On those grounds,

THE COURT

hereby:

1. **Declares that, by the application of discriminatory taxation on spirits as regards, first, geneva and other alcoholic beverages obtained from the distillation of cereals and, secondly, spirits obtained from wine and fruit, under Articles 403 and 406 of the Code Général des Impôts, the French Republic has failed, as regards products imported from other Member States, to fulfil its obligations under Article 95 of the EEC Treaty;**

2. **Orders the French Republic to pay the costs.**

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 27 February 1980.

A. Van Houtte
Registrar

H. Kutscher
President

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

Mr President,
Members of the Court,

The procedure for a declaration that a Member State has failed to fulfil its obligations under the Treaty which must be dealt with today must be considered in connexion with a number of other applications which the Commission has brought against several Member States (Cases 169/78 to 171/78 and 55/79). In these applications it complains that those Member States have infringed Article 95 of the EEC Treaty by giving preferential

1 — Translated from the German.

tax treatment to home-produced spirituous beverages as against similar or competing beverages from other Member States.

The following facts form the basis of this application:

The French production of spirits amounted to approximately 1 230 000 hectolitres in 1975; spirits means spirituous beverages within the meaning of tariff heading 22.09 C of the Common Customs Tariff which are either obtained directly by distilling fermented natural juices like wine or from fermented fruit and other products of plant or vegetable origin or, again, through the addition of flavourings or sugar to the distilled alcohol. The famous spirits manufactured from wine or fruit accounted for almost two-thirds of that production, in other words cognac accounted for approximately 546 000 hectolitres, other wine distillates accounted for approximately 120 000 hectolitres and fruit distillates accounted for approximately 140 000 hectolitres. In addition, 100 000 hectolitres of spirits were manufactured from wine and fruit by small farmers who use their own production. 312 000 hectolitres of rum from the overseas departments should be mentioned as well. In comparison with these figures the production of spirits from grain in France is modest. Only a limited production of geneva, 8 000 hectolitres of which is manufactured from corn mash with the addition of juniper berries, a production which is subject to quota, is worth mentioning. The production of other spirits from grain such as whisky, vodka and gin is, on the other hand, only of marginal importance. Nevertheless, the consumption of whisky in France in the same year amounted to approximately 106 000 hectolitres, almost all of which had accordingly to be imported.

In France all spirits are uniformly subject to excise duty whilst in the case of grain-based spirits and geneva a manufacturing tax is imposed in addition to that tax. Under French tax law (Articles 403 and 406 A of the code Général des Impôts [General Taxation Code], Article 12 of the Loi de Finances pour 1977 [1977 Finance Law] No 76-1232 of 29 December 1976, Journal Officiel de la République Française of 30 December 1976, p. 7587, and Instruction Ministérielle [Ministerial Order] 2 A-2-77 of 24 January 1977) the excise duty was formerly for example FF 3 880 per hectolitre. In the case of spirits made from grain a manufacturing tax of FF 1 920 was imposed in addition and in the case of geneva a manufacturing tax of FF 645 with the result that spirits made from grain bore a total tax burden of FF 5 800 and geneva bore a total tax burden of FF 4 250 per hectolitre of pure alcohol whereas for example spirits made from wine were taxed at only FF 3 880 per hectolitre of pure alcohol. As we heard at the hearing, the excise duty to which all spirits are subject is in the meantime FF 4 270 per hectolitre of pure alcohol whilst spirits made from grain are subject to an additional manufacturing tax of FF 2 110 and geneva is subject to an additional manufacturing tax of FF 710 per hectolitre of pure alcohol. The result of this is thus for example total taxation of FF 4 270 in the case of cognac, which is produced in large quantities in France, FF 4 980 in the case of geneva, for which there is a small French production, and FF 6 380 in the case of whisky which is virtually not produced at all in France.

In a letter of 14 July 1975 the Commission took the view in relation to

the French Government that this different taxation of similar or at least competing goods constituted an infringement of the first paragraph of Article 95 of the EEC Treaty or in the alternative of the second paragraph of Article 95. In contrast to this the French Government, in its reply of 25 February 1976, took the view that the Member States could themselves decide the classification of spirits so long as no system existed under Community law. The French classification was based essentially on a simple distinction between natural spirits and what are known as rectified spirituous beverages; geneva could not be classified in either one or other group. For that reason those beverages were not similar products within the meaning of the first paragraph of Article 95 of the EEC Treaty. Nor was it possible to speak of interchangeable products under the second paragraph of Article 95 of the EEC Treaty because of their different use and by reason of national habits. Thus grain-based beverages were generally used as *apéritifs*, diluted with water, whereas wine or fruit-based spirits and geneva were generally consumed neat as a *digestif* after a meal. For this reason the spirits manufactured from grain, such as for example whisky, were treated in the same way as the other alcohol-based *apéritifs* bearing the highest tax burden including the group of anisette liqueurs which is important in France.

Following this the Commission initiated a formal procedure under Article 169 of the EEC Treaty by letter of 16 March 1976. Since the French Government, by letter of the Permanent Representation for France of 31 May 1976, persisted in its view, the Commission delivered to the French Government a formal opinion in accordance with Article 169 of the EEC Treaty by letter of 23 December 1976 in which it found that there had been an infringement of Article 95 of the EEC Treaty and in which it requested that an end should be put to that infringement within a period of 45 days. Since the Permanent Representation for France merely confirmed receipt of the reasoned opinion of the Commission by date of 10 January 1977, the Commission decided to lodge the application received at the Court of Justice on 7 August 1978 in which it claimed that the Court should declare that the French Republic had infringed Article 95 of the EEC Treaty by applying a discriminatory system of taxation to spirits and should order the French Republic to pay the costs.

In contrast to this the French Republic contends that the Court should dismiss the Commission's application and order the plaintiff to pay the costs of the action.

I — It seems appropriate in the legal appraisal of these facts first of all to define the scope of Article 95 within the context of the Treaty establishing the European Economic Community. As you know, the first paragraph of Article 95 provides that "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". Under the second paragraph of Article 95 "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". This provision forms part of the tax provisions contained in the EEC Treaty. Whilst the Member States were under a duty from the outset progressively to abolish customs duties and charges having equivalent effect as well as quantitative restrictions and corresponding measures, in the field of internal taxation they have in principle retained the right to shape their tax policy independently. The national autonomy is only restricted in so far as this is necessary for the attainment of the general objectives of the Treaty, in particular the free movement of goods. With regard to the elimination of tax disparities arising from the different national systems of taxation Article 99 of the EEC Treaty provides in principle for the formal legal principle of harmonization.

For this reason the French Republic is also quite correct when it emphasizes that the Member States have in principle jurisdiction over the tax classification of goods on the basis of the residual jurisdiction in tax matters and may therefore also in principle provide for the different taxation of spirits (see Case 127/75, *Bobie Getränkevertrieb GmbH* v *Hauptzollamt Aachen-Nord*, judgment of 22 June 1976 [1976] ECR 1079). This is also clearly expressed in the case-law of the Court of Justice when the Court of Justice for example pointed out *inter alia* in Case 148/77 *(H. Hansen jun. and O. C. Balle GmbH & Co.* v *Hauptzollamt Flensburg*, judgment of 10 October 1978 [1978] ECR 1787) that 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. 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. However, according to the requirements of Article 95, such preferential systems must also be extended without discrimination to spirits coming from other Member States. Where national legislation favours certain classes of producers or certain types of spirits those advantages must be extended also to imported spirits from other Member States which fulfil the same conditions, taking into account the criteria which underlie the first and second paragraphs of Article 95, and consequently when products similar to domestic products are involved in accordance with the first paragraph of Article 95 or when under the second paragraph a protective effect in favour of a domestic product arises through a tax on an imported product. This in turn depends upon the extent to which both products are in competition with one another, in other words the extent to which they are interchangeable. The Court of Justice considers that such interchangeability occurs if the domestic product is in competition with the imported product "by reason of one or more economic uses to which it may be put ... even though the condition of similarity for the purposes of the first paragraph of Article 95 is not fulfilled" (see the judgment in Case 27/67, *Firma Fink-Frucht GmbH* v *Hauptzollamt München-Landsberger Straße*, judgment of 4 April 1968 [1968] ECR 223).

It is clear from the foregoing that the decisive factor is therefore the concept of "similarity".

The difficulty of a general definition of "similar products" is attributable above all to the need to differentiate them from any other goods on the one hand or from interchangeable goods within the meaning of the second paragraph of Article 95 of the EEC Treaty on the other. Since the text itself does not permit of an unambiguous statement, it is accordingly necessary to consider the purpose of the provision, taking into account for the purpose of interpretation secondary Community law and the case-law of the Court of Justice.

As the Court of Justice has emphasized on several occasions, the function of Article 95 is to ensure free and undistorted movement of goods through the elimination of tax barriers. For this reason the provision is an important supplement to Articles 9, 12, 13 and 30 of the EEC Treaty since it is intended to fill in any breaches which may have remained, after the abolition of the customs duties and charges having equivalent effect as well as the elimination of the quantitative restrictions, for the Member State to set up fresh obstacles (see Case 24/68, *Commission of the European Communities* v *Italian Republic*, judgment of 1 July 1969 [1969] ECR 193). To this extent it is likewise one of the essential principles of the Common Market although it does not appear in Part Two of the Treaty which is entitled "Foundations of the Community" (see Joined Cases 52 and 55/65, *Federal Republic of Germany* v *Commission of the EEC* [1966] ECR 159). The purpose of the provision is to eliminate all discrimination in trade between Member States (see Case 148/77, *Hansen).* As opposed to the above-mentioned provisions on the free movement of goods Article 95 does not however provide for the abolition of a tax but only for equal treatment for similar foreign and domestic goods (see Case 54/72, *Fonderie Officine Riunite FOR* v *Vereinigte Kammgarn-Spinnereien VKS,* judgment of 20 February 1973 [1973] ECR 193). This already provides the answer to the argument suggesting, it seems to me, in the submissions of the French Government, that this unequal treatment may in the end only be solved by the harmonization of taxation under Article 99 of the EEC Treaty, with the result that there is no longer room for the application of Article 95.

It is necessary to observe first of all in this connexion that unequal treatment of goods in the Common Market may occur not only as a result of discriminatory domestic provisions but also by virtue of different rules for the same goods in the individual Member States. The field of application of Article 99 extends however only to the latter cases. In this instance the unequal treatment of grain-based spirits and wine or fruit-based spirits in question is not however based on the fact that different taxation exists in France and the other Member States but must be attributed to the fact that provisions contained in French tax law provide for different rates of tax for the above-mentioned spirituous beverages linked to the raw material. Such different treatment by discriminatory national provisions clearly comes, within the field of taxation, within the scope of Article 95 which is intended to ensure "that the application of internal taxation in one Member State does not have the effect of imposing on products originating in other Member States

taxation in excess of that imposed on similar domestic products or taxation of such a nature as to protect other domestic products referred to in the second paragraph of the same article" (see Case 31/67, *Firma August Stier* v *Hauptzollamt Hamburg-Ericus*, judgment of 4 April 1968 [1968] ECR 235).

The purpose of the provision may also serve to refute a further argument of the French Government that whisky which is generally used diluted as an *apéritif* and for mixing cocktails is given the same treatment for tax purposes as domestic anise liqueurs manufactured in large quantities which are also subject to a higher rate of tax than wine-based spirits. The meaning and purpose of the provision is however precisely not to interfere with the domestic classification; there has already been an infringement of the first paragraph of Article 95 of the EEC Treaty if an imported product is subject to higher taxation than *one* domestic product without the other domestic classifications being important. The Court of Justice recently expressed this idea in its judgment of 13 March 1979 in Case 86/78 *(Grandes Distilleries Peureux* v *Director of the Tax Department of the Haute-Saône and the Territory of Belfort)* in which it emphasizes that although Article 95 prohibits the Member States from imposing a higher tax on goods imported from other Member States than on domestic products it does not prohibit them from imposing a higher tax on domestic products than on imported products. Such inequality does not come within Article 95 but rather follows from special features of the national legislation which has not been approximated in fields in which the Member States have jurisdiction.

It is necessary for the Member States to comply with the Community rules only in this sense in fixing their taxation. On the other hand however, as the Commission also points out, Article 95 would be a poor means of eliminating tax obstacles in intra-Community trade as a prohibition on arbitrary conduct and a supplementary rule on the customs union if the determination of similarity were aligned on the yardstick of *national* criteria. Whilst Article 95 prohibits the national legislature from pursuing extra-fiscal objectives in the taxation of foreign goods it would certainly be easy for the Member States otherwise to justify different tax treatment of imported products by reference to the domestic economic structure different from the country of origin or to different consumer behaviour. To recognize such objections would inevitably bring about the danger that nine different definitions of similarity would in fact result and that as a result of this the provision would be deprived of its scope. Similarity must therefore be uniformly defined so that the provision may be acknowledged to have direct effect, as the Court of Justice did in its judgment in Joined Cases 52 and 55/65. For these reasons it is impossible to agree with the French Government's view that in determining which goods must be regarded as similar the important factor is consumer habits in the individual Member States or even local patterns of behaviour.

A further result of the principle enshrined in Article 95 is that factors other than tax factors which affect the production costs of the products to be

compared may not be taken into consideration. The Court of Justice stated *inter alia* to this effect in Case 45/75 *(REWE-Zentrale des Lebensmittel-Großhandels GmbH* v *Hauptzollamt Landau-Pfalz,* judgment of 17 February 1976 [1976] ECR 181) that the scope of that article cannot be so extended as to allow any kind of compensation between a tax created so as to apply to imported products and a charge of a different nature imposed, for example, for economic purposes, on the similar domestic product. As a result it is the taxation imposed on the categories of product to be compared which must be equal and it is inappropriate to consider the effect of this taxation on the final price of the nationally-produced and imported products. It is therefore necessary to interpret Article 95 "as prohibiting the imposition of taxation on an imported product according to a method of calculation or manner of imposition which differs from those applying to the tax imposed on the similar domestic product". The free movement of goods, which must be protected, is prejudiced "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". The existence of a protective effect which presupposes a competitive relationship does not need to be shown in this connexion for the purpose of the application of the first paragraph of Article 95 since a competitive situation exists from the outset in the case of similar goods within the meaning of that paragraph.

On the other hand the second paragraph prohibits the Member States from imposing on products imported from other Member States taxation of such a nature as to afford protection to other products. This prohibition on discrimination only applies if the imported goods and the "other products" are in competition with one another on the market of a Member State. However, if they are not similar they can only be in competition with one another if they are interchangeable or capable of being substituted for one another, having regard to the intended purpose. In contrast to the prohibition laid down in the first paragraph, which applies as soon as there is unequal treatment, the second paragraph requires that in addition a protective effect must be caused by the unequal treatment (see Case 27/67, *Fink-Frucht).* The prohibition laid down in the second paragraph is therefore not so strict from this point of view as that laid down in the first paragraph. It follows from this that both rules are independent provisions which apply in the alternative. Whether it is necessary to apply the first paragraph or the second paragraph depends upon whether the focal point of the competition lies between similar goods or those which may be substituted for one another. Although goods may no longer be regarded as similar they are however frequently capable of being substituted for one another and thus come within the field covered by the condition contained in the second paragraph if tax measures in favour of one of the products result in a shift in the market situation in favour of those products.

II — The important factor as regards the application of the first paragraph of Article 95 is therefore whether the products are similar. There is similarity within the meaning of that provision "when the products in question are *normally* to be considered as coming within the same fiscal, customs or statistical classification, *as the case may be*" (see Case 27/67, *Fink-Frucht GmbH).* In its judgment in Case 45/75 *(REWE)* the Court of Justice then specifies further

that for the purposes of the application of the prohibition laid down in the first paragraph of Article 95 the fact that the same raw material is to be found in different products is not sufficient even if the charge is wholly or partially imposed with reference to that raw material. A comparison must however be made between the taxation imposed on products which, at the same stage of production or marketing, have similar characteristics and meet the same needs from the point of view of consumers. The fact that the domestic product and the imported product are or are not classified under the same heading in the Common Customs Tariff constitutes an important factor in this assessment.

As a result of this case-law it is therefore necessary in the interests of clarity and easier comprehension to take into consideration first of all, for the purpose of determining the similarity, formal criteria such as the fiscal, customs or statistical classification. As shown by Case 28/69 *(Commission of the European Communities* v *Government of the Italian Republic,* judgment of 15 April 1970 [1970] ECR 187) which is based solely on the classification for tax purposes, the Court of Justice considers that these classifications should be understood not cumulatively but in the alternative. Case 27/67 *(Fink-Frucht)* already shows that this list is not exhaustive by stating that it is necessary "normally" and "as the case may be" to concentrate upon the above-mentioned criteria. Finally, the Court of Justice also took into consideration in Case 45/75 *(REWE)* material points of reference, which it will be necessary to deal with in detail, whilst expressly emphasizing the importance of formal criteria.

It seems to me that the parties agree on this and only wish the importance of the formal and material criteria to be appraised differently, the French Government for example emphasizing that, having regard to the case-law, it is impossible to deduce the similarity of the products in question from the formal criteria alone. However, even if the classification contained in the Common Customs Tariff is taken as the basis, it is, in the opinion of the French Government, necessary to bear in mind that different rates of duty are applied to the spirituous beverages classified under tariff heading 22.09 C of the Common Customs Tariff on the basis of tariff subheadings I to V. This "customs reality" must also be taken into consideration in determining the similarity of the products in question. Finally the Court of Justice also stated in Case 185/73 *(Hauptzollamt Bielefeld* v *Offene Handelsgesellschaft in Firma H. C. König,* judgment of 29 May 1974 [1974] ECR 607) that "the products under subheading 22.09 A are distinguished by the presence in those products of flavouring substances or distinctive properties of taste". Nor is it possible to deduce a different conclusion, as the Commission attempts to do, from the nomenclature of the Customs Co-operation Council. According to the established case-law of the Court of Justice this nomenclature may be taken into consideration for the purpose of the interpretation of the Common Customs Tariff but may not however modify it.

These arguments do not however convince me for several reasons. As you know, customs tariff law, which must be classified under tax law, concerns the taxes which must be imposed as customs duties in international trade. It is linked to the products and accordingly lays down the rate of customs duty with

regard to each product. The nomenclature is in this connexion a *technical* customs element whereas the rates of duty, which contain the basis of assessment for the calculation of the duty, are the *political* customs element in the customs tariff which make this an important instrument of customs policy within the context of commercial policy. In contrast to the rates of duty, which are linked to the description of the goods and cannot be represented without the nomenclature, the latter is a self-contained piece of legislation designed with technical tariff considerations in mind. It follows from this already that it is impossible to conclude from the different rates of duty that the spirituous beverages listed in the tariff subheadings I to V are different. A closer look at the beverages listed in tariff subheadings I to V shows further that these subheadings were not intended to introduce new descriptions from which it might be possible to deduce a distinction between grain-based spirits and wine or fruit-based spirits. Thus for example gin, whisky and vodka, beverages manufactured from grain, are contained in different subheadings, whilst vodka on the other hand is grouped with plum, pear or cherry brandy. On the other hand, within the whisky group — evidently for reasons of customs policy — a distinction is made between bourbon whisky and other whisky. Finally, cognac, a wine-based spirit, comes under tariff subheading V together with all other unnamed beverages. These examples show that the goods in question, spirit made from grain and spirit made from wine and fruit, are classified under the same heading of the Common Customs Tariff as "spirituous beverages". Classification under the same description is however, according to the case-law of the Court of Justice, at least an indication that they are similar products within the meaning of the first paragraph of Article 95.

As the Court of Justice emphasizes in Case 185/73 *(König)*, in the interests of legal certainty and the simplification of administrative procedures, it is the characteristics and objective properties of products which afford the decisive criteria for their classification in the Common Customs Tariff. Since both spirit made from grain and spirit made from wine or fruit is classified under the same description it is therefore necessary to assume that they have the same objective properties and characteristics.

In the above-mentioned decision the Court of Justice further emphasizes that in the absence of Community explanatory notes the Notes provided for by the Brussels Convention on Nomenclature for the classification of goods in the Customs Tariff afford an authoritative source for the interpretation of common headings. It is in my opinion particularly clear from these notes that spirits as such, regardless of the raw material, must be regarded as similar. In fact they contain the explanation that tariff heading 22.09 covers *inter alia* spirits produced by distilling wine, cider or other fermented beverages or fermented grain or other vegetable products, without adding flavouring. The characteristics which seem to justify treating the different types of spirit as similar products within the meaning of the law on the Common Customs Tariff are then described as follows: "They

retain, wholly or partly, the secondary constituents (esters, aldehydes, acids, higher alcohols, etc.) which give the spirits their peculiar individual flavours and aromas".

To summarize, it is therefore necessary to bear in mind that according to the case-law of the Court of Justice the classification of grain-based spirits and spirits made from wine or fruit under the same heading of the Common Customs Tariff must be taken into account as an essential consideration in appraising whether the above-mentioned products are similar products within the meaning of Article 95.

The fact that it is justified to treat the different types of spirits as similar products within the meaning of Article 95 of the EEC Treaty may moreover be deduced from several judgments of the Court of Justice. For example the judgment of 15 October 1969 in Case 16/79 *(Commission of the European Communities* v *Government of the Italian Republic* [1969] ECR 377) should be mentioned here, in which the Court of Justice found that the Italian Republic, by levying on potable spirits imported from other Member States frontier dues and all other duties which apply to alcohol in its national territory on the basis of a minimum alcohol content of 70% whilst the comparable domestic products were taxed according to the actual alcohol content, had failed to fulfil the obligations imposed upon it by Article 95 of the Treaty establishing the European Economic Comunity. Without dealing with the individual types of spirituous beverage, the Court of Justice merely stressed in that judgment the difference between spirits as such and alcohol contained both in Community law and in Italian domestic law and reached the conclusion that Article 95 applied without any qualification so that therefore the method provided under Italian law taxing potable spirits imported from other Member States had to be regarded as being incompatible with the said article. As a further example the judgment in Case 148/77 *(Hansen)* might be mentioned, the basis of which, as you know, was a main action concerning the taxation of imported overseas rum and in which the Court of Justice held that under Article 95 advantages granted to the home-produced spirits must also be granted without discrimination to spirits imported from other Member States. In Case 185/73 *(König)* the Court of Justice regards "the presence in those products of flavouring substances or distinctive properties of taste" as the common characteristics and objective properties which distinguish spirits coming within tariff subheadings 22.09 C I to V of the Common Customs Tariff as similar products from ethyl alcohol coming within tariff heading 22.09 A.

In the view of the French Government it follows however precisely from the different flavouring substances and distinctive properties of taste of typical spirits that are not similar products. In this connexion it relies upon the statement of the Court of Justice in Case 45/75 *(REWE)*, according to which in order to judge whether or not there is similarity within the meaning of the first paragraph of Article 95 "a comparison must be made between the taxation imposed on products which, at the same stage of production or marketing, have similar characteristics and meet the same needs from the point of view of consumers". It is however impossible to

speak of similar characteristics because in the distilled spirits in question in addition to the alcohol as many as over 275 non-alcoholic substances may be detected, the different composition of which produces the organoleptic qualities of a beverage, which impart themselves to the consumer in the form of flavour, bouquet and smell. With regard to the needs of consumers, it is necessary to bear in mind that the organoleptic characteristics of the various categories of beverage also determine consumer behaviour. Thus for exemple spirits made from wine, principally cognac and armagnac, are drunk neat after a meal as a *"digestif"*. The beverages made from grain such as whisky or gin are, on the other hand, used, frequently mixed with water or soda water, as an *"apéritif"* before a meal. For this reason the products in question are not in competition with one another nor are they interchangeable and therefore *a fortiori* not similar.

In the view of the Commission, on the other hand, the question of the similarity of the beverages must be appraised only having regard to the consumer and his requirements, disregarding other physical and chemical characteristics. The distinction between the three differently taxed categories of spirits is based, in its opinion, solely on the different flavours inherent in the beverages. This is however, even amongst distilled spirits coming within the individual categories, infinitely varied and cannot therefore enable the conclusion to be drawn that no "similarity" exists. Apart from the intoxicating effect, the presence of flavouring substances and distinctive properties of taste, on account of which they meet all the special needs of consumers, should rather be accepted as the common characteristic of spirits. Regardless of the raw material the individual spirits are also consumed in very different ways. As a result of the variety of the products, there is no conceivable case in which one or other product could not be replaced by another. In addition, the Commission doubts whether in view of the variety of possible uses it is possible to speak of fixed drinking habits at all. If there are any such habits they must however be disregarded since they are on the one hand influenced by the price of the beverages in question and are therefore indirectly influenced by the tax and on the other they depend upon the extent to which a specific beverage is traditionally available.

In evaluating these arguments it is necessary first of all to bear in mind that, according to the judgment of the Court of Justice in Case 45/75 *(REWE)*, for the purpose of appraising the similarity of products it is not important whether the products contain the same raw material but rather whether the products have similar characteristics and meet the same needs *from the point of view of consumers* at the same stage of production or marketing.

All types of spirits are however characterized, as far as consumers are concerned, by the following common characteristics: they are liquids containing alcohol obtained by distillation after previous alcoholic fermentation of raw materials which produce alcohol. Distilled spirits differ from beverages produced by simple fermentation, as for example beer and wine, by the presence of a relatively high alcohol content which reaches the limit of the alcohol content which is still

suitable for human consumption. They differ from ethyl alcohol, as we have heard, by the existence of organoleptic properties valued by consumers owing to the presence of secondary substances. As this Court was told at the hearing, it is impossible for consumers to determine whether the organoleptic properties displayed by the individual spirits are attributable to the distilled raw materials or to the flavourings added during or after distillation. Thus in particular the fact that aquavit for example is produced from neutral alcohol with the addition of flavouring, in other words it is not a spirit within the meaning of the above-mentioned Explanatory Notes to the Brussels Nomenclature, can in no way alter the fact that this beverage too has from the point of view of consumers the characteristics of spirits. In addition this Court was told that synthetically-produced alcohol may be used as the raw material for the manufacutre of spirits without being noticeable to consumers. It is therefore quite certain in my opinion that all beverages which have the characteristics described have similar characteristics from the point of view of consumers and are therefore regarded as similar, without the different raw materials, manufacturing processes, chemical composition or addition of flavouring being important.

Nor may the conclusion be drawn, in my view, from the different drinking habits of consumers, as the French Government tries to do, that the beverages in question do not constitute similar products within the meaning of Article 95. In this respect it is necessary to point out, together with the Commission, that consumer behaviour as such may indeed be influenced by a variety of factors such as habit, individual preference, local or national tradition and social, seasonal and climatic conditions, and that consumer behaviour is not least subject to fashion trends. Nationally or locally there usually exists, besides, a certain tradition because the relevant raw materials or indeed the spirits themselves are produced there. In addition, consumer behaviour can, as you know, also be regulated by protective duties or protectionist taxation by excluding foreign products from the market. Such tax discrimination is however precisely intended, as I have already shown in my general observations on Article 95 of the EEC Treaty, to be prevented by that provision. If the provision is intended to retain its importance, the concept of "similar products" must be given a uniform interpretation, without in so doing taking into consideration national habits. It is not difficult to realize that precisely reference to national drinking habits is an easy way of maintaining specific discrimination against foreign products. Consideration of consumer habits in all the Member States however shows that the different types of the beverages in question — the Commission's examples reveal this particularly vividly — are consumed in very different ways and for very different reasons. Such a general view shows us that practically every type of spirits may be replaced by another without the raw materials being important. It is however at the same time therefore quite certain that the different properties of flavour and aroma of the various spirits cannot cast doubt upon their similarity,

regardless of the raw material. In addition to the classification in the Customs Tariff the material criteria therefore also lead to the conclusion that grain-based spirits and wine or fruit-based spirits must be regarded as similar products within the meaning of the first paragraph of Article 95.

Contrary to the view of the French Government, this conclusion is not, and this must be stated finally, called in question by the case-law of the Court of Justice on designations and descriptions of origin. As you know, the Member States may, so long as there are no Community rules, take measures for the protection of designations and descriptions of origin against unfair practices. These are intended to ensure both protection from unfair competition of the interests of the producers concerned and also protection of consumers from misleading declarations. It is necessary however to distinguish from this the objective of Article 95 of the EEC Treaty, in other words the elimination of public intervention which might distort the normal conditions of trade between the Member States.

Since it is thus quite certain that the French Republic has failed to fulfil its obligations under the first paragraph of Article 95 of the EEC Treaty by the different taxation of spirits, it is no longer necessary to deal with the conditions laid down in the second paragraph of Article 95. If the Court of Justice should not concur with my arguments, it should merely be observed in addition that even if the products in question are not held to be similar, they are, "by reason of one or more economic uses to which they may be put, in competition" (Case 27/67 — *Fink-Frucht)* and thus substitute products under the second paragraph of Article 95. If the Court of Justice should nevertheless assume that this provision applies I would have considerable doubts as to whether sufficient evidence has been produced to show that the tax measures in favour of the French production of spirits from wine or fruit result in a shift in the market position in their favour. It can certainly not be deduced from the statistics produced by the French Government, which show a more rapid increase in whisky consumption as compared with the consumption of cognac, that the different treatment for tax purposes of those beverages is not of such a nature as to produce a protective effect since we have no numerical data on the hypothetical behaviour of consumers if both drinks were given equal treatment for tax purposes. Nor however on the other hand do the numerical data supplied by the Commission seem to me to provide sufficient evidence to show that the behaviour of consumers is decisively influenced by the different taxation. Such consumer behaviour could, finally, only be proved by a public opinion poll which is however not necessary in this instance since, as stated above, the French Government has already failed to fulfil its obligations under the first paragraph of Article 95 by the different taxation of the three categories of spirits.

For this reason the Commission's request proves to be well founded and I therefore conclude that the Court of Justice should declare that the French Republic has failed to fulfil its obligations under the first paragraph of

Article 95 of the Treaty establishing the European Economic Community by the application of a system of taxation which provides for a higher tax burden on imported grain-based spirits than it applies to similar domestic wine or fruit-based spirits. In addition, if this is the outcome of the case the French Republic should be ordered to pay the costs.