1. In the present case, the European Commission claims that, by applying excise duty to ouzo at a lower rate than that applied to other alcoholic beverages, Greece has failed to fulfil its obligations under the first paragraph of Article 90 EC. States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

I — Legal framework

A — The relevant Community provisions

2. Article 90 EC provides that: 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.

3. Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (hereinafter ‘Directive 92/83’) divides alcoholic beverages into five categories and contains a section on each category, namely: Section I ‘Beer’ (Articles 1 to 6); Section II ‘Wine’ (Articles 7 to 10); Section III ‘Other fermented beverages’ (Articles 11 to 15); Section IV ‘Intermediate products’ (Articles 16 to 18); and Section V ‘Ethyl alcohol’ (Articles 19 to 26).
4. Article 19 of Directive 92/83 provides that:

'1. Member States shall apply an excise duty to ethyl alcohol in accordance with this directive.

2. Member States shall fix their rates in accordance with Directive 92/84/EEC'.

5. Article 20 of Directive 92/83 provides that:

'For the purposes of this directive the term "ethyl alcohol" covers:

— all products with an actual alcoholic strength by volume exceeding 1.2% volume which fall within CN codes 2207 and 2208, even when those products form part of a product which falls within another chapter of the CN,

— products of CN codes 2204, 2205 and 2206 which have an actual alcoholic strength by volume exceeding 22% vol.,

— potable spirits containing products, whether in solution or not'.

6. Under Article 21 of Directive 92/83, Member States are required to charge 'the same rate of duty on all products chargeable with the duty on ethyl alcohol'.

7. However, in accordance with Article 22 of Directive 92/83, Member States may 'apply reduced rates of excise duty to ethyl alcohol produced by small distilleries ...', provided that inter alia 'any reduced rate they may introduce applies equally to ethyl alcohol delivered into their territory from independent small producers situated in other Member States'.

8. Also, in accordance with Article 23:

'The following Member States may apply a reduced rate, which may fall below the minimum rate but not be set more than 50% below the standard national rate of duty on ethyl alcohol, to the following products:

1. the French Republic, in respect of rum as defined in Article 1(4)(a) of Regul-
tion (EEC) No 1576/89 and produced from sugar cane harvested in the place of manufacture as set out at Article 1(3)(1) of that Regulation, having a content of volatile substances other than ethyl and methyl alcohol equal to or exceeding 225 grams per hectolitre of pure alcohol, and an actual alcoholic strength by volume equal to or exceeding 40% vol.;

'For an aniseed-flavoured spirit drink to be called “ouzo” it must:

— have been produced exclusively in Greece;

— have been produced by blending alcohols flavoured by means of distillation or maceration using aniseed and possibly fennel seed, mastic from a lentiscus indigenous to the island of Chios (Pistacia lentiscus Chia or latifolia) and other aromatic seeds, plants and fruits; the alcohol flavoured by distillation must represent at least 20% of the alcoholic strength of the ouzo.

That distillate must:

— have been produced by distillation in traditional discontinuous copper stills with a capacity of 1 000 litres or less,

— have an alcoholic strength of not less than 55% and not more than 80% vol. Ouzo must be colourless and have a sugar content of 50 grams or less per litre.'
10. It must also be noted that under Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages (hereinafter 'Directive 92/84') the Member States are required not to apply rates below a certain limit. Under Article 3(1):

"As from 1 January 1993, the minimum rate of excise duty on alcohol and alcohol contained in beverages other than intermediate products, wine and beer] shall be fixed at ECU 550 per hectolitre of pure alcohol'.

B — The relevant national provisions


13. That Law sets the basic rate of excise duty at GRD 293 709 (equivalent to EUR 861 949) per 100 litres of pure alcohol but Article 26 of the Law provides for a 50% reduction in the basic rate with regard to ouzo.

II — Facts and procedure

14. Following complaints from private individuals that the Greek authorities applied a more favourable rate of excise duty to ouzo than to other alcoholic beverages such as gin, vodka, whisky, rum, tequila and arak, the Commission, having first asked the Greek authorities for an explanation, sent a letter of formal notice on 16 December 1998 claiming

infringement of Article 90 EC. Being dissatisfied with the replies it received, it issued a reasoned opinion on 10 August 1999, inviting Greece to take the necessary measures to remedy the alleged infringement. Greece refused to comply with that opinion and the Commission accordingly brought the present action before the Court on 6 December 2001.

15. The Commission and the Hellenic Republic submitted written observations to the Court.

16. By letter of 4 April 2003, the Court asked the Commission to explain whether the arguments on which its claim was based did not effectively call into question the validity of Article 23(2) of Directive 92/83. The Council too was invited to submit observations on the subject. The Court also asked the Commission to explain how Greece could have complied with that article of the directive without infringing both Article 90 EC and Directive 92/84 which fixes the minimum rates applicable to alcohol and alcoholic beverages. Lastly, the Court asked the Commission to say whether and how the French Republic had availed itself of the option provided under Article 23 (1) of Directive 92/83.

17. The Commission and the Council submitted written answers to those questions on 17 April and 5 May 2003 respectively.

18. The Commission and the Hellenic Republic also attended the hearing on 16 September 2003.

19. By request lodged with the Court on 6 May 2002, the United Kingdom sought leave to intervene in support of the Commission. The request was granted by order of the President of the Court on 25 July 2002. However, the United Kingdom did not submit any written observations in the course of the procedure, nor did it attend the hearing on 16 December 2003.

III — Legal analysis

A — Inadmissibility on the ground of delays in instituting the pre-litigation procedure

1. Arguments of the parties

20. Greece contends that it adopted the system of taxation at issue in 1993 in full
21. The Greek Government considers that the fact that the Commission had known about the contested national provision since 1993 but did not bring an action for infringement until some years later, is a breach of the principles of good faith, legitimate expectations and legal certainty.

22. The Commission takes a different view. In its opinion, it has wide discretion not only as to when to bring the action referred to in the second paragraph of Article 226 EC but also as to whether it is appropriate to institute the relevant pre-litigation procedure. In the present case, to be precise, it considered that it was appropriate to act after a complaint from interested third parties. The Commission adds that, in any event, Member States cannot justify maintaining in force national provisions that are contrary to the rules contained in the Treaty on the ground of a delay in bringing an action for failure to fulfil obligations.

23. It seems to me that, on this point, the Commission's argument is more consistent with a well-known line of settled Community case-law.

24. As the Commission itself has pointed out, it follows from the judgments in question that it is for the Commission to decide whether and at what time it may be appropriate to bring an action under the second paragraph of Article 226 EC, and also whether it may be appropriate to institute the pre-litigation procedure referred to in the first paragraph of that article. In my view, this clearly means that the Commission must also be accorded discretion as to when to institute the pre-litigation procedure.

25. I would also observe that the Greek Government's argument is tantamount to imposing a time-limit on the exercise of the Commission's power to bring the action in question and consequently a limit on that power, a limit of which there is no trace in


the legal texts and which cannot be deduced by implication, not even on the principles of good faith, legitimate expectations and legal certainty.

26. This is borne out by the fact that the Court has not remained indifferent to demands arising from those principles, since it has had occasion to observe that 'in certain situations the excessive duration of the pre-litigation procedure laid down by Article 169 of the Treaty [now Article 266 EC; but, in my view, the same may be said of excessive delay in instituting the procedure] may make it more difficult for the Member State concerned to refute the Commission's arguments and might thus infringe the rights of the defence'.

27. It is therefore for the defendant State to show that such difficulties have arisen and that they have affected the exercise of defence rights. But in the present case, not only has Greece not shown that such difficulties have arisen; it has not even mentioned them.

28. In the light of the foregoing considerations, I therefore consider that the plea of inadmissibility is unfounded.

B — The preliminary question concerning the existence of a Community provision authorising the contested national measure

1. Arguments of the parties

29. In its reply of 4 April 2003 to the Court's request for an explanation (see point 16 above), the Council, without formally raising an objection of inadmissibility, objected that in bringing the present action the Commission was not in fact calling into question the compatibility of the Greek Government's conduct with Community law but was directly casting doubt on the validity of Article 23(2) of Directive 92/83.

30. In its view, however, that is not compatible with the system of remedies set up by the Treaty. As the Court has explained, that system 'distinguishes between actions under Articles 226 EC and 227 EC which are directed at obtaining a declaration that a Member State has failed to fulfil its obligations, and those under Articles 230 EC and 232 EC which are directed at obtaining judicial review of measures adopted by the Community institutions or of failure to act on their part'. Those remedies have different objectives and are subject to different rules. The Council adds that to allow the Commis-
sion, in the context of an action for failure to fulfil obligations and thus outside the time-limits laid down in the fifth paragraph of Article 230 EC, to challenge the validity of an act adopted by another institution would be incompatible with the principle of legal certainty on the basis of which Community measures may not be called into question indefinitely.

31. In its reply to the Court's request for an explanation, the Commission disputes those conclusions, claiming that the present action was directed solely at the Greek Government's conduct and was not in any way intended to call into question the validity of Article 23(2) of Directive 92/83.

32. To explain the timing of its initiative and the procedure it chose to adopt, the Commission cites the Court's judgment in Socri-dis. According to the applicant, it follows from that judgment that, even if the procedures for implementing a directive are incompatible with the Treaty, that does not mean that the directive itself is unlawful. The directive would be unlawful only if it did not leave the Member States a sufficiently wide margin of appreciation to enable them to implement it in a manner consistent with the requirements of the Treaty. However, that was not so in the present case, since Article 23(2) of Directive 92/83 does not require but merely allows Greece to apply a reduced rate of excise duty to ouzo. It follows that, since in principle the Commission did not know either how or when the Member State in question had given effect to that provision, it could not have applied to have it annulled under Article 230 EC or taken direct action against the Member State.

33. In support of that position, the Commission points out that the 17th recital in the preamble to Directive 92/83 provides that 'in the cases where Member States are permitted to apply reduced rates, such reduced rates should not cause distortion of competition within the internal market'. The Commission claims that, by that recital, the Council transferred to the Member States the responsibility for determining whether the application of reduced rates to certain products was compatible with the Treaty.

34. In the present case, Greece was therefore responsible for implementing Article 23(2) of the directive in a manner consistent with Community law and the Commission acknowledges that it could have done so only by refraining from availing itself of the concession authorised by that provision.

35. With regard to the objection that France was accorded different treatment in connection with the similar option granted to that State under Article 23(1) of Directive 92/83 of applying a reduced rate of excise duty to rum, the Commission contends that in that case the concession was based on Article 227 (2) (now Article 299(2)) EC, under which the Council is required to adopt specific measures to encourage the social and economic development of the French overseas departments.  

36. At the hearing, the Commission repeated that it had not intended and did not intend to question the legality of Article 23(2) of Directive 92/83, either directly or indirectly (notably by a plea of inapplicability under Article 241 EC). However, in its view, even if it were to have that effect for the purposes of the present case, that could not prevent the full exercise of the power conferred on it under Article 226 EC. That was because actions for annulment and actions for failure to fulfil an obligation had different objectives and because the Treaty did not set any limit on the Commission’s power to bring an action for failure to fulfil an obligation but on the contrary accorded it a wide measure of discretion. But above all — and this seems to me to be the nub of the Commission’s argument — because, even if the time-limit for bringing an action for the annulment of an act of secondary legislation authorising a concession had expired, it could/should still object that conduct based on that concession was incompatible with the Treaty. Nor, in its view, could persistence in such conduct be justified, even on the principle of legal certainty.

37. The Commission also points out that the Court has already had occasion, in connection with references for a preliminary ruling, to interpret a provision of the Treaty in a manner that caused the legislature to decide that provisions of secondary legislation based on that provision were unlawful and therefore amend them. It did so, notably, in its judgment in Barber, 11 with regard to the option accorded to Member States under Article 9 of Directive 86/378/EEC 12 to defer application of the principle of equal treatment referred to in Article 119 of the EEC Treaty (now Article 141 EC) with regard to the determination of pensionable age for the purposes of granting old-age or retirement pensions. The Court having held in that

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10 — The Commission also observes that the Council has adopted a number of decisions based on that article of the Treaty (such as Decision 2002/166/EC of 18 February 2002, OJ 2002 L 55, p. 33) authorising the French Republic, by way of derogation from Article 90 EC, to apply a more favourable system of taxation to rum produced in French overseas departments.

judgment that Article 119 EEC did not allow concessions of that kind, the Council decided that certain provisions of Directive 86/378/EEC were partly unlawful and must accordingly be amended.  

38. Greece, which had not had an opportunity to state its views on this point until the hearing, agreed with the objections raised by the Council, adding that the system of taxation at issue transposed Article 23(2) of Directive 92/83 to the letter; that such a provision could not have been introduced into the directive without determining beforehand whether it was compatible with the Treaty; and that in any event the purpose of the provision, namely to protect products of a regional and traditional nature such as ouzo, could clearly not be achieved if — as the Commission claimed — it could not be implemented.

2. Assessment

39. I have reported the arguments of the parties at some length not only because the question I have just mentioned is, in my view, central to the present case but also because the positions taken by the parties raise the more complex issue of how it should be categorised from a legal point of view. It could be considered to be a question of admissibility if (as the Council appears to believe) the Commission's intention in bringing this action was to circumvent the expiry of the time-limits specified in the fifth paragraph of Article 230 EC for seeking the annulment of Article 23(2) of Directive 92/83. Conversely, that is to say if the real object is (as the Commission claims) to determine whether the Greek Government's conduct is lawful and whether it may be contested despite the fact that it complies with that provision, then it would be a question of substance and would destroy the basis of the action. It is precisely because of this latent ambiguity that I am examining the admissibility and the merits of the action separately.

40. That being said, I consider that that ambiguity can be resolved at once by rejecting the Council's objection, on grounds I shall now explain.

41. As I have said, that objection arises from the suspicion that, under cover of proceedings for infringement, the present action is really intended to call into question the legality of Article 23(2) of Directive 92/83.

42. However, if that were the purpose of the action, it is easy to see that it would not be achieved. It would be objected, as the Council itself has pointed out, that the Commission failed to challenge the provision of the directive in question directly within the specified time, as it could easily have done, because it had itself proposed the measure and was therefore well aware of its content and implications at the time when it was adopted. So it could not react many years later by calling into question the legality of the act by means other than those provided in the system, still less could it employ a procedure such as an action for infringement, which would indirectly affect both the author and the addressee of the measure, or rather would affect the former through the latter.

43. So if, by any chance, the aim were to call into question not only the conduct of the Greek Government but also Article 23(2) of Directive 92/83, on which that conduct was based, the present action would have to be declared inadmissible precisely because it made inappropriate use of the system of remedies set up by the Treaty. 14

44. However, as I have already mentioned, the Commission firmly rejects any suspicion of abuse of procedure. It has repeatedly stated that its sole objective is to obtain a declaration that the Greek legislation at issue is incompatible with Article 90 EC. It did not intend in any way to call into question the legality of the provision of the directive which that legislation was designed to implement.

45. That being so, I see no reason not to accept that account for the purpose of defining the aim of the present action. Especially as the Commission has produced a detailed statement of its reasons for bringing the action.

46. The Commission claims that it brought an action for infringement rather than an action for annulment under Article 230 EC because, in its view, the issue in the present case was not the legality of the aforesaid provision of the directive but solely the conduct of the Greek Government.

47. According to the Commission, the provision in question does not require the Greek Republic to adopt the contested system of taxation but leaves it free to decide

14 — See, to the same effect albeit in different circumstances, the judgment in Case 799/79 Brueckner v Commission [1981] ECR 2697, paragraph 19, in which the Court held that ‘although a party may take action by means of a claim for compensation without being obliged by any provision of law to seek the annulment of the illegal measure which causes him damage, he may not by this means circumvent the inadmissibility of an application which concerns the same illegality and which has the same financial end in view’. See also judgments in Case 59/65 Schreckenberg [1966] ECR 785, and Case 543/79 Birke v Commission [1981] ECR 2669, paragraph 28.
whether, how, and when to adopt it. That decision, not the provision of the directive, was the subject of the present action and, for the same reason, proceedings for infringement could not have been instituted before the Greek Government had taken the decision in question.

48. I must observe, however, that even on the Commission's own premisses, I have great difficulty in following its reasoning.

49. It clearly follows from Article 23(2) of Directive 92/83 that Greece was free to decide whether and when to exercise the option it was accorded but it is equally clear that that State was not in fact free to decide how to exercise that option.

50. As the Commission itself has acknowledged, Greece was faced with the following alternatives: either it could simply avail itself of the concession granted under Article 23(2) of Directive 92/83, in which case it would (according to the applicant) be in breach of Article 90 EC; or it could extend the concession granted to ouzo to all similar and/or competing products, in which case it would be in breach of Directive 92/84 which, as already explained (see point 10 above), prohibits Member States in principle from applying rates below a minimum rate.

51. In other words, on the Commission's own admission, it was impossible for Greece to apply the provision in any way that was compatible with the provisions of the Treaty (see judgment in Socridis cited in point 32 above); paradoxically, it was merely 'free' to refrain from availing itself of the concession granted under that provision. However, according to the Commission, that is precisely what that State ought to have done, on its own initiative, to avoid infringing Article 90 EC.

52. Apart from the fact that that would make those to whom an act is addressed responsible for determining whether or not the conduct thereby authorised was lawful, the question is also raised why and on what basis the Greek Government ought to have deemed that it could/should determine such a matter independently. That is especially so since: the Community legislature had clearly already done so on its own account by formally authorising the concession; the Commission itself had failed to challenge it within the specified time (and for some considerable time thereafter); the meaning of the provision is perfectly clear; and, irrespective of the reasons, other Member States
(such as France) had been authorised by the same instrument and in precisely similar terms to avail themselves of identical concessions. So might not the Greek Government have come to the same conclusion as the Commission with regard to the legality of the concession, holding (as it does) that there are no similarities between ouzo and the other products at issue and that the different treatment authorised by the concession was justified by the requirement to protect a product of a regional and traditional nature? And if it had come to that conclusion, by whom, how, and when could or should it have been told that it was mistaken? By the Commission, if and when it decided to notice it?

53. On the other hand, again on the Commission’s premisses, the statement in the 17th recital in the preamble to the directive that, in cases where Member States are permitted to apply reduced rates, such reduced rates ‘should not cause distortion of competition within the internal market’ (see point 33 above), cannot in my view constitute a sort of caveat to the Greek Government.

54. It is not entirely clear whether that recital refers to all cases in which the directive provides for the application of reduced rates. Nor is it clear why, in the system of the directive itself, the prohibition it imposes is expressly confirmed in some provisions on the rates in question but not in Article 23. In any case, the very fact that the rules differ confirms that the concession which the Community legislature granted specifically to Greece for ouzo (and to France for rum) was an authentic derogation from the general rules contained in the directive.

55. Consequently, I do not consider that the view that the application of the concession is unlawful can serve to justify the kind of reverse self-regulation the Commission required of Greece.

56. Nor is the foregoing conclusion contradicted by the judgment in Barber which the Commission cites, in my view mistakenly, in support of its own position (see point 37 above). I note that in that case the Court was asked (without benefit of a unilateral assess-

15 See, for example, Article 4 of Directive 92/83, which authorises Member States to apply reduced rates of duty to beer brewed by independent small breweries under paragraph 1 but explains in paragraph 3 that they must ensure that any reduced rates they may introduce ‘apply equally to beer delivered into their territory from independent small breweries situated in other Member States’ and that ‘no individual delivery from another Member State ever bears more duty than its exact national equivalent’. See also the similar provisions contained in Article 22(1) and (3) on the application of reduced rates to ethyl alcohol produced by small distilleries (see point 7 above).
ment from one side) for a preliminary ruling on the scope of a general provision of the Treaty (Article 119 of the EEC Treaty). As a result of that ruling, the scope of a directive based on that provision was considerably reduced and conduct by Member States that was authorised under the directive consequently became incompatible with the provision in question.

57. Apart from the other conclusions I shall shortly be drawing from that precedent (see point 61), I would merely observe, for the purposes of the point under discussion here, that the Court recognised that in the circumstances the Member States were 'reasonably entitled to consider' that the application of the directive was correct and as a result they could not be penalised for their previous conduct (paragraph 43). This confirms that it is not for the Member States to determine the legality of Community provisions authorising certain conduct on their part (in that case, I should add, less clearly than in the present case).

58. The Commission could object (and, if my understanding is correct, does in fact object) that the present action was intended precisely to bring out certain points that might perhaps not be clear to the Greek Government, in particular by claiming that the Court should declare that by availing itself of the concession granted under Article 23(2) of the directive it had acted in breach of the Treaty. Hence the decision to institute proceedings for infringement, since that procedure, unlike an action for annulment, is directed against the conduct of the State.

59. However, in my view, that line of reasoning is not consistent with the facts. As I have just pointed out, the Greek Government's conduct was authorised by the aforesaid provision of the directive, which left that Government no margin of appreciation. Consequently, what the present action is calling into question is not the method of applying Article 23(2) of the Directive (whose compliance with the provision in question has not been disputed in any way), but the mere fact of applying that provision, that is to say the mere fact of exercising the right conferred by that provision.

60. I find it difficult to understand how the mere application of a provision conferring a right on an individual can constitute a breach of the Treaty without calling into question the legality of the provision which forms the legal basis of that right. There are only two

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16 — Moreover, the Greek Government has maintained from the outset, without being contradicted, that the contested national provision is nothing but a literal transposition of Article 23(2) of Directive 92/83 into the Greek legal order.
possibilities: either the provision is lawful, in which case the proper exercise of the right conferred by the provision must also be lawful; or it is not, in which case the legal basis of the right is in question, not (or not only) the legality of exercising it. Conversely, it seems to me difficult to maintain that the provision is lawful but individual conduct that fully complies with it is not.

61. The judgment in *Barber*, cited above, supports that line of reasoning. It emerged that in so far as a problem arose with regard to the conduct of the Member States concerned in that case, as a result of the Court's interpretation, the provisions of secondary legislation authorising that conduct were not subject to Article 119 EC. It was consequently the provisions themselves, even more than the conduct, that were called into question. And, as we have seen (point 37 above), the Council acted, on a proposal from the Commission, to make the necessary amendments to them.

63. However, as we have seen (point 36 above), the Commission claims that the conduct in question should be considered *in itself*, thus without regard to the legality of the Community provision on which it was based, because persistence in such conduct could not be justified in any circumstances, not even on the principle of legal certainty. It was therefore of no consequence that the provision had not been and, as in this case, could not be called into question because the time-limit for bringing an action for annulment had expired.

62. It therefore seems to me that this precedent too confirms that there is an undeniable connection between a Member State's conduct and the provision of a directive which authorises that conduct, and it is consequently impossible to determine whether the conduct is lawful without considering the legality of the provision.

64. In my view, such a claim must be firmly rejected, not only because it is inconsistent with the logical arguments made earlier (point 60 above) but above all because it raises extremely serious and legitimate concerns. It would inevitably introduce a substantial element of uncertainty, even destabilisation, into the system, since addressees of an act of Community law could no longer have confidence in the legal effects of the act and in particular the rights conferred by that act.
65. In short, the Commission’s claim is in direct conflict with established and fundamental principles of the Community legal order, principles which that claim would inexplicably and unwarrantably sacrifice to the inertia of those who could, or can, determine the legality of the act. I am referring, of course, to the principle of legal certainty and its natural corollary, the principle that acts of the Community institutions are presumed to be lawful.

66. By virtue of that principle, acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are annulled or withdrawn in the cases and forms, and within the time-limits, laid down in the Treaties, that is to say until they are withdrawn by the institution that adopted them, or until an action for annulment or a plea of inapplicability is brought against them under Article 241 EC, or until they are declared to be invalid in a preliminary ruling delivered under Article 234 EC. These provisions are intended ‘to ensure legal certainty by preventing Community measures which produce legal effects from being called into question indefinitely’.

67. However, none of those conditions are met in the present case since, as I have already said more than once, the legality of Article 23(2) of Directive 92/83 was not called into question in any way.

68. But if that is so, that is if the Community provision authorising Greece’s conduct is presumed to be lawful and as such fully capable of producing legal effects, it necessarily follows in the light of the foregoing considerations that the conduct authorised by that provision, that is to say the national measure at issue in this case, must also be held to be lawful.

69. It must therefore be concluded that there is no logical basis for the Commission’s claim and that the present action is consequently unfounded.

70. That being said, however, and before concluding, I should add that the foregoing considerations are not intended to underestimate the question of principle raised by the Commission’s action or the need to find appropriate remedies in cases such as the one under discussion, in which the result may be to maintain situations which it considers to be contrary to general rules of the Treaty. However the fact is that if the Commission, for whatever reason, was
unable to exercise vigilance with regard to such situations at the appropriate time, it can and should endeavour to remedy them, in accordance with its remit, employing all the instruments provided by the system and if necessary submitting a proposal for the amendment or annulment of the relevant provisions as it did after the judgment in Barber. It cannot however seek, on the strength of that remit, to alter precise and fundamental rules of the system, even if situations of doubtful legality may persist as a result. There would indeed be nothing new or even unusual about that, since legal orders are not required to be perfect but they are subject to rules which include the principle of legal certainty.

71. In conclusion I therefore propose that the Court declare that the present action is unfounded and must accordingly be dismissed.

C — Substance

72. The proposed conclusion would render it unnecessary to address the questions concerning the substance of the action. However, for the sake of completeness and entirely in the alternative, I shall also give some thought to those questions.

1. Arguments of the parties

73. The Commission claims that Greece has applied to ouzo, that is to the principal alcoholic beverage produced in Greece, a rate of excise duty 50% below the rate applied to beverages such as gin, vodka, whisky or rum. In its view, that constitutes discrimination prohibited under the first paragraph of Article 90 EC inasmuch as the discriminatory taxation is applied to beverages that are to be regarded as similar products within the meaning of that provision.

74. It claims that their similarity may be inferred, first, from Directive 92/83 itself, which includes all the said beverages in the same category ('ethyl alcohol') for tax purposes, inasmuch as they all have a high alcohol content. According to the Commission, it also follows from the Court's judgment in Case C-302/00,19 that the fact that two products are in the same category for tax purposes indicates that they are similar products within the meaning of Article 90 EC.

75. Citing the Court's judgments in Case 171/78\(^{20}\) and C-230/89,\(^{21}\) to which I shall return, the Commission adds that a similarity between the beverages in question is not precluded by the fact that habits in the consumption of such products vary, in the sense that ouzo is generally consumed as an accompaniment to the starter or the main course whereas the other alcoholic beverages are consumed as aperitifs or digestifs.

76. On the contrary, according to the Commission, the similarity between ouzo and the other spirit beverages is apparent from the fact that, like most such beverages, it too is produced by the distillation of certain raw materials, has approximately the same alcohol content (37.5% vol.), meets the same needs from the point of view of consumers and can be drunk either neat or diluted.

77. The Commission admits that that beverage differs in some respects from other spirit beverages, notably in its taste which is connected with the use of certain aromatic substances and the fact that it is distilled in traditional discontinuous copper stills. However, those differences cannot be regarded as decisive when considering whether alcoholic beverages are similar products because in that case no beverage could be held to be similar to any other. It was precisely to avoid such a conclusion that the Court ruled that in considering whether beverages are to be regarded as similar products within the meaning of Article 90 EC the test is not whether they are identical but whether they are similar.

78. Moreover, in Case C-230/89\(^{22}\) the Court rejected the Greek authorities' argument that ouzo and whisky are not similar because ouzo is the traditional drink of Greece, very extensively drunk by the people of Greece, whereas whisky is considered by the consumer to be a luxury product.

79. In any event, according to the Commission, the fact that ouzo is a traditional product is not sufficient to distinguish it from the other spirit drinks listed in Article 1(4) of Regulation No 1576/89, since many of those drinks are also produced in a traditional manner and associated in some degree with the habits and customs of the country of origin.

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80. Once it is established that the products in question are similar, the Commission contends that the contested tax measure cannot be justified by invoking the fact that Directive 92/83 authorises the application of reduced rates in some cases. They are allowed in those cases only in so far as they do not entail discrimination against products from other Member States. In the present case, however, Greece is applying a reduced rate of excise duty exclusively to a national alcoholic beverage, to the detriment of similar products from other Member States.

81. In the same way Article 7 of Directive 92/84 cannot be cited to justify the Greek measure in question because, although it allows Greece to apply a reduced rate of excise duty to ethyl alcohol consumed in certain regions, that provision concerns the consumption, not production, of the beverage and does not in any case preclude the possibility of extending the concession to products from other Member States.

82. Greece naturally takes the diametrically opposite view, contesting the Commission's arguments point by point on grounds which I shall report below.

83. Before taking a position on the arguments of the parties, I must point out that the Commission explicitly confirmed in the application instituting the present proceedings, in the rejoinder and at the hearing, that the present action related solely to the alleged infringement of the first paragraph of Article 90 EC.

84. It follows that the only question of substance on which the Court is required to rule in the present case is whether or not ouzo is a similar product to the other alcoholic beverages mentioned by the Commission, namely whisky, gin, rum or vodka. If it is, the application of a reduced rate of excise duty to ouzo alone would undoubtedly constitute an infringement of the first paragraph of Article 90 EC since, under Article 1(4)(o)(3) of Regulation No 1576/89, ouzo is by definition produced exclusively in Greece (see point 9 above), whereas whisky, gin, rum and vodka are produced primarily in other Member States. Conversely, if ouzo is not a similar product or if there is not sufficient evidence that it is, the action must be declared to be unfounded and accordingly dismissed because the Court has not been asked, even in the alternative, to determine whether the system of taxation at issue may afford protection that is contrary to the second paragraph of Article 90 EC.
85. Still by way of a preliminary remark, I note that the parties in the present case rely primarily on the case-law of the Court, which is quite extensive on the subject in question. Moreover, the case-law usually refers to particular products and is therefore frequently influenced by specific situations, and this has caused the parties to cite the same precedents in support of different arguments.

86. That being established, I shall now examine the arguments presented in this case, proceeding on a premiss which is not, I think, disputed. It follows from the case-law of the Court that in order to determine whether products are similar within the meaning of the first paragraph of Article 90 EC 'it is necessary to consider whether they have similar characteristics and meet the same needs from the point of view of consumers, the test being not whether they are strictly identical but whether their use is similar and comparable'.

87. In particular, in order to determine whether two categories of alcoholic beverages are similar 'it is necessary first to consider certain objective characteristics of both categories of beverage, such as their origin, the method of manufacture and their organoleptic properties, in particular taste and alcohol content, and, secondly, to consider whether or not both categories of beverage are capable of meeting the same needs from the point of view of consumers'.

88. In order, therefore, for two categories of alcoholic beverage to be regarded as similar within the meaning of the first paragraph of Article 90, they must satisfy two conditions: they must have 'certain objective characteristics' in common and they must 'meet the same needs from the point of view of consumers'.

89. It also follows from that case-law that it is not sufficient for that purpose that only one of those conditions be satisfied but that they must both be satisfied. The Court has held that two beverages 'whose intrinsic characteristics are fundamentally different', for example in respect of the method of manufacture and their organoleptic proper-


ties, cannot be regarded as similar simply because they may be 'consumed in the same way'.  

90. Applying those principles to the present case, I would point out first that as regards the objective characteristics of the products in question, there are some similarities between ouzo and the other beverages at issue, for example in respect of their high alcohol content and the agricultural origin of the alcohol they contain. However, they also differ materially in other important respects, for example in their taste, in the raw materials used and in the methods of manufacture.

91. Moreover, the Commission itself does not dispute that there are such differences but contends that if they were decisive for the purpose of determining whether the first paragraph of Article 90 EC is applicable, no alcoholic beverage could be held to be similar to any other whereas, as we have seen, the Court has ruled that in considering whether products are similar the test is not whether they are identical but whether they are similar.

92. I note however that, as the Greek Government points out, the denomination 'ouzo' is reserved exclusively for alcoholic beverages produced from the raw materials

93. Ouzo is consequently produced from raw materials and in accordance with a method of manufacture described in Article 1(4)(o)(3) of Regulation No 1576/89 (see point 9 above). In particular, that beverage is produced, using aniseed and possibly fennel seed, mastic from a lentiscus indigenous to the island of Chios and other aromatic seeds, plants and fruits, by distillation in traditional discontinuous copper stills with a capacity of 1 000 litres or less.

26 — For example, rum is defined in that Article as:

'a spirit drink produced exclusively by alcoholic fermentation and distillation, either from molasses or syrup produced in the manufacture of cane sugar or from sugar-cane juice itself and distilled at less than 96% vol. so that the distillate has the discernible specific organoleptic characteristics of rum' or 'the spirit produced exclusively by alcoholic fermentation and distillation of sugar-cane juice which has the aromatic characteristics specific to rum and a content of volatile substances equal to or exceeding 225 grams per hectolitre of alcohol of 100% vol. ...' (my emphasis), and whisky is defined as:

'a spirit drink produced by the distillation of a mash of cereals — saccharified by the diastase of the malt contained therein, with or without other natural enzymes, — fermented by the action of yeast, — distilled at less than 94.8% vol., so that the distillate has an aroma and taste derived from the raw materials used, and matured for at least three years in wooden casks not exceeding 700 litres capacity'.

taste of ouzo not identical with that of the other beverages mentioned, it cannot even be regarded as similar to the taste of those beverages.

94. I note, in this connection, that the Court held on another occasion that although vermouth has an alcoholic strength comparable to that of still fruit wines, 'nevertheless it should be borne in mind that vermouth is not made from the same kind of basic products as fruit wines, since not only is ethyl alcohol added to grape wine but also a small quantity of mixed herbs which give vermouth its special flavour. It follows that the organoleptic properties of vermouth do not match those of still fruit wines and that these two categories of beverage meet different consumer needs'.

27 — Judgment in Joined Cases C-367 to C-377 Roders, cited above, paragraph 33.

95. In relation to such needs, other factors too appear to confirm the difference between the beverages in question. As the Greek Government has stated, without contradiction from the Commission, ouzo is generally consumed as an accompaniment to the main course (in particular, fish or traditional Greek meat dishes), mostly by people over 45 years of age, in traditional places (such as country inns, cafes, restaurants or 'ouzeries') whereas whisky, gin, rum and vodka are usually consumed either quite apart from meals or else immediately before or after them, as aperitifs or digestifs, mostly by people between 18 and 44 years of age, in places that serve drinks only (such as bars, pubs and discos). I note in this connection that, according to the Court, liqueur wines such as sherry and madeira are different from table wines by reason of the fact that 'they are usually consumed as aperitifs or as dessert wines and therefore meet different needs from the point of view of consumers'.

28 — Ibid., paragraph 32.

96. The Commission, however, claims that the habits of consumers are not decisive for the purpose of determining whether products are similar within the meaning of the first paragraph of Article 90 EC. As I have already mentioned (see point 75 above), it cites the judgments in Case 171/78 Commission v Denmark and Case C-230/89 Commission v Greece in that connection.

97. The Commission cites the passage in the former judgment in which the Court states that 'the fact that aquavit is preferred in...
Denmark by consumers as an accompaniment to certain typical meals does not prevent that beverage from still being used for other purposes or from thus being in at least a partial substitution relationship with an indeterminate number of other types of spirit. 29

98. However, that statement must be read in conjunction with the statement contained in the next sentence, in which the Court adds: ‘It may therefore be said that to the extent to which the spirituous beverages on which the highest tax burden is imposed are not beverages which are similar to aquavit within the first paragraph of Article 95 [now Article 90] they are in any case in competition with aquavit as referred to in the second paragraph of Article 95 [now Article 90]’. 30 In my view, it follows that the habits of consumers may be immaterial for the purpose of determining whether products are in competition as referred to in the second paragraph of Article 90 EC but that does not necessarily mean that they are also immaterial for the purpose of determining whether products are similar within the meaning of the first paragraph of that article.

99. In my view, the same considerations apply to the other judgment cited by the Commission — the judgment in Commission v Greece — in which the Court also resolved the problem referred to it by assessing it in the light of both the first and the second paragraphs of Article 90 EC. Thus, when the Court states in paragraph 9 of that judgment that ‘for the purpose of measuring the possible degree of substitution between beverages, it is impossible to restrict oneself to consumer habits in a Member State or in a given region’, 31 it does not necessarily mean that the habits of consumers are (or are largely) immaterial for the purpose of determining whether those beverages are similar. On the contrary, in view of the form of words used, it is more plausible to suppose that it meant that they are (or are largely) so for the purpose of determining whether the beverages are in competition as referred to in the second paragraph of Article 90 EC.

100. For the same reason, I do not consider that the Commission’s claim with reference to the same judgment, that the Court recognised in that case that ouzo was similar to whisky, is decisive. In fact, far from pausing to consider whether ouzo and whisky are similar beverages, the Court confined itself to stating that ‘amongst all spirits there is an indeterminate number of beverages which must be regarded as similar products within the meaning of the first paragraph of Article 95 [now Article 90] and even where it is impossible to perceive a

29 — Judgment in Case 171/78 Commission v Denmark, cited above, paragraph 35.
30 — Ibid. My emphasis.
31 — Judgment in Case C-230/89 Commission v Greece, cited above. My emphasis.
sufficient degree of similarity between the products concerned, there are nevertheless characteristics common to all those spirits which are sufficiently marked for it to be said that they are at least partly or potentially in competition'. 32 It was only on that premiss that the Court went on to state that 'the fact that ouzo is regarded as a traditional Greek drink and is drunk extensively by the people of Greece, whereas whisky is regarded by the consumer as a luxury product, is immaterial in this connection'. 33

101. It therefore seems to me that the beverages in question do in fact differ both in respect of intrinsic characteristics such as taste, the raw materials used and the methods of manufacture, and also from the point of view of consumer needs.

102. As to the objection that ouzo and the other alcoholic beverages in question are in the same category for tax purposes ('ethyl alcohol') under Article 19 et seq. of Directive 92/83, I do not consider that objection to be conclusive.

103. I agree with the Greek Government that that fact does not of itself prove that the products in question are similar within the meaning of the first paragraph of Article 90 EC. It is clear from the third and fourth recitals in the preamble to the directive that the category in question is based on the definition set out in the combined nomenclature of the Common Customs Tariff which, according to settled case-law, may provide an indication but cannot provide conclusive evidence that products are similar. 34

104. That conclusion is not, in my view, contradicted by the judgment in Case C-302/00, 35 cited by the Commission in support of its own arguments (see point 74 above). In that judgment, in determining whether dark- and light-tobacco cigarettes are similar products, the Court relied mainly on the fact that they have similar properties and satisfy the same needs of consumers (paragraphs 24 to 26) and only mentioned as an afterthought the fact that they are subject to uniform tax treatment and fall within the

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33 — Ibid., paragraph 9.
35 — Judgment in Case C-302/00 Commission v France, cited above.
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105. Moreover, it seems to me that, as the Greek Government has pointed out, further evidence that the alcoholic beverages classified as 'ethyl alcohol' for tax purposes are not necessarily similar to one another is provided by the fact that beverages with a much lower alcoholic strength by volume than ouzo (which has an alcohol content of 37.5% vol.) are also in that category. Under Article 20 of Directive 92/83, the term 'ethyl alcohol' covers 'all products with an actual alcoholic strength by volume exceeding 1.2% vol. which fall within CN codes 2207 and 2208 ...' and 'products of CN codes 2204, 2205 and 2206 which have an actual alcoholic strength by volume exceeding 22% vol.' This confirms that the products in that category are not necessarily similar, since it is impossible to regard as similar beverages with an alcohol content of 2%, 24% and 37.5% vol. respectively.

106. In conclusion, it seems to me that none of the arguments adduced by the Commission are capable of proving conclusively that the beverages in question are similar within the meaning of the first paragraph of Article 90 EC, and that, on the contrary, there is objective evidence to support the opposite view. Moreover, as I have already observed, the Commission has not asked the Court to determine, in the alternative, whether those beverages are in competition within the meaning of the second paragraph of that provision.

107. It is settled case-law that 'in proceedings for failure to fulfil an obligation it is for the Commission to prove the allegation that the obligation has not been fulfilled'. To be more precise, the Commission is required 'to place before the Court the information needed to enable it to determine whether the obligation has not been fulfilled' and 'it may not rely on any presumption for that purpose', otherwise the action will be inadmissible.

108. In my view, that is precisely what has happened in the present case. It therefore follows that the present action is unfounded and must accordingly be dismissed.

IV — Costs

109. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Hellenic Republic has requested that the unsuccessful party be ordered to pay the costs and, in view of what I have just said about the outcome of the action, I consider that that request should be granted.

V — Conclusion

110. In the light of the foregoing considerations, I therefore propose that the Court should:

(1) Dismiss the action as unfounded;

(2) Order the Commission to pay the costs.