OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 28 April 1988 *

Mr President,
Members of the Court,

1. By interlocutory judgment of 28 October 1986 the Vredegerecht (Local Court) for the Canton of Beveren-Waas asked the Court to interpret the provisions of the EEC Treaty on competition, establishment, the free movement of services and the prevention of discriminatory taxation in relation to the Belgian rules concerning the interest payable on savings deposits.

Those rules are set out, in particular, in the Royal Decree of 29 December 1983, as amended by the Royal Decree of 13 March 1986, which provides for tax exemption on interest up to an amount of BFR 50 000 only on savings deposits to which the rates laid down by law are applied. That relief is not therefore granted in respect of deposits made on more favourable terms.

These proceedings arose from an action brought against ASPA, a credit institution whose registered office is in Antwerp, by Mr Pascal Van Eycke, residing in Beveren-Waas. ASPA had refused to take a deposit from Mr Van Eycke on the more favourable conditions regarding interest rates that were in force before 13 March 1986. Mr Van Eycke therefore sought a declaration that such refusal was unlawful and that the rules applied by the defendant — namely the aforesaid royal decree — were contrary to certain provisions of Community law.

The questions submitted by the national court seek in substance to ascertain (a) whether Article 85 *et seq.* of the EEC Treaty are to be interpreted as precluding national legislation which, incorporating previous agreements between banks, makes the benefit of certain tax exemptions subject to the application of uniform conditions governing the interest payable on savings deposits and thereby restricts competition, and (b) whether Articles 59 to 66 and 95 of the EEC Treaty are to be interpreted as precluding national legislation which makes the aforesaid benefit applicable only to savings deposits denominated in national currency and held by banks established within the territory of the Member State concerned.

Mr Van Eycke, the Belgian Government and the Commission of the European Communities have submitted written observations and presented oral argument at the hearing.

2. The Belgian Government suggests, recalling the Court's judgment of 16 December 1981 in Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, that the Court should disclaim jurisdiction. In its view, the main proceedings are fictitious and were, in

* Translated from the Italian.

any event, instituted as a pretext, as is borne out by seven factors: (a) the plaintiff's lawyer is a trainee in the chambers of the lawyer representing ASPA; (b) the parties have submitted 'joint conclusions' asking for the proceedings to be suspended and for a reference to be made to the Court of Justice; (c) the parties chose by agreement the court of Beveren-Waas in preference to the court of Antwerp, which has territorial jurisdiction; (d) the dispute is devoid of purpose since, apart from precluding the grant of tax relief, the Decree of 13 March 1986 does not prohibit ASPA from applying more favourable terms to savings deposits; (e) since the proceedings were instituted before a local court, the Belgian Government was unable to put forward its arguments in those proceedings; (f) in so far as the Court's judgment would exert pressure on the Treasury Minister, it would be *inutiliter data*; and (g) proceedings instituted by a credit institution for the annulment of the contested legislation are pending before the Belgian Council of State.

I am not swayed by that argument. In the first place, it fails to take account of the fact that, unlike the situation which arose in *Foglia* v *Novello*, the problem raised by the national court relates to its own national law and not to that of another Member State. Secondly, the evidence adduced in support — I am referring in particular to the first three factors — does not demonstrate incontestably that the dispute in question is an artificial contrivance. On the contrary, as the Court has consistently held, it must be 'quite *obvious* that the interpretation of Community law sought [from the Court] ... bears *no* relation to the actual nature of the case or to the subject-matter of the main action' (judgment of 16 June 1981 in Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563, paragraph 6 of the decision; judgment of 26 September 1985 in Case 166/84 *Thomasdünger* v *Oberfinanzdirektion Frankfurt am Main* [1985] ECR 3001, paragraph 11 of the decision; my emphasis).

As for the other four factors referred to by the Belgian Government, I would point out (a) that assessment of the relevance of the answer given by the Court to the main action is a matter for the national court alone (judgment of 12 June 1986 in Joined Cases 98, 162 and 258/85 *Bertini* v *Regione Lazio* [1986] ECR 1885, paragraph 8 of the decision); (b) that, as the Belgian Government's representative has himself acknowledged, the proceedings in question took their usual course and, at least in this case, he was given every opportunity to make his views known; and (c) that the fact that a similar case is pending before another national court is wholly irrelevant to these proceedings.

3. As the Court will recall, Question (a), in which I summarized and rephrased the first two questions submitted by the national court, asks the Court to establish whether the legislation of a Member State which makes a tax exemption conditional on the application of uniform interest rates to savings deposits is contrary to the Community rules of competition.

The plaintiff is in favour of an affirmative answer. In his view, the Decree of 13 March 1986 is contrary to Article 85 of the Treaty because (a) it merely incorporates a concerted practice amongst credit institutions rendering it enforceable *erga omnes*, (b) it has restrictive effects on competition in so far as banks use the interest rate on deposits in order to attract savings, and (c) it adversely affects intra-Community trade by hindering the efforts

of banks from other Member States to penetrate the Belgian market.

I wish to make a preliminary observation. There is no doubt that the banking sector is subject to the rules of competition (judgment of 14 July 1981 in Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021, paragraphs 7 and 8 of the decision) and the fact that a restrictive measure was enacted by the State does not prevent its appraisal in the light of Article 85. Admittedly, that provision is addressed to undertakings and not to the Member States; however, Article 5 of the EEC Treaty requires Member States to abstain from adopting or maintaining in force any measures which could detract from the effectiveness of the Treaty. Accordingly, in its judgment of 3 December 1987 in Case 136/86 (*BNIC* v *Aubert* [1987] ECR 4789), paragraph 23 of the decision, the Court examined national legislation which, as in this case, had incorporated intertrade agreements that were alleged to be incompatible with Article 85 (1).

Having said that, however, I would point out that measures such as the one at issue, to the same extent as operations relating to the discount rate, pursue objectives of monetary policy or, more specifically, credit policy. The grant of certain tax advantages in return for the restriction of the interest rate affects the manner in which savers use their money, the liquid assets of banks and the general level of interest rates applied. In particular, recourse to such an incentive acts as a brake on the rise of interest on deposits and consequently reduces interest on bank loans.

If those findings are correct, it seems clear to me that those measures relate to a matter which Articles 104 and 105 of the Treaty reserve to the Member States. In the absence of harmonizing provisions adopted by the Community, therefore, those measures cannot be regarded as incompatible with Community law even where they involve, as is surely the case here, a restriction of competition with regard to savings deposits.

4. I now come to Question (b) which in substance reproduces the third question submitted by the Belgian court. It seeks to ascertain whether the legislation of a Member State, which reserves the benefit of tax exemption to deposits denominated in national currency and held at credit institutions operating within the territory of the State concerned, is contrary to the rules of primary legislation on establishment, the free movement of services and the prevention of discriminatory taxation.

The answer is simple. I would point out, in the first place, that the reference to Article 59 *et seq.* is irrelevant since the liberalization of capital movements — to which, according to Article 61 (2) of the Treaty, the liberalization of banking services is connected — has not yet been implemented. Furthermore, I would point out that since money does not constitute a 'product', the reference to Article 95 is also groundless (see the judgment of 23 November 1978 in Case 7/78 *Regina* v *Thompson* [1978] ECR 2247, paragraph 25 of the decision). In any event, the Commission has stated — without being successfully contradicted by the plaintiff — that, so far as the benefit in question is concerned, Belgium does not discriminate between branches or subsidiaries of national or foreign banks.

5. In the light of all the foregoing considerations, I suggest that the questions submitted to the Court of Justice by the Vredegerecht for the Canton of Beveren-Waas by interlocutory judgment of 28 October 1986 in the case pending before it between Pascal Van Eycke and ASPA NV should be answered as follows:

Community law as it now stands does not prohibit the Member States from adopting or maintaining in force legislation which makes the grant of certain tax advantages in respect of interest on savings deposits subject to the application of uniform conditions with regard to such interest.