under Article 169, exempt a Member State from compliance with its obligations under the Treaty or prevent individuals from relying, in legal proceedings, on the rights conferred upon them by the Treaty in order to contest any legislative or administrative measures of a Member State which may be incompatible with Community law.

2. A system of differential taxation whereby the grant of a tax exemption or the enjoyment of a reduced rate of taxation is conditional upon the possibility of inspecting production on national territory is discriminatory in nature and as such comes within the prohibition laid down by Article 95. The effect of such a condition which by definition cannot be satisfied by similar products from other Member States is to preclude those products in advance from qualifying for the tax advantage in question and to confine that advantage to domestic production.

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. After that date, a Member State could no longer be authorized to maintain in its tax law or fiscal practices any pre-existing discrimination in the system applicable to the importation of products originating in other Member States.

4. Under the system of the EEC Treaty an aid, within the meaning of Articles 92 and 93, cannot be introduced or authorized by a Member State in the form of fiscal discrimination against products originating in other Member States.

5. The protection of rights guaranteed by the Community legal order does not require an order for the recovery of taxes unduly levied to be granted in conditions which would involve an unjust enrichment of those entitled. There is nothing, from the point of view of Community law, to prevent national courts from taking account in accordance with their national law of the fact that it has been possible for taxes unduly levied to be incorporated in the prices of the undertaking liable for the tax and to be passed on to the purchasers.

In Joined Cases 142 and 143/80

REFERENCES to the Court under Article 177 of the EEC Treaty by the Corte d'Appello [Court of Appeal], Milan, for a preliminary ruling in the actions pending before that court between,
on the one hand,

AMMINISTRAZIONE DELLE FINANZE DELLO STATO

and,

on the other hand,

ESSEVI SPA, having its registered office in Milan (Case 142/80),

and

CARLO SALENGO, an undertaking established in Genoa (Case 143/80),

on the interpretation of Article 95 of the EEC Treaty in relation to the Italian legislation on the State tax on imported potable spirits,

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore, Lord Mackenzie Stuart and T. Koopmans (Presidents of Chambers), A. O'Keeffe, G. Bosco, A. Touffait, O. Due and U. Everling, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

The Italian legislation dealing with excise duty on spirits distinguishes between two categories of spirits according to the method of production: "second category" spirits, distilled from wine, marc, residue from wine-making and fruit, and "first category" spirits produced from other raw materials.

That legislation provides for three types of tax: manufacturing tax, charged under the consolidated Law of 8 July 1924; ordinary State tax introduced by Decreto Legge [Decree-Law] No 635 of 27 April 1936; special State tax, established by Decreto Legge [Decree-Law] No 1200 of 6 October 1948. All those provisions have been amended subsequently on several occasions.

The manufacturing tax is charged on all spirits intended for human consumption, whether they be first or second category

spirits. The same rate is applied to imported products and domestic products. However, domestic products may benefit from certain reductions subject to the limits and conditions laid down by law.

The special State tax is charged on denatured ethyl alcohol used for chemical and industrial purposes. In the case of spirits obtained synthetically from raw materials extracted from the earth the rate of that duty is a multiple of the rate applied to spirits obtained by a process of fermentation and derived from sugar-cane or sugar-beet molasses and from comparable materials.

The ordinary State tax is charged at the full rate (LIT 60 000 per hectolitre of anhydrous alcohol at the time of the events which gave rise to the main actions) on all imported spirits and domestically-produced spirits belonging to the first category. However, various reduced rates are applied to certain domestically-produced spirits depending on the raw material from which they are manufactured. Spirits made from molasses or comparable products, sugar cane or sorghum constitute a case in point. Domestically-produced spirits of the second category are either not subject to the State tax at all (such is the case with potable spirits distilled from wine and marc) or they are taxed at a reduced rate (spirits made from dates or raisins, figs and carobs or other fruits).

The exemption from ordinary State tax granted to certain types of second category spirits produced domestically, in particular to potable spirits distilled from wine, was extended to imported spirits by Article 20 of Decreto Legge No 46 of 18 March 1976, converted into Law No 249 of 10 May 1976, provided that they are accompanied by a certificate approved by the Minister for Finance acting in agreement with the Minister for Industry, Trade and Crafts and with the Minister for Agriculture and Forestry, which certificate must attest that pursuant to the legislation of the country of origin the product was obtained under continuous supervision by the revenue authorities and that the raw material and finished product have been subjected to the same inspections as those prescribed by the Italian legislation.

The rules governing certificates were laid down by a ministerial order of 24 August 1977. A circular was issued by the Minister for Finance on 17 January 1979 dealing with the contents of those covering documents and stating the authorities empowered to issue them in each Member State.

Previously, by writs of 13 January 1976 and 22 July 1977 respectively, Essevi SpA, whose registered office is in Milan, and Carlo Salengo, an undertaking established in Genoa, had instituted proceedings before the Tribunale [District Court], Milan, against the Amministrazione delle Finanze dello Stato [Italian State Finance Administration] for the recovery of the sums paid by way of ordinary State tax on imports of cognac of French origin carried out by Essevi between 1 March 1962 and 1 December 1967, and by Salengo between 18 April 1960 and 25 October 1971. The two undertakings consider that the charging of that State tax is contrary in particular to Article 95 of the EEC Treaty and that it has the effect of subjecting the imported product to internal taxation in excess of the fiscal burden borne by similar domestic products.

By judgments of 1 June 1978, in the case of Salengo, and 7 October 1978, in the case of Essevi, the Tribunale found that a relationship of similarity existed between cognac of French origin and domestically-produced potable spirits

distilled from wine and held that as regards imports taking place after 1 January 1962, the date on which the second stage of the common market began, there was an infringement of Article 95 of the EEC Treaty in these cases by virtue of the fact that the total fiscal burden borne by the imported foreign product was in excess of the fiscal burden borne by the similar domestic product.

Consequently, the court ordered the State Finance Administration to repay the taxes which had been paid by the plaintiffs in breach of the principle of non-discrimination laid down by Article 95.

On 31 August 1978 the State Finance Administration appealed to the Corte d'Appello, Milan, against the judgments of the Tribunale.

While the appeals were pending the Suprema Corte di Cassazione, [Supreme Court of Cassation], composed of members of all its divisions, delivered two judgments, Nos 1317 and 1321 of 1 March 1979, in which it held in actions having the same subject-matter as those before the Corte d'Appello, Milan, that Italy's right to use taxation as an instrument of its agricultural policy and temporarily to maintain differential taxation in the spirits sector at the rate of LIT 60 000 per hectolitre of pure alcohol as a result of the application of the State tax had been expressly recognized by the Commission in the reasoned opinion which it had addressed to the Italian Republic under Article 169 of the EEC Treaty on 28 February 1969. The compatibility of that "aid" with Community law could not be denied by the national court when not only had there been no statement to the contrary on the part of the Commission, but the measure in question had even been expressly recognized by the Commission as being compatible with Community law.

In a further reasoned opinion addressed to the Italian Republic on 31 July 1978 the Commission reversed its position adopted in the reasoned opinion delivered on 28 February 1969 and held that it was contrary to the Treaty to continue to apply the ordinary State tax to spirits imported from other Member States.

By orders of 19 February 1980 the First Civil Chamber of the Corte d'Appello, Milan, stayed the proceedings in the two cases pending before it pursuant to Article 177 of the EEC Treaty and requested the Court of Justice to declare, by way of a preliminary ruling:

— First, what is the effect to be attributed to the aforesaid opinions delivered by the Commission under Article 169 of the EEC Treaty; 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;

— 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.

The two orders of the Corte d'Appello, Milan, were received at the Court Registry on 12 June 1980.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted in each of the cases on 28 August 1980 by the Commission of the European Communities, represented by its Legal Adviser, Antonino Abate, on 9 September 1980 by the respondents in the main actions, Essevi and Salengo, represented by Mario Scalzo, of the Milan Bar, and on 11 September 1980 by the Government of the Italian Republic, represented by Marcello Conti, Avvocato dello Stato.

By order of 19 November 1980 the Court decided to join Cases 142 and 143/80 for the purpose of the oral procedure and the judgment.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it invited the Commission to provide it with certain information and to reply in writing to certain questions. The Commission complied with that request within the prescribed period.

II — Written observations submitted to the Court

1. After drawing attention to the principal aspects of the Italian system of taxation on spirits and to certain questions of fact relevant to the main actions, *Essevi and Salengo*, the respondents in the main actions, submitted observations on the legal issues which may be summarized as follows:

Use of the State tax as an instrument of national agricultural policy

(a) The argument that the State tax on spirits constitutes a legitimate instrument of the Italian Government's agricultural policy draws support from the reasoned opinion which the Commission addressed to the Italian Republic under Article 169 of the EEC Treaty on 28 February 1969. However, the Commission has altered its views in this regard. In the reasoned opinion addressed to the Italian Republic on 31 July 1978, referring to the judgment of the Court of Justice of 10 December 1974 in Case 48/74 *Charmasson* [1974] ECR 1383, it stated that the State tax constituted a fiscal measure of a protectionist nature and that as such it was incompatible with Article 95 of the Treaty.

(b) By ceasing to apply the State tax to imported potable spirits distilled from wine as a result of Decreto Legge No 46 of 18 March 1976, the Government of the Italian Republic itself recognized the incompatibility of that tax with the Treaty and hence the unsoundness of the argument that it is lawful inasmuch as it is a stabilizing instrument in the context of national agricultural policy.

(c) In its judgment of 15 October 1969 in 16/69 *Commission* v *Italian Republic* [1969] ECR 377 the Court of Justice held that potable spirits were not agricultural products and therefore could not benefit from the derogations from the general rules of the Treaty established by Articles 38 to 46 in relation to agriculture.

In the *Charmasson* judgment the Court held that derogations from the general

rules of the Treaty under a national organization of the market were permitted only temporarily and that the retention of a national organization of the market could not be envisaged beyond the transitional period.

As it is a case of measures contrary to the first and second paragraphs of Article 95, they should in any case, under the terms of the third paragraph of Article 95, have been abolished by the beginning of the second stage of the common market.

Use of the State tax as a State aid

(a) It is true that in its reasoned opinion of 28 February 1969 the Commission regarded the State tax as an instrument of national agricultural policy, at least provisionally compatible with Community law. However, the Commission clearly modified its attitude in this regard. In the reasoned opinion of 31 July 1978 it recognized that the charging of the State tax on alcohol imported from the other Member States was contrary to the Italian Republic's obligations under the Treaty. That tax must be treated as any other fiscal measure. Since it is discriminatory and protectionist in nature, private persons may rely on the direct effect of Article 95 when challenging the tax before the national courts.

(b) In several recent judgments the Tribunale, Milan, has held, contrary to the judgments of the Suprema Corte di Cassazione of 1 March 1979, that internal taxation which is contrary to the principle of equal tax treatment falls solely within the scope of Article 95. The argument that any fiscal measure of a protectionist or discriminatory nature constitutes an "aid" and is lawful in the absence of a negative statement from the Commission under Article 93 (2) of the Treaty is untenable.

(c) In its judgment of 27 February 1980 in Case 169/78 *Commission* v *Italian Republic* [1980] ECR 385, the Court recognized the legitimacy of certain exemptions or tax concessions provided that the Member States which make use of such possibilities extend the benefit thereof in a non-discriminatory manner to imported products in the same situation. In no case, according to that judgment, can differences in tax treatment of a discriminatory or protective nature be accepted as legitimate.

The protective and discriminatory nature of the State tax

Since it cannot be lawful either as an instrument of national agricultural policy or as an "aid", the State tax, charged for years in flagrant breach of Article 95, is both protective and discriminatory in nature. That follows from the fact that by virtue of its treatment as first category spirits imported cognac distilled from wine was subject to the State tax, whilst the similar domestic product was exempted from it.

The non-binding nature of the Commission's opinion under Article 169 of the EEC Treaty

(a) In its reasoned opinion of 28 February 1969 the Commission was mistaken in its attempt to extend the exceptions allowed for agricultural

products to an industrial product, namely potable spirits, and in its failure to recognize that even if such an exception was permissible it should have ceased, by virtue of the third paragraph of Article 95 of the Treaty, before the beginning of the second stage.

(b) In any event, the last paragraph of Article 189 clearly states that "opinions" delivered under Article 169 "have no binding force". The case-law of the Court and legal commentary have recognized the non-binding nature, as against States, of reasoned opinions delivered by the Commission as part of the procedure under Article 169.

(c) In particular, the Commission's opinion of 28 February 1969 was, by its nature, not binding and might be assimilated to a "recommendation" and thus to a measure of an essentially political nature.

The replies to be given to the questions submitted

It is suggested that the following replies be given to the questions submitted by the Corte d'Appello, Milan:

(a) By applying to potable spirits imported into Italy and coming from other Member States, the State tax of LIT 60 000 (later LIT 90 000) per hectolitre of pure alcohol and by not applying that tax to similar domestic products, Italy has infringed Article 95 of the EEC Treaty;

(b) The reasoned opinion addressed to the Italian Republic by the Commission on 28 February 1969 under Article 169 of the EEC Treaty cannot justify the charging of that tax;

(c) After the beginning of the second stage of the common market Italy should have abolished any pre-existing discrimination to the detriment of imported potable spirits distilled from wine and should therefore have extended to imported products the exemption from the State tax granted to domestic products.

2. The *Government of the Italian Republic* explains how and why tax relief was granted to domestic producers of potable spirits distilled from wine until the entry into force of Decreto Legge No 46 of 18 March 1976.

(a) The Commission acknowledged, in particular by letters dated 4 November 1965 and 8 May 1968 and in the reasoned opinion of 28 February 1969, that differential taxation resulting from the application of the State tax could continue to exist provisionally, as that tax constituted an instrument of Italian agricultural policy in the spirits sector.

The unambiguous position adopted by the Commission was binding upon national courts, and, as the Suprema Corte di Cassazione had held in its judgments of 1 March 1979, it did not allow them to dispute the compatibility of the aid in question with Community law.

(b) The Commission's change of attitude in its reasoned opinion of 31 July 1978 was valid only for the future. It could not annul retroactively the decision taken earlier to allow the differential application of the State tax as

a measure of aid compatible, albeit only provisionally, with the common market. Moreover, at the time when this second reasoned opinion was delivered the system for charging the State tax had undergone radical alteration involving in particular equality of treatment extended by Article 20 of Decreto Legge No 46 of 18 March 1976 to domestic products and products imported from other Member States as regards the effects of the exemptions and reliefs. Thereafter the problem therefore arises in completely different terms.

(c) The court which made the reference is itself convinced in principle that decisions taken by the Commission under Article 93 of the Treaty are binding on the national court. The ruling which it has requested from the Court concerns essentially the interpretation and validity of the measures by which the Commission allowed the differential taxation to be maintained provisionally.

(d) The measure at issue indisputably constitutes an aid granted by the State for the benefit of certain undertakings or to encourage the production of certain goods. Such aid is subject to the rules contained in Articles 92 and 93 of the EEC Treaty. Those rules apply without distinction to all forms of State intervention designed to subsidize and encourage the production and distribution of particular products. One of the commonest forms of State aid consists of tax reliefs. Tax treatment favouring certain categories of undertakings exclusively, as against producers in the same sector as a whole, can constitute an aid within the meaning of Article 92. The tax relief granted in Italy to domestic undertakings producing potable spirits distilled from wine has all the characteristics of aid designed to ensure the maintenance and development of a particular sector of production and constitutes a typical form of support for an important domestic industry for the purpose of stabilizing an entire sector of the market. As such, there is absolutely no doubt that it falls within the ambit of Articles 92 and 93.

(e) The fact that an aid may be tolerated on the basis of Articles 92 to 94 means that it cannot also be subjected to appraisal in the light of the general prohibition on fiscal discrimination laid down by Article 95. A favourable tax system which constitutes an aid cannot fall within the ambit of Article 95. Only Article 92 et seq., as opposed to Article 95, are applicable to tax reliefs, which, being designed to favour certain undertakings or certain products, come under Article 92.

As it is a question of aids in the form of tax reliefs, to accept that Article 95 is applicable would be to deprive Articles 92 and 93 of their entire substance as regards that very common type of aid. Article 95 prohibits absolutely and unconditionally, as from the beginning of the second stage, all internal taxation of a discriminatory nature. Unlike Articles 92 and 93, it does not confer any discretion on the Community institutions and does not grant Member States any option, comparable to that provided for in Article 93 (2), of altering an aid instead of abolishing it. The simultaneous application of the two sets of rules to the same tax relief is out of the question.

Article 92 expressly refers to aid granted "in any form whatsoever". To exclude tax reductions from the scope of the rules on aids so as to subject them solely to the rules contained in Article 95 would be tantamount to substituting an unusable instrument for the "precision instrument" of Articles 92 and 93.

(f) That proposition is not invalidated by the judgment of the Court of 21 May 1980 in Case 73/79 *Commission* v *Italy* [1980] ECR 1533. That case concerned an aid granted in the form, not of a tax relief, but of a direct subsidy and the question of a possible breach of the prohibition of fiscal discrimination was examined with regard to the source of finance for the aid.

On the other hand, in the judgment of 25 June 1970 in Case 47/69 *Government of the French Republic* v *Commission* [1970] ECR 487 the Court held that "when an aid is financed by taxation of certain undertakings or certain producers, the Commission is required to consider not only whether the method by which it is financed complies with Article 95 of the Treaty but also whether in conjunction with the aid which it services it is compatible with the requirements of Articles 92 and 93". In the judgment of 22 March 1977 in Case 74/76 *Iannelli & Volpi* [1977] ECR 557 the Court held that certain aspects of an aid "may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article 93".

Therefore an aid consisting solely of tax relief may be judged only in the light of the principles of Article 92 and by means of the procedure laid down in Article 93. It would be incompatible with the tenor of those rules and with the division of responsibilities effected thereby to allow private persons to rely on the very different rules of Article 95 in order to challenge directly before national courts the compatibility of such a tax benefit with Community law. To grant that in such a case the national court may examine directly the compatibility of the aid with Community law, either with Article 95 or with any provision other than Article 92, would call in question the division of responsibilities established by Article 93 and would deprive the function assigned to the Commission in this field of all substance.

(g) Thus the Commission in no way exceeded the limits of the powers which are conferred upon it by Article 93 in authorizing Italy temporarily to continue the aid granted to domestic producers of potable spirits distilled from wine by means of exemption from the State tax amounting to LIT 60 000 per hectolitre of pure alcohol. The facts of the case fall within the ambit of Article 92 with the consequence that the tax relief at issue could not be regarded as being caught by an absolute and unconditional prohibition of such a nature as to give individuals a personal right capable of being relied on directly before national

courts. It is for the Commission to judge at its discretion the compatibility of the aid with the common market. It made legitimate use of that discretion, resulting in an affirmative decision which cannot be challenged by any national court.

The merits of the Commission's appraisal are not the subject of the questions raised in the order for reference and cannot in any event be reviewed by the Court.

(h) The judgment of 15 October 1969 whereby the Court held that potable spirits are not agricultural products is clearly of no relevance to the decision to be given in the present case. Indisputably, the general rule laid down by Article 92 applies also to aids granted to non-agricultural products in order to encourage indirectly activities which come within the field of agriculture.

As regards the *Charmasson* judgment, it suffices to note that in the present case it is a question of applying not a special system, but the general rule relating to aids, the effects of which extend beyond the transitional period. It may also be observed that the present case concerns not the merits of the discretionary appraisal of the compatibility of the aid, but solely the existence of the power exercised by the Commission under Article 93.

(i) If the Court were to feel obliged to affirm the applicability of the prohibition laid down by Article 95 to the present case, it should expressly limit the effects of its judgment to taxation which might be wrongfully levied in the future. There is no reason for not regarding the principle expressed in the second paragraph of Article 174 of the EEC Treaty, which is general in scope, as applicable to the present proceedings instituted pursuant to Article 177.

On the basis of the general principle of legal certainty the Court has found that it has the power, in exceptional cases, to restrict the possibilities open to persons concerned to rely on its own judgments, even if they are in the nature of purely interpretative decisions. The principles of legal certainty and of the protection of legitimate expectation prevent the re-opening of matters which have been definitively disposed of with the agreement of all concerned by means of the payment and recovery in good faith of a tax expressly held compatible with the common market by the responsible institution.

3. The *Commission*, after recounting the facts which gave rise to the main action, the context in which the orders for reference were made and the principal provisions of the rules governing the State tax, submits observations on matters of law which may be summarized as follows:

The Commission's position with regard to certain tax advantages granted by Member States

(a) For a certain time the Commission indeed considered that the Member States could temporarily maintain certain tax advantages in favour of domestic agricultural products covered by a national organization of the market. That view was reflected in the reasoned opinion addressed to the Italian Republic on 28 February 1969.

(b) The Commission, by implication at least, modified its point of view following the Court's judgment of 15 October 1969. The Commission's position became more explicit after the *Charmasson* judgment: by letters of 31 July 1975 and 18 June 1976, then by the reasoned opinion of 31 July 1978, it informed the Italian Government of the reasons why the reasoned opinion of 1969 must be regarded as no longer valid and the State tax treated as incompatible with Article 95 of the EEC Treaty.

The effect of reasoned opinions delivered pursuant to Article 169 of the EEC Treaty

(a) A reasoned opinion which the Commission delivers pursuant to Article 169 in the performance of the tasks conferred on it by Article 155 of the Treaty is an administrative measure intended to express the Commission's point of view. It concludes the inquiry stage of the administrative procedure for dealing with infringements and at the same time constitutes a condition precedent to the commencement of an action (where appropriate) before the Court. Although it reflects the authority which attaches to the supervisory function conferred upon the Commission by Article 155 and to the enforcement function provided for in Article 169, such a reasoned opinion is a measure issuing from one of the parties to a dispute between the Commission and a Member State and it defines the latter's obligations under the rules of Community law. It is subject to judicial review by the Court, which alone is invested by the Treaty with the power to declare the law and to give an authoritative interpretation of the Treaty.

(b) Thus the effect of a reasoned opinion is relative: it does not immediately entail the amendment of the national provisions which the Commission considers contrary to Community law. Nor can it regularize situations existing under national legislation which are contrary to the provisions of Community law.

(c) Hence a reasoned opinion does not create any new obligation for Member States, it does not confer new rights upon them or impair existing rights arising under Community rules. *A fortiori* it cannot alter the personal rights of individuals which national courts are obliged to safeguard at all times, even when a divergent reasoned opinion exists.

(d) To accept any other proposition would be to make the direct effect of Community provisions dependent upon the interpretation given to them by the Commission. The judicial procedure laid down in the second paragraph of Article 169 would thus be rendered redundant.

The interpretation of Article 95 of the EEC Treaty in relation to the State tax

The questions to which the Court is requested to reply raise issues which are essentially concerned with Article 95.

(a) The first issue is whether the rule prohibiting fiscal discrimination is deemed to be transgressed when internal taxation is imposed only on imported

products, similar domestic products being totally exempt therefrom.

The reply to this question is obvious. Moreover, in the context of the main actions the discrimination against imported products is affected by an aggravating circumstance: the European Agricultural Guidance and Guarantee Fund grants considerable amounts of aid each year to the Italian distilleries producing potable spirits distilled from wine; French cognac does not enjoy such aid.

(b) The question whether after the commencement of the second stage it is possible to permit exceptions to the prohibition of fiscal discrimination laid down by Article 95 and to continue pre-existing discriminations in a Member State undoubtedly requires a negative reply. There can be no question of any exception and, moreover, it is not possible to make compliance with Article 95 conditional on the attainment of the objectives laid down in other provisions of the Treaty, such as Article 99. This view is supported by recent decisions of the Court.

The State tax in relation to Article 92 of the EEC Treaty

(a) In its replies to the questions put by the Court the Commission states that it has never examined the State tax in relation to Articles 92 and 93 (1) of the Treaty, never described it as an "aid" and never adopted any "decision" in that regard. Thus, adhering wholly and unconditionally to the case-law of the Court, it has accorded to the Italian State tax treatment which in all respects resembles that applied to numerous other instances of internal taxation contrary to Article 95 of the Treaty.

(b) Moreover, it never occurred to the Italian administrative authorities themselves to present the State tax as an "aid", still less to request the Commission to embark upon the procedure laid down in Article 93.

In any event, the incompatibility of the duty with Article 92 is manifest: it is clearly an "operating" aid rather than a development aid, it is entirely lacking in transparency, does not entail any reciprocal undertaking on the part of the beneficiaries, for example with regard to restructuring or reorganization, and does not possess the element of degressivity which is a feature of sectoral aids.

The replies to be given to the questions referred to the Court

The questions submitted by the Corte d'Appello, Milan, should be answered as follows:

(a) Reasoned opinions delivered by the Commission under the first paragraph of Article 169 of the EEC Treaty cannot affect the rights and obligations of the Member States deriving from provisions of Community law. The Court of Justice ensures that reasoned opinions are in conformity with Community law through the procedure laid down in the second paragraph of Article 169 of the EEC Treaty.

Reasoned opinions are not binding upon national courts. In particular, they cannot alter or impair personal rights which provisions of Community law confer upon private persons and which national courts

are obliged to safeguard, even when a divergent reasoned opinion exists.

(b) As from 1 January 1962 Article 95 of the EEC Treaty precludes Member States from imposing on an imported product any internal taxation of any kind in excess of that imposed on similar domestic products. The rule prohibiting fiscal discrimination laid down by Article 95 does not permit derogations or exceptions.

III — Oral procedure

Essevi and Salengo, represented by Mario Scalzo, the Government of the Italian Republic, represented by Marcello Conti, and the Commission, represented by Antonino Abate, presented oral argument and replied to questions put by the Court at the sitting held on 10 February 1981.

The Advocate General delivered his opinion at the sitting on 1 April 1981.

Decision

1 By two orders of 19 February 1980 received at the Court on 12 June, the Corte d'Appello [Court of Appeal], Milan, referred to the Court of Justice, pursuant to Article 177 of the EEC Treaty, certain questions for a preliminary ruling on the interpretation of Articles 95 and 169 of the EEC Treaty in order to determine the compatibility with the Treaty of the retention under Italian legislation of a system of differential taxation charged on potable spirits distilled from wine.

2 It is apparent from the file on the case that the two undertakings, respondents in the main action, imported in the course of the period from 1 March 1962 to 1 December 1967, in the case of the first undertaking, and in the course of the period from 18 April 1960 to 25 October 1971, in the case of the second undertaking, cognac of French origin on which they paid taxes fixed by law for "first category" ethyl alcohol, that is to say for spirits which fail to meet specific requirements relating to origin and manufacture or, in so far as they are produced outside the territory of the State, cannot be inspected at the production stage.

3 The respondents in the main action instituted proceedings before the Tribunale [District Court], Milan, for the recovery of the taxes paid on the ground that Article 95 of the EEC Treaty had been infringed during the above-mentioned periods and obtained judgment, on 26 January and 1 June 1978 respectively, against the Italian State Finance Administration which was ordered to repay the taxes improperly levied.

4 On 31 August 1978, the State Finance Administration lodged an appeal against those judgments and, in the proceedings, relied on the case-law of the Corte Suprema di Cassazione [Supreme Court of Cassation] which, in its judgments Nos 1317, 1318 and 1321 of 1 March 1979, took the view that the contested system of taxation was lawful under Community law. The State Finance Administration contended at that stage that the Commission of the European Communities acknowledged, in an opinion delivered on 28 February 1969, that the Italian Republic was entitled to impose the tax as an instrument of its agricultural policy in the spirits sector and to maintain provisionally the contested system of differential taxation. In its opinion, the Commission expressly recognized that system as an "aid" compatible with the rules of Community law, with the result that the State tax was lawfully levied on spirits imported from France.

5 The Corte d'Appello takes the view that the factors mentioned above are not such as resolve entirely the problem raised before it. It points out that although, in its opinion of 28 February 1969, the Commission acknowledged that Italy was entitled to maintain and to apply the contested system of taxation as an instrument of its agricultural policy, several new factors have arisen since that date. In this connexion, it refers to the judgment delivered by the Court on 15 October 1969 in Case 16/69 *Commission* v *Italy* [1969] ECR 377 in which it was held that potable spirits, liqueurs and other spirituous beverages were not agricultural products within the meaning of the Treaty, to the judgment of 10 December 1974 in Case 48/74 *Charmasson* [1974] ECR 1383 in which barriers to trade between the Member States were held to be incompatible with the common market after the expiry of the transitional period even where such barriers form part of a national organization of the market and, finally, to the reasoned opinion which the Commission addressed to the Italian Republic on 31 July 1978 on differential taxation in relation to the imposition both of the State tax and of the manufacturing tax.

6 Having regard to those new factors as well as to the arguments adduced by the State Finance Administration, the Corte d'Appello has requested the Court to declare by way of a preliminary ruling:

"— First, what is the effect to be attributed to the aforesaid opinions delivered by the Commission under Article 169 of the EEC Treaty; 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 similiar domestic products and is not charged thereon, Italy has infringed Article 95 of the EEC Treaty;

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".

Some aspects of the background to the cases

7 It appears from the documents lodged with the Court by the Italian Government that on 8 May 1968 the Commission sent to the Italian Minister for Foreign Affairs the following letter:

"I should be obliged if you would bring to the attention of the Italian Government the following matters relating to taxes on spirits.

Italian legislation on the taxation of spirits provides that the latter are subject to State tax at the rate of LIT 60 000 per hectolitre of pure alcohol and to a manufacturing tax of LIT 60 000 per hectolitre of pure alcohol. Numerous reductions are provided in favour of certain products including potable spirits distilled from wine and from marc. These spirits are exempt from the State taxes and are subject to a manufacturing tax of LIT 53 000 per hectolitre in the case of potable spirits distilled from wine and of LIT 50 000 per hectolitre in the case of potable spirits distilled from marc.

State tax on imported potable spirits distilled from wine and from marc is charged at the rate of LIT 60 000 per hectolitre of pure alcohol and manufacturing tax at the rate of LIT 60 000 per hectolitre of pure alcohol.

This differential system, which places imported products at a disadvantage, is contrary to Article 95 of the Treaty . . .

The Commission has already communicated its observations on these problems to the Italian Government by letter of 4 November 1965. By letter of 12 February 1966 from the Italian Permanent Representation, the Italian Government informed the Commission of its views. According to the Italian Government, the purpose of the differential taxation of spirits is to enable the various raw materials for the production of alcohol to be used for that purpose and thereby ensure the sale of certain raw materials from which alcohol for agricultural purposes may be produced. Consequently, this differential system could be abolished only once provision for Italian agricultural interests in this sector is made within the framework of the common agricultural policy for spirits. Secondly, the Italian authorities contend that discrimination which is at least as serious exists in the other Member States, such as that resulting from the existence of the monopolies in France and Germany.

The Commission does not altogether deny the existence of the agricultural problems posed by spirits in Italy. For this reason it maintains that 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.

However, agricultural requirements cannot justify all the above-mentioned differences in taxation between domestic products and imported products. The needs of agriculture are already provided for by the State tax paid on imported products alone. Therefore, considerations of an agricultural nature cannot be relied upon also in the case of the manufacturing tax in order to justify differential taxation to the detriment of imported potable spirits distilled from wine and from marc and of imported products similar to vermouth and marsala.

On those grounds, the Commission maintains that the Italian Republic has failed to fulfil its obligations under the Treaty with regard to the reduction

in the manufacturing tax on potable spirits distilled from wine and from marc and the reduction in the manufacturing tax on alcohol used in the manufacture of vermouth and marsala. For those reasons, the Commission requests the Government of the Italian Republic, under Article 169 of the Treaty, to submit to it its observations on the above matters within one month of the receipt of this letter. The Commission reserves the right to deliver, if necessary, after taking note of those observations, the reasoned opinion provided for in Article 169."

8 Following the Italian Government's failure to take action in response to the Commission's requests, on 28 February 1969 the Commission drew up pursuant to Article 169 of the EEC Treaty a reasoned opinion concerning taxes on the consumption of spirits which is formulated in the following terms:

"In Italy, domestically-produced spirits are subject to State taxes at the rate of LIT 60 000 per hectolitre of pure alcohol and to a manufacturing tax of LIT 60 000 per hectolitre of pure alcohol. Numerous reductions are provided for by law, particularly in the case of potable spirits distilled from wine and from marc which are exempt from the State tax and subject to a manufacturing tax of LIT 53 000 per hectolitre in the case of potable spirits distilled from wine and of LIT 50 000 per hectolitre in the case of potable spirits distilled from marc.

On the other hand, potable spirits distilled from wine and from marc and imported into Italy are subject to State taxes at the rate of LIT 60 000 per hectolitre of pure alcohol and to a manufacturing tax of LIT 60 000 per hectolitre of pure alcohol . . .

As early as November 1965 the Commission drew the attention of the Italian Government to the discriminatory nature of this system.

Subsequently, by letter of 8 May 1968, the Commission initiated, for infringement of Article 95 of the EEC Treaty, the procedure provided for in Article 169 of the Treaty. In its reply, given by letter of 23 July 1968 from the Italian Permanent Representation, the Italian Government informed the Commission that it had no intention of abolishing the differential taxes in question until the national monopolies existing in Germany and in France were modified and a common agricultural policy was established in this sector . . .

The arguments adduced are not capable, except in one respect, of calling in question the grounds on which the views expressed by the Commission in its letter of 8 May 1968 are based. Above all, it must be pointed out that in no circumstances may the Member States rely on similar infringements by other Member States in order to escape their own obligations under the provisions of the Treaty.

As for the argument that Italy implements its agricultural policy on spirits by recourse to taxation and that it will not be able to alter its position except in the context of the implementation of a common policy on spirits, the Commission has already acknowledged, in its above-mentioned letter of 8 May 1968, that Italy was in fact entitled to impose the tax as an instrument of its agricultural policy in this sector and maintain provisionally, within that framework, differential taxation at the maximum rate of LIT 60 000 per hectolitre of pure alcohol resulting from the charging of the State tax. Recourse to such taxation enables spirits to be sold at a fairly uniform price, regardless of their cost price."

9 The Commission proceeded to conclude in its reasoned opinion that, as regards various aspects of the tax system other than the State tax, there was a failure by the Italian Republic to fulfil its obligations under the Treaty. It should be noted that this reasoned opinion did not result in proceedings being instituted before the Court.

10 On 31 July 1975, the Commission sent to the Italian Government, pursuant to the first paragraph of Article 169, a fresh communication setting forth, in the light of the rule against discrimination contained in Article 95, certain criticisms directed at the tax system for spirits in force in Italy in relation to the manufacturing tax, the ordinary State tax and the special State tax and requesting the Italian Government to bring to an end the discrimination which this system entailed *vis-à-vis* products imported from other Member States.

11 Since the Commission was not fully satisfied with the response of the Italian authorities to this new action on its part, it delivered on 31 July 1978 a reasoned opinion on differential taxation concerning the charging of the

manufacturing tax and the State tax on spirits. As before, the reasoned opinion was not followed by the initiation of proceedings before the Court.

12 The Italian Government has argued before the Court that the contested system of taxation is in reality merely an aid in favour of agriculture granted in the form of a tax advantage reserved to domestic production. It takes the view that this system of aid was upheld by the reasoned opinion of 28 February 1969 and that, in the absence of any measure to the contrary, that authorization still subsists and must therefore be accepted as being valid by the national courts. Even in the absence of any authorization, that aid may be maintained by virtue of Article 93 on the ground that it predates the entry into force of the Treaty.

Significance of the attitudes adopted and the opinions delivered by the Commission under the procedure provided for in Article 169

13 The purpose of the questions submitted by the Corte d'Appello is in the first place to establish the legal significance and authority of opinions delivered by the Commission under the procedure for instituting proceedings under Article 169 of the Treaty against a State for failure to fulfil its obligations. More precisely, the question is one of determining the legal effect of an assurance of the kind given by the Commission in its letter of formal notice of 8 May 1968 and its opinion of 28 February 1969, issued pursuant to Article 169 of the Treaty, authorizing Italy provisionally to maintain a system of so-called "differential taxation".

14 Article 169 provides that if the Commission considers that a Member State has failed to fulfil its obligations under the Treaty, "it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations". The article adds that the Commission may bring the matter before the Court of Justice if the State concerned does not comply with the opinion within the period laid down by the Commission.

15 The purpose of that preliminary procedure which comes within the general scope of the supervisory task entrusted to the Commission under the first indent of Article 155 is, in the first place, to give the Member State an

opportunity to justify its position and, as the case may be, to enable the Commission to persuade the Member State to comply of its own accord with the requirements of the Treaty. If this attempt to reach a settlement is unsuccessful, the function of the reasoned opinion is to define the subject-matter of the dispute.

16 On the other hand, the Commission is not empowered to determine conclusively, by opinions formulated pursuant to Article 169 or by other statements of its attitude under that procedure, the rights and duties of a Member State or to afford that State guarantees concerning the compatibility of a given line of conduct with the Treaty. According to the system embodied in Articles 169 to 171 of the Treaty, the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court.

17 *A fortiori,* the Commission cannot, in the attitudes which it adopts and in the opinions which it is obliged to deliver under Article 169, exempt a Member State from compliance with its obligations under the Treaty. Such assurances cannot have the effect, in particular, of precluding individuals from relying in legal proceedings, on the rights conferred upon them by the Treaty in order to contest any legislative or administrative measures of a Member State which may be incompatible with Community Law.

18 The answer to the first part of the questions submitted should therefore be that opinions delivered by the Commission pursuant to Article 169 have legal effect only in relation to the commencement of proceedings before the Court against a State alleged to have failed to fulfil its obligations under the Treaty and that the Commission may not, by adopting an attitude in the context of that procedure, release a Member State from its obligations or impair rights which individuals derive from the Treaty.

Compatibility with Article 95 of a system of differential taxation of spirits

19 The purpose of the second part of the questions submitted is to ascertain whether a Member State may impose on spirits originating in other Member States a fiscal charge from which similar domestic products are, in whole or in part, exempt.

20 It is apparent from the orders referring the questions to the Court that the relationship of similarity, within the meaning of Article 95, between the imported product (in the present case cognac of French origin) and the competing domestic product (in the present case potable spirits distilled from wine or from marc) is not disputed. According to the information supplied by the Italian Government, the difference in the tax system applied to the two types of product stems from the fact that imported spirits, classified as "first category spirits", are as such subject to tax at the full rate whereas the corresponding domestically-produced spirits are classified as "second category spirits" which are exempt from State tax, in view of the fact that only spirits the manufacture of which may be made subject to inspections carried out at the production stage on Italian territory may be classified in that category.

21 As the Court has stated in a consistent line of decisions (most recently in its judgment of 14 January 1981 in Case 104/79 *Chemical Farmaceutici SpA),* in its present stage of development Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law if it pursues objectives of economic policy which are themselves compatible with the requirements of the Treaty and its secondary legislation and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products.

22 To make the grant of a tax exemption or the benefit of a reduced rate of taxation conditional upon the possibility of inspecting production on national territory constitutes, however, a condition which by definition cannot be satisfied by similar products from other Member States. The effect of such a requirement is to preclude in advance those products from qualifying for the tax advantage in question and to confine that advantage to domestic production. It is therefore apparent that such a system of taxation is discriminatory in nature and as such comes within the prohibition laid down by Article 95.

23 The answer to the second part of the questions submitted should therefore be that a system of taxation of spirits organized in such a way as to confine

exemptions or reduced rates of tax to domestic production alone constitutes discrimination prohibited by Article 95 of the Treaty.

Temporal effect of Article 95 and its relationship to the system of aids

24 The point raised by the third part of the questions submitted is whether, on the expiry of the period laid down by the third paragraph of Article 95, a Member State could have been authorized to maintain, by way of exception, pre-existing discrimination in the system of taxation applicable to the importation of potable spirits distilled from wine.

25 It is apparent from the file on the case, land from the arguments adduced by the Italian Government in the proceedings before the Court, that the national court wishes to ascertain whether the view expressed by the Commission in its letter of 8 May 1968 and in the reasoned opinion of 28 February 1969 on the provisional retention of the system of so-called "differential taxation" concerning the State tax may be treated as approval of an aid within the meaning of Articles 92 and 93 of the Treaty even after the expiry of the period laid down by the third paragraph of Article 95.

26 The third paragraph of Article 95 provides that "Member States shall, not later than at the beginning of the second stage, repeal or amend any provisions existing when this Treaty enters into force which conflict with the preceding rules".

27 It follows from that provision that 31 December 1961 constitutes the final date by which the Member States should have removed from their legislation and from their fiscal practices any measures which were incompatible with the rule against discrimination contained in the first two paragraphs of Article 95. As from that date, therefore, those provisions became fully effective and may be relied upon by individuals as against any Member State.

28 The argument put forward by the Italian State before both the national court and the Court of Justice to the effect that the exemption pronounced by the Commission in its letter of 8 May 1968 and in the reasoned opinion of 28 February 1969 constitutes an authorization to grant an aid within the meaning of the Treaty is untenable in fact and in law. It is sufficient to point out in this connexion that, under the system of the Treaty, an aid cannot be introduced or authorized by a Member State in the form of fiscal discrimination against products originating in other Member States.

29 The answer to the third part of the questions submitted should therefore be that, under the third paragraph of Article 95, the rule against discrimination set out in the first two paragraphs of that article became fully effective as from 1 January 1962 and that 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.

Temporal effect of the present judgment

30 In the observations which it has submitted to the Court, the Italian Government has contended that, should the Court find that the attitudes adopted by the Commission with regard to the application in the present case of the prohibition contained in Article 95 have no effect, it should limit the scope of its judgment to any improper levying of taxes which may take place in the future, whilst recognizing, as regards the past, the definitive nature of the effects of the exemption granted by the Commission.

31 In this regard, it relies first on the precedent set by the judgment of 8 April in Case 43/75 *Defrenne* [1976] ECR 455 in which the Court found, on the basis of the general principle of legal certainty, that it had the power to restrict, in exceptional cases, the right of those concerned to rely upon its judgments. An additional consideration in the circumstances is, according to the Italian Government, the need to protect its legitimate expectation regarding the validity of a tax measure expressly authorized by the Community executive.

32 Secondly, the Italian Government draws attention to the fact that the taxes at issue have been passed on by importers to the trade, with the result that to refund them would impose a heavy burden on Italian public finances without generating any corresponding benefit for consumers who alone, in the final analysis, have been affected by the tax measure in question.

33 With regard to the first argument, it should be recalled that the relevant provision of the Treaty, that is to say Article 95, and the question of its direct applicability are the subject of a long-standing, copious and varied body of case-law has dispelled all doubts regarding the scope of that provision. It is sufficient to recall in this regard that, as early as its judgment of 14 December 1962 in Joined Cases 2 and 3/62 *Commission* v *Grand Duchy of Luxembourg and Kingdom of Belgium* [1962] ECR 425, at the very time when the contested duties were being levied, the Court emphasized the stringent requirements inherent in this provision of the Treaty.

34 With regard to the tax measures forming the subject-matter of the present dispute, it should be pointed out that even if the attitudes adopted by the Commission in relation to them since 4 November 1965 have succeeded, as far as the Italian authorities are concerned, in creating an appearance of legality, the uncertainties which have emerged at Community level and at national level since that date with regard to the compatibility of the measures in question with Community law prevent the Italian Government in the present case from being able to rely on the requirements of legal certainty or on the existence of a legitimate expectation in order to justify a temporal restriction of the scope of this judgment.

35 With regard to the argument deduced from the taxes which the respondents in the main action seek to recover have been passed on to the consumers, it is necessary to state that the protection of rights guaranteed in the matter by the Community legal order does not require an order for the recovery of charges unduly levied to be granted in conditions which would involve an unjust enrichment of those entitled. There is therefore nothing, from the point of view of Community law, to prevent national courts from taking account in accordance with their national law of the fact that it has been

possible for taxes unduly levied to be incorporated in the prices of the undertaking liable for the tax and to be passed on to the purchasers (judgment of 27 March 1980 in Case 61/79 *Amministrazione delle Finanze* v *Denkavit Italiana* [1980] ECR 1205).

Costs

36 The costs incurred by the Government of the Italian Republic and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Corte d'Appello, Milan, by orders of 19 February 1980 hereby rules:

1. **Opinions delivered by the Commission pursuant to Article 169 of the EEC Treaty have legal effect only in relation to the commencement of proceedings before the Court against a State alleged to have failed to fulfil its obligations under the Treaty. The Commission may not, by attitudes adopted in the context of that procedure, release a Member State from its obligations or impair rights which individuals derive from the Treaty.**

2. **A system of taxation of spirits organized in such a way as to confine exemptions or reduced rates of tax to domestic production alone constitutes discrimination prohibited by Article 95 of the EEC Treaty.**

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.