the price of the commodities, less the tax.

(c) A comparison based on alcoholic strength is wholly irrelevant to the consumer's preference for one beverage over another; it gives no guidance on the question whether a particular tax ration affords protection for either beverage. There is no evidence to suggest that beer is indirectly protected by the fact that wine is subject to a heavier tax burden on the basis of its alcoholic strength.

(d) In practice, no Member State imposes duty upon all alcoholic beverages at a constant rate per degree of alcohol. The Commission itself does not recommend such a standard.

(e) The different manufacturing methods and natural properties of the two beverages do not provide the basis for a method of calculating the incidence of taxation upon each. There is no satisfactory basis for answering the question whether the two products are subject to the same tax burden. The least unsatisfactory and misleading standard of comparison, according to the Neumark Committee, is the incidence of duty on consumer spending.

(f) The range of prices paid by consumers of wine is, admittedly, wide but the range of alcoholic strength is also wide. Duty is charged on wine in the United Kingdom at the same rate per hectolitre for all wines having an alcoholic strength of between 8.5% and 15%. That duty is fully in accordance with the recommendations of the Commission in its proposals for harmonizing duty on alcoholic beverages. The result, however, is that the tax burden measured per degree of alcohol is more than 70% higher for wine containing 8.5% alcohol than for wine containing 15%.

(g) Similarly, value added tax is generally regarded as the most neutral of all indirect taxes, being based on the price paid by the consumer: the amount of value added tax charged on a bottle of top quality wine sold in a restaurant is many times more than that charged on a bottle of vin ordinaire sold in a supermarket, although their alcoholic strengths may be identical. Since value added tax is compatible with the EEC Treaty it follows that Article 95 does not require tax burdens to be equal in relation to alcoholic strength.

(h) In order to compare the incidence of duty per unit of price on wine and beer respectively it is necessary to determine the average price charged for wine; but the calculation is equally necessary if the comparison is to be based on alcoholic strength. There is of course a margin of error in any calculation of an average price; it is, however, more precise and less variable than determining an average alcoholic strength.

(i) An equalization of the tax burdens on wine and beer, calculated on the basis of alcoholic strength, is in any case relevant only to the removal of trade barriers arising from the differences between national tax systems under Article 99 of the treaty; it is not relevant in establishing whether there are discriminatory or protective tax practices within the meaning of Article 95. It has been established by the Court that Articles 95 and 99 pursue quite different objectives.

B -- The results of the different methods of comparison

(a) If it is accepted that the least misleading standard of comparison is the incidence of tax per unit of average price the United Kingdom submits that its fiscal policy does not produce a difference such as to afford protection for beer.

During the relevant period the excise duty in question represented 23% of the retail price of beer, and 24% of the price of wine. At present, in the case of wines produced in other Member States it represents an even smaller proportion of the price and, almost certainly, a smaller proportion of consumer expenditure than for beer. In the circumstances the duty charged by the United Kingdom on wine cannot constitute internal taxation "of such a nature as to afford indirect protection to other products".

(b) It was stated by the Advocate General in his first opinion in these proceedings that the statistics produced showed that consumer habits had not been influenced thitherto by the higher tax on wine and

therefore showed clearly that neither the consumption of wine nor that of beer had been influenced by the tax up to then.

(c) Even in the unlikely event of the comparison's being based on the incidence of taxation per degree of average alcoholic strength, the present ratio is not to be regarded as inconsistent with obligations arising from the Treaty. Since the average alcoholic strength of table wine is in the region of 12% and that of beer is approximately 3% the ratio of excise duty charged on a given volume ought to be in the region of 4:1; at present the ratio in the United Kingdom is about 4.2:1. Such a minimal difference cannot be decisive, especially as the Commission itself envisaged a maximum ratio rather than a fixed ratio between the different rates of duty.

(d) The Commission has recommended that spirits should be charged at a higher rate of duty according to alcoholic strength than liqueur wines. It appears, therefore, to have accepted that there are social reasons for imposing a relatively higher rate of taxation on beverages with a higher alcoholic content. It follows that a relatively higher rate of tax on wine than on beer should be acceptable.

(e) Even if on a given criterion the rate of duty on wine were found to be significantly higher than on beer, account should be taken of the point made by the Italian Government in another case before the Court that there is an infringement of Article 95 only if the sole purpose of fixing differentiated rates is to impede production which, for objective reasons, is impossible to carry out within the country: yet it is perfectly possible to produce wine in the United Kingdom.

C -- The trend

It is true that between 1972 and 1979 changes in the respective rates of duty showed a proportionately larger increase in the duty on wine than in that on beer. However, on 27 March 1980 the duty on beer not exceeding an original gravity of 1 030 degrees was increased from UKL 10.65 to UKL 13.05 per hectolitre, and the duty on wine not exceeding 15% alcohol was increased from UKL 71.49 to UKL 81.82 per hectolitre. On 11 March 1981 the duty on beer was further increased to UKL 18 per hectolitre and that on wine UKL 95.20 per hectolitre. The increase in the rates of duty since 1972 was, therefore, for typical beer of 1 030 degrees, 168.5%, and for wine 168.4%. The protective trend noted by the Court has therefore been entirely eliminated.

D -- Retroactive effect of the judgment

In the unlikely event of the Court's holding that any element in the fiscal policy of the United Kingdom was inconsistent with the second paragraph of Article 95 certain individual rights might be created retroactively unless the Court were to limit such retroactivity applying the principle laid down in [the Defrenne case].

***The Government of the Italian Republic**, intervening, takes the view that the judgment of 27 February 1980 established definitively that beer and wine are in competition with each other and that wine is subject in the United Kingdom to a heavier tax burden then beer; thus the only question which remains to be resolved is whether the difference in the tax burden is of such a nature as to be able to afford protection to beer. As to that, the Court found that the trend of the two sets of taxation showed a protective tendency to the disadvantage of wine imported into the United Kingdom; the heavier tax burden imposed on wine in the United Kingdom must therefore now be considered in the light of the criterion of an "appropriate ratio" of tax from the point of the Community as a whole.*

A -- Observations on the report submitted by the Government of the United Kingdom

(a) The statement that the considerable differences between the manufacturing processes and properties of wine and beer make substitution between the two products unlikely runs directly contrary to the findings contained in the Court's judgment. At best, such differences might be taken into consideration

solely in order to establish what would be the appropriate tax ratio so as not to influence the normal operation of competition between the two products.

(b) The argument (a new one) that a relatively higher rate of duty on wine than that on beer might be justified for social reasons is unacceptable and unfounded.

It falls outside the framework outlined by the Court's interlocutory judgment. In any case, once the fact that the products are in competition with each other has been established, a system of taxation designed to protect the domestic product at the expense of the imported one cannot be justified as far as Article 95 of the Treaty is concerned by considerations pertaining to any social objectives which might be pursued by the national legislature. Considerations of that kind, moreover, must be assessed at Community level; as far as the relationship between an agricultural product such as wine and an industrial product such as beer is concerned the most that might be justified in view of the requirements of the Common Agricultural Policy is the introduction of a rate of duty favouring the agricultural product.

(c) The arguments based on the submissions of the Italian Government in another case are manifestly outside the present area of contention as defined in the judgment of 27 February 1980. In any case although Article 95 undoubtedly permits Member States to retain, on the grounds of legitimate considerations of economic policy, differential taxation on similar or competing products, they may only do so where all the products are, or may be, produced within the country. In that context consideration must be given to the actual geographical, climatic and technological conditions which might make it possible for the commodities in question to be produced on a sound economic basis once the fiscal barriers have been removed. It is not possible to speak, in specific and realistic terms, of a potential production of wine in the United Kingdom.

(d) Equally irrelevant is the argument that the protectionist nature of the taxation system in the United Kingdom is belied by the fact that in recent years the tax burden imposed on the two products has increased by the same percentage. The existence of a protective trend, established objectively by the fact that in the past duty on wine has increased progressively at a far greater rate than the duty on beer, cannot be disproved by the mere circumstance that the difference between the rates of increase has recently disappeared. That fact shows merely that the discriminatory measures adopted in the past had already reached a level more than sufficient to guarantee the desired protective effect.

B -- The appropriate tax ratio

(a) Discussion must be restricted to the application of Article 95; the issue does not concern any harmonization of national legislation on excise duty in the context of Article 99 (...). The question is, under what conditions may the United Kingdom's system, which is based solely on the volume of the product and not its price or alcoholic strength, be considered to satisfy the requirements of Article 95.

Under such a system the only ratio compatible with the second paragraph of Article 95 of the Treaty, according to the Italian Government, is that of equality: a given quantity of wine must bear the same duty as that imposed on the same quantity of beer.

(b) The fact that this fails to take into account the real differences between the wine and beer as far as retail price and alcoholic strength are concerned merely reflects the choice made by the national legislature which adopted volume as the sole criterion. If the duty is not to influence competition then that same criterion must logically be applied likewise to the tax ratio between wine and beer.

(c) The choice between wine and beer is not determined by the desire to procure the maximum quantity of alcohol at the minimum price. The two beverages are in competition because they are both beverages of low alcohol content suitable for accompanying meals or for quenching thirst. The differences in kind which lead the consumer to choose one or the other have to do not with the alcohol content but with the general characteristics (taste and flavour in particular) of the two products. Differential taxation on the

basis of average alcohol content, when applied to products in respect of which such content does not play any real or decisive part which the consumer regards as characteristic, can have no reason or purpose other than to place wine at a competitive disadvantage as against beer.

(d) On the assumption that the differences between wine and beer might, even within a system of taxation based on volume, justify a departure from the criterion of parity between the rates of duty applicable to equal volumes of domestic beer and imported wine, the extent of such disparity must in any case be rigorously assessed in the light of all the characteristics, regarded by the consumer as important, which are peculiar to each of the products, and not in the light of one of them alone, selected arbitrarily.

Equality in the rates of duty constitutes at least the "tendency" criterion to be adopted for the purposes of the second paragraph of Article 95; appropriate justification must be given for any departure from such parity.

(e) There can be no justification in any case for a tax ratio between equal quantities of wine and beer which is in excess of the ratio of their respective alcoholic strengths.

(f) A tax ratio equal to the ratio of the respective alcoholic strengths cannot constitute[s] (...) merely the upper limit beyond which there is clearly an infringement of the second paragraph of Article 95. Whatever criterion may be adopted in practice it is difficult to conceive of any reason for further differentiation between the rate of duty chargeable on wine and that chargeable on beer.

(g) The difference in alcoholic strength alone cannot justify a corresponding difference in the rate of duty.

Under a system of taxation based on quantity the qualitative characteristics of the products in question may be regarded as relevant only if they affect the quantities of each consumed in like circumstances. The alcohol content of wine and of beer is in itself not relevant to any of their uses; on the contrary, it is the general characteristics of each product which may explain why in similar circumstances beer consumption is generally greater than wine consumption. Experience based on consumer habits within the Community as a whole shows that the ratio certainly cannot be in excess of 1:1.5.

Moreover, the second paragraph of Article 95 precludes protective taxation in any form whatsoever, even if it is detrimental not to all imported competing products but only to some of them. A tax ratio calculated on the basis of the average alcohol content of wine cannot, therefore, in any event be appropriate; the most that might be said is that such a ratio might make it possible to guarantee the neutrality of the duty as regards competition in the case of wine the alcohol content of which is equal to or above the average; the same neutrality could not be ensured in respect of wines having an alcohol content below the average. It is therefore the minimum alcohol content which must be taken into account in every case in calculating the appropriate tax ratio between wine and beer if it is accepted that alcohol content is the criterion (albeit too restrictive and partial) to be applied.

Beer faces most direct competition from the lighter wines having an alcoholic strength of between 9 degrees and 10 degrees; therefore in view of the normal alcoholic strength of beer (3.7 degrees) the tax ratio may not, even on that basis, differ greatly from the ratio of 2:1. Having regard to all the characteristics of the two products that ratio ought to be reduced below that to the ratio of 1.5:1.

(h) Even if it were legitimate to select just one of all the characteristic features of wine and beer for use as the sole standard of reference for the appropriate tax ratio, it would be logical to consider not merely the alcohol present in the finished products but all the sugars and other alcohol-producing matter present in the unfermented liquors from which the two beverages are made. That factor is definitely more significant than just the alcohol present in the finished product and it is equally susceptible of accurate measurement.

If the extracts of the unfermented liquors for the most common wines and beers are compared, the ratio is found to be in the region of 1.8:1.

(i) On the basis of alcohol content as the criterion the appropriate tax ratio cannot exceed 2.8:1. In view of the fact that the alcoholic strength of the most usual kind of beer is not less than 3.7 degrees, that ratio must even be slightly reduced, to roughly 2.5:1.

(j) The average retail price cannot serve as the sole standard of reference.

The Court rejected that approach in its interlocutory judgment. In any case, under a tax system based on volume, the price or value of the products is, by definition, irrelevant; a single rate of duty is applied both to the most costly wines and to the cheaper wines, just as a single rate of duty is applied equally to the most select beers and the most common ones. It would be inconsistent with the logic of that system to rely on the average retail price solely in order to obtain different levels of taxation by volume of the two competing products.

The adoption of a tax ratio based on the average price for wine would lead to discrimination against cheaper wines priced below the average. Such a situation cannot be regarded as compatible with the requirements of Article 95. The fact that such taxation would be neutral as regards competition in the case of some imported wines neither eliminates nor compensates for the discriminatory and protective character of the duty in the case of other such wines.

The unacceptability of any reference to average price is emphasized by the fact that the cheaper wines, being lighter, are more easily able to compete with beer.

The prices used in calculating the average price are not homogeneous: some relate to direct sales in bars, some to sales in restaurants and some to sales through specialized outlets or supermarkets: in view of the wide difference in costs in each of those cases, an average calculated by such a method would be anything but meaningful.

A purely arithmetical average of retail prices or alcohol content cannot have any meaning. It would, in any case, be necessary to calculate an average weighted to take account of the actual distribution of each of the various types of wine and beer on the basis of their price or alcoholic strength.

(k) A comparison of the system of taxation in force in the United Kingdom, in which the tax ratio between wine and beer is in excess of 5:1 for the same volume, and the appropriate ratio determined on the basis of objective criteria shows clearly and without a doubt that it is discriminatory and that its purpose is to protect domestic beer production.

III -- Information provided and written observations submitted by the parties following the Order of 15 June 1982

The Commission supplied the Court with two series of tables.

(a) The first table shows the consumer prices, the amount of value added tax and excise duty and the consumer prices net of tax for wine and beer in the Federal Republic of Germany, France, Italy, the Netherlands, Belgium and Luxembourg, expressed in national currencies, for the years from 1977 to 1981 (...) .

[…]

A particular point to emerge from that information is that there are substantial variations in the prices of typical beers (that is to say beers with an original gravity of 1038 degrees) sold in public houses, according to the geographical region, the nature of the establishment and the bar in which the beer is served, and in the prices of typical beers sold in retail outlets. Therefore it is very difficult to arrive at a single typical price; the price given by the United Kingdom, namely 60 pence per pint (0.568 litres) or UKL 1.06 per litre, can be regarded as falling at the lower end of the possible range of typical prices for a beer of popular quality, whether sold in a public house or in retail outlet.

As regards wine, the selection of the prices published in a specialized review offers a very general picture both of the evolution of table wine prices in the United Kingdom over a period of time and of their range, which is frequently considerable, at any one time. A retail price of UKL 3 may reasonably be regarded as typical for a litre of "wine or popular quality".

The duty on a beer with an original gravity of 1038 degrees is currently UKL 25.84 per hectolitre. The duty on wine is currently UKL 106.80 per hectolitre.

The incidence of excise duty on the price net of tax is 39% for a litre of typical beer selling at UKL 1.06 per litre and 69.3% for a litre of wine selling at UKL 3 per litre.

The incidence of excise duty on wine prices exceeds that on beer prices by a margin of more than two-fifths. In order to achieve the same incidence on both products, the duty on wine would need to be reduced from UKL 108.80 per hectolitre to approximately UKL 60 per hectolitre.

The rates of excise duty used by the Commission for those calculations are those in force in the United Kingdom following the changes in the 1982 budget. The excise ratio between wine and beer is at present 4.175:1 rather than the 5:1 ratio which obtained at the time when this application was submitted.

The figures given by the Commission confirm the continued existence of a serious breach of Article 95 of the EEC Treaty in the United Kingdom, notwithstanding the adjustments made in successive budgets to the rate of excise duty applied to wine and beer.

However, it must be observed that, in view of the specific nature of the excise duty on wine and beer, the establishment of a ratio between those two duties based on the criterion of price is extremely hazardous and of doubtful validity, owing in particular to the wide range of wine prices. Account must also be taken of the technical impossibility for the tax authorities of monitoring the continual varieties in price due to a wide variety of factors amongst which, for wines, fluctuations in exchange rates, according to the origin of the product, are of special importance.

It was held by the Court in its interlocutory judgment of 27 February 1980 that the appraisal of the incidence of the tax burden in relation to the alcoholic strength of the beverages in question is the only criterion whereby an objective, although imperfect, comparison can be made between the rates of tax applied to wine and beer.

[…]

The Government of the United Kingdom submitted several documents to the Court.

(a) An initial table shows representative prices for a pint of beer, converted into prices per litre, for the years from 1977 to 1982, as recorded in the reports submitted to Parliament annually by the Commissioners of Customs and Excise. Those prices are reasonably typical of the price charged for draught beer served in a public bar and are not to be regarded as average prices. They are based on observation of price trends among the national brewers.

The table also shows the amount of excise duty and value added tax included in each price and the prices net of excise duty and value added tax.

(b) The reports of the Commissioners of Customs and Excise contain no information on representative prices of wine (...) .

The table wines produced in a Member State and "most commonly sold and consumed in the United Kingdom", are, for the purpose of the Court's order, two wines imported from Germany ("Blue Nun" and "Goldener Oktober"). The United Kingdom submits tables showing, for those two types of table wine, the off-licence prices, the amount of excise duty and value added tax and the prices net of excise duty and tax.

(c) The information concerning those two brands of wine is not, however, comparable with that concerning beer. The two brands in question account for only a small part of the total United Kingdom market for table wine, whereas the figures for beer relate to numerous brands which together account for a substantial proportion of the total consumption of that commodity.

(d) A fourth table shows the average prices of beer and table wine, taking into account sales to the consumer from all types of outlets, including restaurants, recorded by the Government's Central Statistical Office. That table also contains, for each average consumer price, the amount of excise duty and value added tax and the price net of excise duty and tax.

(e) The information on beer prices shows that the "average" price for beer is slightly higher than the "typical" price. As far as wine is concerned, table wine "of average price" is as representative of all sales of table wine as the wine "most commonly sold and consumed" in the United Kingdom, referred to in the preamble to the Court's order.

(f) A fifth table states the quantity and value of imports of table wine into the United Kingdom in 1980, the latest year for which comprehensive information is available. That shows that the average value of table wine imported into the United Kingdom for 1980 from other Member States was approximately 10% higher than the average value for all imports, after the values of imports from outside the European Community had been increased to allow for the maximum amounts of customs duty chargeable. The level of mark-ups between importation and sales to consumers does not vary widely according to the source of a table wine; the figures in the fourth table for the prices, net of duty and tax, of all table wines are therefore approximately 10% below the figures which would be appropriate for the average prices of table wines imported from other Member States.

(g) A sixth table shows the net quantities of table wine and beer which attracted duty in the United Kingdom in each year from 1972 to 1981 inclusive. That information is generally accepted as the best available indicator of consumption.

3. The Government of the Italian Republic, the intervener in the proceedings, submits a number of observations concerning the information supplied to the Court by the main parties to the proceedings.

(a) The proper basis of comparison between beer and wine can be obtained only by reference to the level of tax applicable to those products per unit of volume. At most the basis adopted might be the level of tax applicable to the alcoholic strength. Consumer prices, especially in the case of average prices, are influenced by too many uncertain factors to provide a reasonable basis of comparison between the tax burdens borne by the two competing products.

(b) Even if consumer prices are compared, the considerable tax discrimination to the detriment of wine is apparent.

The incidence of excise duty on the price of beer is 39% or 42%, according to whether the consumer price, in a public house, for 1 litre of typical beer, representative of the major part of the market, is UKL 1.06 or UKL 1.03.

A wide variation is apparent in the case of consumer prices for typical wine of popular quality. According to the information supplied by the Commission, the consumer price for a large number of such wines is approximately UKL 3 per litre or less. The incidence of duty is therefore 69% or more, which is much higher than the incidence of duty on beer.

The two brands of German white wine referred to by the United Kingdom cannot be regarded as typical, popular or representative of the United Kingdom market, particularly in view of the fact that they account for only a small part of that market. Thus the information provided by the United Kingdom Government does not permit a proper comparison to be made.

Very many French and Italian wines are sold in the United Kingdom at prices per litre which are considerably lower than the price per litre of the two German wines to which the United Kingdom Government refers. The prices for those wines are at the upper end of the price range indicated by the Commission.

If the criterion of consumer prices is adopted, reference will have to be made to the price range given by the Commission, from which it is apparent that the consumer price of many table wines drunk in the United Kingdom is approximately UKL 3 per litre or less.

A proper comparison, in relation to Article 95 of the EEC Treaty, can be made only between the price of typical wine and the price of typical beer. If that principle is applied, the incidence of duty on the cheapest wine is approximately 160%, whereas the incidence of duty on beer is only 39% to 42%.

(c) No comparison can be made between average prices. In any event, the average price of wine given by the United Kingdom is in no way representative of the price of a typical, popular wine, if only because it includes the considerable cost of service. The information supplied by the United Kingdom does not provide any basis of assessment which may be relied upon for settlement of the dispute.

(d) The average value given by the United Kingdom for imported table wine is much too high (...). [The] prices (...) are considerably higher than the consumer prices for Italian wines indicated in the tables supplied by the Commission.

In any event, even if the average import value indicated by the United Kingdom is accepted, it cannot have changed significantly between 1980 and 1982. If the average value of UKL 0.7388 is accepted for 1982 as well, the average consumer price for table wine cannot be more than UKL 3 per litre, which reflects an incidence of excise duty on wine of approximately 69.3%, whilst the incidence of duty on beer is approximately 39% to 42%.

The discrimination is therefore evident even if prices to consumers are adopted as the criterion for comparison and even if, in the case of wine, the very high consumer price of UKL 3 per litre is taken as a basis.

(e) In a tax system like that of the United Kingdom, in which duty is charged on wine and beer exclusively on the basis of volume, determination of the exact ratio between the rates applicable for the two products should also logically be based on purely quantitative criteria. Therefore the ratio between the duty charged on a given volume of wine and the duty charged on an identical volume of beer should tend towards parity. A clearly defined and limited departure from that theoretical parity can be justified only if the difference between the two rates is strictly confined within the limits of the ratio existing between the quantities of the two products which are normally consumed in similar circumstances, so that the quantity of wine and the quantity of beer normally consumed must be subject to the same amount of duty. The

ratio between the quantities of the two products normally consumed in approximately 1:1.5. It may be inferred from the principles laid down in Article 95 of the Treaty that the ratio between the rates applicable, according to volume, to the two products in the United Kingdom must not depart from the ratio between the quantities normally consumed.

IV - Oral procedure

[…]

3.6.1 Opinion of AG Reischl

Commission of the European Communities
v
United Kingdom of Great Britain and Northern Ireland

Case 170/78

10 May 1983

AG Reischl

[1983] ECR 2265

http://www.curia.eu.int/en/content/juris/index.htm

[…]

1.4 Judgment of 27 February 1980

In its interlocutory judgment [citation omitted], the Court stated first that the United Kingdom had essentially admitted (had not called in question) the facts put forward by the Commission, especially as regards the evolution in the rates of excise duty. The United Kingdom did deny the existence of a competitive relationship between wine and beer, with the result that there was no possibility of substitution, which was the condition for the application of the second paragraph of Article 95. Moreover, according to the United Kingdom, even if such a possibility of substitution were recognized, the tax system applied to wine was not protective in nature within the meaning of that provision.

In paragraph 6 the Court stated that, in order to determine whether there was a competitive relationship within the meaning of the second paragraph of Article 95, it was necessary to look not only at the present state of the market but also at possible developments within the context of free movement of goods within the Community and at further possibilities for the substitution of products for one another which might be revealed by intensification of trade, so as fully to develop the complementary features of the economies of the Member States in accordance with the objectives laid down by Article 2 of the Treaty.

In paragraph 10 of the judgment, the Court emphasized that the second paragraph of Article 95 (in relation to determining whether there was a protective effect) was linked to the "nature" of the tax system in question so that it was not possible to require in each case that the protective effect should be shown statistically. The Court stated: "It is sufficient for the purposes of the application of the second paragraph of Article 95 for it to be shown that a given tax mechanism is likely, in view of its inherent characteristics, to bring about the protective effect referred to by the Treaty."

In paragraph 14 of the judgment, the Court stated: "It is impossible to deny that to a certain extent the two beverages in question are capable of meeting identical needs, so that it must be acknowledged that there is a certain degree of substitution for one another."

In his first Opinion Mr Advocate General Reischl further confirmed that the products were interchangeable (...) from the point of view of consumers, beer and wine were put to the same use and had the same characteristics. Both were produced by fermentation and differed from the other thirst-quenching beverages listed in Chapter 22 of the Common Customs Tariff in that they contained alcohol. According to his Opinion, the relatively small alcoholic content also distinguished both drinks from spirits covered by tariff heading 22.09 C of the Common Customs Tariff and obtained by distillation. I regard paragraph 14 of the judgment, as amplified by Mr Advocate General Reischl in his first Opinion on this case, as an important starting-point for my own Opinion.

With regard to the basis of calculation to be used, in relation to the established competitive relationship, for comparing the total tax burdens imposed on the two products, the Court stated in paragraph 18: "The explanations supplied show that neither simply taking into consideration the volume of the two beverages nor a comparison between the typical units of consumption can provide a suitable basis for comparison. The same applies to a comparison based on the effect of the tax burden on the selling price of the two types of beverages in view of the fact that although it is relatively easy to ascertain an average price in the case of beer it is difficult to determine a representative basis for comparison in the case of wine, a characteristic of which is the wide range of prices."

In paragraph 19 of its judgment the Court added: "Of the criteria put forward by the parties, the only factor which may enable an appropriate and somewhat objective comparison to be made consists therefore in the appraisal of the incidence of the tax burden in relation to the alcoholic strength of the beverages in question." By taking into consideration that criterion, the Court then ascertained inter alia that wine was at that time subject in the United Kingdom to a tax which was approximately 50% higher than that on beer, assuming that the alcoholic strength of the beverages was respectively 11 degrees to 12 degrees and 3 degrees to 3.7 degrees. As appears from the same paragraph, the Italian Government argued that in the case of normal table wines with an alcoholic strength of 9 degrees to 10 degrees the margin of discrimination was approximately 100% to 125%.

In paragraph 20 the Court stated in conclusion and subject to the observations made in paragraph 16 on the need first to determine an appropriate tax ratio between wine and beer that, according to the only criterion whereby an objective, although imperfect, comparison could be made between the rates of tax applied to wine and beer, it seemed that wine was subject in the United Kingdom to a tax burden which was heavier than that imposed on beer.

I shall take paragraphs 18 to 20 inclusive in relation to the criteria to be used for comparison as the second starting-point for my own analysis. In that regard, I infer from the words which I have italicized on the one hand that the Court considers alcoholic strength to be an appropriate, although imperfect, criterion for comparison. On the other hand, I infer that the Court did not intend also to exclude the supplementary use of the criteria of volume and price. At least in relation to the supplementary importance of the criterion of price, that also seems to be the logical inference to be drawn from the questions put to the parties in the Court's subsequent order of 15 July 1982.

A third important starting-point for my own analysis is in my opinion to be found in the view expressed in paragraph 24 "that a comparison of the development of the two tax systems in question shows a protective trend as regards imports of wine in the United Kingdom."

1.5 The further course of the procedure

[...] At the sitting on 19 May 1982, the Commission confirmed that in its view a ceiling should be established by the Community for the taxation of wine but there should be no fixed reciprocal relationship between rates of taxation applicable to wine and beer. That point of view (...) is based on the twofold consideration that there are Member States which produce beer exclusively or almost exclusively but that in the remaining Member States both beer and wine are produced without its appearing that the heavier taxation of beer in those countries affects the healthy development of breweries. There is virtually no importation of beer in that group of countries, whilst in the first-mentioned group of countries there is in fact significant importation of wine. The Commission added that, as appears from [several] judgments of the Court [citations omitted], a Member State may lay down differing tax arrangements even for identical products on the basis of objective criteria provided that such arrangements pursue objectives of economic policy which are themselves compatible with Community law and that they are not discriminatory or protective in nature. The establishment of a reciprocal relationship between the rates for beer and wine, like the harmonization of the rates of taxation, constitutes an essential aim only in the context of the harmonization of legislation and cannot be achieved by means of the application of Article 95 (...) .

In his Further Opinion of 16 June 1982, Mr Advocate General Reischl,. (…) [w]ith regard to the proper tax ratio between wine and beer, (...) considers (...) that differential taxation - which he also regards as permissible in principle on the basis of the judgment of the Court cited by the Commission - should not discriminate or afford protection against imported products. In his detailed examination of the excise duty applied to wine in relation to the various criteria for comparison, he questions inter alia "whether and how far alcoholic content has a decisive effect on consumer behaviour, in view of the other considerable differences between wine and beer, and whether that is not ultimately influenced only by the selling price of the beverages in question." Finally, he concludes "that the relatively heavier tax burden on wine in relation to that on beer... does not in itself justify with sufficient certainty the assumption that those tax arrangements are of such a nature as to afford indirect protection to domestic beer production." I should probably have reached the same conclusion on the basis of the information available at that time. In my own examination I shall therefore concentrate on examining the new facts which have since become available as a result of the questions put by the Court in its order of 15 July 1982 (...) .

2. Supplementary remarks

2.1. Summary of the starting-points for my own analysis

I now pass to my own analysis of the problems raised by this case. For that purpose I have chosen as the starting-points for the definition of my view the following points, already referred to, in the Court's interlocutory judgment:

(a) The interchangeability of wine and beer;

(b) The comments on the various criteria for comparison, in the light, however, of the statements contained in the Court's decision of 15 July 1982 and also in the light of the parties' replies to that decision;

(c) The protective trend [...].

2.2. The interchangeability of wine and beer

With regard to the interchangeability of wine and beer, I have nothing to add at this stage to the remarks contained in the Court's judgment and the two Opinions of Mr Advocate General Reischl. If it is accepted that there is a competitive relationship, it is at the same time recognized that the second paragraph of Article 95 may be applicable. In my closing remarks, however, I shall return to a number of characteristics of the competitive relationship between wine and beer.

2.3. The criteria for comparison for the determination of the tax burden

The Court concluded in paragraphs 19 and 20 of its interlocutory judgment that on the basis of the alcoholic strength, which was regarded by the Court as the most objective, although imperfect, criterion, the wines considered to be relevant for purposes of comparison were subject to a tax which was approximately 50% higher than that on the relevant beer. I shall later return to the question of the proper tax ratio, which was left open. According to the Commission and the Italian Government (which take into account lower percentages of alcohol), the tax advantage on the basis of that criterion is substantially higher. Precisely because the Court itself regarded the criterion of alcoholic strength as imperfect I consider it desirable to make also a few remarks on the other criteria applied by the Commission.

First of all, as the Italian Government has rightly observed in its various observations, the use of the criterion of volume is logical, inasmuch as the United Kingdom's tax arrangements are themselves based on the criterion of volume. Moreover, Mr Advocate General Reischl rightly observed in his first Opinion that the interchangeability of wine and beer results in particular from the fact that both are thirst-quenching drinks of low alcoholic content and, as is well-known, the volume of a drink is one of the decisive factors in the quenching of thirst. The Italian Government admits that a corrective factor of 1.5 must be applied here, that is to say that 1 litre of wine must be compared with 1.5 litres of beer. It rightly remarked in its observations on the replies given by the Commission and the United Kingdom that the information provided on the consumption of wine and beer in the most important wine- and beer-consuming countries justifies even a somewhat lower corrective factor of 1.35. On the basis of that criterion, taxation on wine would be more than three times as high as that on beer. The margin of discrimination would therefore amount to at least 200%.

So far as the criterion of the comparison of prices is concerned, I agree with the United Kingdom and Mr Advocate General Reischl that it is certainly relevant in principle (...). Secondly, with reference to the Further Opinion of Mr Advocate General Reischl, I take the view that differences in production costs, alcoholic strength and other differences in cost and quality, together with consumers' preferences, ultimately find expression in the price of the various products. It is not without reason that the terms "competitive mechanism" and "price mechanism" are often regarded as synonymous. The competitive relationship between wine and beer is in fact expressed in their price ratio. If the United Kingdom had imposed upon beer and wine taxation calculated on the basis of the same percentage of their respective prices to the consumer net of tax, there could in my view be no question of an infringement of the second paragraph of Article 95.

The difficulties in applying the criterion of price in this case, however, arise out of the fact that in its tax system the United Kingdom applies the criterion of volume as the basis for the taxation of wine and beer, rather than that of price. The comparison of price is further hampered by the very divergent structures of the sales markets for wine and beer and by the very different prices which are charged for different types of wine as a result of inter alia differences in quality.

The difficulty relating to the structures of the sales markets may be overcome by comparing prices on one market in which both products are sold, that is to say supermarkets and other retail traders which sell both beer and wine to the consumer. In its reply to the Court's order of 15 July 1982, the Commission in my view rightly adopted that basis for its comparison of prices.

The difficulty arising out of the wide range of wine prices may in my view be overcome either by comparing taxation on the cheapest table wines with taxation on beer (as the Italian Government recommended in its observations on the information furnished by the Commission) or by calculating the maximum price of the cheapest table wines which together have a share of the market considered to be sufficient (as the Commission in fact suggests). The relevant price of table wines, according to which of the two solutions is chosen, amounts to UKL 2 or UKL 3 per litre [footnote omitted]. The margin of discrimination against wine thus amounts to between 30 and 120% of the price net of tax (+/- 70 to 300% of the excise duty on beer).

The Italian Government argues, in defence of the comparison which it favours between the tax burden on beer and the tax burden on the cheapest table wine, that Article 95 prohibits protective tax discrimination affecting any imported product. However, I consider that as in cartel law for the purpose of determining whether fair competitive relationships exist particular products with a negligible share of the market may be disregarded and that the calculation by the Commission of a maximum price for cheap table wine therefore offers a more secure basis for the comparison of prices. According to the United Kingdom's own explanation at the most recent sitting, the relatively cheap Italian table wines have a 20% share of the British market, which certainly represents a sufficiently important share of the market to apply the comparison of taxation. In that connexion I recall that in the Commission Notice on agreements of minor importance in the field of cartel policy [citation omitted] restrictions on competition in relation to market shares of only 5% are regarded as relevant from the point of view of maintaining fair competitive relationships. On the other hand, I again agree with the Italian Government that the average import price for wine imported into the United Kingdom (...) makes it unlikely that the two types of German wine referred to by the United Kingdom for the purposes of the comparison of prices may in fact be regarded as representative. Certainly that applies to supermarket chains which import their own wine.

The information set out by the Italian Government is also of importance inasmuch as it appears from it that the most relevant Italian wines for purposes of assessing appreciable restrictions on competition have an alcoholic strength of only 9 to 10 degrees. As appears from the information provided by the Commission[,] (...) the margin of discrimination against the most relevant wines at the material time for the determination of an infringement of the Treaty amounts to at least 90% for those wines by application of the criterion of alcoholic strength. Moreover, there is a clear connexion between the criteria for comparison of alcoholic strength and price in so far as, by virtue of the regulation relevant to this case, (...) the guide price is laid down per degree of alcohol per hectolitre. For table wines with a lower alcoholic strength proportionately lower guide prices apply as compared with table wines with a higher alcoholic strength.

[…]

2.4. Conclusions based on the application of the various criteria for comparison

In short, it is clear from an analysis of the documents received after the Court's decision of 15 June 1982 that the tax burden on the wines most relevant from the point of view of competition, was at the material time for the purpose of determining a possible infringement of the Treaty, at least 70 to 100% higher than that on beer on the basis of all the defensible criteria. I (...) consider that the criterion of the influence on prices is the most relevant criterion from the point of view of competition. However, I have at the same time pointed out that under the common organization of the market in wine there is a direct relationship between wine prices and alcoholic strength, which also confirms the relevance of the criterion of alcoholic strength, for which the Court expressed a preference in its interlocutory judgment. A difference of 70 to 100% in the tax burden is in my opinion, without prejudice to the question of the proper tax ratio to be discussed next, itself a clear indication that the excise duty levied by the United Kingdom on wine affords indirect protection to the production of beer in that country, since the burden thereof may, as appears from the information provided, increase the retail price net of tax to as much as 160% of that price.

2.5. The question of the proper tax ratio

I agree with the Commission that a proper tax ratio between wine and beer can be established only by means of harmonization of legislation on excise duty under Articles 99 and 100 of the Treaty (...). Because of the vagueness of the very term "indirect protection" in the second paragraph of Article 95 no precise limit can be established on the basis of that provision of the Treaty. However, in the case of a tax burden as high in absolute terms as that concerned in this case, a difference in the tax burden of at least 70 to 100% compared with the substitute product, beer, is on the basis of all elementary experience concerning the competitive mechanism bound to result in a very appreciable restriction of competition to the detriment of wine. Even in the case of a difference in tax burden of 50% as was accepted by the Court in its interlocutory judgment, I would still consider that to be the case, if, as in this case, other factors indicate that there is an even greater difference. Thus in my opinion an appreciable restriction on competition to the detriment of wine ipso facto means that there is indirect protection of the competing product, beer, within the meaning of the second paragraph of Article 95.

[…]

2.6 The protective trend

[…] On the basis of Articles 169 and 171 of the Treaty, (...) for the application of that criterion the way in which the tax ratio between beer and wine has developed in the United Kingdom between the date of accession and the date on which the application was lodged is decisive.

As appears from the information provided by the Commission and not contested by the United Kingdom in relation to the trend during the relevant period of 1973 to 1978, the tax ratio between beer and wine rose from 1:3.2 on 1 January 1974 to 1:4.2 on 27 March 1974 and to 1:5.6 on 16 April 1975. On 1 July 1977 the tax ratio began to fall slightly to 1:5.3, which is the decisive tax ratio for purposes of these proceedings. From the information on consumption provided by the Commission it is clear that the increase in excise duty in 1975 was coupled with a fall in the consumption of wine per head of the population. The connection between a rise in the excise duty and consumption per head of the population is, however, even more clearly demonstrated by the information on developments after 1978. In 1980 the tax ratio between beer and wine fell to 1:4.9 and in 1981 to the 1974 level of 1:4.2. At the same time the consumption of wine per head of the population rose substantially (from 5.41 litres per head in 1977 to 7.8 litres per head in 1981), while the consumption of beer fell between 1979 and 1981 for the first time since 1972, from 122.1 litres to 111.5 litres per head of the population. The United Kingdom confirms those developments by means of its own figures. It also recognizes the relationship which exists between the tax burden and consumption and (...) it concluded from the developments after 1978 that the protective trend identified in the Court's interlocutory judgment had now been wholly eliminated. Apart from the fact that that conclusion is incorrect in comparison with the tax ratio on 1 January 1974, I have already observed that in these proceedings the developments between 1973 and 1978 alone are relevant for the purpose of determining a protective trend. In relation to that period, the existence of a protective trend is also confirmed by (…) the United Kingdom.

To those remarks I would further add that the establishment of a protective trend over a material period of time may indeed constitute important evidence in relation to an infringement of the second paragraph of Article 95, but none the less such evidence cannot in itself be decisive for purposes of the application of that provision. Instead it is ultimately a question of deciding whether, at the material time for the purpose of determining an infringement of the Treaty, the tax burden on imported products is so much higher than the tax burden on domestic substitute products that it must be assumed that domestic production of the substitute products is indirectly protected by the taxation on the imported products. Conclusions on the latter point may certainly be supported by a simultaneous increase over that time in the difference in tax burden.

3. Final remarks and conclusion

3.1. Characteristics of the competitive relationship between wine and beer

In relation to the cheap types of wine which are relevant from the point of view of competition, I agree with the Commission and Mr Advocate General Reischl that differences in the manufacturing structures of wine and beer are ultimately of no great importance. First, differences in production costs will, as stated above, be expressed in differences in price, so that in the use of the criterion of price they are automatically taken into account in the comparison of the tax burden. Secondly, the most relevant cheap wines and beer and both usually produced by large-scale production processes, as the Commission and Mr Advocate General Reischl have already observed.

The great differences in the structures of the markets in wine and beer I also consider ultimately to be no impediment to a clear comparison of the tax burdens. From the very fact that Article 97 is not applicable it follows that in the application of the second paragraph of Article 95 average rates of taxation may not be applied to all imported wine. From the objective of the second paragraph of Article 95 together with the general scheme of the Treaty it in fact follows that proof of a clear restriction of competition with regard to imported products which separately or collectively have an appreciable share of the market in those products is of itself sufficient to establish an infringement of that provision. Such an appreciable share of the market is, as appears from the information provided by the United Kingdom itself, already constituted by the fact that wine is sold in supermarkets and by other retailers who sell wine and beer, whereas the market share of the relevant cheap wines in the total supply of wine may, as appears from the information provided by the two parties during the proceedings and by the Italian Government, be assessed at at least 20%. A market share of only 5 to 10% would, as has already been stated, in my view have been sufficient.

Finally, the information provided on prices and consumption of wine and beer confirms that in the competitive relationship between wine and beer price ratios and the tax included therein for the consumer play a part which may be clearly demonstrated and which has also been acknowledged by the United Kingdom.

I therefore consider that the uncertainties regarding the competitive relationship between wine and beer referred to in paragraph 24 of the Court's interlocutory judgment may now be regarded as having been satisfactorily removed.

3.2. The legal consequences of a finding that the United Kingdom has infringed the Treaty

[As, for example, is also frequently the case with the judgments of the Court on infringements of Article 30 of the EEC Treaty, the precise legal consequences which judgment against the United Kingdom in this case entails under Article 171 of the Treaty cannot be ascertained. In that regard there is certainly a [wide] area of uncertainty in relation to a judgment on the second paragraph of Article 95 than a judgment on the first paragraph thereof. In this case it is in any event in my view certain that the United Kingdom may not after judgment has been given against it return to a protective trend in the development of the tax relationship. I consider that that that conclusion in itself makes it clear that the Commission retains a legitimate interest in continuing its action even after the reversal of the trend in the United Kingdom between 1977 and 1981 (…).

However, it must also in my opinion be concluded from general experience with regard to the competitive mechanism and from the information provided by the parties that there is still indirect protection of the production of beer at least as long as the tax burden on the relevant cheap wines, as measured by reference to the price net of taxation, remains at least 30% higher than the tax burden on beer. Indeed it cannot in my opinion be ruled out that even in the case of a lesser difference in tax burdens there may still be indirect protection of beer, but that would nevertheless have to be demonstrated by means of more evidence than has been produced up to now.

[…]

3.3 Conclusion

In conclusion I propose that the Court should declare, in accordance with the Commission's application, that the United Kingdom of Great Britain and Northern Ireland has failed on the grounds stated to fulfil its obligations under the second paragraph of Article 95 of the Treaty […].

3.6.2 Judgement of the Court of Justice

Commission of the European Communities
v
United Kingdom of Great Britain and Northern Ireland

Case 170/78

12 July 1983

Court of Justice

[1983] ECR 2265

http://www.curia.eu.int/en/content/juris/index.htm

[…]

8. As regards the question of competition between wine and beer, the Court considered [in its interlocutory judgment] that, to a certain extent at least, the two beverages in question were capable of meeting identical needs, so that it had to be acknowledged that there was a degree of substitution for one another. It pointed out that, for the purpose of measuring the possible degree of substitution, attention should not be confined to consumer habits in a Member State or in a given region. Those habits, which were essentially variable in time and space, could not be considered to be immutable; the tax policy of a Member State must not therefore crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to respond to them.

9. The Court nonetheless recognized that, in view of the substantial differences between wine and beer, it was difficult to compare the manufacturing processes and the natural properties of those beverages, as the Government of the United Kingdom had rightly observed. For that reason, the Court requested the parties to provide additional information with a view to dispelling the doubts which existed concerning the nature of the competitive relationship between the two products.

10. The Government of the United Kingdom did not give any opinion on that question in its subsequent statements. The Commission expressed the view that the difference in the conditions of production, to which the Court had attached some importance, was not significant from the point of view of the price structures of the two products, particularly in relation to the competitive relationship between beer and wines of popular quality.

11. The Italian Government contended in that connection that it was inappropriate to compare beer with wines of average alcoholic strength or, *a fortiori*, with wines of greater alcoholic strength. In its opinion, it was the lightest wines with an alcoholic strength in the region of 9%, that is to say the most popular and cheapest wines, which were genuinely in competition with beer. It therefore took the view that those wines should be chosen for purposes of comparison where it was a question of measuring the incidence of taxation on the basis of either alcoholic strength or the price of the products.

12. The Court considers that observation by the Italian Government to be pertinent. In view of the substantial differences in the quality and, therefore, in the price of wines, the decisive competitive relationship between beer, a popular and widely consumed beverage, and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest varieties. Accordingly, that is the appropriate basis for making fiscal comparisons by reference to the alcoholic strength or to the price of the two beverages in question.

Determination of an appropriate tax ratio

13. As regards the selection of a method of comparison with a view to determining an appropriate tax ratio, the Commission considers that the safest method is to use a criterion which is linked both to the volume of the beverages in question and to their alcoholic strength. The Commission considers that taxation in excess of the ratio 1:2:8 by reference to volume (which therefore represents a tax ratio of 1:1 by reference to alcoholic strength alone) raises a "presumption" that indirect protection is afforded to beer.

14. The Government of the United Kingdom referred to the conclusions of the report submitted to the Commission in 1963 by the Fiscal and Financial Committee (the Neumark Report) and emphasized once again that a proper comparison should be based on the incidence of taxation on the prices net of tax of the two products in question. In its opinion, a comparison based on average prices is preferable to a comparison based on average alcoholic strength. There is no question of a discriminatory or protective commercial practice where it is established that the taxes charged on two competing products represent the same proportion of the average prices of those products. The Government of the United Kingdom considers that, according to that criterion, its tax system has no protective effect.

15. On that point, the Italian Government challenges the arguments put forward by the United Kingdom and by the Commission. It emphasizes the importance, for the settlement of the dispute, of the fact that wine is an agricultural product and beer an industrial product. In its opinion, the requirements of the Common Agricultural Policy should lead to the introduction of a rate of taxation favouring the agricultural product and it would therefore be inconsistent with that policy to eliminate altogether, under a national tax system, the effects of Community intervention in support of wine production.

16. The Italian Government also contests the importance which the Commission attaches to the question of the alcoholic strength of the two beverages in question. In its opinion, the decisive criterion is the assessment of the incidence of taxation in relation to the volume of the two beverages. There are two reasons for this: in the first place, the United Kingdom's system of taxation is based on the volume of the products; secondly, since in both cases the beverages have a low alcohol content and are suitable for accompanying meals or for quenching thirst, the consumer's choice is influenced not by the alcoholic strength of the two products but by their general characteristics such as taste and flavour, with the result that they are consumed for the same purposes and in more or less the same quantities. Experience shows that the consumption ratio between beer and wine, if not exactly equal, is in any event no higher than 1.5:1.

17. The Italian Government concludes that the two criteria relating to volume and alcoholic strength should be combined in the sense that, although, in principle, there must be equal taxation by reference to the volume of the two beverages, the existence of higher taxation of wine by reference to alcoholic strength alone would be a reliable indication that there was discrimination and that the tax system in question had a protective effect.

18. The exchange of views between the parties which followed the judgment of 27 February 1980 showed that, although none of the criteria for comparison applied with a view to determining the tax ratio between the two products in question is capable of yielding reliable results on its own, it is none the less the case that each of the three methods used, that is to say assessment of the tax burden by reference to the volume, the alcoholic strength and the price of the products, can provide significant information for the assessment of the contested tax system.

19. It is not disputed that comparison of the taxation of beer and wine by reference to the volume of the two beverages reveals that wine is taxed more heavily than beer in both relative and absolute terms. Not only was the taxation of wine increased substantially in relation to the taxation of beer when the United Kingdom replaced customs duty with excise duty, as the Court has already stated in its judgment of 27 February 1980, but it is also clear that during the years to which these proceedings relate, namely 1976 and 1977, the taxation of wine was, on average, five times higher, by reference to volume, than the taxation of beer; in other words, wine was subject to an additional tax burden of 400% in round figures.

20. As regards the criterion for comparison based on alcoholic strength, the Court has already stated in its judgment of 27 February 1980 that, even though it is true that alcoholic strength is only a secondary factor in the consumer's choice between the two beverages in question, it none the less constitutes a relatively reliable criterion for comparison. It should be noted that the relevance of that criterion was recognized by the Council in the course of its work which is still in progress on the harmonization of the taxation of alcohol and various types of alcoholic beverages.

21. In the light of the indices which the Court has already accepted, it is clear that in the United Kingdom during the period in question wine bore a tax burden which, by reference to alcoholic strength, was more than twice as heavy as that borne by beer, that is to say an additional tax burden of at least 100%.

22. As regards the criterion of the incidence of taxation on the price net of tax, the Court experienced considerable difficulty in forming an opinion, in view of the disparate nature of the information provided by the parties. In particular, the incomplete nature of the information supplied by the Commission, which consisted of lists of selling prices without parallel information revealing, within those prices, the incidence of excise duty, value added tax and the price net of tax, rendered assessment of that criterion, which the United Kingdom Government considered to be of paramount importance, particularly difficult.

23. In reply to the Order of 15 July 1982, in which the Court requested the parties to provide information on consumer prices and the prices net of tax for the types of wines and beer most commonly sold and consumed in the United Kingdom, the United Kingdom Government merely provided information relating to two German wines (Goldener Oktober and Blue Nun) which are undoubtedly widely consumed but are scarcely representative of the state of the wine market within the Community.

24. The Commission and the Italian Government disputed the relevance of the wines selected by the United Kingdom Government and submitted detailed information relating to Italian wines; the Commission attempted to establish average prices whilst the Italian Government, in accordance with the approach referred to above, compared the incidence of taxation on the price of a typical

British beer with the incidence of taxation on the cheapest Italian wine which was available in significant quantities on the United Kingdom market.

25. The Commission's calculations, which relate to the United Kingdom market in its present state and the relevance of which is not challenged by the United Kingdom Government, show that wine is subject to an additional tax burden of around 58% and 77%, whereas the Italian Government's calculations relating to the cheapest wine show that wine is subject to an additional tax burden of up to 286%. Those findings are indirectly confirmed by the United Kingdom Government's analysis of the selling prices of the two German wines. Indeed, one of those two wines represents almost exactly the point of parity between beer and wine, from the point of view of the incidence of taxation on the price. That example shows that all cheaper wines marketed in the United Kingdom are taxed, by reference to price, more heavily in relative terms than beer. It appears from the price lists provided by the Commission that on the United Kingdom market there are an appreciable number of wines falling within that definition, and among them practically all the Italian wines, which are therefore subject to an additional tax burden which increases in inverse proportion to their price.

26. After considering the information provided by the parties, the Court has come to the conclusion that, if a comparison is made on the basis of those wines which are cheaper than the types of wine selected by the United Kingdom and of which several varieties are sold in significant quantities on the United Kingdom market, it becomes apparent that precisely those wines which, in view of their price, are most directly in competition with domestic beer production are subject to a considerably higher tax burden.

27. It is clear, therefore, following the detailed inquiry conducted by the Court - whatever criterion for comparison is used, there being no need to express a preference for one or the other - that the United Kingdom's tax system has the effect of subjecting wine imported from other Member States to an additional tax burden so as to afford protection to domestic beer production, inasmuch as beer production constitutes the most relevant reference criterion from the point of view of competition. Since such protection is most marked in the case of the most popular wines, the effect of the United Kingdom tax system is to stamp wine with the hallmarks of a luxury product which, in view of the tax burden which it bears, can scarcely constitute in the eyes of the consumer a genuine alternative to the typical domestically produced beverage.

28. It follows from the foregoing considerations that, by levying excise duty on still light wines made from fresh grapes at a higher rate, in relative terms, than on beer, the United Kingdom has failed to fulfil its obligations under the second paragraph of Article 95 of the EEC Treaty.

[…]

3.7 *Case C-213/96: Outokumpu Oy*

NOTE AND QUESTIONS

This case concerns the Finnish law on taxation of sources of energy and is a good example of the Court's insistence that Article 90 [ex 95] is central to the creation of a single market.

1. In what way could it be argued that once the law was applied to imported electricity discrimination was inevitable?

2. What would Finland be obliged to do to if it wanted to continue to apply the law to domestically produced electricity?

3. What do you find more convincing – the opinion of the AG or the judgment of the Court?

3.7.1 Judgement of the Court of Justice

Outokumpu Oy

Case C-213/96

2 April 1998

Court of Justice

[1998] ECR I-1777

http://www.curia.eu.int/en/content/juris/index.htm

[…]

16. Outokumpu instituted proceedings before the Uudenmaan Lääninoikeus for annulment of the decision of the Helsinki District Customs Office on the ground that the excise duty on electricity was a charge having equivalent effect to a customs duty, prohibited by Articles 9 and 12 of the Treaty. Outokumpu submitted, in the alternative, that a duty of that kind was discriminatory under Article 95 of the Treaty, and asked for it to be reduced to the lowest level of duty on electricity produced in Finland, namely 0 p/kWh, the rate applicable to exempted electricity or electricity falling outside the scope of Law No 1473/94.

17. Since it considered that the outcome of the case before it depended on the interpretation of Articles 9, 12 and 95 of the Treaty, the national court stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'Under Finnish national legislation on the taxation of energy, excise duty on electricity is levied in Finland on electrical energy produced there, the amount of the duty depending on the method of production of the electricity. On electricity produced by nuclear power, the excise duty charged is a basic duty of 1.5 p/kWh and an additional duty of 0.9 p/kWh. On electricity produced by water power, the excise duty charged is only an additional duty of 0.4 p/kWh. On electricity produced by other methods, for example from coal, excise duty is charged on the basis of the amount of input materials used to produce the electricity. On electrical energy produced by some methods, for example in a generator with an output below two megavolt-amperes, no excise duty at all is charged. On imported electricity, the excise duty charged, regardless of the method of production of the electricity, is a basic duty of 1.3 p/kWh and an additional duty of 0.9 p/kWh. The excise duty on electricity is thus determined with respect to imported electricity on a different basis from that applied to electricity produced in Finland. The levying of excise duties determined on the basis of the method of production of the energy is founded on environmental grounds in the drafting history of the law. The amount of duty chargeable on imported electricity is not, however, determined on the basis of the method of production of the electricity. The excise duty chargeable on imported electricity is higher than the lowest excise duty chargeable on electricity produced in Finland, but lower than the highest excise duty chargeable on electricity produced in Finland. The excise duty on imported electricity is levied on the importer, whereas the excise duty relating to electricity produced in Finland is levied on the electricity producer.

1. Is excise duty on electricity, determined for imported electricity in the manner described above, to be regarded as a charge having equivalent effect to a customs duty, within the meaning of Articles 9 and 12 of the EC Treaty?

2. If it is not a charge having equivalent effect to a customs duty, is excise duty on electricity, determined for imported electricity in the manner described above, to be regarded as a tax which discriminates against imports from other Member States, within the meaning of Article 95 of the EC Treaty?‘ […]

19. As regards classification, the Court has consistently held (see, inter alia, Case C-90/94 Haahr Petroleum v Åbenrå Havn and Others [1997] ECR I-4085, paragraph 19) that provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together, so that under the system established by the Treaty the same charge cannot belong to both categories at the same time.

20. The Court has also consistently held (see, inter alia, Haahr Petroleum, paragraph 20) that any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12, 13 and 16 of the EC Treaty. However, such a charge may not be so characterised if it forms part of a general system of internal dues applying systematically to categories of products according to objective criteria applied without regard to the origin of the products, in which case it falls within the scope of Article 95 of the Treaty.

21. The first point to note is that a duty of the kind at issue in the main proceedings forms part of a general system of taxation which is levied not only on electrical energy as such but also on several primary energy sources such as coal products, peat, natural gas and pine oil.

22. Second, both imported electricity and electricity of domestic origin form part of the same tax system and the duty is levied by the same authorities, whatever the origin of the electricity, under procedures governed by the general legislation on excise duties.

23. Third, with the exception of electricity of domestic origin produced in generators with an output below two megavolt-amperes and of that produced in small quantities from peat, the duty is levied on electricity, whatever its origin, whether domestic or imported. In those circumstances, the fact that in the case of imported electricity the duty is payable by the importer on importation does not provide a sufficient basis for the conclusion that it is imposed on the goods concerned by reason of the fact that they cross the frontier.

24. Outokumpu observes, however, that according to the Court's case-law (see, in particular, Case 132/78 Denkavit Loire v France [1979] ECR 1923, paragraph 8), in order to form part of a general system of internal dues, the charge imposed on imported products must be imposed on domestic products and imported products at the same marketing stage and the chargeable event must be identical for both classes of products.

25. On this point, it must be stated that, in circumstances such as those of this case, no difference may be discerned in the fact that imported electricity is taxed at the time of importation and electricity of domestic origin at the time of production, since in view of the characteristics of electricity the marketing stage is the same for both operations, namely the stage when the electricity enters the national distribution network (see, to that effect, Joined Cases C-149/91 and C-150/91 Sanders Adour and Guyomarc'h Orthez Nutrition Animale v Directeur des Services Fiscaux des Pyrénées-Atlantiques [1992] ECR I-3899, paragraph 18). […]

29. Consequently, an excise duty of the kind at issue in the main proceedings constitutes internal taxation within the meaning of Article 95 of the Treaty, not a charge having equivalent effect to a customs duty within the meaning of Articles 9 and 12.

30. As regards the compatibility of such a duty with Article 95 of the Treaty, it is settled case-law, first, that in its present state of development Community law does not restrict the freedom of each Member State to establish a tax system which differentiates between certain products, even products which are similar within the meaning of the first paragraph of Article 95 of the Treaty, on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law, however, only if it pursues objectives 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, against imports from other Member States or any form of protection of competing domestic products.

31. Article 95 of the Treaty therefore does not preclude the rate of an internal tax on electricity from varying according to the manner in which the electricity is produced and the raw materials used for its production, in so far as that differentiation is based, as is clear from the actual wording of the national court's questions, on environmental considerations.

[…]

34. However, on the question whether differentiation such as that which characterises the tax system at issue in the main proceedings is compatible with the prohibition of discrimination in Article 95 of the Treaty, the Court has consistently held that that provision is infringed where the taxation on the imported product and that on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product (see, in particular, Case C-152/89 Commission v Luxembourg [1991] ECR I-3141, paragraph 20).

35. That is the case where, under a system of differential taxation of the kind at issue in the main proceedings, imported electricity distributed via the national network is subject, whatever its method of production, to a flat-rate duty which is higher than the lowest duty charged on electricity of domestic origin distributed via the national network.

36. The fact that electricity of domestic origin is in some cases taxed more heavily than imported electricity is immaterial in this connection since, in order to ascertain whether the system in question is compatible with Article 95 of the Treaty, the tax burden imposed on imported electricity must be compared with the lowest tax burden imposed on electricity of domestic origin (see, to that effect, Commission v Luxembourg, paragraphs 21 and 22).

37. The Finnish Government raises the objection that in view of the characteristics of electricity, the origin and consequently the method of production of which cannot be determined once it has entered the distribution network, the differential rates applicable to electricity of domestic origin cannot be applied to imported electricity. It submits that in those circumstances application of a flat rate, calculated so as to correspond to the average rate levied on electricity of domestic origin, is the only logical way of treating imported electricity in an equitable manner.

38. The Court has already had occasion to point out that practical difficulties cannot justify the application of internal taxation which discriminates against products from other Member States (see, inter alia, Case C-375/95 Commission v Greece [1997] ECR I-5981, paragraph 47).

39. While the characteristics of electricity may indeed make it extremely difficult to determine precisely the method of production of imported electricity and hence the primary energy sources used for that purpose, the Finnish legislation at issue does not even give the importer the opportunity of demonstrating that the electricity imported by him has been produced by a particular method in order to qualify for the rate applicable to electricity of domestic origin produced by the same method.

40. Moreover, the Court has already held that although in principle Article 95 of the Treaty does not require Member States to abolish differences which are objectively justified and which national legislation establishes between internal taxes on domestic products, it is otherwise where such abolition is the only way of avoiding direct or indirect discrimination against the imported products (Case 21/79 Commission v Italy [1980] ECR 1, paragraph 16).

41. In the light of the foregoing considerations, the answer must be that the first paragraph of Article 95 of the EC Treaty precludes an excise duty which forms part of a national system of taxation on sources of energy from being levied on electricity of domestic origin at rates which vary according to its method of production while being levied on imported electricity, whatever its method of production, at a flat rate which, although lower than the highest rate applicable to electricity of domestic origin, leads, if only in certain cases, to higher taxation being imposed on imported electricity.

[...]

3.7.2 Opinion of AG Jacobs

Outokumpu Oy

Case C-213/96

13 November 1997

AG Jacobs

[1998] ECR I-1777

http://www.curia.eu.int/en/content/juris/index.htm

(footnotes omitted)

52 It may be noted that a Member State wishing to retain differential tax rates based on objective criteria such as, in the present case, the method of production is entitled to require appropriate evidence from the importer that those criteria have been met if that is feasible, provided that the evidentiary requirements are not stricter in respect of imported products than they are for similar national products or disproportionate to the goal pursued, namely to eliminate the risk of fraud. […]

54 If […] it is not possible in practice for the importer in this case to prove the method of production of the electricity, it appears that the importing Member State has only one option: it must tax imports at the lowest rate applicable to domestic production. On the basis of the past decisions of the Court, a system of taxation of sources of energy in which the duty on imported electricity is, even if only in certain cases, higher than the duty on electricity produced domestically would seem to be contrary to the first paragraph of Article 95 of the Treaty.

55 There are, however, certain features of the present case which have not coincided in any of the aforementioned decisions of the Court and which raise the question whether the existing principles should be extended to the present case.

56 First and foremost, there seems to be a compelling justification for the tax system at issue in the present case: it appears that the differential rates of tax for domestic electricity were set with a view to preferring electricity produced by methods less harmful to the environment over that produced by more damaging methods. The Finnish Government's claim to that effect is supported by the structure of the tax rates, ranging from very heavy rates of tax on electricity produced from heavy fuel oil and coal to very low rates of duty on hydroelectric power. The setting of an average rate for imports will not of course affect the environmental impact of the imported electricity in the country in which it is produced, but appears to have been intended to correspond to the average rate applicable to national production and thus to enable Finland to retain its environmentally motivated tax rates on national production. The Court in its decisions on Article 95 has not hitherto directly considered the status of environmental concerns as the driving force behind differential rates of tax.

[…]

59 A further feature of the present case derives from the fact that electricity is, as indicated above, an unusual commodity which cannot comfortably be assimilated to other goods and products. Since it

cannot be stored, its production is contemporaneous with its release onto the grid and hence its availability for consumption. For that reason, it is common ground that it is not just difficult but impossible to identify the source, and hence the method of production, of imported electricity. It may therefore not be appropriate to apply to electricity the principles developed in cases concerning goods such as alcohol, oil, and beer whose source is less elusive.

60 The Court's previous case-law might be taken to suggest that a system of taxation in which differential rates are applied to domestic production while an average of those rates is applied to equivalent imports can never be compatible with Article 95 since the application of a rate of taxation to imports which represents the average differential rate applied to domestic production may entail that some imports are taxed at a higher rate than equivalent domestic products. That unequivocal conclusion seems inappropriate where imports are, as in the case of electricity, inextricably pooled, so that no individual instance of a greater tax burden can be proved or even identified. In particular where, as here, the differential rates on domestic production are based on different methods of production and it is impossible to determine the method of production of imports or even to identify imports from a particular producer, a strict application of the Court's earlier case-law would in practice mean that a Member State could never subject domestic production to differential rates. […]

61 […] It seems to me that to deprive Member States, in the absence of Community rules on the matter, of any possibility of using a system of differential taxation to pursue aims of environmental policy in relation to the production of electricity would be disproportionate given that properly calculated averages do not entail any overall restriction on imports, that any discrimination in individual cases is presumed and unquantifiable and that no other means of achieving the environmental objective seems readily available.

62 In order, however, for a flat-rate duty on imports to be permissible in such circumstances, the average must be correctly calculated. In particular it must be weighted so as precisely to reflect the spread of the domestic products subject to differential taxation; moreover the weighting must be regularly reviewed in the light of changing patterns of production. […]

63 It is however for the national court to verify the accuracy of the figures presented by the Finnish Government and of the resultant average tax which can lawfully be imposed on imports. […]

64 In the light of all the foregoing considerations, I conclude that a system of taxation of electricity such as that at issue in the present case should not be regarded as infringing Article 95 where the average rate applied to imports has been correctly calculated.

[…]

3.8 Case C-109/98: CRT France International

CRT France International SA and Directeur Régional des Impôts de Bourgogne

Case C-109/98

22 April 1999

Court of Justice

[1999] ECR I-2237

http://www.curia.eu.int/en/content/juris/index.htm

Summary of the facts and procedure

CRT France International SA ('CRT'), which imports into France telecommunications equipment and in particular transmitting-receiving sets operating on two-way channels ('CB sets'), brought proceedings against the Regional Director of Taxes, Burgundy, concerning a tax demand served on CRT on 18 October 1996 by the tax administration in the sum of FF 25 127 160 in respect of the flat-rate tax on the supply of CB sets. The national court asked the Court of Justice for a preliminary ruling on the compatibility of this tax with Articles 9, 12 and 95 of the Treaty.

Judgment

[…]

5. According to CRT, in the absence of domestic production, the tax at issue must be considered a charge having an effect equivalent to a customs duty since it is levied only on imported products. CRT considers that the tax levied on CB sets imported from other Member States is contrary to Articles 9 and 12 of the Treaty and that the tax levied on CB sets imported from non-member countries is contrary to Article 113.

6. CRT takes the view that the tax cannot be regarded as internal taxation within the meaning of Article 95 of the Treaty since it does not form part of a general system of taxation systematically levied on imported products and domestic products or, more particularly, a general system of taxation on use of the radio relay system. Numerous types of equipment using the radio relay system are not subject to any tax. Moreover, the taxation of other types of equipment using that relay system is based on criteria different from those on which the taxation of the CB sets is based. Taxation of the latter depends only on the number of CB sets sold, without account being taken of their subsequent use in French territory, the particular use of the frequency bands on which they transmit or the width of the band concerned.

7. CRT has stated, without being contradicted, that the introduction of the tax had the effect of doubling the prices of sets at the lower end of the range, which account for the bulk of sales, and that as a result the market has collapsed.

8. The French Government and the Commission, on the other hand, consider that, even in the absence of domestic production, the tax in question is in the nature of internal taxation within the meaning of Article 95 of the Treaty since it forms part of a general system of taxation intended to defray the charges borne by the French Republic through use of the Hertzian radio spectrum, which is the public property of the State. Before 1 January 1993 that tax was levied on the use of CB sets by users wishing to receive an individual administrative authorisation. It was in the interests of administrative simplification that the law was amended to ensure that the tax was no longer levied on the use but on the supply of CB sets and was no longer payable by users but by manufacturers and importers.

[…]

FINDINGS OF THE COURT

11. It is settled case-law that the essential feature of a charge having an effect equivalent to a customs duty which distinguishes it from an internal tax is that the former is borne solely by an imported product as such, whilst the latter is borne by both imported and domestic products (see, in particular, Case 90/79 Commission v France [1981] ECR 283, paragraph 13).

[…]

13. The Court has also recognised that a charge borne by a product imported from another Member State, when there is no identical or similar domestic product, does not constitute a charge having equivalent effect but internal taxation within the meaning of Article 95 of the Treaty if it relates to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products (Case 90/79 Commission v France, cited above, paragraph 14).

[…]

15. Whilst it has been established that most of the devices using that radio spectrum are taxed, the method of taxing CB sets differs from that applied to other equipment in that, in the case of CB sets, it is the supply that is taxed whereas in other cases the tax is borne by the users.

16. As the Advocate General has observed in point 31 of his Opinion, no evidence has been produced to show why the use of that radio spectrum makes it necessary to tax the supply of CB sets rather than their use.

[…]

21 It follows that, in so far as it is levied on the supply of CB sets imported from other Member States, the tax constitutes not internal taxation within the meaning of Article 95 of the Treaty but a charge having an effect equivalent to a customs duty, which is prohibited by Articles 9 and 12 of the Treaty.

[…]

4. FURTHER READING

4.1 Charges Having an Effect Equivalent to a Customs Duty

4.1.1 Treatises:

- Dashwood, Alan and Derrick Wyatt. The Substantive Law of the EEC. London: Sweet & Maxwell, 1987, 103-106.
- Kapteyn, P.J.G. and P. Verloren van Themaat. Introduction to the Law of the European Communities after the Coming into Force of the Single European Act. Boston: Kluwer Law and taxation Publishers, 1989, 368-375.
- Lasok, D. The Customs Law of the European Economic Community. Boston: Kluwer Law and Taxation Publishers, 1990, 44-56.
- Stein, Eric; Hay, Peter and Michel Waelbroeck. European Community Law and Institutions in Perspective. Indianapolis: Bobbsmerrill Co., 1976, 373-376.
- Steiner, Josephine. Textbook on EC Law. London: Blackstone Press, 1996.
- Vaughan, David. European Communities. Halsbury's Laws of England, London: Butterworths, 1986, vol. 51, sections 12.49-12.54.

4.2 Discriminatory Taxation

4.2.1 Treatises:

- Dashwood, Alan and Derrick Wyatt. The Substantive Law of the EEC. London: Sweet & Maxwell, 1987, 107-118.
- Kapteyn, P.J.G. and P. Verloren van Themaat. Introduction to the law of the European Communities after the Coming into Force of the Single European Act. Boston: Kluwer Law and Taxation Publishers, 1989, 368-375.
- Lasok, D. The Customs Law of the European Economic Community. Boston: Kluwer Law and Taxation Publishers, 1990, 157-171.
- Stein, Eric; Hay, Peter; Waelbroeck, Michel and Joseph Weiler. European Community Law and Institutions in Perspective: Supplement 1985. Indianapolis: Bobbsmerrill Co., 1985, 93-110.
- Steiner, Josephine. Textbook on EEC Law. London: Blackstone Press, 1990, 67-69.
- Vaughan, David. European Communities. Halsbury's Laws of England, London: Butterworths, 1986, vol. 52, sections 20.07-20.12.

4.2.2 Articles:

- Barents, René. "Recent Case Law on the Prohibition of Fiscal Discrimination under Article 95." 23 Common Market Law Review 641-660, No.3, 1986.
- Vandencasteele, Alexandre. "L'Article 95 du Traité CEE. Un Examen de la Jurisprudence Récente de la Cour de
- Justice." Cahiers de Droit Européen 543-564, No.5-6, 1984.
- Weiler, Joseph "The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods" in The Evolution of the EU Law by Craig and de Burca eds. p.349-376