OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 21 February 1991 *

My Lords,

1. In this case, the Commission seeks a declaration that certain Greek legislation on the taxation of spirits is incompatible with Article 95 of the EEC Treaty. The legislation in question was adopted in 1986 and it established a system of value added tax. As amended, it provides for the imposition of VAT at the rate of 36% on certain imported spirits which, according to the Commission, are not produced in Greece, such as whisky, gin, vodka, rum and tequila. Other spirits, such as ouzo, brandy and various liqueurs, many of which are produced in Greece, are subject to VAT at a lower rate. The written pleadings of both parties refer to a lower rate of 16%, although at the hearing the lower rate was said to be 18%. Whatever the lower rate may be, it is clear that it is substantially less than the higher rate.

Article 95 of the Treaty

2. The purpose of Article 95 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 ... Article 95 must guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products' (Case 168/78 *Commission* v *France* [1980] ECR 347, paragraph 4). The Court sees Article 95 as a supplement to the Treaty rules on the abolition of customs duties and of charges having equivalent effect. The article therefore encompasses not only goods produced in the Member States, but also goods originating in non-member countries which have entered into free circulation in the Community: see Case 193/85 *Co-Frutta* [1987] ECR 2105. It is therefore immaterial that some of the spirits at issue in these proceedings are produced outside the Community, for the rate of tax to which they are subject is not affected by whether or not they are in free circulation.

3. The basic rule is that laid down in the first paragraph of Article 95, which provides as follows:

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.'

* Original language: English.

The application of that paragraph requires a comparison to be made between the tax burden imposed on domestic products and the tax burden imposed on 'similar' imported products. The Court has emphasized that the first paragraph of Article 95 'must be interpreted widely so as to cover all taxation procedures which conflict with the principle of the equality of treatment of domestic products and imported products; it is therefore necessary to interpret the concept of "similar products" with sufficient flexibility' (see e. g. Case 169/78 *Commission* v *Italy* [1980] ECR 385, paragraph 5). Products are regarded as similar for these purposes if they have similar characteristics and meet the same needs from the point of view of consumers. The decisive factor is not whether the products in question are identical but whether they have similar and comparable uses (ibid.).

4. The second paragraph of Article 95 provides:

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

This paragraph covers the discriminatory tax treatment of products which, although not similar within the meaning of the first paragraph of Article 95, 'are nevertheless in competition, even partial, indirect or potential' with each other (Case 168/78 *Commission* v *France* [1980] ECR 347, paragraph 6).

5. In order to establish a breach of the second paragraph of Article 95, it must be shown that the effect of the national legislation in question is to afford indirect protection to domestic production (see e. g. Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417, paragraph 9). None the less, in order to satisfy this requirement, it is not necessary for statistical data to be produced. It is enough for it to be shown that 'a given tax mechanism is likely, in view of its inherent characteristics, to bring about the protective effect referred to by the Treaty' (ibid., paragraph 10), for example by reducing the potential consumption of imported products (voir Case 216/81 *Cogis* [1982] ECR 2701, paragraph 11).

The arguments of the parties

6. In the present case, the Commission argues that the class of spirits taxed at 36% is essentially the same as the class taxed at the lower rate. Despite the fact that their ingredients and the way in which they are produced might differ, they all, according to the Commission, have similar uses and meet the same consumer needs. The Commission points out that the alcoholic strength of spirits in both categories varies from 29% to 45% and that they all come under the same heading of the Common Customs Tariff. The Commission concludes that the contested Greek legislation is incompatible with the first paragraph of Article 95 but that, if the criterion of similarity laid down by that provision is found not to be satisfied, then the contested legislation is in any event contrary to the second paragraph of Article 95.

7. The classification of different products under the Common Customs Tariff was at one time regarded by the Court as an important factor in determining whether products were to be regarded as similar for the purposes of the first paragraph of Article 95 (see Case 45/75 *Rewe* [1976] ECR 181, paragraph 12), although it was not treated as decisive (see Case 169/78 *Commission* v *Italy* [1980] ECR 385, paragraph 31). However, in *Cogis* (see paragraph 8 of the judgment), the Court stated that it was not necessary to refer to the customs classifications of different products in order to establish whether they were similar for the purposes of the first paragraph of Article 95. Other distinguishing criteria such as the origin and method of manufacture of the products, their possible application and the habits of consumers in the Community as a whole were said to be more important. I therefore disregard the fact that the spirits at issue in these proceedings all fall under the same heading of the Common Customs Tariff.

8. In its defence, the defendant claims that there are objective differences between the spirits taxed under Greek law at the lower rate and those taxed at 36%. Much of its argument is concerned with distinguishing ouzo, which is taxed at the lower rate, from whisky, which is taxed at the higher rate. Ouzo is said to be an ordinary product of daily consumption which bears no comparison with a luxury product like whisky. The defendant maintains that Member States are entitled to tax luxury products more heavily than ordinary products. It adds that ouzo is for the most part produced by small undertakings which would be unable to support an increased tax burden. The defendant claims that the Court has acknowledged that Member States are entitled to grant tax advantages to certain types of undertaking for reasons of economic or social policy. The defendant also takes issue with the Commission's claim that the contested legislation discriminates against imported spirits, maintaining that a range of spirits, both domestic and imported, are taxed at the lower rate.

9. Moreover, at the hearing, the defendant claimed for the first time that some of the spirits taxed at 36%, namely gin, vodka and rum, were not exclusively imported but were also now produced in Greece. The defendant added that a certain amount of whisky was bottled in Greece. It went on to cite statistics purporting to show that imports into Greece of some of the spirits taxed at the higher rate were increasing. This new information was said to show that the contested legislation did not discriminate against spirits produced outside Greece and that it had not caused a reduction in imports.

The legality of the contested legislation

10. The effect of Article 95 on the taxation of spirits has been considered by the Court on a number of occasions. In Case 319/81 *Commission* v *Italy* [1983] ECR 601, paragraph 16, the Court stated that:

'Amongst all spirits there is an indeterminate number of beverages which must be regarded as similar products within the meaning of the first paragraph of Article 95 and even where it is impossible to perceive a sufficient degree of similarity between the products concerned, there are nevertheless characteristics common to all those spirits which are sufficiently marked for it to be said that they are at least partly or potentially in competition. That is sufficient for it to be concluded that taxation of them must not have the effect of protecting domestic products. For that purpose it is necessary to take into consideration the potential market of the products in question in the absence of protectionist measures . . . '.

It follows from that statement that all spirits must be regarded as being at least in competition with each other for the purposes of the second paragraph of Article 95. Most of the arguments put forward by the defendant to justify the contested legislation are consequently irrelevant.

11. With regard to the new material which the defendant sought to introduce at the hearing, I do not think that it should be admitted. The defendant had ample opportunity to communicate it to the Commission in the course of the pre-litigation procedure and to adduce it in the written procedure before the Court. Its failure to do so deprives the Commission of the opportunity to make a considered response to it and the Court of the benefit of an exchange of written pleadings on the matter.

12. In any event, the new information does not in my opinion assist the defendant. As far as the level of imports is concerned, the Commission rightly pointed out at the hearing that imports might have been even higher had all spirits been taxed in Greece at the same rate.

13. The defendant's claim that some spirits taxed at 36% are produced in Greece is not in itself enough to show that the contested legislation does not discriminate against imports in the absence of any evidence as to the proportion represented by such spirits of Greek spirit production as a whole. The Court held in Case 169/78 *Commission* v *Italy* [1980] ECR 385, which also concerned spirits, that a system in which typical domestic products were in the most favoured tax category, while the two types of product which were almost all imported from other Member States were subject to heavier taxation, was incompatible with Article 95. The Court explained that it was immaterial that domestic production of spirits in the second category also existed, since only minimal quantities were involved.

14. The defendant cannot therefore avoid the prohibition laid down in Article 95 simply by alleging that a small fraction of the spirits produced in Greece are taxed at the higher rate. Only if a significant proportion of such spirits fell within each of the relevant tax categories would the contested legislation fall outside Article 95:

see Case 243/84 *John Walker & Sons Ltd* [1986] ECR 875, paragraph 23. No evidence has been put forward to show that this is in fact the case.

15. The only outstanding question is whether the contested legislation is likely to have a protective effect. That question must in my view be answered in the affirmative, since it must be assumed that there is no, or at least no significant, production in Greece of spirits taxed at the higher rate of 36%. The contested legislation is therefore more likely to discourage consumption of imported than of domestically produced spirits.

16. That may be sufficient to dispose of the issues before the Court. Nevertheless, for the sake of completeness, I will examine the substance of the arguments put forward by the defendant in its written pleadings. The Court has acknowledged on a number of occasions that:

'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' (see e. g. Joined Cases 142 and 143/80 *Essevi and Salengo* [1981] ECR 1413, paragraph 21).

17. The contested legislation does not in my view satisfy these criteria. The defendant has not sought to distinguish the two classes of spirits on the basis of the raw materials used in their manufacture or the production processes employed. The defendant claims that one of the purposes of the legislation is to protect small businesses. It is not, however, apt to achieve that objective, since the rate of VAT to which particular spirits are subject is not affected by the size of the undertaking which produced them. Although the defendant claims that ouzo is produced essentially by small undertakings, it has produced no evidence to support this claim. Indeed, it acknowledges in its rejoinder that some of the ouzo and brandy produced in Greece comes from large undertakings. In any event, a small undertaking in Scotland producing, say, whisky would still find its output taxed in Greece at the rate of 36%.

18. With regard to whisky in particular, the Court held in Case 216/81 *Cogis* [1982] ECR 2701 that 'Article 95 prohibits a system of taxation affecting differently whisky and other spirits'. Whisky's alleged status as a luxury product is not such as to alter that conclusion. It is true that the Court acknowledged in Case 319/81 *Commission* v *Italy* [1983] ECR 601, at paragraph 14, that Member States were entitled to tax such products more heavily than ordinary goods. The Court emphasized, however, that that right did not justify any departure from the conditions

laid down in Article 95, in particular the principle of non-discrimination. The Court's case-law makes it clear that Member States cannot justify the discriminatory tax treatment of a particular product solely on the basis that the product in question is regarded as a luxury item in certain parts of the Community. As the Court emphasized in Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417 at paragraph 14, in this respect:

'... it is impossible to restrict oneself to consumer habits in a Member State or in a given region. In fact, those habits, which are essentially variable in time and space, cannot be considered to be a fixed rule; the tax policy of a Member State must not therefore crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them'.

19. I am therefore unable to accept the defendant's claim that whisky's alleged status in Greece as a luxury product constitutes an objective justification for taxing it more heavily than, for example, ouzo. As the Commission points out, whisky might not enjoy the same status in Scotland and brandy, which is taxed in Greece at the lower rate, might be regarded as a luxury product in some parts of the Community.

20. The defendant has not sought to establish any separate justification for distinguishing the spirits other than whisky which are taxed at 36% from those taxed at the lower rate. In my view, spirits in both categories must accordingly be regarded as similar for the purposes of the first paragraph of Article 95. Since the class of spirits taxed at the higher rate consists mainly of imports, the contested legislation is therefore contrary to that provision.

21. In any event, spirits in both categories must be regarded at the very least as potentially in partial or indirect competition with each other for the purposes of the second paragraph of Article 95. The contested legislation is therefore incompatible with that provision, for, as I have explained, it is in my view likely to produce a protective effect.

22. Accordingly, I am of the opinion that the Court should declare that the Hellenic Republic, by subjecting certain spirits imported from other Member States to VAT at a higher rate than that normally imposed on spirits produced in Greece, has failed to fulfil its obligations under Article 95 of the EEC Treaty. The Hellenic Republic should be ordered to pay the costs.