OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 15 MAY 1975 [1]

Mr President,
Members of the Court,

1. In the judgment in Case 77/72, *(Capolongo v Maya* [1973] ECR 622) the Court, answering questions referred for a preliminary ruling mainly concerning Articles 13 and 92 of the EEC Treaty, raised in connection with the contribution to the Ente nazionale per la cellulosa e per la carta (National Board for Cellulose and Paper, ENCC levied on packaging imported into Italy, had declared itself as follows:

'In the absence of accurate information relating to the objectives, nature and methods of collection of the duty in dispute, it must be stated that, in exercise of the powers conferred by Article 177, the Court, having to limit itself to giving an interpretation of the provisions of Community law in question, cannot consider legal acts and provisions of national law, the risk being that the reply will correspond only imperfectly to the circumstances of the case.'

In this manner the Court expressed its reservation regarding the relevance, for the purpose of its application by the national court to the case before it, of the interpretative ruling given by the Court on the basis of the general questions referred by the national court. In view of what subsequently transpired, the Court's reservation appears to have been fully justified.

Indeed, I consider that, from the evidence submitted in the present proceedings, in which once again an interpretation of the Treaty is sought regarding the same national provision as that which led to the reference for a preliminary ruling in Case 77/72, it is clear that the questions of interpretation which have been raised could be more appropriately considered in the light of Article 95 rather than Article 13 (2), with which the Court's judgment on that occasion was principally concerned.

The national court which on that occasion requested an interpretation of the Treaty did not extend its request to include an interpretation of Article 95; and, perhaps because of the marked absence of more precise information on the subject-matter of the case in point, the Court did not see fit to venture outside the limits of the reference from the national court. Similarly, in the present case, the Pretore of Abbiategrasso, influenced perhaps by the direction given to the question by his predecessor, and without paying sufficient regard to the significance of the reservation expressed in the judgment in *Capolongo* concerning its application to a particular case, follows the example of the first court and concentrates his attention on the concept of charge having equivalent effect to a customs duty, giving no consideration whatever to the provisions which limit the powers of the States in the field of taxation.

To ensure that the basic rules of the customs union are expressed with the necessary clarity, thus enabling the law to function correctly and to have the requisite certainty, it is essential to avoid any uncertainty which might arise from a ruling which does not fit in well with the position under national law in relation to which it was given and is therefore liable to assume a significance different from what the Court in fact intended. The information supplied in the present case

1 — Translated from the Italian.

by the court making the reference and by the interveners is, therefore, welcome because it enables us, if not to resolve the question of interpretation of the Treaty, at least to put it in the correct relationship with the national context from which it arose.

2. The Pretore of Abbiategrasso re-submits the questions of interpretation regarding Article 13 (2) of the Treaty which was also referred in Case 77/72. In the present case, however, the question is more specific, because, in framing it, the Pretore epitomizes a number of features which make it possible to identify and distinguish more closely, than in the earlier case the issues in connexion with which an interpretation of the EEC Treaty is being sought. The essential features of the internal charge concerning which the Italian Court is seeking interpretation of Article 13 (2) are the following:

1. It is collected by a public authority other than the State on certain domestic products and certain products coming from other Member States; on the basis of identical criteria.
2. The revenue therefrom is, by law and statutory regulation, intended to be used for the following purposes:
   (a) the financing of various activities within the territory of the State for the purpose of increasing domestic agricultural production of cellulose;
   (b) the financing of research activities for the benefit of national undertakings which are producers of cellulose and paper;
   (c) the subsidizing exclusively of newsprint produced by the national paper mills in order to make it available to the publishers of the country at below the market price. The subsidy is not granted in respect of newsprint and similar paper imported direct by private interests from other Common Market countries.

The questions put by the Italiean court refer to the situation prevailing in the period 1970/1973, that is, prior to the amendment of the arrangements at the instance of the Commission under Article 93 (2) of the EEC Treaty, implemented by the Italian State with effect from 1 January 1974 in order to conform with Article 92 of the Treaty. It must, however, be emphasized that the interpretation of the rules on State aids, already the subject of the judgment in *Capolongo,* has no relevance to the present proceedings.

As regards the statement under (c) above, the Italian Government and the Commission point out (and the same emerges from the pleadings of both the ENCC and the plaintiff undertaking in the main action) that the subsidy was also granted to newsprint coming from paper mills situated in other Member States, provided it was not imported direct by the relevant consumer but through the ENCC. In other words, the reduction in price could be obtained only if purchase of the foreign product was effected through the Ente nazionale and if the Italian consumer obtained his supply from that body.

It is clear, therefore, that a basic feature of the national arrangements described by the Abbiategrasso court in section (c) of its first question is that the subsidy granted to home-produced newsprint and similar paper is not granted to newsprint coming from other Member States except when it is purchased through ENCC.

Another consideration, not sufficiently brought out in Case 77/72, is that, as regards the portion of revenue used for the purpose of a mandatory reduction in the price of newsprint, the product subject to the levy is not the same as the product which benefits from it, because newsprint, whether home-produced or imported, is exempt from the levy.

In an endeavour to discover anything which might help it to remove its doubts

about the compatibility with the Treaty of the charge concerned in terms of the machinery of which it forms an integral part, the national court, bearing in mind the judgment of this Court in Case 77/72, is, in essence, asking the Court to clarify the decision in the light of the details now placed before it.

3. The levy to which the Italian court refers consists of a national charge which resembles a tax falling on national products or on products of other Member States imported for consumption in Italy. The conditions under which it is applied are identical in the case of each category of product.

In principle, the revenue from a levy of this nature is essentially of assistance to the national production of cellulose and paper and also, in no insignificant degree, to national newspaper publishers, who benefit from a price which is mandatorily reduced below the normal market price officially fixed by the CIP (Comitato Interministeriale per i Prezzi). In this respect, too, those who, in Italy, produce paper for this purpose are indirectly given an advantage over their competitors and, thanks to a subsidy which enables them to sell at a low price are placed in a privileged position compared with any foreign competitors. It is true that the product imported from other Member States could also enjoy the benefit of the subsidy, but the need to operate through the ENCC justifies the assumption that, in practice, the only quantity of paper actually imported into Italy is the amount necessary to meet any proportion there may be of national demand which cannot be met by home supply.

The case-law of this Court has established that the essential ingredient of a charge having equivalent effect to a customs duty within the meaning of Article 13 of the Treaty is not its protectionist or discriminatory character, which may not indeed be present, but the fact that it is specifically applied to a product imported from a Member State by reason (if not at the time) of its importation, and this holds good even when the charge is not collected by the State and even in the absence of competition from domestic products.

The Court has repeatedly declared that, though they play a complementary role to the rules governing the customs union, such as the prohibitions on charges having equivalent effect to customs duties, the rules in Article 95 et seq. limiting the powers of the States in the field of taxation are concerned with wholly different circumstances; that is to say, Article 13 and 30, on the one hand, and Article 95, on the other, cannot apply jointly to one and the same case (see the judgment in Case 57/65 *Lütticke v Hauptzollamt Saarlouis* [1966] ECR 211; Case 25/67, *Milch-, Fett- und Eier-Kontor,* [1968] ECR 220 and Case 27/67, *Fink-Frucht,* [1968] ECR 231). In the judgment in Case 25/67 the Court expressly declared that 'it is difficult to conclude that within the system of the Treaty one and the same charge may at the same time be a "charge having equivalent effect" within the meaning of Articles 9, 12 and 13 and also "internal taxation" for the purposes of Articles 95 and 97'.

It should be noted that the Court is not speaking here of internal taxation prohibited under Article 95 but is making more general reference to the concept of 'internal taxation for the purposes of Article 95'.

In *Lütticke* the Court justified its ruling that it was impossible to apply the prohibition under Article 13 to internal taxation on the grounds that the two different types of charge were governed by different systems. This principle has been even more recently upheld in the judgment of 22 October 1974 in Case 27/74 *(Demag v Finanzamt Duisburg-Süd* [1974] ECR 1046).

In line with these principles, the Court concluded from Articles 95 et seq. that

'the concept of a charge having equivalent effect does not include taxation which is imposed in the same way a State on similar or comparable domestic products, or at least which falls, in the absence of such products, within the framework of general internal taxation, or which is intended to compensate for such internal taxation within the limits laid down by the Treaty' (Judgment in Case 24/68 *Commission v Italian Republic* [1969] ECR 201, ground of judgment No 11).

It is clear that, in principle, this concept includes the charge under consideration by the national court; it is in fact uniformly applied to the home-produced and imported products concerned, solely on the basis of the use to which they are to be put. Furthermore, if the goods become unfit for use there is a refund of the amount paid.

4. However, in *Capolongo,* the Court ruled as follows: 'A duty falling within a general system of internal taxation applied systematically to national and imported products according to the same criteria can nevertheless constitute a charge having an effect equivalent to a customs duty on exports, when such duties are intended exclusively to support activities which specifically benefit the taxed domestic product'.

This ruling may, *prima facie,* seem hardly consistent with either the distinction drawn between the different fields in which Articles 13 and 95 are applied, or with the fact, to which attention was drawn earlier, that the use to which a charge is put has no bearing on the decision whether a charge having equivalent effect to a customs duty is involved.

In fact, when it is borne in mind that the said ruling is restricted to a case involving substantial fraud on the law, the extension of this concept which this judgment undoubtedly entails can be fitted quite well into the pattern built up by the development of the case-law of the Court; that is, it applies to a case where the income from the quasi-fiscal charge applied without distinction to domestic and imported products is *wholly* employed for the *exclusive and specific* benefit of the national product subject to the charge, with the result that the incidence of the levy on the latter is offset by the specific benefit which the product derives from it. As the Court declared in the judgment in *Capolongo,* in such circumstances, even if levied according to the same criteria on the imported product and the domestic product, the duty constitutes for the former a net supplementary tax, whilst for the latter it constitutes in reality a set-off against benefits or aids. Where these conditions apply the home product is only in appearance subject to a charge. In view of the actual incidence of the charge in terms of the economic machinery of which it forms part, it falls for all intents and purposes on the imported product alone.

Even though, therefore, the charge might form part of a general system of internal taxation and were applied on the same basis to home-produced and imported products, it would, if the substance of the matter is looked at, in reality constitute a charge having equivalent effect to a customs duty.

It is important to take a realistic view of the economic developments involved, looking beyond the formal position, so as to ensure that the law corresponds to the facts and that the objectives of the Treaty are at the same time succesfully pursued; on that very clear assumption, this justified exempting from the operation of Article 95 a charge which, on a strictly formal view, would fall within its ambit, in order to bring it within the ambit of the rule in Article 13 which is a better instrument of control when the real nature of the charge is viewed against the particular national intervention mechanism of which it forms an integral part.

Viewed in this light, therefore, the ruling in *Capolongo* does not imply any change in the principles propounded in previous decisions of the Court distinguishing between the respective fields of application of Articles 13 and 95, which, as we have see, have in any case been subsequently re-affirmed in the judgment in *Demag*, Case 27/74.

But it would be impossible to maintain that this remained consistent with the system if the principle laid down in *Capolongo* were to be extended to a situation other than the strictly limited one of substantial fraud on the law which, as I have pointed out already, is alone able to justify bringing within the ambit of Article 13 facts which would be normally covered by Article 95.

The contention by the plaintiff in the main action that, on the basis of that principle, the home product subject to the charge and the products which benefit from it need not be necessarily be the same, must accordingly be rejected.

For the same reason there can be no countenancing the suggestion, mooted by the Commission, of changing the principle in such a way as to enable it to be extended to cover a situation in which only some of a multiplicity of activities financed by means of the levy in question are for the exclusive benefit of the national products subject to it. Apart from its being incapable of being justified as a question of principle, to extend Article 13 to cover such cases might also give rise to unfairness and lead to practical difficulties which it would be impossible to ignore.

Let us take the specific case of the Ente nazionale per la cellulosa e per la carta. In the Commission's view, of the activities mentioned by the national court, only that part of the expenditure involved in the financing of research in the paper industry, representing 5 % of the Ente's outgoings, could conceivably be regarded as contrary to Article 13 if the principle laid down in *Capolongo* were extended in the direction as proposed by the Commission. On this view, however, the outcome would be that the internal charge collected by the Ente would be prohibited in its entirety as a charge having equivalent effect and would, accordingly, have to be repaid *in toto* to all those who had to pay it, notwithstanding that the kind of intervention on the part of the Ente which was regarded as in conflict with the Treaty represented only an insignificant percentage of its total intervention.

On the other hand, to allow that, in circumstances where an internal charge used, even only in part, for the specific benefit of national producers, must, on account if its essentially discriminatory character, be treated as incompatible with Article 95, a situation of this kind falls to be dealt with under that article, would enable the national court to relate the consequences of such incompatibility to its actual extent by declaring the charge to be inapplicable only in so far as, in terms of the use to which it is put, it constitutes an infringement of the rule (Judgment in Case 34/67 *Gebrüder Lück* [1968] ECR 251).

This shows that the distinction between the concept of a charge having an equivalent effect to a customs duty and that of an internal tax is not of purely theoretical interest but is of great practical importance. This also emerges from the precedents established by this Court, under which the concept of charges having equivalent effect has been extended even to payments which are not discriminatory or protective in effect (Judgment in Case 24/68, *Commission v Italian Republic*, [1969] ECR 201; Judgment in Joined Cases 2 and 3/69 *Sociaal Fonds voor de Diamantarbeiders* [1969] ECR 222); whereas a fiscal or quasi-fiscal charge which is neither discriminatory nor protective is, under Article 95, permitted.

Without ignoring the importance of interpreting the Treaty rules concerned

in such a way as not to weaken the safeguards provided for the free movement of goods in the common market, it is essential to be guided by the need for a clear concept of the considerations involved in the interest of legal certainty and the correct application of those rules.

5. In the circumstances envisaged by the court making the reference, the application of these principles tends to prevent the ruling in *Capolongo* from providing it with adequate guide-lines on which to reach a decision in the main action. Indeed, more than half the outgoings of the Ente is allocated to activities associated with products, such as newsprint and paper for periodicals, other than those on which the charge collected by the Ente is levied. In certain cases the man who produces paper or cardboard and the man who produces newspapers are one and the same person. But, apart the fact that such identity is purely a matter of chance, it must be borne in mind that the mandatory reduction in the price of newsprint and the exceptions made in favour of the periodical press are of specific benefit to the publishers concerned, whereas the national producers of these types of paper can derive only indirect advantage therefrom, if at all, in so far as these measures may increase the national demand for newsprint and, as has already been indicated, in so far as, more particularly, they may be placed in a position of advantage in the Italian market compared with foreign producers of newsprint.

In such circumstances, as has already been indicated, it is impossible to establish, as without any possibility of exception must be established that the product subject to the charge and the domestic product benefiting from it are one and the same.

There is an absence, therefore, of the condition necessary to enable the internal charge concerned to be taken out of its natural context as taxation subject to Article 95.

It is against this background perhaps that the court making the reference may be able to assess the validity of its doubts about the possible incompatibility of the internal charge with a law, such as Article 95, which was directly applicable at the material time (Case 57/65 Lütticke, [1966] ECR 210).

As we have seen, following the Commission's intervention, pursuant to Article 93 (2), the Italian State agreed to change, with effect from 1 January 1974, the system of aids granted through the ENCC by, for example, extending the aids for the press to consumers of newsprint coming from other Member States and imported by them direct into Italy, and by ceasing to use the revenue from the charge to finance research carried out by the Ente for the paper industry.

The fact that these and other aspects of the national arrangements in force at the material time in the main action be said to conflict with the Community rules governing state aids does not enable private parties, by motion before the national court, to have their rights directly enforced; failing the direct applicability of Article 92, with which the aid financed by the charge concerned may have conflicted, they cannot avoid liability to pay the charge during the period prior to 1 January 1974.

Nor would it be possible to regard the rules in that Article as being directly applicable, with retrospective effect, simply because the Italian Government agreed to the Commission's requests.

As a result of the way in which the Commission in fact applied the rule, any direct applicability it might have could, at the most, be in the future, to deal with the kind of situation which the Commission's decision has served to eliminate; it could in no case be retrospective.

The application of Article 92 to an aid would not, however, make it impossible, on account of the way the aid was financed, for the same facts to fall under the prohibition in Article 95 as well.

6. Viewing the reference from the Italian Court against the background of the actual requirements of the situation and bearing in mind what has been said concerning the effect of Article 13 (2), I believe that its first question could best be considered under Article 95.

On that basis it would first of all be necessary to consider whether the use to which revenue from an internal levy was put is of any significance in establishing whether, to the detriment of the imported product, the charge is discriminatory within the meaning of the first paragraph of Article 95. It is not an easy question and if it is to be dealt with in sufficient depth it deserves the fullest consideration.

Bearing in mind, however, that, in the absence of a question expressly relating to that rule, the parties entitled to submit observations under Article 20 of the Statute of the Court have not had an opportunity to express their views on the point, I must confine myself to a short comment of a general nature.

Generally speaking, in applying Article 95, it is not in my view possible to ignore the use to which revenue from the charge is put, was this may sometimes be necessary to establish whether, to use the word in a sense which is not merely formal, discrimination is in fact being practised.

Circumstances in which there is, not only occassionally but regularly, a specific allocation of part of the revenue of the charge collected on certain home-produced and imported products to the financing of activities which mainly benefit the national products subject to it could constitute a situation, prohibited under the first paragraph of Article 95, in which a product of the other Member States in indirectly subject to a national charge which is, in fact, greater than that applied to the same national product.

Equality of treatment in the field of taxation for the products of other Member States, compared with home products, may, in the Community legal order, acquire a significance which goes beyond a purely formal concept of parity based solely on the character of the charge imposed, the basis on which it is levied, and the conditions under which it is collected.

If, in tune with the spirit of the judgment in *Capolongo,* a charge the income from which is exclusively devoted to funding activities which specifically benefit the national product subject to it, can, as far as that product is concerned, be regarded as non-existent, because the benefit obtained wholly offsets the charge it is called upon to pay, it would be reasonable also to recognize that, when it is not exclusively devoted to this purpose and the charge is, in the case of the national product, only partially offset by the advantage it derives from it, the imported product has, as regards the charge concerned, in fact to pay a higher charge than the home product; and this conflicts with the provision in Article 95.

However, it would at all times be of the essence that the use to which the charge was put benefited the whole product to it *in a specific way.* Otherwise, it would not be possible to identify discriminatory treatment with sufficient certainty to justify a limitation of national sovereignty which could be directly enforced by the national court. In this connexion, full regard must also be paid to the peculiar delicacy of taxation and its ramifications and the important part they play in the conduct of the Member States' affairs. The independence which each Member State enjoys in determining its objectives and

in deciding where its interests lie must be accompanied by freedom to levy taxes, on which Article 95 imposes limitations solely in order to prevent discrimination and to prohibit protective measures.

7. As regards the second question which is, however, in my view, superfluous, it suffices to point out that the right of private parties to have Article 13 (2) of the Treaty, which this Court has already declared to be directly applicable, enforced was created only after the date of expiry of the transitional period. In fact, the Decision of the Council of 26 July 1966 concerning earlier establishment of the customs union affected neither measures having equivalent effect to customs duties nor measures having equivalent effect to quantitative restrictions.

8. The third question asks whether, bearing in mind the consequences which flow from the reduction in the market price of paper subsidized by means of the abovementioned charge, the charge is not in conflict with Community law, given also that it enables the national paper mills, to the exclusion of Community competitors, to share out amongst themselves almost the whole of the Italian market in newsprint, thus creating a situation which contravenes Article 85 and 86 of the Treaty.

The plaintiff in the main action regards the relationship between the companies producing cellulose and paper and other companies which are cellulose consumers as a forced consortium because, under Article 1 of Law No 1435 of 13 June 1935, setting up the ENCC, they were compelled to join the ENCC. The plaintiff contends that this gives rise to situations which contravene Article 85 and 86 of the Treaty owing to the fact that:

(a) the national paper mills and the ENCC share out amongst themselves the Italian newsprint market on the basis of allotted quotas, which are fixed under agreements concluded between the ENCC and the Italian paper mills;
(b) even though this is at the instigation of the CIP (Inter-departmental committee on prices), paper mills and the ENCC substantially agree the prices for paper on sale to the Italian publishing companies; other agreements bind the publishing houses belonging to the press federation to the paper mills and the ENCC.

The plaintiff in the main action further argues, that, to the extent that the ENCC purchases paper at home or abroad in order to sell it to national consumers, it acts just like a private undertaking and must, therefore, be treated on this account as an undertaking subject to the rules on competition, especially those prohibiting cartels and abuse of a dominant position. The fact that the ENCC is not a profitmaking body does not prevent it from falling under the definition of an undertaking within the meaning of Articles 85 and 86 of the Treaty. As regards its other activities the ENCC can be treated as an association of undertakings on the basis of the aforementioned article of the Law of 13 June 1935; its decisions can constitute decisions of associations of undertakings in so far as they are binding on the companies which are constituent members of it.

As regards Article 85 and 86 of the Treaty, I must first of all point out that the question does not refer to a specific use, within the limits of its discretion, of its powers by the ENCC, but only to the normal application on its part of the legislative provisions to which it is subject.

As is stated in Case 2/73, *Geddo v Ente nazionale risi,* [1973] ECR 892, my answer on this point is that as a body established and governed by the law of the state, the ENCC cannot be reproached for complying with that law

so long as it is not held to be contrary to Community law.

In that case the Court found that, as a general rule, Article 86 of the Treaty does not apply to a charge for the purpose of financing national aids (ibid. p. 879, ground of judgment No 11).

The same principle must *a fortiori* apply to Article 85, because there is no alternative open to the undertakings compulsorily organized in a state body, which, as far as they are concerned, does not act as their common organization but as having authority over them in the pursuance of public policy as expressed in the law of the State.

To establish, thereafter, whether in the present case it is possible to recognize the existence of state measures adopted or maintained, as far as the ENCC is concerned, in contravention of Articles 85 and 86, within the meaning of Article 90 of the Treaty, the Court would need to make an evaluation of facts, actions and circumstances which it is not qualified to make when giving a preliminary ruling on interpretation under Article 177 of the Treaty, and which the national court would not be in any better position to make in view of the fact that, generally speaking, as the Court had occasion to note on the subject of paragraph 2 of the Article in the Judgment in Case 10/71 *(Port of Mertert,* Rec. 1971, p. 730), Article 90 does not easily lend itself to direct application in a case where the Commission has not made use of the powers conferred on it by Article 90 (3).

On the basis of the foregoing considerations, then, I recommend that the answer to the questions referred by the Pretore of Abbiategrasso should be to the following effect:

1. The prohibition of charges having equivalent effect to a customs duty contained in Article 13 (2) of the EEC Treaty does not cover a charge which forms part of a general system of internal taxation, and which is applied on the same conditions to both home-produced and imported products, with the exception of cases where the charge is exclusively used for financing activities of specific benefit to the identical home-produced product which is subject to it.

2. The rule in Article 13 (2) became directly applicable with effect from 1 January 1970.

3. Articles 85 and 86 of the EEC Treaty are not applicable to a charge used to finance national aids.