

OPINION OF MR ADVOCATE GENERAL REISCHL
DELIVERED ON 28 NOVEMBER 1979¹

*Mr President,
Members of the Court,*

The following facts form the basis of the action brought by the Commission against the Italian Republic for a declaration that that State has failed to fulfil its obligations under the Treaty:

Italian production of spirits, in other words the manufacture of spirituous beverages within the meaning of tariff heading 22.09 C of the Common Customs Tariff, which amounts to somewhat more than 400 000 hectolitres per annum, is centred upon the manufacture of spirits from wine and marc, such as brandy and grappa. The manufacture of spirits from other fruit is far less important and may be estimated at approximately 24 000 hectolitres per annum, whilst the production of spirits from grain is even smaller. The Commission, which relies upon figures from the Italian Ministry of Finance, quotes in this connexion 78 hectolitres for 1975 and only 4 hectolitres of pure alcohol for 1976. According to the data of the Italian Government, domestic whisky and rum production amounts to 19 000 hectolitres altogether per annum; in this connexion it should however be stated that in Italy "whisky" is manufactured from a blend of imported whisky, alcohol obtained from domestic products and water. In contrast to the small national production 74 000 hectolitres of whisky were imported in 1975 for consumer use.

In addition to what are known as State taxes, the manufacturing tax and value-added tax, Italian tax law provides for a further tax on spirituous beverages which

are intended for retail. This tax is imposed in the form of tax banderoles affixed to bottles of up to 2 litres capacity.

The present case involves only the banderole tax which provides for different rates for spirits made from marc, spirits made from wine and spirits made from grain or sugar-cane. By Article 6 of Decree No 745 of 26 October 1970 on special measures for stimulation of the economy (*Gazzetta Ufficiale della Repubblica Italiana* [Official Journal of the Italian Republic] No 272 of 26 October 1970, p. 7193), which became Law No 1043 of 18 December 1970 (*Gazzetta Ufficiale della Repubblica Italiana* No 323 of 23 December 1970, p. 8543), the banderole tax on spirits made from grain and sugar-cane, with the exception of gin, was considerably increased, whilst the rates of tax on other spirits, in particular those made from wine and marc, remained the same. For details of the rates of tax now applicable reference should be made to the table contained in the report for the hearing. It is clear from that table that Lit. 20 are payable on a one-litre bottle of spirits made from marc, Lit. 60 on a bottle of wine-based spirits and Lit. 420 on a bottle of spirits made from grain and sugar-cane, which corresponds to a ratio of 1:3:21 in the sequence of the above-mentioned products.

The Commission informed the Italian Government as early as 1974 of its objections to those rules, which impose a higher tax on the main imported spirits

¹ — Translated from the German.

made from grain and sugar-cane, such as whisky and rum, than on the corresponding national products made from wine, marc and fruit. In its reply, the Italian Government pointed out *inter alia* that Italy also has a considerable production of spirits made from grain and sugar-cane, that the statistics show a faster increase in the consumption of imported spirits made from grain and sugar-cane than in spirits which are manufactured from wine and marc, and finally that the problems of different taxation must be solved within the context of the harmonization of taxes.

As a result, the Commission initiated under Article 169 of the EEC Treaty by letter of 11 June 1976 a formal procedure; in that letter it complained that the Italian Government had infringed either the first paragraph of Article 95 of the EEC Treaty or the second paragraph of that article by the tax in question. In its reply of 28 July 1976 the Italian Government pointed out on the one hand that the spirits in question were not similar within the meaning of Article 95 of the EEC Treaty, that the Italian products were taxed just like the imported products and that the other national products were not protected. In answer to this the Commission delivered to the Italian Government by letter of 23 January 1978 a reasoned opinion under Article 169 of the EEC Treaty in which it found that there had been an infringement of Article 95 of the EEC Treaty and requested that that infringement should be put to an end within a period of 15 days. Since the Permanent Representation for Italy stated in a letter of 20 April 1978 that it saw no reason to abandon the present tax practice, the Commission lodged an application received at the Court of Justice on 7 August 1978 claiming that the Court should declare that the Italian

Government had failed to fulfil its obligations under Article 95 of the EEC Treaty by imposing from 26 October 1970 a different and higher tax (national tax *banderole*) on imported spirits, and that it should order the Italian Republic to pay the costs.

I adopt the following viewpoint with regard to this application:

I — The Italian Government considers that the application is *inadmissible* for two reasons.

It claims first of all that it is impossible to divide the examination of the general taxation imposed on spirits into individual complaints which are only directed against specific taxes. This is also stated in the case-law of the Court of Justice which made it clear in Case 28/67 (*Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn*, judgment of 3 April 1968 [1968] ECR 143) that by the expression internal taxation, Article 95 of the EEC Treaty refers to *all* taxation which is actually imposed on the domestic product at all stages of its manufacture and marketing. As the Commission has however itself confirmed, the different taxation of spirits by means of tax *banderoles* forms only *one* aspect of the tax discrimination with which the Italian Republic is reproached. The appraisal of the tax burden imposed on comparable products must be considered in a general context; in this connexion it is also necessary to take into account the tax burdens which are *only* imposed on a national product and which are disregarded if only one

component of the general taxation on imported products is examined.

It is necessary to observe as regards this objection that having regard to the case-law of the Court of Justice on Article 95 of the EEC Treaty it is certainly necessary to agree with the Italian Government that there is only an infringement of Article 95 if the result of a "specific comparison of the taxation" is that imported products are taxed at a higher rate than similar domestic products. This is, however, as the Commission also points out, a question relating to the substance of the application which cannot exclude its admissibility. Moreover, this much should only be observed in addition on this point, the Italian Government has not stated conclusively either in the preliminary procedure which must be carried out under Article 169 of the EEC Treaty or in these proceedings that the higher taxation imposed on spirits made from grain and sugar-cane by means of tax banderoles is compensated for by other taxes which impose a heavier tax burden on spirits made from wine or marc.

Nor can I agree with the second objection of the Italian Government that the application is inadmissible because on the one hand the plaintiff does not state clearly enough whether the application is based on the first or on the second paragraph of the Article 95 of the EEC Treaty and because on the other the plaintiff's submissions with regard to the protectionist effect of the tax required under the second paragraph are not sufficiently substantiated. As I have already stated in my opinion in Case 168/78, the paragraphs in question constitute two different prohibitions which differ with regard to their factual requirements and must therefore be applied alternatively. This is also stated

in the case-law of the Court of Justice, for example when the Court of Justice explains in Case 27/67 (*Fink-Frucht GmbH v Hauptzollamt München-Landsberger Straße*, judgment of 4 April 1968 [1968] ECR 223) that in addition to the prohibition contained in the first paragraph of Article 95, the second paragraph of the same article forbids the imposition on imported products of any form of taxation of such a nature as to afford indirect protection to other products. Such protection would occur in particular if internal taxation were to impose a heavier burden on an imported product than on a domestic product with which the imported product is, by reason of one or more economic uses to which it may be put, in competition, even though the condition of similarity for the purposes of the first paragraph of Article 95 is not fulfilled. It is clear from this that the second paragraph of Article 95 supplements the first paragraph under the above-mentioned conditions. The Commission must also be understood to mean this when it states that either the first paragraph or, in the alternative, the second paragraph of Article 95 is infringed by the different banderole tax. Whether the higher taxation on imported spirits made from grain and sugar-cane is however of such a nature as to afford indirect protection to the domestic products made from wine or marc is also a question relating to the substance of the case and cannot exclude the admissibility of the application.

II — In *support* of the application the Commission claims that the Italian Government is in breach of the first paragraph of Article 95 of the EEC Treaty by imposing on spirits made from grain, in respect of which there is virtually no domestic production, internal taxation in excess of that imposed on similar domestic products made from wine or marc. As may be deduced from the case-law of the Court

of Justice, spirits must be considered regardless of their raw material as similar products within the meaning of the above-mentioned provision since they are classified under the same tariff heading, tariff heading 22.09 C of the Common Customs Tariff, and have similar characteristics and meet the same needs from the point of view of consumers.

In contrast to this the Italian Government objects that the tax banderole price of spirit made from grain and sugar-cane is the same for both imported and Italian products. In addition, in contrast to the plaintiff's view, 19 000 hectolitres of whisky and rum were manufactured in Italy by blending which, when bottled, are subject to the same taxation on sale as the corresponding imported beverages. The objective of the provision contained in Article 95, which must be regarded in this connexion as a supplement to the prohibition on customs duties and charges having equivalent effect, is however to ensure the neutrality as regards competition of the same products, without encroaching upon the jurisdiction of the Member States in tax matters. For this reason the Member States must be free to treat domestic products differently even if they should be similar. Only the Council may approximate the excise duties and other indirect taxation, if necessary, by the harmonization of taxation by means of directives in accordance with Articles 99 and 100 of the EEC Treaty and not by means of a broad interpretation of Article 95 which on the one hand can only be done with regard to specific cases and is in addition likely to increase the existing disequilibria. Regardless of these general questions on the scope and importance of Article 95 it is necessary

however in any case to bear in mind that spirits made from grain and those made from wine or marc cannot be regarded as similar products within the meaning of Article 95. They differ by their raw materials, manufacturing processes, characteristics and alcohol composition. Consequently, the choice of consumers is also determined by the different flavour of the beverages, their supposed quality, different drinking habits and health considerations. Only subsidiary importance is attached to the classification in the Common Customs Tariff from which moreover it is also clear that the products in question are different.

As these arguments are in their essentials identical to the statements of the parties in the procedure brought by the Commission against the French Republic for a declaration that that Member State had failed to fulfil its obligations under the Treaty (Case 168/78), which is analogous in this respect, I can be brief in the legal appraisal of them. In the above-mentioned proceedings I have already pointed out that the Treaty establishing the European Economic Community leaves the jurisdiction of the Member States in tax matters in principle unaffected with the result that they are at liberty to introduce the system of taxation which in their view is best suited to individual products. If as a result of different taxation by the individual Member State distortions of competition occur which jeopardize the establishment of conditions similar to those on the internal market Article 99 provides for the possibility of harmonizing *inter alia* excise duties and other indirect taxation. However it is necessary to distinguish between this and the case in which the establishment of conditions similar to those on the internal market in economic exchange between the Member States is

hindered by different *national* taxation. In this case Article 95 restricts the jurisdiction of the Member States in tax matters by providing that the national system of taxation must not lead to the imposition of taxation on imported products in excess of that imposed on similar domestic products. An infringement of the first paragraph of Article 95 of the EEC Treaty accordingly then occurs as soon as a product imported from other Member States is subject to higher taxation in relation to *any* domestic product.

It is therefore an infringement of the first paragraph of Article 95 of the EEC Treaty if the imported spirits made from grain are products similar to the domestic spirits made from wine or marc and are subject to higher internal taxation than the latter. Since it is likewise not important in this connexion whether other similar or even identical domestic products are subject to higher taxation, we do not need to go further into the question whether the spirits manufactured in Italy from grain and sugar-cane must be regarded as domestic products either. Owing to the remaining jurisdiction in tax matters, the Italian Government is at liberty to impose higher taxation on those products than on other similar domestic products for reasons not appertaining to tax — the Italian Government mentions here a political and economic objective. Such an objective not appertaining to tax should however not be pursued in the taxation of products from other Member States which must be regarded as similar to domestic products.

Nor is it possible to deduce anything else in opposition to the submissions of the Italian Government from the judgment of the Court of Justice in Case 148/77

(*H. Hansen Jun. & O. C. Balle GmbH v Hauptzollamt Flensburg*, judgment of 10 October 1978 [1978] ECR 1787). In this judgment the Court of Justice holds that at the present stage of its development, 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 for legitimate economic or social purposes. If such tax advantages are granted to certain types of spirits they must however also be granted to imported Community spirits which fulfil the same conditions, taking into account the criteria which underlie the first and second paragraphs of Article 95.

I have already explained in detail in my opinion in Case 168/78, to which reference should be made on this point too, that spirits of all kinds, regardless of the raw material which forms the basis of the distillation, must be regarded as similar products within the meaning of the first paragraph of Article 95 having regard both to the formal and to the material criteria mentioned by the Court of Justice. It should only be observed in addition that the great increase in the consumption of grain-based spirits as compared with the consumption of spirits made from wine or marc does not, as the Italian Government considers, constitute evidence that the products in question are different since such an increase may have many quite different causes.

Since therefore the imported spirits made from grain are subject to higher taxation in the form of tax banderoles than similar domestic products made from wine and marc and since the Italian Government was unable to produce evidence that the higher taxation is compensated for by another tax, it is

necessary, finally, to state that the Italian Republic has been in breach of the first paragraph of Article 95 of the Treaty on account of the different taxation of spirits. As the Commission's application

based on the first paragraph of Article 95 of the EEC Treaty has already proved to be well founded it is no longer necessary to deal with the requirements of the second paragraph of that provision.

I therefore conclude that the Court of Justice should declare that the Italian Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty by imposing from 26 October 1970 on imported spirits in the form of a national tax *banderole* different taxation which is higher than that imposed on similar domestic products. In addition the Court should order the Italian Republic to pay the costs.