# OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 28 NOVEMBER 1979 [1]

*Mr President,*
*Members of the Court,*

In order to understand the procedure initiated by the Commission against the Kingdom of Denmark for a declaration that that Member State has failed to fulfil its obligations under the Treaty it is necessary to be aware of the following facts concerning the situation on the Danish market in spirits and the intrinsic features of Danish taxation.

Danish production of spirits, liqueurs and other spirituous beverages within the meaning of tariff heading 22.09 of the Common Customs Tariff amounted in 1977 to a total of 81 000 hectolitres of pure alcohol. The production of aquavit, which is manufactured from neutral alcohol with the addition of vegetable flavourings, accounts alone for approximately 60 000 hectolitres of pure alcohol (80 %) of this total quantity. The total consumption of spirits, liqueurs and other spirituous beverages amounted in Denmark in the same year to 92 400 hectolitres of pure alcohol. Aquavit accounted for 57 870 hectolitres (63 %) and the remaining alcoholic drinks for 34 530 hectolitres (37 %) of that total. By far the major part of the aquavit *consumed*, in other words 57 280 hectolitres of pure alcohol (99 %), was of Danish origin, whilst only a small quantity of 590 hectolitres of pure alcohol (1 %) was accounted for by aquavit imported mainly from the Federal Republic of Germany (57 %), Norway (39 %) and Sweden (4 %). Of the remaining beverages consumed in the above-mentioned period, 11 180 hectolitres (32 %) were of Danish origin whilst the larger part, in other words 23 340 hectolitres of pure alcohol (68 %), chiefly in the form of whisky, vodka, cognac, gin and rum, was imported.

Danish tax law — Law No 151 of 4 April 1978 on excise duties on alcoholic beverages and related products (Bekendtgørelse af Lov om afgift af spiritus m.m.), which is at present in force — provides for the imposition of an excise duty on alcohol, the rates of which vary according to whether aquavit or other beverages are involved. The tax on aquavit was first of all increased as from 21 August 1976 from Dkr 108.60 to Dkr 130.30 and then further increased by Law No 437 of 6 September 1977 to the rate applicable at present, Dkr 167.50 per litre of pure ethyl alcohol. On the other hand, the taxes on other beverages were at the same time increased from Dkr 154.80 to Dkr 185.75 and finally to Dkr 257.15 per litre of pure ethyl alcohol. Under Articles 3 and 4 of the above-mentioned laws a product must satisfy *inter alia* the following conditions in order, as aquavit, to obtain the more favourable rate of tax:

1. It must be manufactured from neutral alcohol with the addition of vegetable flavourings.

2. It must have an alcohol content of between 40 % and 49.9 %.

3. The vegetable extract must not exceed two grammes per 100 millilitres.

1 — Translated from the German.

4. The beverage must not be in the nature of gin, vodka, geneva and other beverages, of liqueurs, punch, bitters and related beverages, of anise liqueurs or rum, or of spirits made from fruit and other products whose characteristic flavour is traditionally attributable to distillation or maturing.

As early as 22 December 1975 the Commission drew the attention of the Danish Government to the fact that the different taxation of aquavit, which forms the major part of the Danish production of alcohol and Danish consumption, and other beverages was an infringement of Article 95 of the EEC Treaty. The Danish Government dismissed this objection by letter of 17 February 1976, stating that aquavit and other distilled spirits intended for consumption were not similar products within the meaning of the above-mentioned provision.

As a result the Commission, by letter of 26 March 1976, initiated a formal procedure under Article 169 of the EEC Treaty. In that letter it stated *inter alia* that aquavit must be regarded as a similar product in relation to the other alcoholic beverages, that the latter were however virtually not produced in Denmark and that for that reason the higher rate of tax affected almost exclusively imported spirits with the result that those rules constituted an infringement of the first paragraph of Article 95 of the EEC Treaty or at least of the second paragraph thereof. Since the Danish Government adhered to its viewpoint in its reply of 26 April 1976, the Commission delivered to the Danish Government by letter of 10 December 1976 a formal opinion in accordance with Article 169 of the EEC Treaty in which it found that there had been an infringement of the first paragraph of Article 95 or, in the alternative, of the second paragraph of Article 95 of the EEC Treaty, and requested that that infringement should be put to an end within a period of one month. In its reply of 23 February 1977 the Danish Government explained that the existing rules not only were not discriminatory but even imposed a higher tax on aquavit, in relation to its retail price, than was the case with the other more expensive beverages. As a result the Commission lodged the present application to the Court of Justice on 7 August 1978 requesting that the Court should declare that the Government of the Kingdom of Denmark had infringed the first paragraph of Article 95 or, in the alternative, the second paragraph of Article 95 of the EEC Treaty, by not unifying the taxation on alcoholic beverages. In addition it requested that the Government of the Kingdom of Denmark should be ordered to pay the costs of the action.

In contrast to this Government of the Kingdom of Denmark contends that the application should be dismissed and that the Commission should be ordered to pay the costs of the action. In the alternative, the Danish Government contends that the Court of Justice should only declare that there has been an infringement of Article 95 of the EEC Treaty if it reaches the view that one or more alcoholic beverages must be regarded as similar to aquavit within the meaning of the first paragraph of Article 95 or at least as interchangeable under the second paragraph of Article 95 of the EEC Treaty.

This case also confronts us with legal problems which have already arisen in a similar form in Cases 168/78 *(Commission of the European Communities* v *French Republic)* and 169/78 *(Commisssion of the European Communities* v *Italian Republic).* A domestic product, in

this instance aquavit, which is produced in large quantities and almost exclusively covers domestic demand, is taxed at a lower rate than other spirituous beverages which, like whisky, cognac, gin, vodka and similar products, are mostly imported. The decision depends upon whether the spirits, liqueurs and similar beverages listed in Article 3 of Danish Law No 151 of 4 April 1978 must be regarded as products similar, within the meaning of the first paragraph of Article 95 of the EEC Treaty, to domestic aquavit which, under Article 2 (1) of the above-mentioned law, is subject to a considerably lower tax.

In support of its application the Commission therefore essentially puts forward the arguments which it has already submitted in the above-mentioned proceedings against the French and the Italian Republics. It reaches the conclusion that the result of the precise definition of aquavit contained in the Danish law in question and based upon taste and degree of alcohol is that similar beverages imported from the other Member States are taxed at a higher rate. Since both aquavit and those other products must be regarded as similar products within the meaning of the first paragraph of Article 95 of the EEC Treaty, having regard to the formal and material criteria elicited by the Court of Justice, the Danish law infringes that provision, which does not permit any discrimination based on economic policy or social reasons against similar imported goods.

In support of its opposite viewpoint, the Government of the Kingdom of Denmark also advances a series of arguments which have likewise already been put forward by the French and Italian Governments and on which I have already given my views in my opinions in the above-mentioned cases; reference should be made to them in this connexion.

Thus the Danish Government too points out that the taxation on spirits is not discriminatory since the preferential rate of tax for aquavit is applied both to domestic products and to the products imported chiefly from the Federal Republic of Germany. The higher taxation on spirituous beverages other than aquavit affects moreover not only imported but also domestic products, since at least approximately one-third of the beverages consumed in Denmark which do not come within the description of aquavit are of domestic origin. Even if aquavit and the other spirituous beverages must be regarded as similar products it is necessary to bear in mind that the latter are not subject to higher taxation than similar products by reason of their importation into Denmark. Article 95 of the EEC Treaty does not however provide for general tax neutrality but rather envisages cases in which a discriminatory distinction is made between imported and domestic goods from a tax point of view. The Danish system of taxation however does not make the different taxation of spirituous beverages dependent upon the condition of importation. The statement that the tax structure of a Member State may in no way influence the free movement of goods within the Community leads to an extensive application of Article 95 which, as may be deduced from Article 99, was not intended.

These submissions of the Danish Government cannot, as I have already explained in my opinions in Cases 168/78 and 169/78, be convincing for various reasons. It should therefore be recalled very briefly once more that in intra-Community trade goods are taxed according to the principle of the country of destination by exempting the goods as fully as possible from the indirect taxation of the exporting country and imposing the indirect taxation of the importing country on the goods as fully as possible. The tax provisions contained in Article 95 *et seq.* were only included in the Treaty, leaving national tax autonomy in principle, in order to exclude discriminatory application of the principle of the country of destination as regards the free movement of goods. Whilst Article 99 of the EEC Treaty enables disparities arising from the *different* national systems of taxation to be eliminated by harmonization in the conditions laid down in that article, Article 95 is intended to ensure tax neutrality in the form that goods imported from other Member States are not given worse treatment by *national* tax provisions, either directly or indirectly, than similar domestic products. This means, as the Court of Justice emphasized in particular in Case 148/77 *(H. Hansen jun. & O. C. Balle GmbH & Co.* v *Hauptzollamt Flensburg,* judgment of 10 October 1978 [1978] ECR 1787), that special advantages for certain types of spirit must be granted to *all* types of spirits if they prove to be similar within the meaning of the first paragraph of Article 95 of the EEC Treaty. Since, as we have seen, Article 95 is also intended to prevent disguised discrimination, it is also irrelevant, contrary to the view held by the Danish Government, that the tax discrimination is expressly linked to the condition of importation. Such disguised discrimination may for example even occur if only a minimal proportion of the imported products benefit from preferential tax treatment which is granted to the major proportion of national production, whilst the majority of the similar goods which are chiefly imported remain excluded from that preferential tax treatment.

This becomes particularly clear in the Danish system of taxation. Aquavit, which is subject to preferential tax treatment, is defined according to this on the one hand by the manufacturing process and on the other by the alcohol content and specific percentage of other ingredients. It is then provided in addition that beverages, even if they can display the characteristics described, may not be in the nature of gin, vodka, geneva, etc. The result of these rules is that 57 280 hectolitres of aquavit of Danish origin which benefits from the preferential tax treatment contrasts with only 590 hectolitres of imported aquavit, whilst 23 340 hectolitres of other imported spirits are subject to the higher taxation and are thus discriminated against in relation to the domestic aquavit. The fact that in addition the smaller quantity of 11 180 hectolitres of other national beverages is likewise subject to the higher taxation cannot alter the impermissible discrimination. It is also irrelevant whether the strong market position of Danish aquavit is attributable to traditional consumer demand or is a result of that discrimination, since the first paragraph of

Article 95 of the EEC Treaty is not based on the protectionist effect of the different taxation.

Finally, the Danish Government points out that the different taxation of aquavit and the other spirituous beverages occurred after conversion into a specific tax of the *ad valorem* duty imposed on the individual beverages in order to prevent a disproportionately high tax being imposed on aquavit having regard to its lower manufacturing costs in relation to other products of higher value on account of the tax levied per litre of pure alcohol. Such a specific tax, which also takes into account the principle of an *ad valorem* tax, is not prohibited by the EEC Treaty.

Nor can these arguments however be convincing for various reasons. On the one hand the advantages granted to the national products through an *ad valorem* tax should in fact also be extended to similar spirits from other Member States, having regard to the case-law of the Court of Justice in Case 148/77 *(Hansen).* Both aquavit and some of the spirits which are chiefly imported too, such as for example gin, vodka and geneva, are manufactured from neutral alcohol which again in its turn can be obtained, as this Court was told at the hearing, from grain, potatoes or molasses. These beverages must therefore be described as similar as regards their manufacturing costs with the result that the tax advantages granted to domestic aquavit must also be granted to the latter beverages under Article 95. On the other hand however, and this is the decisive consideration, the Kingdom of Denmark decided upon a specific tax by means of the tax per litre of pure alcohol which must be applied similarly with reference to the alcohol content and thus regardless of the manufacturing costs according to the first paragraph of Article 95 of the EEC Treaty. The Court of Justice has also already given a ruling to this effect in Case 45/75 *(REWE-Zentrale des Lebensmittel-Großhandels GmbH* v *Hauptzollamt Landau/Pfalz,* judgment of 17 February 1976 [1976] ECR 181), stating that "the equality between the level of taxation imposed on a domestic product and on the imported product, required by Article 95, is valid independently of the effect of factors other than taxation on the respective production costs of the products to be compared". In particular "the scope of that article could not be so extended as to allow any kind of compensation between a tax created so as to apply to imported products and a charge of a different nature imposed, for example, for economic purposes, on the similar domestic product".

According to a correctly understood interpretation of the first paragraph of Article 95 of the EEC Treaty an infringement of that provision accordingly always occurs whenever higher taxation is imposed on a product imported from other Member States in relation to a similar domestic product, without the domestic classification for tax purposes being of importance. The result of this may be, as the Danish Government correctly observes, that under the domestic system of taxation higher taxation is imposed on other domestic products which also fulfil the characteristic of similarity than on similar imported goods. Such a situation in which similar domestic products are made worse off is however the result of the jurisdiction in tax matters left to the Member States which is not covered by

Article 95 of the EEC Treaty. In contrast to the view of the Danish Government it is also impossible to deduce any other solution from the statement of the Court of Justice in Case 78/76 *(Firma Steinike und Weinlig* v *Federal Republic of Germany,* judgment of 22 March 1977 [1977] ECR 595) that "the objective of Article 95 is to abolish direct or indirect discrimination against imported products but not to place them in a privileged tax position in relation to domestic products". This statement only makes it clear that the imported goods may not be put at a disadvantage in relation to domestic products from the point of view of tax law.

To finish the examination it is therefore only necessary to deal with the question whether aquavit, in the definition contained in the Danish tax law in question, must be regarded as a product similar within the meaning of the first paragraph of Article 95 of the EEC Treaty to the other spirituous beverages coming within tariff heading 22.09 C of the Common Customs Tariff. Contrary to the opinion held by the Danish Government, which puts forward essentially the same view in this connexion as was also put forward by the French and Italian Governments in Cases 168/78 and 169/78, this question must be answered in the affirmative having regard to my statements in the above-mentioned cases.

Since it is thus quite certain that the Kingdom of Denmark is infringing the prohibition laid down in the first paragraph of Article 95 of the EEC Treaty by imposing higher domestic taxation on the imported products which exhibit the criteria described than on aquavit, it is no longer necessary to deal with the conditions laid down in the second paragraph of that provision and the request made in the alternative by the Danish Government.

I therefore conclude that the Court should declare that the Kingdom of Denmark has failed to fulfil its obligations under the first paragraph of Article 95 of the EEC Treaty by imposing higher taxation on imported spirits, liqueurs and other beverages within the meaning of tariff heading 22.09 C of the Common Customs Tariff than on domestic aquavit and that it should order the Kingdom of Denmark to pay the costs of the action.