OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 1 March 1988 *

Mr President,
Members of the Court,

1. The question whether value-added tax may be charged on free samples has been raised in fresh terms in Italy since the adoption of a decree on 29 January 1979, and it is precisely the implementation of that legislation that the Commission is questioning in this action.

2. Prior to the adoption of that decree Italian legislation exempted from VAT 'free samples of low value expressly described as such' and extended the same exemption to imports of similar free samples. However, the 1979 decree repealed the provision extending the exemption to imports of free samples.

3. On the basis of the repeal of that measure, the Italian Ministry of Finance took the view that imports of free samples were now subject to VAT and officially confirmed that viewpoint by resolutions of 30 June 1979 and 10 December 1982 replying to requests from the United Kingdom Embassy and a company. In those circumstances the Commission considered that after the adoption of the Decree of 29 January 1979, Italy's application of VAT to imports of free samples of low value was contrary to Article 95 of the EEC Treaty (hereinafter referred to as Article 95) and of Article 14 (1) (a) (hereinafter referred to as Article 14) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on 'the harmonization of the laws of the Member States relating to turnover tax — Common system of value-added tax: uniform basis of assessment' [1] and on that basis commenced these infringement proceedings.

4. Article 95 is at issue here inasmuch as it prohibits a Member State from imposing on the products of other Member States any internal taxation in excess of that imposed on similar domestic products (first paragraph) or of such a nature as to afford indirect protection to other products (second paragraph). As for Article 14 of the directive, it provides that without prejudice to other Community provisions Member States must exempt 'final importation of goods of which the supply by a taxable person would in all circumstances be exempted within the country'. The latter provision involves imports from any State, irrespective of membership of the EEC.

5. The Italian Republic's defence is based largely on consideration of the effects of international conventions in national law. Italy considers that the resolutions of 1979 and 1982, whereby its Ministry of Finance interpreted the legislation in force as

* Translated from the French.

1 — OJ L 145, 13.6.1977, p. 1.

meaning that VAT was applicable to imports of free samples, took no account of Article 2 of the Geneva Convention of 7 November 1952 (International Convention to Facilitate the Importation of Commercial Samples and Advertising Material), ratified and implemented in Italy by a Law of 26 November 1957, which exempts samples of low value from import duties. By virtue of that provision free samples from all States party to the Convention, including all the Member States, must be exempted from VAT. The exemption is also applicable to imports of free samples from States which are not party to the Convention but which enjoy most favoured nation status in Italy.

6. Italy therefore considers that an examination of all the rules with legal force in its territory indicates that only free samples imported from States which are not parties to the Geneva Convention and do not enjoy most favoured nation status are not exempt from VAT, and that Italy has failed to fulfil its obligations under Article 14 only with regard to those imports. Equal treatment with respect to free samples imported from the many States which are party to the Geneva Convention or which enjoy most favoured nation status was guaranteed by a resolution of the Minister of Finance of 18 June 1984 pointing out the effect of the Geneva Convention and by instructions from that Minister to all the customs divisions pointing out, in addition, the effect of most favoured nation status and requiring the repayment of amounts improperly levied. As for the levying of VAT on free samples imported from the small number of other States, the consolidated law on VAT which Italy is in the process of adopting should put a stop to it and bring the legislation into conformity with Community law.

7. This line of reasoning leads me to state, in common with the Commission, that the failure to fulfil obligations under Article 14 is acknowledged as regards imports of free samples from States which are not parties to the Geneva Convention and do not enjoy most favoured nation status. The only point remaining for discussion is whether the position regarding imports of free samples from States which are signatories to the Geneva Convention or enjoy most favoured nation treatment does constitute an infringement as alleged, in spite of the explanations given by Italy.

8. For purposes of clarity it seems to me important to stress that, as the Italian Republic itself conceded, the controversial provision of the 1972 Decree as amended in 1979 is, if considered in isolation, directly contrary to Community law; however, the main thrust of the defence argument is that it was wrong to consider that provision in isolation, and indeed to apply it in isolation, between 1979 and 1984.

9. In its reply the Commission maintained its position on the basis of two lines of argument.

10. First, it indicates that although the administrative instructions relied on by the Italian Government have improved the situation in relation to the first period following the amendment of the legislation in 1979 the fact remains that the legal

position established in Italy by that amendment has given rise to considerable confusion; that, moreover, is attested by the original position adopted by the Finance Ministry. Italian law thus created uncertainty for the parties concerned who, faced with a provision abolishing the former treatment of imports in the same manner as domestic transactions, may encounter difficulties in asserting rights the basis of which seems dubious to them. The Commission points out in particular that the existence of the 1952 Geneva Convention cannot be more obvious for the parties concerned than it was for the competent administration during the initial period.

11. In the alternative, the Commission goes on to observe that the requirement that the exemption be applied uniformly to all imports is based upon a concern for equal treatment, which is of a unitary nature and cannot be complied with only partially. It is therefore the requirement as a whole that is contravened.

12. The Commission's first line of argument relies on the requirement of clarity which is referred to by Article 14 and also in the case-law of the Court, namely the judgments of 4 April 1974, *Commission* v *France*,[2] and of 25 October 1979, *Commission* v *Italy*.[3] According to those judgments, the maintenance or implementation of a provision which gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law may constitute a failure by the relevant Member State to fulfil its obligations within the meaning of Article 169 of the Treaty.

2 — Case 167/73 [1974] ECR 359.

3 — Case 159/78 [1979] ECR 3247.

13. In its rejoinder, the Italian Republic took the view that the Commission's reasoning based on the ambiguity of the retention of the provision as amended in 1979 and on the uncertainties to which it may give rise in the minds of the parties affected constituted 'an unacceptable amendment of the cause of action' in relation to the document commencing the proceedings and may not be taken into consideration.

14. In my view that objection of inadmissibility cannot be upheld. For a long time the Court has distinguished between the making of fresh submissions during the case, which is in principle prohibited unless they are based on legal considerations evinced during the written procedure, and the development of new arguments. The Court has already held that nothing precludes the examination of such arguments developed in support of submissions already made in the application.

15. In the document commencing these proceedings the Commission puts forward its view that the position of importers of free samples from States party to the Geneva Convention is only a '*de facto* solution which does not guarantee the rights of importers, who, if they were charged tax, might experience difficulties in having their rights upheld by the courts'. The Commission's description of the situation as a '*de facto* solution' does not correspond exactly to the legal position analysed in the reply as being ambiguous and liable to produce uncertainty but it may be observed that in its application the Commission merely adopted the description used by the Italian Republic itself in its telex of 8 June 1985. It seems to me that the arguments contained in the reply concerning the ambiguous legal position which may produce uncertainty should not be regarded

as a fresh submission in relation to the arguments set out in the document commencing the proceedings. In that document, and indeed in the reasoned opinion as supplemented, the submission is set out perfunctorily, since at that stage it was only made in the alternative. However, it seems to me that in the reply a submission which had previously been made is clarified and no entirely fresh submission is put forward.

16. Consequently, I must now examine the Commission's reasoning with regard to the Italian Republic's attempt to refute it on the merits. A comparison of the features of these proceedings with those which gave rise to the abovementioned judgment of the Court of 25 October 1979 in *Commission* v *Italy*, concerning customs agents, seems to me to provide particularly convincing support for the Commission's application. In a case concerning a legislative provision under which a licence to act as a customs agent could be issued only to Italian nationals or nationals of a State granting equal treatment in the matter to Italians (the maintenance in force of which was regarded by the Commission as a failure to fulfil obligations under Article 52 of the Treaty), the Court rejected the Italian Republic's objection that the disputed provision was interpreted subject to that article, which was directly applicable in Italian domestic law, and that having regard to all the rules in force in Italian national law its maintenance in force could not be regarded as a failure to fulfil obligations. The Court held that although the objective situation was clear by reason of the direct applicability of Article 52, the maintenance of a provision incompatible with the Treaty gave rise to an ambiguous state of affairs by maintaining, as regards those subject to the law, a state of uncertainty as to the possibilities available to them of relying on Community law, and therefore held that there was a failure to fulfil obligations.

17. In my view, the combined presence in Italian domestic law of the 1972 provisions, as amended in 1979, and the provisions of international conventions such as the Geneva Convention or conventions granting most favoured nation status does not in this case give rise to a *de facto* situation which is less ambiguous or leaves the persons concerned in any less a state of uncertainty as to the applicability of rules compatible with Community law than the situation which gave rise to the abovementioned judgment of the Court. Such a conclusion would be all the more difficult inasmuch as between 1979 and 1984 the position of the Italian Ministry of Finance attested not uncertainty as to the possibility of applying rules in conformity with Community law but rather a firm, although mistaken, belief that rules contrary to Community law should be applied. This bears eloquent witness to the ambiguity of which the Commission complains.

18. The Italian Republic submits that the 'alleged confusion' no longer exists since precise instructions have been given, first by a circular of 1984 and subsequently by a note of 5 November 1986 from the Minister of Finance.

19. To my mind the reply to that argument is to be found in the judgment of the Court of 15 October 1986, *Commission* v *Italy*,[4] according to which the incompatibility of national legislation with provisions of the Treaty, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended, and mere

4 — Case 168/85 [1986] ECR 2945.

administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty. The inadequacy of administrative circulars as a means of removing ambiguity was also underlined by the judgment of the Court of 7 February 1985 in *Commission* v *France*.[5]

20. The ministerial instructions relied on by the Italian Republic are not an appropriate procedure for removing the confusion caused by the state of the Italian legislation after the 1979 amendment. It is true that since 1985 the Italian Government has announced the forthcoming adoption of a consolidated law on VAT which, as regards the exemption from VAT of free samples, would re-institute equal treatment for domestic and imported products. However, to my knowledge, this bill has not been adopted and the situation of confusion has not therefore been resolved by an appropriate legal procedure. I should add that the discussion at the hearing on the question whether the instructions contained in the note of 5 November 1986 resulted in exemption only for imports of medical samples or whether, by means of interpretation referring to the resolution of 18 June 1984, they should be considered to result in exemption for imports of all free samples of low value did nothing to dispel my doubts concerning the clarification brought about by the circulars relied on by the Italian Republic.

21. The Italian Government also submits that the persons concerned cannot be in a state of uncertainty *vis-à-vis* the legislation in force in Italy inasmuch as imports are undertaken by specialists who are not unaware of tax systems, even those which result from the application of international conventions.

22. An examination of the Court's case-law shows that the fact that persons to whom legislation is addressed are accustomed to making use of it in the course of their occupation does not, in the Court's view, dispel any confusion which it may cause. Furthermore, it does not seem to me that the argument relied on by the Italian Republic is capable of convincing the Court. We must bear in mind that from 1979 to 1984 the Italian Minister of Finance manifested difficulty in understanding the law on VAT, on which, in principle, he, with his departments, is the greatest national specialist. Why, therefore, should individuals, even those who specialize in imports, perceive matters more clearly than the national tax authorities?

23. Furthermore, in the light of these ambiguities in the Italian legislation and the resulting uncertainty in the minds of the persons concerned the argument put forward at the hearing that the failure to exempt in fact affected only imports from a tiny (and unspecified) number of countries, not including any Member State, does not seem to me to be relevant. The Court has already held, for example in the judgment of 7 February 1984,[6] that the fact that a provision has only rarely been applied in practice is insufficient to put an end to the infringement which it represents.

5 — Case 173/83 [1985] ECR 491.

6 — Case 166/82 *Commission* v *Italy* [1984] ECR 459.

24. In the final analysis it is the following question that arises: How can the transition from the situation pertaining until 1979, in which compliance with Community law was guaranteed by a clear and unequivocal provision of national law, to a different situation in which (partial) compliance with Community law results only from a laborious combination of scattered provisions which, as the errors of the first period showed are difficult to administer, be considered satisfactory?

25. For those various reasons, and without it being necessary to examine the submission relied on in the alternative by the Commission, I consider that by adopting and maintaining in force a provision, as amended in 1979, which is incompatible with Article 95 inasmuch as it subjects free samples imported from Member States to VAT and with Article 14 inasmuch as it subjects free samples imported from other countries to that tax, the Italian Republic has placed the persons concerned in a state of uncertainty as to the possibilities available to them of relying on that law, notwithstanding the objective situation resulting from the provisions of international conventions which are applicable in Italian national law and comply with Community law.

26. Consequently, I propose that the Court should:

Declare that by adopting and maintaining in force that provision the Italian Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty and Article 14 (1) (a) of the Sixth Council Directive of 14 May 1977;

Order the Italian Republic to pay the costs.