OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 30 SEPTEMBER 1969[1]

Mr President,
Members of the Court,

In the case to be dealt with today you are called upon to declare whether or not there has been an infringement of the Treaty on the part of the Italian Republic. For this purpose the relevant facts are as follows.

During its examination of the Italian tax regulations in force relating to alcohol and wine the Commission came to the conclusion that in various circumstances imported products bear a higher tax than comparable national products or that only imported products are taxed. The only taxes among the cases examined by the Commission which relate to this dispute are the tax on manufacture and the State tax, which are levied on potable spirits and liqueurs. According to the Italian customs tariff, Section IV, Chapter 22, Heading 22.09, Note 3, p. 91 read in conjunction with Decree-Law No 836 of 16 September 1955 which became Law No 1037 of 15 November 1955 the said taxes are calculated in the case of imported products on the basis of a minimum alcoholic content of 70% whereas domestic products are always taxed according to their actual alcoholic content (which basis of taxation is only of relevance in the case of imported products if the alcoholic content exceeds 70% when it is taxed at a correspondingly higher amount). As the actual alcoholic content of most potable spirits is much lower than 70%, imported products are taxed at a higher rate than domestic products. The Commission takes the view that so far as imports from other Member States are concerned, this amounts to an infringement of Article 95(1) of the EEC Treaty.

Accordingly, it sent a letter dated 4 November 1965 to the Italian Government and requested it to submit its observations and to remove the discrimination. It received a reply in a letter dated 12 February 1966 from Italy's Permanent Representative stating that no such discrimination was admitted. Tax on potable spirits at a fixed uniform rate was a problem common to all Member States which could only be solved by a harmonization of the Member States' policy with regard to alcohol.

As the Commission did not consider this explanation to be satisfactory, it commenced by a letter dated 2 February 1967 the formal procedure under Article 169 of the EEC Treaty. The observations to be submitted by the Italian Government under this procedure on the Commission's reasoned opinion followed in a letter of 15 April 1967 from Italy's Permanent Representative. He repeated that the question of taxing alcohol must be treated as a Community problem. In particular it was necessary to restructure the monopolies in alcohol which existed in other Member States.

The Commission was not however satisfied with this argument. On 7 May 1968 it therefore delivered to the Italian Government its reasoned opinion in accordance with the procedure under Article 169 of the EEC Treaty in which it stated that there had been an infringement of Article 95 of the EEC Treaty and called upon the Italian Government to remedy it. Italy's Permanent Representative replied in a letter of 23 July 1968 that the Italian Government could not comply with this demand. It took the view that the provisions to which objection was taken were necessary for the protection of important sectors of agriculture. In particular they enable surplus wine and wines unfit for consumption to be sold to distilleries at reasonable prices. In particular without a tax on imports potable spirits coming on to the Italian

1 — Translated from the German.

market would be too cheap and would make it more difficult to market the surplus wine production.

As the Commission was still not convinced that the reasons put forward by the Italian Government to justify the provisions were valid, it finally decided to institute proceedings before the Court. In its application lodged at the Court on 31 March 1969 it consequently asked for a declaration 'that the Italian Republic by applying a system of taxation which imposes a higher tax burden on potable spirits imported from other Member States than that on the corresponding national products has infringed Article 95 of the Treaty establishing the European Economic Community'.

The Italian Government on the other hand persists in its view that the complaint is unjust. It therefore asks that the application be dismissed.

Legal consideration

With regard to the legal consideration of the facts of this case it must first of all be borne in mind that the Italian Republic does not deny that a higher tax is levied on imported potable spirits as a result of calculating the alcoholic content on the basis of fixed percentage of 70% in those cases where this alcoholic content is not attained. The Commission has shown how this comes about in its application by citing as an example potable spirits distilled from cereals which in general have an alcoholic content of 40%. Let me refer you to this example.

It must moreover be stressed that the Italian Government by departing from its original arguments in justification of the situation described now apparently no longer makes any reference to the situation existing in other Member States, in particular to the existence of alcohol monopolies in those States. As the Commission has shown, this would not in fact help the defendant's case. In the first place, the Commission does in fact take action—this submission was not challenged—if necessary by means of the procedure under Article 169 of the EEC Treaty in the same way against all Member States in which similar tax discrimination exists. On the other hand it must be said that even the failure to take such action, in particular the failure to attack existing monopolies in alcohol effectively, would not entitle the Italian Republic not to fulfil its obligations under the Treaty and to attempt to obtain compensation by taking unilateral national measures which infringe the Treaty. The case-law of the Court supports this view and in particular, on the question of the failure by other Member States to fulfil their obligations and also on the question of the failure by the Council and the Commission to apply the provisions of the Treaty (I refer to Joined Cases 90 and 91/63 [1964] E.C.R. 631 and 632 and Cases 52 and 55/65 [1966] E.C.R. 172). Moreover it must be noted (as was done in Joined Cases 90 and 91/63) that the Italian tax regulations apparently existed *before the entry into force* of the Treaty, so that the conduct of the Community institutions was not responsible for their introduction, or in other words that they cannot be explained as being a reaction to infringements of the Treaty by other Member States.

In fact the Italian Government attempts to justify the contested regulations essentially by referring to Article 38(2) of the EEC Treaty. According to this, Articles 39 to 46 of the Treaty contain special provisions for agricultural products which exclude the application of the provisions for the establishment of the Common Market and therefore also permit exceptions to the principle laid down in Article 95. The Italian Government relies on the existence of the national organization of the market in vine products. This comprises—and this is one of its essential features—measures which are intended to enable surplus wine production to be sold at favour-

able prices to distilleries, and therefore to encourage the processing of wine into alcohol. The import of cheap alcohol and products having an alcohol content could impair the efficacy of the said measures. Looked at in this light imposing a higher tax burden on such products is justified even where they come from other Member States.

The first arguments on these lines are found in the defence. They are however put forward in a very summary form. It comes therefore as no surprise that the Commission's only reaction was to advance some seemingly formal arguments. In particular it called attention to the fact that its departments had in cooperation with government experts already drawn up in 1961 a list of agricultural products for which it could be assumed that there was a national market organization or a state monopoly. However—so far as Italy was concerned—there was no reference in the list to a market organization either for wine or alcohol. In addition the Commission refers to the fact that by virtue of the clause of Article 226 authorizing protective measures to be taken, it granted by a Decision of 18 May 1961 an authorization to Italy exempting it, as regards wine imports, from the application of Article 33 of the EEC Treaty and from Article 7 of the Decision of 12 May 1960 for accelerating the attainment of the objects of the Treaty, and by the Decision of 13 December 1961 extended this exemption. This would not have been necessary if it had been possible to acknowledge that a market organization existed. It appears to be questionable whether these arguments of the Commission are sufficient. In this connexion I am not thinking of the Decision of the Council of 4 April 1962 invoked by the Italian Government in which the opening of a global quota of wine by Italy was fixed on the basis of Article 43 of the Treaty (that is to say, on the basis of the provision under which decisions for the implementation of measures specified in the Title relating to agriculture can be adopted), for—as the Commission has stated—this was obviously taken in view of the fact that Regulation No 24 on the progressive establishment of a common organization of the market in wine entered into force on the same day. What merits greater attention is rather the fact that the Italian Government had already taken the view in 1960 when it lodged its request that it should be exempted from the application of Article 33, that there was in fact a market organization in vine products and that in its letter to the Commission of 3 August 1960 it simply stated that in order to avoid disturbances on the market it was not opposed to the application of Article 226 if the Commission should run into difficulties of definition with reference to the concept of 'market organization'. Finally it may be worth noting that in its rejoinder the Italian Government made very detailed statements to prove the existence of a national market organization in vine products.

There thus does in fact appear to be ground to put aside the formal arguments of the Commission, and to consider the question of the criteria in Italy of a national market organization in vine products. Anyone doing this is indeed faced with a really difficult and complex concept for which an authoritative definition can nowhere be found in the Treaty and what is more it is not certain whether the Member States gave it the same meaning before the entry into force of the Treaty.

With regard first of all to the provisions of the Treaty, which mention the replacement of national market organizations by a common market organization, it can be inferred from them that a market organization provides 'safeguards for the employment and standard of living of the producers concerned' (Article 43) and must guarantee a market for the products concerned (Article 45). As regards the

common market organizations, which also come into consideration as models for guidance, the objectives of Article 39 play an important part (which assist *inter alia* in ensuring a fair standard of living for the agricultural community and in stabilizing markets). In order to attain these objectives provision can be made under Article 40, for example, for regulation of prices, aid for the production and marketing of the various products, storage and carry-over arrangements and common machinery for stabilizing imports or exports. This is obviously the basis of the definition which the Commission gave on 29 November 1960 in answer to a parliamentary question and which is published in the Official Journal of 1960 on page 1533. According to this definition by the expression market organization is to be understood 'the whole of the provisions relating to the sale of a specific agricultural product in a State ... whereby the employment and standard of living of the producers in question are guaranteed'. These conditions, the Commission's definition goes on to say, 'are only fulfilled if the marketing of the domestic production and the stability of the price levels are protected and secured not only against the effects of imports but also against effects of fluctuations of domestic production or demand'. The Commission offered a similar kind of definition under Article 169 in which the concept of a market organization was also disputed (Case 18/61). In that case it described as typical measures for the organization of a market, preventing certain quantities of goods from reaching the market (for example by a prohibition on imports), support-buying, storage of products, levies etc. In the opinion of the Federal Republic of Germany against which it brought proceedings in that case the characteristics of a market organization are in fact compensation for market fluctuations and also the objectives pursued by means of a body of rules (for example the maintenance of national production, the provision of regular supplies) and that the mere existence of rules relating to imports can be sufficient to establish such an organization, although the Commission however disputed this view. In so far as the concept 'market organization' has already been considered in a general way in the case-law of the Court (Cases 90 and 91/63 [1964] E.C.R. 634), it was defined—in relatively vague terms—as a combination of legal organizations and measures on the basis of which it is sought to control and regulate the market.

If after these attempts to find a definition and after these suggestions the question is asked what rules the Italian Government cites for the purpose of alleging the existence of a national market organization, the following in particular must be borne in mind. In the case of wine reference is made to the measures for encouraging quality, the grant of subsidies to cooperatives so that products can be dealt with on a collective basis and that the period during which they can be marketed can be extended, the ban on the importation of *vins ordinaires*, preferential tax treatment to encourage the distilling and consumption of wine, the obligation to distil certain wine and also the obligation only to use spirits distilled from wine for the processing of certain products. In the case of alcohol reference is made to special duties on synthetic alcohol and alcohol obtained from certain raw materials. They are intended to guarantee the marketing of untaxed alcohol at satisfactory prices. There is a similar system for alcohol which has not been denatured. In addition there is tax relief for raw materials whose processing is intended to be encouraged.

There are in fact grounds for the view that these rules are to be regarded as a body of provisions for the purpose of controlling and regulating the mar-

ket. A national market organization not only consists of measures, which are intended to guarantee protection against imports (a fact which the Commission with reference to the prohibition on imports of *vins ordinaires* laid special emphasis) but also of an attempt to exercise control over market conditions with the object of stabilizing the market, guaranteeing sales and satisfactory prices. It is of particular interest that the Commission's proposal for a regulation of the Council concerning supplemental provisions for a common market in vine products (of 24 June 1967) provides to some extent for similar measures, namely the purchase of alcohol, obtained from the distilling of wine and the grant of bonuses for the production of potable spirits from wine.

Nevertheless it is the Commission's view that no evidence has been adduced to show that the market organization which the Italian Government maintains has been established does in fact exist. In this connexion there is certainly no importance to be attached to the fact—which is certainly not decisive—that there is no government body which has special jurisdiction to administer the market organization. But the Commission notes the absence of regulations for minimum prices, it emphasizes that there are no guaranteed prices for the current season, a decision having to be made in fact at the end of the marketing season on the measures which have to be taken, and further it takes the view that the measures for encouraging quality and granting subsidies for cooperatives mentioned by the Italian Government are not typical regulations for establishing a market organization. Having regard to the situation described by the Italian Government it seems to me to be legitimate to ask whether the Commission when making its observations did not proceed on the basis of a concept of a market organization which is too narrow. In any event the view can be taken that its objections are not completely convincing. It would perhaps have been different if the Commission had dealt with the problem more thoroughly and not limited itself to some observations mostly of a negative character.

However in the last analysis the conclusion has to be reached that it is necessary to go into the question of market organization in greater detail in order to decide this case. The following considerations put forward principally by the Commission are conclusive for the solution of the problem. The Italian Government maintains that a market organization for *wine* and *alcohol* exists, whereas the Commission criticizes the measures relating to imports of potable spirits. The Treaty itself only allows exceptions to its general rules, even in the case of agricultural market organizations, in respect of agricultural products in Annex II to the Treaty. Potable spirits are not listed there. Like the Commission I cannot accept that this is unimportant and cannot agree with the Italian Government when it says that it is unimportant because it is impossible to distinguish between potable spirits and alcohol and because in addition the measures applied by it are only intended for alcohol contained in potable spirits. In fact, although the production processes and the basic materials used are the same, it is not only Italian law which distinguishes between potable spirits and alcohol. The distinction is also found (with an exact definition for potable spirits with reference to the basic materials used and the special features of the end product) in the Brussels Nomenclature and in particular the distinction was made absolutely clear when the list in Annex II was supplemented in accordance with Article 38(3) of the Treaty. When adding to the list a restrictive attitude was deliberately adopted in accordance with the principle that exceptions to the general rules of the Treaty must be

kept within the narrowest possible limits. This explains why, notwithstanding the Italian Government's request for the inclusion of potable spirits in Annex II, the Council in Regulation No 7(a) of 18 December 1959 (Official Journal 1961 p. 72) only included in the list in Annex II as an agricultural product 'ethyl alcohol or neutral spirits whether or not denatured, of any strength, obtained from agricultural products listed in Annex II of the Treaty' and on the other hand expressly excluded 'liqueurs and other spirituous beverages and compound alcoholic preparations (known as "concentrated extracts") for the manufacture of beverages'. This is without any doubt a policy decision in the field of economics which is a determining factor for us in this case, and which cannot be undermined by allowing special rules for potable spirits on the ground that they are only intended to apply to the alcoholic content of potable spirits.

In spite of the clear distinction which the Treaty intends to draw between alcohol and potable spirits the question can certainly be asked whether a market organization for specific products can also include measures relating to other processed products closely connected with them, in which only agricultural products are contained. In answering this question it would be necessary to consider another definition of the concept of a market organization, which the Commission gave in a letter of 14 April 1961 to the Chairman of the Commitee on Agriculture of the European Parliament, the last sentence of which reads as follows: 'L'application des mesures à la frontière dôit etre liée à celles prises sur le marché interieur, soit du produit en question, soit d'un produit dont celui-ci *dépend étroitement*'. ('The application of measures at the frontier must be linked to those taken on the domestic market, either relating to the product in question or to a product upon which it *closely depends*.') Before advocating the application of this formula to a specific set of facts it must however be borne in mind that in its case-law the Court has emphatically stressed the need to interpret narrowly the special provisions for agriculture. I refer in this connexion to Joined Cases 2 and 3/62 and in particular to those parts of the judgment which are on pages 431 and 432 of [1962] E.C.R. According to them exceptions in favour of certain agricultural products cannot simply be extended to products which are manufactured by the processing of the very products given preferential treatment. Consequently strict proof is certainly required for the proposition that exceptions have no effect unless they are extended to cover such processed products. However no such proof has been given in this case. In my opinion the Italian Government has not shown that the market organization for wine and alcohol which exists or is alleged to exist in Italy is ineffective or would be seriously impaired if the protective measures criticized by the Commission against imported potable spirits were removed. It must nevertheless be borne in mind that the potable spirits and liqueurs taxed at a higher rate only compete with part of the products properly covered by the market organization for alcohol within the meaning of the Treaty. Further, with regard to any disturbance of the protected economic sector which may be apprehended, reference would have to be made in this case, as was done in Cases 2 and 3/62, to the Community protective procedures provided for in the Treaty and in special implementing provisions.

Therefore I come to the conclusion that in this case, whether a market organization for wine and alcohol exists in Italy or not, the special rules for

agriculture and in particular the provisions relating to market organization cannot justify the retention with regard to imported potable spirits of special rules derogating from the principles laid down in Article 95.

The Commission's application is therefore well founded, that is to say, the Court must declare that the Italian Republic, by applying a system of taxation under which a higher tax burden is imposed on potable spirits imported from other Member States than that on corresponding national products has infringed Article 95 of the Treaty establishing the European Economic Community. If the Court makes such a declaration it must also allow the Commission's claim that the costs be borne by the Italian Republic.