3. Under the third paragraph of Article 95 of the EEC Treaty, the rule against discrimination set out in the first two paragraphs of that article became fully effective as from 1 January 1962. A Member State could no longer be authorized to maintain after that date any pre-existing fiscal discrimination in the system applicable to the importation of potable spirits originating in other Member States.

Mertens de Wilmars Pescatore Mackenzie Stuart Koopmans O'Keeffe

Bosco Touffait Due Everling

Delivered in open court in Luxembourg on 27 May 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 1 APRIL 1981 [1]

Mr President,
Members of the Court,

1. The two procedures for a preliminary ruling in respect of which this opinion is given raise identical problems concerning the interpretation of Article 95 of the EEC Treaty, that is to say, of the well-known prohibition of internal taxation of a discriminatory nature. The questions have been submitted to this Court by the Corte d'Appello [Court of Appeal], Milan, and relate to two actions brought in 1976 and in 1977 respectively by the undertakings Essevi, Milan, and Salengo, Genoa, against the Amministrazione Italiana delle Finanze [Italian State Finance Administration]. The plaintiffs sought at first instance — and obtained by judgments of the Tribunale [District Court], Milan, of 1 June and of 7 October 1978 — an order for the recovery from the defendant of the sums levied by way of State tax on certain consignments of French cognac imported by Salengo between 1960 and 1971 and by Essevi

1 — Translated from the Italian.

between 1962 and 1967. The national court is called upon to determine on appeal whether the system of State taxes on spirits based on Italian laws dating back to 1936 (but which have successively been amended) are compatible with Article 95. That explains why the court has had recourse to the procedure provided for by Article 177 of the EEC Treaty.

With regard to the characteristics of the tax burden at issue, it is worth emphasizing that at the time when the facts of the case occurred the sum was proportionate to the quantity of pure alcohol which each product contained and that potable spirits distilled from wine were in principle exempt from the tax whereas other types of spirits were taxed at reduced rates. However, the exemption or the reduced rates could be applied only if the use of the raw materials was ascertained in advance, at the production stage, by inspectors of the Finance Administration. This in practice restricted the benefit of such concessions to spirits produced in Italy.

As long ago as 4 November 1965, the Commission informed the Italian Government that in its view the charging of manufacturing tax and of State tax on imported spirits at rates higher than those laid down for corresponding domestic products was contrary to Article 95 of the EEC Treaty. Following the Italian Government's reply by letter of 12 February 1966 justifying the differential taxation of spirits by reference to the aim of ensuring the sale of certain agricultural raw materials for producing alcohol, the Commission subsequently explained its views in greater detail by letter of 8 May 1968. In that letter, after acknowledging "the existence of the agricultural problems posed by spirits in Italy", the Commission stated that in its view "the differential taxation provided for under Italian legislation and attributable to the imposition of the State tax may be permitted provisionally since the State tax constitutes, in a manner of speaking, an instrument of Italian agricultural policy on spirits, enabling the latter to be sold on the market regardless of their origin and irrespective of the cost of the raw material". Consequently, the Italian Government was requested to amend its legislation only as far as the manufacturing tax was concerned. In its reasoned opinion of 28 February 1969, the Commission reaffirmed its attitude both by confirming that Italy could maintain *provisionally* differentiations inherent in the State taxes and by alleging that the Italian Government was in breach of Article 95 in only three cases where manufacturing tax was charged at a reduced rate.

Six years later, by letter of 31 July 1975, the Commission again drew the Italian Government's attention to the matter of the differential taxation of spirits, informing it that, in the light of the judgment of this Court of 10 December 1974 in Case 48/74 *Charmasson* [1974] ECR 1383, none of the taxes charged could any longer be regarded as justified. It had been held in that judgment that after the expiry of the transitional period, all barriers to trade, even if they formed part of a national organization of the market for certain agricultural products, were contrary to the Treaty. The judgment thus opened the door to actions by private persons who had an interest in the removal of such barriers. The Commission warned therefore that every Member State was obliged to abolish any measures which were incompatible with Community law in the light of that judgment.

Article 20 of Decreto Legislativo [Legislative Decree] No 46 of 18 March 1976 introduced in Italy a new system for certain imported spirits. However, the Commission, by letter of 18 June 1976, brought to the attention of the Italian Government that it was still in breach of Article 95 by imposing higher taxation on imported products than on similar domestic products. By letter of 28 July 1976, that Government described the State tax on spirits as a measure designed to equalize the different production costs of spirits derived from various raw materials, a measure which was legitimate as an instrument of agricultural policy in the absence of a common policy in this sector. However, the Commission rejected the considerations set forth in that letter and on 31 July 1978 it delivered a reasoned opinion which stated that: "the Italian Republic has failed to fulfil its obligations under the Treaty by maintaining ... fiscal discrimination in regard to the imposition of manufacturing tax, ordinary State tax and special State tax on spirits imported from the other Member States".

2. It was necessary in my opinion to recapitulate in some detail this long-standing quarrel between the Commission and the Italian Government on the central problem in the present case also because the significance of the attitude initially adopted by the Commission is still a matter of dispute. I have referred to a quarrel which was both long, having lasted 13 years (!) and, I may add, inconclusive, since the Commission has taken no action on the basis of Article 169 to ensure compliance with its reasoned opinion of 31 July 1978. At national level, on the other hand, as I have already mentioned, the two actions brought by Essevi SpA and the firm of Salengo were begun in 1976 and 1977 and, after judgment at first instance by the Tribunale, Milan, given in favour of the plaintiffs, the appeal stage has now been reached in connexion with which the present proceedings have arisen. There is however another factor to which I should refer. Pending the hearing of the appeal, the Italian Corte di Cassazione [Court of Cassation], composed of members from all its divisions, delivered two judgments, Nos 1317 and 1321 of 1 March 1979, in actions having the same subject-matter as those before the Corte d'Appello, Milan, in which it held, *inter alia*, that "in regard to imports under the EEC arrangements for spirits distilled from wine, at least prior to the opinion delivered by the Commission of the European Communities on 28 February 1969, differential taxation resulting from the imposition of the State tax at the rate of LIT 60 000 per hectolitre of pure alcohol does not enter into the calculation of the fiscal costs of the imported product". In support of that statement, the Corte di Cassazione pointed out that in the opinion of 28 February 1969 addressed to the Italian Republic pursuant to Article 169 of the EEC Treaty, the Commission expressly recognized Italy's right to use the tax as an instrument of its agricultural policy in the spirits sector and to maintain provisionally in that sector differential taxation at the rate of LIT 60 000 per hectolitre of pure alcohol. The Corte di Cassazione also observed that the compatibility of a State aid with the common market may not be denied by a national court when not only has there not been any declaration to the contrary by the Commission but the latter has, moreover, expressly recognized the measure as compatible with the Treaty.

In its orders referring the matter to this Court, the Corte d'Appello, Milan, has expressly referred to judgments Nos 1317 and 1321/79 of the Corte di Cassazione but has not considered them capable of dispelling doubts as to the compatibility of the State tax on spirits with the rules of Community law. However, the wording of the questions submitted pursuant to Article 177 of the EEC Treaty reflects, as we shall see, the approach adopted by the Italian Supreme Court.

3. The first question of the two which the Court has been requested to answer is worded as follows: "First, what is the effect to be attributed to the aforesaid opinions delivered by the Commission under Article 169 of the Treaty establishing the EEC; then whether, by applying to potable spirits distilled from wine and imported from other Member States a system of taxation including the State tax of LIT 60 000 per hectolitre of pure alcohol (LIT 90 000 as from March 1976), which is not provided for in the case of similar domestic products and is not charged thereon, Italy has infringed Article 95 of the EEC Treaty".

It is obvious that this question must be split into two: in other words, to begin with, it is necessary to determine the effect of the opinions delivered by the Commission pursuant to Article 169 of the EEC Treaty. The answer is simple: these opinions certainly have no binding force (see the last paragraph of Article 189) and constitute only one stage in the procedure initiated against Member States for infringements of the Treaty found by the Commission; they constitute a necessary precondition for a matter to be brought by the Commission before the Court of Justice "if the State concerned does not comply with the opinion within the period laid down" (second paragraph of Article 169).

In the present case, however, we are aware that the problem of the effect of opinions delivered pursuant to Article 169 has been raised with reference to the passage in the opinion of 28 February 1969 in which the Commission stated that Italy could provisionally maintain existing differentiations in the State taxes levied on spirits. Can a declaration of this kind be deemed to have the effect of an authorization? In my opinion, the answer can only be that it cannot. The Commission's power to authorize certain conduct on the part of the Member States must be expressly provided for by the Treaty and in no circumstances, save where such a provision exists, may the Commission exempt a State, even temporarily, from compliance with its obligations under a rule such as that contained in Article 95, the more so as it is a directly applicable rule and its observance may therefore also be sought by private persons. In fact, a declaration of the kind contained in the opinion of 28 February 1969 relating to the State tax on spirits reflects merely the Commission's view that, at least for a certain period, the conduct of a Member State alleged to have infringed the Treaty is partly justified and that consequently, to that extent, the procedure under Article 169 is not to be pursued with but it certainly does not confer on the State in question an individual right to continue that line of conduct, as though the Commission's interpretation of the Treaty exempted that State from any responsibility. In this connexion, it should be borne in mind in relation to the present case that as long ago as 15 October 1969, the Court stated in its judgment in Case 16/69 *Commission* v *Italian Republic* [1969] ECR 377 that potable spirits are not included in the list of agricultural products, and thus rejected the

proposition that, in the sector of potable spirits, fiscal discrimination contrary to Article 95 may be justified by relying on the possibility of derogating in agricultural matters from certain rules of the Treaty. This upset in reasoning on which the Commission had based its argument that the differential application of the State taxes on spirits (at least in respect of the alcohol content of potable spirits) was justified. This should have caused the Italian Government to reflect on its line of conduct in regard to the taxation of potable spirits.

Again, still with reference to the effects of opinions delivered by the Commission pursuant to Article 169, it is worth emphasizing that those effects are in any event confined within the ambit of the infringement procedure and are not to be confused with any position which the Commission may adopt in regard to State aids. There is in fact a clear distinction between the observations of the Commission provided for in Article 93 (3) and the opinions under Article 169. That distinction corresponds to the obvious difference between the procedure for a declaration that an aid is compatible with the common market and the procedure for establishing an infringement of the Treaty. In my opinion, therefore, it is not permissible for a declaration by the Commission that a given tax measure is, provisionally and on the basis of certain grounds, not contrary to the Treaty, to be deemed to constitute a declaration that such a measure, inasmuch as it amounts to an aid, is compatible with the Treaty. In the present case, moreover, it does not appear that the Italian Government, in its correspondence with the Commission prior to the adoption of the reasoned opinion of 28 February 1969, ever described the tax in question as an aid within the meaning of Articles 92 or 93 or that the Commission, in the attitudes which it adopted on 8 May 1968 and on 28 February 1969, intended to apply the above-mentioned provisions of the Treaty to the question of the retention of the State tax at issue. As we have seen, the Commission had been prepared to regard that tax as permissible on the mistaken assumption that potable spirits were agricultural products and on the basis of the idea, which was subsequently refuted by the Court in the *Charmasson* judgment, that pending a common organization of the market the Member States were permitted, after the expiry of the transitional period, to maintain in force provisionally certain measures in favour of certain domestic products even if they were such as to hinder the free movement of goods within the common market. Therefore, the attitudes adopted by the Commission regarding the question whether the Italian State tax on spirits was permissible may not be deemed to come *ex post* within the scope of Articles 92 and 93 of the Treaty.

4. The second part of the first question is formulated in a manner which inconsistent with the function of proceedings for an interpretation by way of a preliminary ruling. The national court cannot expect this Court to decide, on the basis of Article 177, a specific case of an alleged infringement of the Treaty by a Member State. However, as on many other occasions, the question may be understood in general terms. On that basis, it will be necessary to establish whether or not the application by a Member State to potable spirits imported from other Member States of a system of taxation involving a fiscal burden which is not provided for in the case of corresponding domestic products and is not charged thereon is compatible with Article 95.

The answer in my opinion is that it is not. The discriminatory nature of a system of taxation of the kind described is obvious. It is legitimate to wonder, going beyond the extremely clear terms in which the question is couched and bearing in mind the characteristics of the case in point, whether there is fiscal discrimination contrary to Article 95 where the difference in treatment stems not from the national tax provision in itself but from the fact that the latter provides for tax exemptions or reductions which are applicable in practice to domestic products alone. Article 95 however is quite explicit: it prohibits the imposition *directly or indirectly* on the products of other Member States of any internal taxation of any kind in excess of that imposed *directly or indirectly* on similar domestic products. The fact that certain tax reductions or exemptions may be subject to conditions which in practice only domestic products can satisfy constitutes an example of taxation which indirectly produces discrimination.

5. In its second question, the Corte d'Appello, Milan, asks the Court to determine "whether, after the commencement of the second stage referred to in the third paragraph of Article 95 as being the final date for the abolition of national rules conflicting with the principle of equal tax treatment laid down in the first and second paragraphs of the said article, it is permissible by way of exception for Italy to continue a pre-existing discrimination in respect of the importation of potable spirits distilled from wine".

It is so abundantly clear that the third paragraph of Article 95 is binding that no comment is called for. *Not later than at the beginning of the second stage,* the Member States were required to repeal or amend any provisions existing when the Treaty entered into force which conflicted with the rules laid down in the first and second paragraphs of that article. Therefore, "pre-existing discrimination" (to use the precise wording employed by the national court) affecting the importation of potable spirits should have been abolished: no possibility of an exception is envisaged by Article 95. That being granted, it only remains to be seen whether other rules of the Treaty may permit non-compliance with the principle of non-discrimination in tax matters and that possibility makes it necessary to examine more closely the argument of the Italian Government that certain tax advantages granted in respect of domestic products and taking the form of aids to domestic production should be appraised in the light not of Article 95 but of Articles 92 and 93 of the EEC Treaty. It is true that the Corte d'Appello, Milan, has made no allusion whatsoever to those rules, thus allowing the inference that it has not considered their interpretation to be relevant to the solution of the cases before it. However, it is preferable in my opinion, giving a wide interpretation to the above-mentioned question, to complete the examination of the point of view taken by the Italian Government in these proceedings.

According to that point of view, in a case such as the one in point, it might be argued that there is an aid to domestic production not because the revenue from the higher tax imposed on imported products is earmarked for the support of domestic production but rather by the very fact that the latter is subject to a lower tax burden. Consequently, the circumstances here are different from those considered by the Court in its judgment of 21 May 1980 in Case 73/79 *Commission* v *Italian Republic* [1980] ECR 1533 in which it stated that "discriminatory tax practices are not exempted from the application of Article

95 by reason of the fact that they may at the same time be described as a means of financing a State aid".

I should like to observe in this connexion that to allow the Member States to escape the prohibition contained in Article 95 by classifying differential taxation as a measure implementing a policy of support for a sector of the national economy might make an objective classification of those systems of taxation which are contrary to Article 95 impossible. The distinction between fiscal discrimination aimed exclusively at protecting domestic production against outside competition and systems of differential taxation designed to support a given sector of the market in the context of national economic policy as a whole is so blurred as to give rise to serious dangers of abuse. It is clear that any discriminatory taxation to the detriment of certain imported products automatically confers an advantage on competing domestic products and may therefore be considered as being an aid to domestic production. If therefore the discriminatory fiscal practices which a Member State describes as aspects of its sectoral support policy were to be considered as falling outside the scope of application of Article 95, the applicability of that article would be severely restricted.

The objections which I have raised are, in my opinion, supported by the case-law of this Court. In the first place, I recall that in its judgment of 22 March 1977 in Case 74/76 *Iannelli* v *Meroni* [1977] ECR 557, this Court had occasion to state that since Article 95 of the Treaty refers to internal taxation of any kind "the fact that a tax or levy is collected by a body governed by public law other than the State or is collected for its benefit and is a tax charge which is special or appropriated for a specific purpose cannot prevent its falling within the field of application of Article 95 of the Treaty". Since the particular case on which the Court gave its ruling concerned certain charges forming part of a system of State aids, it may be inferred from the above-mentioned judgment that a link between a discriminatory fiscal burden and a system of aids is not sufficient to preclude the application of Article 95. More recently, in its judgment of 10 October 1978 in Case 148/77 *Hansen* [1978] ECR 1787, the Court held that "where national tax legislation favours certain classes of producers or the production of certain types of spirits by means of tax exemptions or the grant of reduced rates of taxation, even if such advantages benefit only a small proportion of domestic production or are granted for special social reasons, those advantages must be extended to imported Community spirits which fulfil the same conditions . . ." (paragraph 20 of the decision, p. 1807). I observe that in the same judgment the Court considered it preferable to examine the problem from the point of view of Article 95 rather than in the light of the provisions on aid contained in Articles 92 to 94 "since the latter also rest on the same basic idea as Article 95, namely the elimination of State interventions — including tax abatements — which might have the effect of distorting the normal conditions of trade between Member States" (paragraph 14 of the decision).

Those precedents place in its proper perspective the above-mentioned

judgment of 21 May 1980 in Case 73/79 *Commission* v *Italian Republic* which confirms that if an aid is incompatible with Article 95, such incompatibility may constitute a valid ground for abolishing the measure. That is necessarily the case where the method of financing the aid is such as to impose a burden on competing foreign products which do not benefit from the aid or where revenue from a tax imposed in a non-discriminatory fashion on domestic products and on imported products is earmarked for the financing of the aid allocated to the same domestic products. In the case with which we are concerned, the aid to domestic production is said to have consisted quite simply in applying a system of tax advantages (exemptions or reduced rates) which in practice benefit domestic products alone. Therefore, even if the allocation of an aid to the products themselves were permissible, the fact that it is granted by means of discriminatory taxation to the detriment of imported products would be sufficient to render the aid incompatible with, and therefore prohibited by, Article 95.

6. For all those reasons, I propose that the Court should rule as follows on the problems raised in the preliminary questions submitted to it by the Corte d'Appello, Milan:

1. Opinions expressed by the Commission pursuant to Article 169 of the EEC Treaty are not binding; their effects are confined within the ambit of the infringement procedure which is governed by that article.

2. The prohibition of discrimination laid down by Article 95 of the EEC Treaty extends to any system of taxation which, directly or indirectly (and therefore also by means of a grant of tax exemptions or reductions applicable in practice to domestic products alone), has the effect of taxing imported goods more heavily than corresponding domestic products.

3. Article 95 categorically prohibits, as from the commencement of the second stage of the transitional period provided for in Article 8 of the EEC Treaty, any kind of internal taxation of a discriminatory nature.

4. The fact that the State imposing the tax regards a system of tax exemptions intended to benefit domestic production as an aspect of its comprehensive support policy for sectors of the national economy in need of aid is not sufficient to enable that system to escape the prohibition of discrimination laid down by Article 95.