OPINION OF ADVOCATE GENERAL LENZ
delivered on 15 July 1997 *

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A — Facts

1. In the present proceedings the Tribunale di Trento (Trento District Court) has referred to the Court for a preliminary ruling a question relating to the compatibility of the Italian consumption tax on audiovisual and photo-optical products [1] with Community law. The Court has already had occasion to examine this tax, although in another context. [2] The main proceedings from which the present case arises relate to an action brought by Grundig Italiana SpA against the Ministry of Finance of the Italian Republic, in which the plaintiff seeks repayment of the sum of LIT 112 236 330 770 and statutory interest. This is the amount of consumption tax paid by the plaintiff between 1 January 1983 and 31 December 1992, the period during which the disputed tax was in force. In the opinion of the plaintiff, the Italian consumption tax is in breach of Community law and on that ground should not be paid.

* Original language: German.

1 — Introduced by Article 4 of the Decree Law of 30 December 1982, which was converted with amendments into Law No 53 of 28 February 1983 and supplemented by the implementing provisions of the Ministerial Decree of 23 March 1983.

2 — Judgment in Case 130/92 *OTO* v *Ministero dell Finanze* [1994] ECR I-3281.

2. According to information from the Commission, the tax applies to 12 categories of audiovisual and photo-optical instruments, such as cameras, lenses, binoculars, telescopes, cine-cameras, record players and television sets. The tax is levied at a uniform rate of 16% of the value of the equipment. (Television sets are subject to a reduced rate of 8%.) The taxable amount is calculated in different ways, however, depending on whether the product is of domestic manufacture or imported. According to the national court, the taxable amount in the case of domestic products is the total cost of manufacture, including preparation and packaging costs; transport and distribution costs, intermediaries' expenses and all other expenditure relating to release for consumption on the domestic market are not included. Domestic producers are entitled to indicate as the taxable value the invoiced sales price of the products less a flat-rate deduction of 35% of the price. The Minister for Finance can set a flat-rate deduction of a different percentage for certain categories of products after assessing the impact of internal marketing costs on the usual price of the product. Recourse to the flat-rate deduction precludes any other deduction from the price for the purpose of determining the taxable value. The tax offices must recognise the taxable value arrived at in this way as appropriate unless the price charged differs from the normal value of the products sold.

3. In the case of imported products, by contrast, the taxable value is the value at the Italian frontier, which is determined on the basis of the customs value as defined by Regulation (EEC) No 1224/80 [3] plus any costs and charges for customs presentation at the Italian frontier, including duties payable for release into free circulation in the Community, less any components of the price paid or payable that relate to the transportation and marketing of the products within the national customs territory. There is no possibility of making a flat-rate deduction for imported goods.

4. In addition, there are different procedures for collecting the tax, depending on whether the products are of domestic manufacture or imported. Domestic manufacturers are required to make a quarterly return containing the essential details needed for assessment of the tax, which has to be paid within the month following the relevant calendar quarter.

5. For importers, by contrast, the tax is assessed and collected at the time of import through customs. According to the national court, this leads to different payment times for the same tax.

6. The national court considers that, as a preliminary to any other questions raised by the parties, it is necessary to determine whether or not the provisions introducing

3 — Council Regulation (EEC) No 1224/80 of 20 May 1980 on the valuation of goods for customs purposes (OJ 1980 L 134, p. 1).

and applying the national consumption tax at issue are incompatible with Community law. It states further that there is reasonable doubt as to the possibility of a conflict with Community law, so that it is necessary to seek a preliminary ruling from the Court of Justice under Article 177 of the Treaty. Accordingly, it refers the following question to the Court of Justice for a preliminary ruling:

'Must Article 95 of the EC Treaty be interpreted as prohibiting a Member State from introducing and collecting a national consumption tax of the kind provided for by Article 4 of the Decree Law of 30 December 1982, converted into law by Law No 53 of 28 February 1983, and further governed by the Decree of the Ministry of Finance of 23 March 1983, in so far as different taxable amounts are determined for domestic products and for those imported from other Member States and different procedures are laid down for collection of the tax on the same products?'

B — Analysis

I. Article 95

7. As stated in the *OTO* judgment, [4] the disputed tax has to be examined in the light of Article 95 of the EC Treaty. In the grounds of that judgment the Court noted that it had already held that a tax such as the national consumption tax must be regarded as being an integral part of a general system of internal taxation within the meaning of Article 95 of the Treaty and that its compatibility with Community law must be assessed on the basis of that article. [5] As regards the Italian tax to be examined in the present case, the Court went on to hold that it is a tax within the meaning of Article 95 in so far as it is applicable to goods imported from other Member States and, where appropriate, to goods originating in non-member countries which are in free circulation in the Member States. The Court has consistently held that Article 95 of the Treaty applies only to the products mentioned above. [6]

8. According to Article 95 of the EC Treaty, no Member State 'shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products'.

9. The first paragraph thus deals with similar products. Where such similarity does not exist, the second paragraph provides that 'no Member State shall impose on the products of other Member States any internal taxation

4 — Case C-130/92, cited above (footnote 2), paragraph 15 et seq.

5 — Case C-130/92, cited above (footnote 2), paragraph 11.

6 — Case C-130/92, cited above (footnote 2), paragraph 18 et seq.

of such a nature as to afford indirect protection to other products'.

10. According to established case-law, the aim of Article 95 of the Treaty is 'to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which result from the application of internal taxation which discriminates against products from other Member States'. [7] It is therefore intended to ensure equality of treatment in internal taxation. [8]

11. In the view of the Court, the similarity required under the first paragraph of Article 95 exists if at the same stage of production or marketing the products have similar characteristics and meet the same needs from the point of view of consumers. Whether or not the domestic product and the imported product are classified under the same heading in the Common Customs Tariff constitutes an important factor in this assessment. [9]

12. It appears from the Commission's observations that 12 categories of audiovisual and photo-optical products are subject to the consumption tax under Article 4(1) of Law No 53 of 1983. Cameras, lenses, binoculars, telescopes, cine-cameras, record players and television sets are mentioned by way of example. As the description of the products is extremely precise, it is undoubtedly safe to assume that the necessary similarity exists between products of Italian manufacture and those imported from other Member States. Leaving aside the question of quality, from the consumer's point of view there is likely to be no difference between the properties and purpose of an Italian television set and those of one manufactured in another Member State.

13. If such similarity does not exist, the second paragraph of Article 95 prohibits the protectionist effect of the tax, which would occur in particular if internal taxation were to impose a heavier burden on an imported product than on a domestic product with which the imported product is, by reason of one or more economic uses to which it may be put, in competition. [10] As the tax in question is levied on audiovisual and photo-optical equipment in the categories of cameras, lenses, cine-cameras, and so on, it is undeniable that domestic and imported products are in competition with one another.

7 — Case C-130/92, cited above (footnote 2), paragraph 16.

8 — Judgment in Case 54/72 *FOR* v *VKS* [1973] ECR 193, paragraph 5.

9 — Judgment in Case 45/75 *REWE* v *Hauptzollamt Landau* [1976] ECR 181, paragraph 12.

10 — Judgment in Case 27/67 *Fink-Frucht* v *Hauptzollamt München* [1968] ECR 223, especially at 232.

14. Article 95 is therefore applicable here in any event. In the light of the information available, the products would appear to be similar within the meaning of the first paragraph of Article 95. In case of doubt, it is for the national court to make a product classification.

15. It must be stated, however, that Article 95 is applicable in any case and that the remainder of this examination will relate to the level of taxation on the various products.

II. The individual taxation procedures

1. The different basis of assessment

16. As can be seen from the order for reference, the national court casts doubt on the compatibility of the Italian consumption tax with Community law on several grounds. It refers first to the different basis of assessment for domestic and imported products. In the case of *goods produced in Italy*, this is the ex-works price of the product plus the cost of preparation and packaging. Transport and marketing costs within Italy are not included. This means that for such products manufactured and marketed in Italy, absolutely no transport and marketing costs are taken into account when determining the taxable amount.

17. According to the national court, the basis of assessment for *imported products* from other Member States is the value of the goods at the Italian frontier, determined on the basis of the valuation for customs purposes within the meaning of Regulation No 1224/80, [11] plus any costs and charges for customs presentation at the Italian frontier. Hence transport and marketing costs up to the Italian frontier form part of the taxable value. In addition, the cost of release into free circulation in the Community must be taken into consideration, although this has no relevance here as Article 95 does not apply to goods imported direct from non-member countries. The only deductions that can be made from the value so determined are in respect of the price components relating to transport and marketing costs in Italy. Any components representing costs incurred before the frontier cannot be deducted. [12] This means that for imported goods the taxable amount is the price at the frontier, including transport and marketing costs up

11 — Under the first paragraph of Article 3 of Regulation No 1224/80, the customs value of imported goods is the price actually paid or payable for the goods when sold for export to the customs territory of the Community. Under paragraph 1(e) of Article 8, the cost of transport and insurance of the imported goods to the place of their introduction into the customs territory of the Community, among other costs, is to be added to that price.

12 — The Commission points out that in such a case the transport costs are counted twice, since Article 8 of the regulation expressly states that they are to be added to the price.

to the Italian border, less price components representing transport and marketing costs in Italy.

18. The Commission has given an example to show what this means in practice: an Italian manufacturer who delivers a consignment of television sets from Rome to Bolzano can deduct the entire transport costs from the taxable amount. A German producer who has delivered a consignment of television sets *of the same value* to the same customers in Bolzano from Essen or Lübeck, for example, can deduct from the taxable amount only the transport costs incurred within Italy, that is to say for the leg from the Brenner Pass to Bolzano, a distance of 75 kilometres. As the transport costs as far as the Italian border are included in the calculation, the customs value of a product of equal value used for determining the taxable amount and hence the tax is correspondingly higher than the value used for Italian products, namely the ex-works value. The basis of assessment for imported goods is therefore higher than it is for domestic goods, leading to higher taxation on the former, despite the tax rate being the same. In the opinion of all the parties to the proceedings with the exception of the Italian Government, this constitutes discrimination prohibited by Article 95.

19. The Italian authorities dispute the existence of such discrimination. They contend that all goods — whether imported or manufactured in Italy — are accorded equal treatment. In both cases, they point out, the transport and marketing costs incurred in Italy are deducted from the taxable amount. They emphasise again in particular that in their view there is no difference between the wording used for imported goods ('price components paid or to be paid in respect of carriage and marketing within national customs territory') and the 'costs of dispatch, distribution, intermediate costs and all other expenditure relating to release for consumption on the national market', which can be deducted from the price of Italian goods. On that basis, they contend, there is complete equality of treatment between imported and domestic products. In their view, the claim that in the case of imported goods the costs incurred up to the Italian border should also be deducted is entirely without foundation. They justify their stance on the grounds that the tax at issue is an internal consumption tax, the levying of which requires that the product be intended for consumption. As it is an internal tax, the conditions to be met for its application can stem only from facts relating to the national tax system, that is to say primarily the intended use of a product for consumption on the domestic market. In the case of a product manufactured in Italy, it can be assumed, according to the Italian Government, that the product is released for consumption on the Italian market when it leaves the factory. In the case of imported goods, this occurs at the time of importation at the Italian frontier.

20. According to the Italian Government, the application of the tax also demonstrates that the essential prerequisite for liability to the tax is that the products be intended for

consumption on the Italian market. Accordingly, goods in transit and goods intended for export are exempt from the tax.

21. As it is an internal consumption tax on products for consumption on the Italian market, the value of the product at the moment at which it is made available to the Italian consumer is, according to the Italian Government, the deciding factor. In the case of imported goods, this is the value free at frontier (including transport costs incurred up to the frontier), which, in the view of the Italian Government, is the value at which the product comes on to the Italian domestic market, and hence it is also the value used as the basis of assessment. Domestic products come on to the Italian market at their ex-works value, for which reason here too the packaging and preparation costs are included.

22. In the opinion of the Italian Government, such an approach is compatible with Community law, as different national tax systems continue to exist that have not yet been harmonised. For that reason, it contends, a system of internal taxation, including a consumption tax, is lawful. According to Italy, there are no provisions of Community law that require Member States to disregard certain price components when determining the value of imported goods on the sole ground that domestic products do not bear corresponding costs, for objective economic reasons. By way of example, the Italian Government compares a product from Italy with one from Japan in free circulation in Portugal. According to the Italian Government, it is obvious that the additional costs, which affect the customs value, are far higher in the case of the Japanese product than in that of the product from Italy. It contends that this is an elementary economic fact and certainly not the result of discrimination on the part of the importing country.

23. As far as the latter example is concerned, it cannot be denied that the transport costs for a product from Japan may be higher than those for a product manufactured in the country in which it is to be sold. It does not necessarily follow, however, that this elementary economic fact may be used as a basis for higher taxation.

24. As I have already stated, imported products are subject to higher taxation than domestic products because of their higher taxable value. This is not contested by Italy either. Indeed, the Italian Government considers that it must be accepted that imported products have a higher price than domestic products when they cross the frontier because of the transport costs that have already been incurred. On the basis of that difference in price, the taxable amount is then determined equally for domestic and imported products — according to the

Italian Government — less transport and marketing costs incurred in Italy.

25. But this too can lead to higher taxation on imported products which is prohibited under Article 95 of the Treaty. In accordance with consistent case-law of the Court, it is necessary, for the purposes of the application of the prohibition on discrimination laid down in Article 95, to take into consideration the provisions relating to the basis of assessment and the detailed rules for levying the various duties in addition to the rate of tax. In that regard, the decisive criterion of comparison is the actual effect of each tax on domestic production, on the one hand, and on imported products on the other. Even where the rate of tax is the same, the effect of that tax may vary according to the detailed rules governing the basis of assessment and collection applied to domestic production and imported products respectively. [13] The provisions of Article 95 give a Member State the option of applying to the imported product a system of taxation different from that to which the similar domestic product is subject, but only if the charge to tax on the imported product remains at all times the same as or lower than the charge applicable to the similar domestic product. As the Court has held, the first paragraph of Article 95 would be infringed 'if the tax on the imported product and that applied to the similar domestic product were calculated in a different way and in accordance with different rules, leading, even if only in certain cases, to lower taxation of the domestic product'. [14]

(a) Different initial value

26. Such a difference in taxation, in other words higher taxation for imported products, stems in the present case from the fact that, even on the assumption that the scope for deducting costs is truly the same, the Italian rules are based on *different initial values*. The taxable amount is different if the calculation — even be it the same — is based on a different initial value. That is true of the Italian rules in the present case in that it adds to the actual value of the imported product at the Italian frontier the transport and marketing costs incurred up to the frontier. In accordance with the case-law of the Court in the *Iannelli* case, [15] this infringes Article 95. That case related to levies charged on home-produced wallpaper and imported wallpaper. In the case of domestic products, the basis of assessment was the price of paper regarded solely as a raw material, whilst the basis for the imposition of the levy upon the corresponding imported product was derived from its overall value. The overall value was to be understood as the cost of the finished product shown on the invoice (composed

13 — Case 55/79 *Commission* v *Ireland* [1980] ECR 481, paragraph 8 and the references it contains.

14 — Case 127/75 *Bobie* v *Hauptzollamt Aachen-Nord* [1976] ECR 1079, paragraph 3.

15 — Case 74/76 *Iannelli* v *Meroni* [1977] ECR 557.

therefore of the cost of the original raw material together with the value added), increased by the expenses of loading, shipping, commission, insurance, transport and so on as far as the frontier, even if those expenses were not included in whole or in part in the seller's invoice. The Court again stated that in order to apply Article 95, the basis of assessment and detailed rules for levying the tax must also be taken into consideration. As soon as any differences in that respect result in the imported product being taxed at the same stage of production or marketing at a higher rate than the similar domestic product, the prohibition in Article 95 is infringed. According to the Court, this would happen 'if a tax is assessed on the value of a product and in the case of the imported product factors for assessment are taken into consideration which are likely to increase the value of the imported product *vis-à-vis* the corresponding domestic product'. [16]

27. The Italian consumption tax at issue in the present case is also a tax assessed on the value of a product. It therefore infringes Article 95 if the value of the imported products is higher than that of domestic products because transport costs as far as the frontier form part of the taxable amount. [17]

28. As regards Italy's contention that the disputed consumption tax is legitimate as it is part of the domestic tax system which has not hitherto been harmonised, the Court has held that obstacles to the free movement of goods may be eliminated by applying the procedure for the harmonisation of tax legislation, but the harmonisation of the provisions relating thereto cannot be laid down as a condition for the application of Article 95, which imposes on Member States with immediate effect the duty to apply their tax legislation without discrimination even before there is any harmonisation. [18]

29. The Commission cites in this connection the case-law of the Court regarding Regulation No 1408/71 and direct taxation. In the area of direct taxation, for example, in the absence of more specific Community rules, reliance has been placed on the general principles of Community law in order to prevent discriminatory taxation. This comparison confirms the conclusion reached earlier that prior harmonisation is not a precondition for the application of directly applicable provisions of the Treaty. Recourse to the general provisions on discrimination is unnecessary in the present case, however, as the Treaty contains a specific provision on that point, namely Article 95.

16 — Case 74/76, cited above (footnote 15), paragraphs 20 and 21.

17 — In this connection, attention is again drawn to the example of television sets imported into or transported within Italy; see point 18 above.

18 — Case 55/79, cited above (footnote 13), paragraph 12.

30. Accordingly, it must be held that the Italian legislation on the consumption tax infringes Article 95 in so far as it bases the calculation of the taxable amount on a different, higher value. Such higher taxation is likely to hinder the free movement of goods between Member States.

(b) Other aspects

31. Although a breach of Article 95 has already been established, therefore, I would like to consider the other aspects raised by the parties to the proceedings. They lead me to conclude that even the Italian Government's claim that all products are treated equally as regards the deduction of costs within Italy does not stand up to scrutiny. In this connection, the plaintiff and the Commission point out that a common market now exists, especially in the audiovisual and photo-optical field. In their view, this means that undertakings sell their products in several Member States. In order to do so, they attempt to *centralise their distribution system*, with the result that transport costs are incurred at only one place, usually the location of the parent company. The parties contend that the same applies to marketing costs. After-sales service networks are centralised in order to provide a uniform guarantee in all Member States, which, as the plaintiff observes, is required by the Community rules.

32. Advertising costs must also be counted among these various marketing costs. Consequently, they too are paid centrally at one place, namely the head office of the parent company. If that office is located outside Italy, under the Italian arrangements no transport or marketing costs at all can be deducted from the taxable amount.

33. In the view of the Commission, Italy has *regulated this tax as though the common market did not exist* and as though it could be assumed that the transport and marketing costs incurred with respect to Italy could be determined precisely and were also to be defrayed in Italy itself, for the Italian Government stated in the oral procedure that in the case of imported goods only costs arising and paid in Italy itself can be deducted.

34. For the sake of clarity, I refer once again to the example given in the oral procedure. Grundig, among other companies, advertises its products at an important football match involving an Italian team, which is played in Germany and broadcast in many Member

States, including Italy. According to the Italian Government, the cost of such advertising cannot be deducted from the taxable amount because it was incurred in Germany and was paid there. Nothing would change even if the cost relating to Italy could be established precisely. Even if at that football match Grundig specifically advertises a product that it wishes to sell exclusively in Italy, those costs cannot be deducted from the taxable amount.

35. It is therefore quite possible to conceive of instances in which none of the transport and marketing costs relating to sales in Italy can be deducted in full. The fact that this may not hold true in all cases is immaterial since, in accordance with the case-law of the Court, Article 95 is infringed if higher taxation is imposed in some cases. [19]

36. Hence, from that point of view it would no longer be possible to deduct any transport and marketing costs for imported goods, either because they could no longer be quantified owing to the centralisation of costs or because they were no longer incurred or paid in Italy itself. The basis for assessing the consumption tax would therefore be the customs value including costs as far as the frontier without any deduction. Even if costs have been centralised and can therefore no longer be shown individually for each Member State, this does not mean that they are not included in the price in some form or other. The customs value at the frontier is thus higher than the net value of the product, but the transport and marketing costs incurred cannot be deducted. In this case the inequality of treatment is even more pronounced, as not only is a higher initial value used to calculate the taxable amount but it is also no longer possible to deduct any costs.

37. The inequality of treatment becomes even greater if, going a stage further, it is assumed that Italian manufacturers have also centralised their sales and marketing costs and that — as the Italian Government stated at the hearing — in the event of distribution and marketing systems having been centralised, the costs can be deducted in the country in which they have been incurred. This would mean that an Italian manufacturer could deduct not just the costs relating to Italy but also the costs incurred in Italy, in other words a large part of the costs of the entire distribution and marketing system, whereas in the case of imported goods such costs can no longer be deducted.

19 — Case 45/75, cited above (footnote 9), paragraph 15.

38. The plaintiff and the Commission refer to another circumstance that can give rise to discrimination against imported products. In their opinion, it is not possible to deduct transport and marketing costs relating to Italy — even if they can be quantified — because only the price components relating to such costs can be deducted. In the view of the plaintiff and the Commission, this means in practice that those *price components* have to be shown separately *on the invoice*. As in practice this is neither usual nor possible, since only an overall price is ever stated, for that reason too it would be impossible to deduct transport and marketing costs for imported products.

39. In my view, it does not appear from the documents that separate invoicing is really required. According to the Italian Government, costs are deducted on the basis of the customs declaration made at the frontier. From this the conclusion could be drawn that in order to claim the deduction it is sufficient for costs to be broken down accordingly on the customs declaration, always on the assumption of course that a breakdown of costs is possible. Further clarification of this issue is a matter for the national court, which has the necessary information. Even if separate invoicing were necessary, however, I see no reason why such a breakdown could not be made on the invoice form. (The question whether such a breakdown is still possible, given centralization, has already been discussed). [20]

20 — See points 31 to 34 above.

40. The Commission and the plaintiff cite yet another reason why no costs can be deducted in the case of imported products. They point out that, contrary to the situation for domestic goods, *no quarterly return* is submitted for imported goods. From this they conclude that in the case of imported goods no return can be made in which the costs to be deducted can be declared. The Italian Government disputes this, pointing out that all costs to be deducted can be entered in the customs declaration.

41. I see no reason why the deduction of certain costs for imported goods should be impossible merely because only a customs declaration and no quarterly tax return is to be submitted for such goods. As the customs declaration serves to determine the customs value, which may include transport costs, a breakdown of costs has to be made in any case. Since the calculated value thus constitutes the taxable value, no further calculations are necessary. However, this question too must ultimately be decided by the national court, which has more precise information on the content of the customs declaration. Should it transpire that the costs to be deducted cannot be shown on the customs declaration, Article 95 would have been infringed in that respect as well.

42. There is therefore discrimination against imported goods not only on account of the different values used to calculate the taxable amount but also because of the differing extent to which transport and marketing costs relating to Italy can be deducted from those values.

43. As regards the increase in the value on which the tax is levied to include transport costs up to the Italian frontier, Italy has also submitted that this is based on the Community's *regulation on the valuation of goods for customs purposes* and for that reason cannot infringe Community law. It must be said in that connection that the regulation in question is designed to govern trade with non-member countries. [21] Calculation of the customs value including transport costs up to the frontier cannot contravene Article 95 in the case of imports from non-member countries, as Article 95 does not apply in this instance. This does not mean, however, that if the provisions of that regulation are transposed to a completely different case — namely the importation of goods from other Member States — such an increase in the basis of assessment is not in breach of the prohibition on discrimination laid down in Article 95.

44. Finally, the Italian Government cites my *Opinion in the OTO case* as evidence that inequality of treatment between imported and domestic products does not exist. It refers in that regard to the observation that there are no grounds for concluding that goods from other Member States (whether manufactured there or released into free circulation) are treated less advantageously than products manufactured in Italy. [22] As the relevant footnote clearly indicates, that statement relates to a previous paragraph in the Opinion dealing with the interpretation of the wording of the question referred in that case, which involved imports from non-member countries. The observation referred to by the Italian Government should therefore be understood to mean that the question submitted by the national court gave no grounds for concluding that there was discrimination against products manufactured within the Community and that the question therefore did not need to be examined.

2. Possibility of making a flat-rate deduction in respect of products manufactured in Italy

45. In the opinion of the national court, further discrimination may result from the fact

21 — Articles 1(1)(g) and 3(1) of Council Regulation (EEC) No 1224/80.

22 — Opinion in Case C-130/92 *OTO* v *Ministero dell Finanze* [1994] ECR I-3281, paragraph 15.

that the option of calculating the taxable amount on a flat-rate basis is available only for domestic products.

46. The Italian Government disputes the existence of such discrimination. It maintains that the purpose of the facility to make a flat-rate deduction is not to reduce the taxable amount. The flat-rate amount of 35% is deducted not from the ex-works value of the product but from the selling price, on the assumption that 35% reflects the impact of transport and marketing costs within Italy on the price of the product. The Italian Government points out that those costs can also be deducted from the taxable amount for imported goods. It also observes that it is possible to adjust the amount of the flat-rate deduction to suit general economic conditions or to products for which the impact of the said costs on the price does not correspond to 35%. In addition, it points out that the price of the product declared by the manufacturer, from which the flat-rate deduction is made, must correspond to the normal value of the goods defined in accordance with Italian legislation. The competent authorities verify whether that is the case. The Italian Government concedes that if a manufacturer opts to make a flat-rate deduction his figures must initially be treated as correct, but this does not mean that the authorities are tied to the extent that they can no longer verify them.

47. For that reason, in the view of the Italian Government, the flat-rate deduction is only an *alternative to the calculation of the taxable amount*. It does not alter the costs deducted, hence the taxable amount does not change either. That is why the possibility of making a flat-rate deduction does not, in the view of the Italian authorities, give domestic manufacturers an advantage. Accordingly, imported goods are not placed at a disadvantage either.

48. The Italian Government does not dispute the fact that the taxable amount can be calculated far more rapidly and easily for domestic products on the basis of the flat-rate deduction. It considers, however, that this merely *restores comparability* between domestic and imported products, and that without the possibility of making a flat-rate deduction it is far more difficult to calculate the taxable amount for domestic products than for imported ones.

49. The Italian Government maintains that in the case of imported products all that is required is to determine the customs value in accordance with Regulation No 1224/80, a value that can be established formally and objectively. The taxable values derive from the same formalities as are required for the customs declaration. According to the Italian Government, the ex-works value of domestic products is much more difficult to determine. Accounting and tax documents

(e. g. invoices, which include all incurred costs in the price, without specifying them) cannot be used directly for this purpose. Whereas the importer does not need to submit more forms and declarations than for the normal border crossing, in order to determine the taxable amount of domestic products additional documents and evidence must be produced for the return.

50. In my view, that reasoning cannot be fully endorsed. For imported goods as well, it is not sufficient to state the value free at frontier. On the contrary, in that case too, the transport and marketing costs incurred in the Italian market must be quantified precisely in order to be capable of deduction. It is therefore difficult to see why those costs should be easier to determine for imported goods than for domestic products, all the more so as in the case of imported goods transport and marketing costs are incurred both up to the frontier and within Italy. Unlike the domestic manufacturer, therefore, the importer may also have to break down the costs according to the territory in which they are incurred. It is far from clear why the importer requires fewer documents and less evidence for this than the domestic producer, unless the deduction of such costs is entirely prohibited for importers, which would undeniably constitute discrimination within the meaning of Article 95.

51. For that reason, the possibility of making a flat-rate deduction cannot be deemed to place the different circumstances of importers and domestic producers on an equal footing. Indeed, the latter are in a comparable position. The flat-rate calculation of the taxable amount does in any event simplify the calculation. Contrary to the contention of the Italian Government, there is no objective reason why that facility should not be extended to imported products as well.

52. The Italian Government contends, however, that the possibility of making a flat-rate deduction constitutes merely a formal simplification which gives rise to *no higher burden of taxation* on imported goods.

53. The Court has consistently held that the first paragraph of Article 95 prohibits the levying of a tax on a product imported from another Member State in accordance with different methods of calculation or rules — for example a flat-rate amount in one case and a graduated amount in the other — leading, even if only in certain cases, to higher taxation of the imported product. [23] In the view of the Commission, such unequal treatment of imported products amounts to 35%. The *flat-rate calculation*, which is permitted only for domestic products, is the only way of deducting marketing and transport costs

23 — Case 127/75, cited above (footnote 14), paragraph 4, and Case 45/75, cited above (footnote 9), paragraph 15.

incurred within Italy. In that regard, the Commission reiterates its assertion that there is discrimination on the basis of different taxable amounts. It maintains that the price components relating to transport and marketing costs incurred in Italy cannot be deducted as they are not stated separately on the invoice, which shows a single price. Moreover, the Commission argues, there is no known procedure whereby importers can declare and deduct those costs. Finally, it restates the view that, because of centralisation, it is not possible to break down the price either according to particular types of cost or according to the particular Member States in which those costs arise. Such a demand on the part of the Italian Government is, in the Commission's opinion, nothing short of 'diabolical'. Thus, the Commission contends, it can be assumed that marketing and transport costs within Italy cannot be quantified and hence deducted unless the possibility of a flat-rate deduction is provided for. Since that option is available only to domestic producers, however, and at a rate of 35%, the Commission maintains that the tax on imported goods is 35% higher as there is no possibility of such a flat-rate deduction in the case of such goods.

54. It is doubtful whether it can really be argued that no costs at all can be deducted by means of the 'normal method'. If necessary, this is a matter for the national court to decide. Moreover, when calculating the price, each undertaking must determine the extent to which the price includes transport and marketing costs. Those amounts should also be evident from accounting documents. Whether such figures are sufficiently precise, however, and hence meet the requirements for allowing the deduction of such costs, is questionable, particularly since in the age of centralised distribution networks it could be extremely difficult to quantify precisely the costs incurred in Italy.

55. Given those circumstances, the possibility cannot at any rate be ruled out that undertakings from other Member States may not be able to quantify their costs with sufficient precision and hence deduct them in full. The Italian Government itself has stated how difficult it is for Italian producers to quantify deductible costs using the 'normal method'. Since, as I have already said, there is no difference in relation to imported products in that regard, it may in certain cases be more difficult, if not impossible, for foreign manufacturers to deduct their transport and marketing costs incurred in Italy. That in itself is sufficient for a finding of discrimination under Article 95. It is therefore not merely a question of the convenience of undertakings from other Member States, as the Italian Government maintains. Even if such undertakings found a way of deducting their costs, it would undoubtedly entail far greater effort — and financial expense — than for domestic producers. Even in that

case, however, there would still be a risk of imported products being treated less favourably. That risk can be excluded only if the possibility of making a flat-rate deduction is also extended to imported goods. Since, as I have already stated, the situation is the same for both imported and domestic products, there is no evident impediment to granting such a concession.

56. Finally, the Italian Government asserts that the possibility of making a flat-rate deduction places domestic producers at a disadvantage, as the possibility of opting for simplified calculation always has its counterpart in slightly higher taxation for those benefiting from it. However, that too is not an obstacle to extending the flat-rate arrangement to imported goods. The possibility of flat-rate calculation could be allowed for imported goods on exactly the same terms as for domestic products. The fact that it may entail slightly higher taxation does not constitute unequal treatment of imported goods and hence discrimination.

57. Finally, the EFTA Surveillance Authority points to a further possibility of unequal treatment of imported products under the flat-rate calculation procedure. It states that domestic products could enjoy more advantageous treatment by virtue of the fact that in the case of a product on which the profit margin is less than 35%, it is nevertheless possible to deduct 35% of the normal value. In that way, the producer could reduce the taxable amount of the product below the value that would be regarded as the basis of assessment for tax if the 'normal method of calculation' were used.

58. I cannot entirely accept that calculation, inasmuch as the flat-rate deduction of 35% should correspond not to the profit margin but to the price component relating to transport and marketing costs in Italy. The situation might be different if the observations of the EFTA Surveillance Authority related to those costs.

59. In conclusion, it should nevertheless be held that the Italian legislation governing the consumption tax is in breach of Article 95 in so far as it does not provide for the possibility of making a flat-rate deduction in respect of imported goods.

3. Differences in the procedures for collecting the tax

60. The national court also expresses doubts as to the compatibility of the tax with Article 95 of the EC Treaty because of the different procedures for its collection. In the case of imported goods, the obligation to pay the tax arises at the *time of importation* of the goods at the customs frontier. That is also when the tax becomes due and must be

paid by the importer. The situation is different for domestic products. Here the tax obligation arises when the product is released on to the Italian market for consumption, but the tax does not become payable until later, that is to say when the domestic producer has to submit the tax return to the tax authorities, which he must do every quarter during the month following the end of the quarter. This means that the tax becomes due and thus has to be paid *up to four months after the release* of the goods for consumption.

61. In the opinion of the Commission, the plaintiff and the EFTA Surveillance Authority, that constitutes further discrimination against imported goods, which is prohibited under Article 95 of the Treaty. They cite in this regard the case-law of the Court, according to which the effect of a tax may vary according to the detailed rules for levying the tax applied to domestic products and imported products respectively. [24] Such differences in the rules for levying a tax exist where facilities for deferred payment are granted for domestic products but denied for imported products. In that case Article 95 is infringed even if the benefit of that deferred payment facility is small. [25]

62. In the present case as well, payment of the consumption tax is deferred by up to four months for domestic products. If account is also taken of the substantial sums claimed by the plaintiff in the main proceedings, the benefit in favour of domestic products can no longer be described as small. Article 95 has therefore been infringed.

63. The Italian Government defends this method of tax collection on the ground that effective tax control would otherwise be impossible. It states that in the case of imported products, an entire consignment is cleared for customs at the frontier and simultaneously taxed. The situation is different for domestic products, which are marketed item by item. In its view, effective tax control cannot be exercised item by item. For that reason, the situation has to be harmonised with that for imported products. That is achieved by accumulating during a given period the instances in which a producer releases a product on to the market and thus becomes liable to tax. A collective tax return is then submitted for that set of instances, which can then be verified by the tax authorities.

64. In that way, the Italian Government explains why it is necessary for domestic producers to submit a tax return not for each product but for a specified period. It has not, however, successfully explained why the related possibility of deferring payment is not granted for imported goods. In that case, an infringement of Article 95 can be avoided

24 — Case 55/79, cited above (footnote 13), paragraph 8.
25 — Case 55/79, cited above (footnote 13), paragraph 9.

only by granting the deferred payment facility for imported goods as well. However, it is doubtful whether the existing possibility of paying the tax, upon request, up to 30 days after importation is sufficient. That is a question that must be decided by the national court, which must also examine whether the need to make such a request constitutes an obstacle for imported products.

65. The objective must be to prevent imported products from being treated less favourably than domestic products.

66. The Italian Government has requested the Court, should it find that the differences in the procedures for collecting the tax constitute discrimination, to lay down criteria for calculating the heavier taxation of foreign products in such a case. It is not, however, the function of the Court to resolve the dispute in the national proceedings. It can only provide the national court with criteria for interpreting Community law. The precise calculation of the sum to be paid to the plaintiff must be left to the national court. Equally, it is for the national court to decide within the framework of its own legal system whether internal taxation which is discriminatory within the meaning of Article 95 is to be regarded as not payable in its entirety or only in so far as it exceeds the tax assessed on the domestic product. [26]

67. It should therefore be held that Article 95 of the EC Treaty is to be interpreted as meaning that a consumption tax such as that in dispute, which lays down different taxable amounts and different collection procedures for domestic products and those imported from other Member States and allows the possibility of making a flat-rate deduction only for domestic products, is in breach of that article.

C — Conclusion

68. I therefore propose that the Court give the following answer to the question submitted by the national court:

Article 95 of the EC Treaty must be interpreted as prohibiting a Member State from introducing and collecting a national consumption tax of the kind provided

26 — Case 74/76, cited above (footnote 15), paragraph 22.

for by Article 4 of the Decree Law of 30 December 1982, converted into law by Law No 53 of 28 February 1983, and further governed by the Decree of the Ministry of Finance of 23 March 1983, in so far as different taxable amounts are determined for domestic products and for products imported from other Member States, different procedures are laid down for collection of the tax and the possibility of making a flat-rate deduction for calculating the taxable amount is reserved for domestic products.