OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 6 November 1990 *

Mr President,
Members of the Court,

1. The present actions for failure to fulfil obligations, which have been brought against the Kingdom of Spain, the Hellenic Republic and the Italian Republic, seek a declaration from the Court that those Member States have failed to fulfil the obligations imposed on them by Article 95 of the Treaty through their omission to adopt the measures necessary to enable persons not subject to value added tax (hereinafter referred to as VAT), who import goods on which that tax has already been charged in other Member States, to deduct the residual portion of VAT paid in the Member State of exportation, in so far as that amount is still incorporated in the value of the goods at the time of exportation.

2. Before I go on to examine whether the States in question have indeed failed to fulfil their obligations, I must for a moment consider the arguments put forward by the Kingdom of Spain which expressly requests the Court to modify the legal principles on which it has decided past case-law [1] in the matter and in particular to modify the solution presented in its judgment in *Gaston Schul I.*

3. I do not at this point intend to describe in detail the problem which the Court resolved in that case. Suffice it to recall that the Court there ruled that the imposition of VAT on an item when it is imported by a private individual who is not entitled to remission in the Member State of exportation must make allowance for the residual portion of VAT still incorporated in the value of the item when it is imported, if the supply of similar items within the territory of the Member State of importation is not subject to VAT. Let me also point out that the Court there held that Article 2 of the Sixth Directive, [2] which lays down the principle that imported goods shall be subject to VAT, does not infringe Article 95, provided that it is interpreted in the manner advocated by the Court with regard to the need to deduct residual VAT.

4. According to the Kingdom of Spain, that principle was of an exceptional and temporary nature and the prospective removal of fiscal frontiers should now give the Court cause to modify, if not to reconsider, that solution, which gives rise to serious practical difficulties. More particularly, it benefits States of exportation, which retain the VAT originally levied, to the detriment of States of importation, whose revenue is unfairly reduced. In addition, such a system is anything but satisfactory, whereas other solutions advocated by the Commission in its proposals for a directive or in its White Paper, or by the Council, which the latter, however, has not yet adopted, provide a satisfactory solution to the problem of avoiding double impo-

* Original language: French.

1 — Judgment in Case 15/81 *Gaston Schul* v *Inspecteur der Invoerrechten en Accijnzen (Gaston Schul I)* [1982] ECR 1409; judgment in Case 47/84 *Staatssecretaris van Financiën* v *Gaston Schul (Gaston Schul II)* [1985] ECR 1491; judgment in Case 39/85 *Bergeres-Becque* v *Service interrégional des douanes* [1986] ECR 259 and judgment in Case 299/86 *Drexl* [1988] ECR 1213.

2 — Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (OJ L 145, 1977, p. 1).

sition while at the same time distributing VAT revenue on an equitable basis between Member States. Such is the case with schemes which provide either for full remission on exportation and imposition when the goods in question are imported, or for one single VAT charge (in the State of exportation or in that of consumption) with subsequent payment of compensation between the Member States concerned. In contrast, the system which the Commission proposes would seriously penalize those Member States of the Community with the lowest living standards because the influx of second-hand goods is most marked in such States.

5. I would not deny that the arguments which the Kingdom of Spain has presented to the Court are of interest; however, I do not believe that the Court is the appropriate forum in which to discuss such matters. What we have heard are arguments which are primarily of a political order and which illustrate the need for fiscal harmonization in this area, rather than legal arguments which might lead the Court to a reappraisal of principles laid down in its earlier case-law.

6. Furthermore, those principles have already refuted in advance the main objections submitted to the Court in the present cases. Thus, while certain Member States maintained, according to the judgment in *Gaston Schul I*, that

'the establishment of a system ensuring the complete neutrality of internal taxation with regard to intra-Community trade could take place only by strict application of the principle of taxation in the Member State of destination and that would mean full remission of tax on all products at the time of exportation. It is for the political institutions of the Community to adopt such a solution since it involves a political choice', [3]

the Court ruled in unequivocal terms that:

'although the establishment of a system of complete neutrality in the field of competition involving full remission of tax on exportation is indeed a matter for the Community legislature, *so long as such a system is not established Article 95 of the Treaty prevents* an importing Member State from applying its system of value added tax to imported products in a manner contrary to the principles embodied in that article'. [4]

7. In other words, the absence of VAT harmonization in this area cannot effectively be relied on in order to render nugatory the rights conferred on individuals by Article 95 of the Treaty. Moreover, this reasoning suffices to dispel the arguments in which Greece and Italy relied on the existence of a proposal for a directive, just as it also suffices to undermine the reasoning based on equity between Member States which Spain used in its attempts to persuade the Court in the present cases not to confirm the principle that residual VAT is deductible. Budgetary difficulties with which States may on occasions have to contend cannot have any bearing whatever on their compliance with the absolute and unconditional prohibition against taxing imported goods more heavily than domestic goods.

8. Finally, I shall outline very briefly the argument put forward by the Kingdom of

3 — Case 15/81, cited above, at paragraph 37.

4 — Ibid., paragraph 38, my emphasis.

Spain to the effect that the Commission failed to take account of other indirect charges levied on goods and that it has thereby given rise to distortions in competition to the detriment of those States which have not introduced such charges. The latter might for that reason be persuaded to adopt those charges, and this would push back even further the prospective removal of fiscal frontiers. In answer to this line of argument, the Commission points out, quite correctly in my opinion, that the situation described by the defendant State could not under any circumstances justify the infringement of Article 95 which would arise under a system of discriminatory taxation. Equally cogent, in my view, are the secondary observations of the Commission to the effect that Member States are entitled, under Community law as it stands at present, to set up specific systems of taxation other than VAT, provided that such charges meet the requirements set out in Article 95 and do not discriminate against imported products. Finally, it should be noted that the removal of barriers caused by differences between taxation systems, even those which are not discriminatory, comes under Article 99, rather than under Article 95 which seeks to eliminate directly and immediately those fiscal provisions which are discriminatory and protective.

9. Consequently, I can do no more than suggest that the Court should reject the contention of the Spanish Government and reaffirm the solution in *Gaston Schul I* that Member States, if they wish to impose VAT on imported goods, must first deduct the residual portion of that tax still contained in the value of the goods at the time of their importation.

10. I would now like to consider the extent to which the defendant Member States have failed to fulfil their obligations under Article 95, as interpreted above.

11. There can be no doubt that Member States are under an obligation to ensure that private individuals shall benefit from a deduction in the amount of residual VAT incorporated in the value of the product. In other words, any failure to apply Article 95 as interpreted in the case-law of the Court undoubtedly constitutes a failure to fulfil obligations. However, the Commission's action is not directed against the actual failure to apply that Article — a failure which in any case is not really disputed by Spain, Greece or, as became clear from the hearing, by Italy — but rather against the absence of measures designed to ensure that national legislation complies with Article 95.

12. I would first point out that, while the directly applicable provisions of the Treaty do not make it necessary to adopt 'national implementing provisions' [5] and while there is no doubt that private individuals may rely on Article 95 before courts and tribunals, those facts relate only to a 'minimum guarantee' which is not adequate in itself to ensure a full and comprehensive application of the Treaty. [6]

13. Moreover, according to the decided case-law of the Court, [7]

'the principles of legal certainty and the protection of individuals require, in areas covered by Community law, that the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations

5 — Judgment in Case 168/85 *Commission* v *Italy* [1986] ECR 2945, at paragraph 11.

6 — Ibid. and judgment in Case 72/85 *Commission* v *Netherlands* [1986] ECR 1219.

7 — Judgment in Case 257/86 *Commission* v *Italy* [1988] ECR 3249; see also the judgment in Case 143/83 *Commission* v *Denmark* [1985] ECR 427.

and enable national courts to ensure that those rights and obligations are observed'. [8]

14. If we apply those principles to the cases in hand, we shall find that the absence of suitable provisions in national law designed to ensure that the residual portion of VAT can be deducted at the time of importation is, to say the very least, incompatible with the requirements of clarity, precision and certainty which have been laid down by the Court. The failure to adopt adequately publicized general measures has two consequences. In the first place, one can only agree with the Commission's view that public servants in the Member States will not implement the principles relating to the deduction of residual VAT unless they have been instructed to do so by their superiors. Secondly, individuals will find themselves in a situation in which the only available text will be that of the national measure providing for taxation at the time of importation, a measure which will have nothing to say on the subject of the deduction of residual VAT, whereas it is precisely such a deduction which guarantees that national legislation complies with Community law. In such circumstances, individuals will be completely uncertain as to whether they may invoke Community law. In that regard, I must also emphasize that the argument based on heightened awareness of Community law by individuals in order to justify rules of national law which infringe directly applicable provisions of the Treaty has already been rejected by the Court. [9]

15. I would make one final comment: the Commission, which had initially called in question the absence of laws, regulations or administrative provisions, gives to understand that it will in future be satisfied with administrative instructions which have been sufficiently publicized. Is it possible to reconcile this view with the principles laid down in the Court's own case-law that a national legislative provision which infringes Community law cannot be revoked merely by administrative instructions, but rather requires a similarly mandatory text? If the Court should take the view in the present cases that this requirement should be retained, it would, however, not thereby be dismissing the action. In fact, the Court would then be recording the failure to fulfil obligations within the limits of the action brought by the Commission, while accepting that the Member States have in any case not adopted the necessary measures.

16. There is, however, reason to ask whether the situation in the present cases may not be distinguished from that in which national legislation actually conflicts with Community law. National legislation which provides for the imposition of VAT when goods are imported is not at variance with Community law; such legislation complies with Community law *provided that it can be interpreted in the manner required under Article 95*. What we are concerned with, therefore, is not to remove an infringement, but rather to specify, for certain situations, how VAT is to be calculated in respect of imported goods. It does not appear possible to treat the need to determine the interpretative details of a text, no matter how compelling such a need may be, in the same way as the need to revoke that text if it is at variance with Community law. In other words, the nature of the measures required to ensure respect for the correct application of Community law may vary in the light of the distinction between situations in which there is an infringement *stricto sensu* of Community law brought about by a legislative provision and situations where the infringement consists only in the fact that

8 — Case 257/86, cited above, at paragraph 12

9 — See Case 168/85 *Commission* v *Italy*, cited above

the provision has not been interpreted in a manner consistent with the Treaty.

17. In this case I would be inclined to take the view that an administrative instruction, if it receives the relevant publicity required to inform individuals, may in fact constitute an adequate way in which to guarantee the interpretation required under Community law. Such a solution may all the more readily be envisaged if we bear in mind the fact that circulars are the normal medium through which legislative texts are interpreted by administrative authorities, and a medium whose role is *de facto* of particular importance in matters of taxation.

18. For the above reasons, I would propose that the Court should grant the application brought by the Commission against the Kingdom of Spain, the Hellenic Republic and the Italian Republic and order those States to pay the costs.