OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 16 October 1986 *

Mr President,
Members of the Court,

A — 1. This case concerns the Italian tax on fresh and dried bananas and banana meal which was introduced by Law No 986 of 9 October 1964 with which the Court is already familiar as a result of the request for a preliminary ruling in Case 193/85.

2. The Commission considers that the charging of that tax is incompatible with the first paragraph of Article 95 of the EEC Treaty in so far as it affects products from French overseas departments (to which, according to the judgment in Case 148/77, [1] the first paragraph of Article 95 is applicable). It considers that at least the second paragraph of Article 95 has been infringed in so far as fruit of domestic origin is not specifically taxed. The application of the second paragraph of Article 95 does not depend on whether the domestic products which benefit by the tax are similar to the imported products: it is sufficient that they compete with them, even partially, indirectly or potentially. In a letter sent to the Italian Minister for Foreign Affairs in October 1983 the Commission stated that this was its assessment of the situation, and asked for observations.

3. The defendant did not contest the Commission's allegations but, by a telex message sent by the Italian Permanent Representation in December 1983, announced an amendment of the Italian tax system (with regard to taxes on bananas from French overseas departments and the ACP States). Since no other reaction was forthcoming and the Commission's reasoned opinion of December 1984 requesting the Italian Republic to adopt measures within one month of its notification drew no response, the Commission brought an action under Article 169 of the EEC Treaty on 13 June 1985.

4. In its application, the Commission asks the Court for a declaration that the Italian Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty by imposing and maintaining in force a consumer tax on fresh and dried bananas and on banana meal.

B — My comments are as follows

1. 5. The fundamental question raised by the request for a preliminary ruling in Case 193/85, to which I referred earlier, is whether the Italian tax on bananas is to be assessed in the light of Article 95 of the Treaty or is to be regarded as a charge having an effect equivalent to a customs duty. In the light of all the material facts and the relevant case-law I came to the conclusion that the tax was to be regarded as a charge having an effect equivalent to a customs duty. No reason to doubt that conclusion has emerged from this case, in which the oral proceedings took place on the same day as those in Case 193/85.

6. The consequence, in my view, is that the Commission cannot be granted the declaration which it is seeking. However, since it is not possible simply to declare that

* Translated from the German.

1 — Judgment of 10 October 1978 in Case 148/77 *H. Hansen jun. & O. C. Balle GmbH & Co.* v *Hauptzollamt Flensburg* [1978] ECR 1787.

the provisions on charges having an effect equivalent to customs duties — whose scope is different — have been infringed (since reference was made in the precontentious stage invariably and exclusively to a failure to fulfil obligations under Article 95, and the concept of 'charges having an effect equivalent to customs duties' was not even implicitly raised during the proceedings), I can only recommend that the Commission's action be dismissed on the ground that it misclassified the contested Italian tax.

2. 7. Nevertheless, in view of the awkward problems of demarcation arising with regard to internal taxation within the meaning of Article 95 and charges having an effect equivalent to customs duties, I am unwilling to let the matter rest here and shall also consider what the result will be if it is assumed that Article 95 of the EEC Treaty is relevant in a case of this kind.

8. *(a)* In two documents the *Commission* has once again set before the Court its grounds for considering that Article 95 is infringed where a tax is charged virtually exclusively on imported fruit (bananas) whilst fruit which is primarily of domestic origin remains untaxed. It considers that the first paragraph of Article 95 is applicable because bananas and other domestic fruit are to be regarded as 'similar' products on the basis of the definitions given in the Court's case-law. The Commission considers, however, that in any event the second paragraph of Article 95, which supplements the first paragraph of that provision, is applicable on the ground that the tax obviously tends to protect fruit of domestic origin.

9. In the course of the proceedings the *Italian Government* primarily gave assurances that the promised measures, which have already been drawn up, would soon be adopted. The law could not be amended more rapidly because the views of other interested ministries had to be taken into account and, in addition, other amendments have recently been proposed. Apart from that, the Italian Government merely stated, with regard to the first paragraph of Article 95, that the requirements laid down in the Court's case-law with regard to its application had not been satisfied. It argues that it is not in fact possible to regard bananas and local Italian fruit as similar, since their characteristics are very different and it must be acknowledged that bananas and other fruit do not fulfil comparable needs. The Italian Government refers by way of example to the higher water content of pears, which, unlike bananas, have thirst-quenching properties. It also points out that, on the Italian market at least, bananas are regarded as a fruit which is nutritious and high in energy for young children and are therefore used to supplement other fruit.

10. *(b)* It is appropriate first to consider the *first paragraph of Article 95,* which is worded as follows:

'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.'

According to the case-law of the Court, that provision covers products which 'have similar characteristics and meet the same needs from the point of view of consumers', an important indication in that regard being classification under the same heading of the Common Customs Tariff (judgment in Case 45/75 [2]). The Court has also emphasized in that connection (judgment in Case 170/78 [3]) that the first paragraph of Article 95 relates to 'broadly comparable' products and (in

2 — Judgment of 17 February 1976 in Case 45/75 *Rewe-Zentrale des Lebensmittel-Großhandels GmbH* v *Hauptzollamt Landau (Pfalz)* [1976] ECR 181, paragraph 12 at p. 194.

3 — Judgment of 27 February 1980 in Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417, paragraph 9 at p. 433.

the judgment in Case 216/81 [4]) that that provision must be interpreted widely and that the concept of 'similar products' must be interpreted with sufficient flexibility on the basis of their comparable use.

11. If one attempts on the basis of those criteria to answer the question whether the Italian consumer tax on bananas is caught by the first paragraph of Article 95, it is very difficult to make anything of the fact that bananas fall within heading No 08.01 B of the Common Customs Tariff whereas other kinds of fruit, which the Commission considers to be 'similar', fall under customs headings of their own (08.02: citrus fruit; 08.03: figs; 08.04: grapes; 08.06: apples, pears and quinces; 08.07: stone fruit, such as apricots, peaches and plums; 08.08: berries, such as strawberries). Indeed, since then the Court has made it clear that customs classification cannot provide conclusive evidence of similarity for the purposes of the first paragraph of Article 95 of the EEC Treaty (judgment in Case 169/78 [5]).

12. In any event, it must be admitted that it is not possible to accept without reservation that bananas and other fruit are broadly comparable products. As the Italian Government has shown, they do not have exactly the same characteristics and do not fulfil the same needs; on the contrary, some characteristics (flavour, water content) are markedly different.

13. *(c)* However, as regards the question whether the first paragraph of Article 95 is actually applicable, it is no more necessary to form a definitive view than it was in other cases (for instance, Case 168/78 [6]) in which that question also arose, for in this case, too, the complementary provision set out in the second paragraph of Article 95 is available for the purposes of assessment. That provision is considerably wider in scope and it should be possible to reach a decision on that basis without special difficulties. The second paragraph of Article 95 reads as follows:

'Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.'

14. *(aa)* It is clear from the case-law that that provision applies where different tax is charged on products which have sufficient characteristics in common to constitute at least in certain circumstances an alternative choice for consumers (*Commission* v *French Republic* [1980] ECR 347, paragraph 40 at pp. 369-370); it is sufficient for the imported product to be in competition with the protected domestic product in one or several economic uses, whereas flavour and consumer habits are not appropriate differentiating criteria (*Commission* v *French Republic*, cited above, paragraphs 6 and 37, which concerned spirits).

15. The judgment in *Commission* v *United Kingdom* [1980] ECR 417, paragraph 14 at p. 434, states equally broadly that it is sufficient that the products are in some

4 — Judgment of 15 July 1982 in Case 216/81 *Cogis (Compagnia Generale Interscambi)* v *Amministrazione delle Finanze dello Stato* [1982] ECR 2701, paragraph 7 at p. 2712.

5 — Judgment of 27 February 1980 in Case 169/78 *Commission* v *Italian Republic* [1980] ECR 385, paragraph 31 at p. 407.

6 — Judgment of 27 February 1980 in Case 168/78 *Commission* v *French Republic* [1980] ECR 347.

circumstances capable of meeting identical needs, so that it must be acknowledged that they are to some extent substitutable products (in the judgment in Case 171/78[7] it is stated that there must be at least partial or potential competition). Furthermore, in the judgment in Case 216/81 *Cogis* v *Amministrazione delle Finanze dello Stato*, cited above, paragraph 9 at p. 2713, it is stated that the second paragraph of Article 95 is designed to cover 'all forms of indirect protection through taxation in the case of products which, without being similar within the meaning of the first paragraph, are nevertheless in competition, even partially, indirectly or potentially'.

16. It is therefore hardly surprising that the second paragraph of Article 95 should have been applied where aquavit was taxed differently from spirits, whisky was taxed differently from cognac, spirits obtained from cereals and sugar cane were taxed differently from spirits obtained by distilling wine and from marc, and wine was taxed differently from beer.

17. *(bb)* To my mind there is no doubt (as I have already indicated) that that provision — provided that the tax on bananas is not regarded as a charge having an equivalent effect to a customs duty — also applies in the present case, which is characterized by the fact that a large tax is charged on bananas, which are mainly imported, whilst domestic fruit remains untaxed (during the oral procedure, the Commission clearly illustrated the impact on prices by reference to two types of Italian fruit). In fact it would be hard to deny — even a layman could confidently make this judgment — that if not all the characteristics of bananas and other fruit at least a number of them (which is sufficient affording to the case-law) are the same or similar and accordingly those products are largely comparable as regards their use, and in certain cases are substitutes for each other as far as the consumer is concerned.

18. It must also be borne in mind that according to the judgment in Case 168/78 *Commission* v *French Republic*, cited above, paragraph 41, a further material criterion is the protective nature of the contested tax system. In the judgment in Case 170/78 *Commission* v *United Kingdom*, cited above, paragraph 24, the Court found, by comparing the development of the tax systems in question, a protective trend. As regards the present case it is relevant in that connection that the substantial tax on bananas was introduced when the banana monopoly in Italy was abolished. The plaintiff in the main proceedings in Case 193/85 gave a significant quotation from a note dated 11 April 1972 from the Italian Permanent Representation concerning the banana monopoly to the effect that that monopoly was a market organization designed to benefit domestic fruit production which was in competition with bananas (and which must be protected); the system which took its place (that is to say, the consumer tax on bananas) was stated to have the same purpose.

19. It is also very significant that the defendant government asserted early in the proceedings that it wished to abolish the tax on bananas from the French overseas departments and the ACP States (at the hearing it provided particulars of the stage reached in those proceedings). To my mind, this can be seen as nothing other than tacit recognition of the justification of the applicant's view.

7 — Judgment of 27 February 1980 in Case 171/78 *Commission* v *Kingdom of Denmark* [1980] ECR 447, paragraph 12 at p. 465.

20. Finally, the defendant's argument in Case 193/85 to the effect that the second paragraph of Article 95 is inapplicable because the tax on bananas has the aim of protecting not only Italian fruit but fruit produced throughout the Community is manifestly ineffective. Apart from the fact that it must naturally be assumed that the Italian legislature is primarily concerned with the interests of Italian producers, it can be observed in that connection, as the Commission points out, that the second paragraph of Article 95 is not concerned specifically with domestic products but with 'other products'. It must also be stressed that, since there is already a common organization of the market in fruit which provides specific protection, it is certainly not open to a Member State to introduce further protective mechanisms in respect of individual types of fruit, which may possibly disregard the interests of other Member States which have a particular interest in competing products affected by the national protective rules.

21. *(cc)* On the assumption that Article 95 is relevant in this case, the Commission's argument to the effect that that provision has been infringed by the introduction of a tax charged largely on imported products and only to an insignificant degree on domestic products, whilst other competing domestic products are subject to no such tax, is well founded.

C — 22. Since, however, as I have shown, my principal finding is that the applicant should have assessed the contested Italian tax system in the light of the provisions on charges having an effect equivalent to customs duties I have no alternative in the final analysis but to propose that the action brought by the Commission under Article 95 of the EEC Treaty be dismissed as unfounded and that it should be ordered to pay the costs.