

COMMISSION OF THE EUROPEAN [UNION], represented by its Legal Adviser, Anthony McClellan, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

supported by the

ITALIAN REPUBLIC, represented by Arnaldo Squillante, President of Section at the Consiglio di Stato [State Council] and Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by Marcello Conti, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

intervener,

v

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, represented by R. N. Ricks, Assistant Treasury Solicitor, acting as Agent, assisted by Peter Archer QC, of Gray's Inn, with an address for service in Luxembourg at the British Embassy,

defendant,

APPLICATION for a declaration that the United Kingdom of Great Britain and Northern Ireland, by failing to repeal or amend its national provisions with regard to excise duty on still light wine, has failed to fulfil its obligations under the second paragraph of [Article 110 TFEU],

THE COURT,

composed of: J. Mertens de Wilmars, President, P. Pescatore, A. O'Keefe and U. Everling (Presidents of Chambers), Lord Mackenzie Stuart, G. Bosco, T. Koopmans, O. Due, K. Bahlmann, Y. Galmot and C. Kakouris, Judges;

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Decision

- 1 By application lodged on 7 August 1978, the Commission instituted proceedings under [Article 258 TFEU] for a declaration that the United Kingdom had failed to fulfil its obligations under the second paragraph of [Article 110 TFEU] by levying excise duty on still light wines made from fresh grapes (hereinafter referred to as "wines") at a higher rate, in relative terms, than on beer.
- 2 On 27 February 1980, the Court delivered an interlocutory judgment ([1980] ECR 417) in which first of all it resolved several points of law concerning the interpretation of [Article 110 TFEU] and, secondly, undertook a preliminary examination of certain questions which at the time did not yet seem capable of being settled definitively. Before giving judgment on the application lodged by the Commission, the Court ordered the parties to re-examine the subject-matter of the dispute in the light of the legal considerations set out in the judgment and to report to the Court before a specified date either on any solution of the dispute which they had reached or on their respective points of view. The Court reserved the right to give final judgment after that date after examining the reports submitted to it or in the absence of those reports.
- 3 In the light of that judgment, the parties initially examined the dispute on a bilateral basis. Subsequently, the Commission attempted to resolve it in negotiations within the Council by means of a comprehensive settlement of the problem of the taxation of spirits. Pending the outcome of those negotiations, the parties sought and obtained several extensions of the period prescribed by the Court in its judgment of 27 February 1980. Since they were unable to reach an amicable agreement, they submitted their reports on 1 and 2 December 1981 respectively. The Italian Government, which intervened in the proceedings, was given an opportunity to express its views.
- 4 The parties presented oral argument at the sitting on 19 May 1982. Since the information provided at that stage was still insufficient to

enable it to decide the case, the Court, by order of 15 July 1982, which was made pursuant to Articles 46 and 60 of the Rules of Procedure, ordered the inquiry to be expanded. It sought additional information from the parties regarding consumer prices and prices net of tax for wine and beer of popular quality, that is to say wine and beer of the types most commonly sold and consumed in the United Kingdom and in the other Member States. It also sought information concerning the trend in the total annual consumption of wine and beer in the [Union].

- 5 The parties replied to those questions and presented further oral argument at the sitting on 15 March 1983.

Substance

- 6 It may be recalled that the questions which were considered and left partly unanswered in the judgment of 27 February 1980 concerned, first of all, the nature of the competitive relationship between wine and beer and, secondly, the selection of a basis for comparison and the determination of an appropriate tax ratio between the two products. Those two questions must be reconsidered in the light of the information provided during the two further stages of the inquiry.

Competitive relationship between wine and beer

- 7 In its judgment of 27 February 1980, the Court emphasized that the second paragraph of [Article 110 TFEU] applied to the treatment for tax purposes of products which, without fulfilling the criterion of similarity laid down in the first paragraph of that article, were nevertheless in competition, either partially or potentially, with certain products of the importing country. It added that, in order to determine the existence of a competitive relationship within the meaning of the second paragraph of [Article 110 TFEU], it was necessary to consider not only the present state of the market but also possible developments regarding the free movement of goods within the [Union] and the further potential 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 3 TEU].
- 8 As regards the question of competition between wine and beer, the Court considered 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 [Union] 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 [Union].
- 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 110 TFEU].

Costs

29 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. However, under Article 69 (3) the Court may order that the parties bear their own costs in whole or in part where the circumstances are exceptional.

30 It is appropriate to exercise that discretion in this case. It has become clear, in the course of the proceedings, that the Commission brought this action without conducting an adequate preliminary inquiry; that led to repeated requests for information and extensions of the proceedings by the Court. The parties must therefore bear their own costs, except as regards the costs of the Italian Republic, which are to be paid by the United Kingdom.

On those grounds,

THE COURT

hereby:

- 1. Declares 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 of Great Britain and Northern Ireland has failed to fulfil its obligations under the second paragraph of [Article 110 TFEU].**
- 2. Orders the Commission of the European [Union] and the United Kingdom to bear their own costs. The costs incurred by the Italian Republic are to be paid by the United Kingdom.**

Mertens de Wilmars

Pescatore

O'Keefe

Everling

Mackenzie Stuart

Bosco

Koopmans Due

Bahlmann

Galmot

Kakouris

Delivered in open court in Luxembourg on 12 July 1983.

P. Heim

J. Mertens de Wilmars

Registrar

President

Robert Schütze European Union Law Lisbonised Cases