OPINION OF ADVOCATE GENERAL ALBER

delivered on 6 March 2001 [1]

1. In its action the Commission objects to the Italian provisions by which higher taxes are imposed for intra-Community flights than for domestic flights.

2. Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes [2] provides that '... Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community.' By adopting this regulation the Community legislature declared that the provisions relating to the freedom to provide services were applicable to the air transport sector. [3]

3. According to the case-law of the Court, there is a restriction on the principle of the freedom to provide services if, as a result of the measure in question, a cross-border service costs more than a similar domestic service. [4] Pursuant to Article 3 of the Ministerial Decree of 13 August 1998 implementing Law No 537 of 24 December 1993, as amended by Law No 662 of 23 December 1996, a tax ('airport tax') of ITL 15 500 per passenger is levied for intra-Community flights, and ITL 7 000 per passenger for domestic flights.

4. The Italian Republic has not disputed the infringement of Article 3 of Regulation No 2408/92 in conjunction with Article 59 of the EC Treaty (now, after amendment, Article 49 EC). However, it states that a legislative amendment is being prepared that will remove the distinction between intra-Community flights and domestic flights as regards the levying of the tax.

5. According to settled case-law, elimination of the infringement of the Treaty after

1 — Original language: German.

2 — OJ 1992 L 240, p. 8.

3 — Case C-361/98 *Italy* v *Commission* [2001] ECR I-385, paragraph 32. Opinion of Advocate General Alber delivered on 6 March 2001 in Case C-70/99 *Commission* v *Portugal* [2001] ECR I-4845, point 31 et seq.

4 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 28.

an action has been brought has no effect on the merits of that action. The subject of the dispute is described in the reasoned opinion of the Commission of 14 December 1998. Even if the failure to fulfil obligations as stated were remedied after the expiry of the time-limit prescribed in the second paragraph of Article 169 of the EC Treaty (now the second paragraph of Article 226 EC), there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur, as a result of its default, towards other Member States, the Community or private parties. [5] The Court should therefore find in favour of the Commission.

6. The Commission has asked that Italy be ordered to pay costs. Pursuant to Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if the successful party makes an application to that effect.

5 — Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 45, and Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 31.

Conclusion

7. In view of the foregoing, I propose that the Court should give judgment as follows:

(1) By maintaining in force Article 3 of the Ministerial Decree of 13 August 1998 implementing Law No 537 of 24 December 1993, as amended by Law No 662 of 23 December 1996, which provides for differentiated airport taxes according to whether the flight is domestic or to another Member State, the Italian Republic has failed to fulfil its obligations under the Treaty, in particular Article 59 of the EC Treaty (now, after amendment, Article 49 EC) in conjunction with Article 3 of Council Regulation (EEC) No 2408/92 of 23 July 1992.

(2) The Italian Republic is ordered to pay the costs.