production tax] on regenerated mineral oils produced in Italy and for the "sovraimposta di confine" [frontier surcharge] on regenerated oils from other Member States, the Italian Republic has failed to fulfil its obligations under the first paragraph of Article 95 of the EEC Treaty;

2. Orders the parties to bear their own costs.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 8 January 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 15 NOVEMBER 1979 [1]

Mr President,
Members of the Court,

I — The use of lubricants both for combustion engines (motor oils) and for a number of industrial purposes (industrial oils) gives rise to a substantial residue in the form of used oils. In part the used oils are too impure to be used again and can only be disposed of by discharge into the environment or by incineration; for the rest they can either be burnt (in their existing state) or after elutriation in order to produce heat (heating oil used by refiners) or regenerated by distillation or other methods with a view to being re-used for the same purposes as new oils.

These operations have fostered a profitable industry. The market in lubricants (motor oils) is supplied on the one hand by refiners (refining and distributing lubricants go hand in hand) and, on the other, by manufacturers of lubricants

1 — Translated from the French.

which mix a proportion of regenerated oil with stock oil purchased from the refiners.

Undertakings engaged in regeneration, whose installations and production capacity are generally small, themselves collect the used oils which are their raw material or rely on undertakings which collect such oil and, in the case of motor oils, a re-purchase price is paid therefor. More often than not in the Member States the oils may be collected only by persons holding a valid administrative permit to collect or regenerate oils. Frequently the national territory is divided into exclusive collection zones and the collectors are tied to the regenerators by supply contracts.

The regenerators, whose customers are the manufacturers of lubricants, produce a product which competes with and is in part a substitute for new oils produced by the refineries. The effectiveness of the collection and regeneration depends on the price of the used oils purchased from holders and on the delivery price to the lubricant manufacturers. The price at which the oils are re-purchased from holders is therefore the basic factor in the cost of regenerating and thus in the cost price of the regenerated oil. As the market for lubricants now stands and by virtue also of the strong position of refiners, outlets for regenerated oils in the Member States are limited. A further factor in the cost however is the tax advantages which may be granted by the public authorities which often resort to such measures in order to promote collection and regeneration. Such an incentive is moreover necessary for the setting up of a system to compensate for the collection and transport costs. As long as no obligation exists for holders of used oil to dispose of it and as long as the structure of the sector remains as it is now it is only such an incentive which makes collection possible in regions where outlets are few and far between and where collection costs are substantial as is the case in certain Member States.

The collection and regeneration of used oils therefore have the advantage of making it possible to dispose of waste which constitutes a serious risk of pollution of the environment and to ensure the recycling of a product derived from limited natural resources which are almost all situated outside Community territory. From this point of view a contribution to the fight against pollution of the environment can certainly be regarded as a contribution to the development of economic progress. Nevertheless until relatively recently only a part of the used oils available was collected and the quantities collected included only a small proportion of industrial oils. Owing to the constraints of shortages and ecological considerations that situation is changing. The public authorities are in fact increasingly intervening to ensure as rational a collection as possible.

II — Provision for recourse to such an incentive has also been made by the Community authorities. The representatives of the Governments of the Member States, meeting within the Council, reached agreement on 5 March 1973 that efforts towards achieving harmonization should not delay the adoption of measures which were essential if better protection of the

environment was to be provided. Council Directive No 75/439/EEC of 16 June 1975 provides that the Member States are to set up harmonized systems for collecting or disposing of waste oil, if necessary, by means of recycling, that is to say, by regeneration or industrial combustion for purposes other than destruction, together with a system of financing to cover the operational costs of the authorized undertakings.

However it is clear that divergent use of that incentive by the member States could limit the freedom of competition between the collecting and regenerating industries and the free movement of regenerated oils.

The problem of the non-discriminatory use of fiscal measures in connexion with the protection of the environment and the policy relating to the use of raw materials is at the centre of the present case.

III — In Italy the manufacture of petroleum products is regulated by Decree-Law No 334 of 28 February 1939 which has frequently been amended. In the terms of the Decree-Law production of petroleum products is in particular conditional on a licence being granted by the Ufficio Tecnico delle Imposte di Fabbricazione [Technical Office for production taxes]. Petroleum products are subject to an internal tax, the imposta interna di fabbricazione [internal production tax]. Imported products bear the same charge at the frontier.

In order to promote the recycling of used petroleum products the first paragraph of Article 12 of Italian Law No 1852 of 31 December 1962 provides:

"Any person proposing to obtain petroleum products, by any means or process whatsoever from products of the same kind which have already been used within the national territory shall be bound by and subject to the legal effects of the provisions of Royal Decree-Law No 334 of 28 February 1939, which became Law No 739 of 2 June 1939, and by the subsequent amendments thereto, and also by the obligations laid down by Decree Law No 271 of 5 May 1957, which became, after amendment, Law No 474 of 2 July 1957, with regard to the movement and storage of the products obtained".

"Products obtained shall be chargeable to excise duty at the rate of 25% of the rate laid down for each type of product referred to".

The scope of the obligations which Italy has allegedly failed to fulfil in respect of which the Commission seeks a ruling from the Court has diminished considerably between the time when the application was brought before the Court and the opening of the oral procedure. "Interpreting the reasoned opinion of the Commission of 10 January 1978" the Commission's agent stated, less than one week before the opening of the oral procedure, that the breach of which the Italian Republic is allegedly guilty relates solely to the tax rules laid down for the regenerated petroleum produces referred to in the second paragraph of Article 12 of the said law. I shall therefore examine the dispute as it now stands.

In substance the Commission takes the view that the different tax treatment of national petroleum products (lubricants) regenerated from products of the same

kind already used within the country (taxed at 25% of the full rate) and the same products, even if they have been regenerated, imported from the other Member States (taxed at the full rate) is contrary to the provisions of the first paragraph of Article 95 of the EEC Treaty. In short the Commission complains that Italy has not granted the more favourable national treatment to imported products which have been regenerated although the two categories of products are not merely similar but identical.

IV — Let me say at the outset that I have been entirely convinced by the explanations of the Italian Government.

In the first place the grant of certain advantages to the national products is justified by the particular nature of the regeneration process which complies with a certain number of economic as well as ecological requirements.

Under Article 13 of Council Directive No 75/439/EEC such advantages may take the form of "indemnities . . . for the service rendered" which must not however be "such as to cause any significant distortion of competition or to give rise to artificial patterns of trade in the products".

The indemnities may be financed, "among other methods", by a charge imposed on products which after use are transformed into waste oils, *or on waste oils themselves.* It is quite remarkable in this respect that the wording adopted by the Council did not incorporate the Commission's proposal that measures of a *fiscal* nature (exemptions) are to be *excluded* as they do not enable the compensation to be adjusted according to the region or the undertaking. It is hardly necessary to recall that the Commission has not challenged the Council directive.

Consequently the Member States could make use of tax measures (charges or exemptions) in order to finance the advantages to be accorded to regeneration. In the Federal Republic of Germany a law of 28 December 1968 set up a fund for the disposal of used oils in order to collect and dispose of used lubricants. In the framework of that public service the undertakings which, after collection, burn or regenerate used lubricants receive a subsidy equal to the difference between the cost and the proceeds of sale, allowing for a reasonable profit. These subsidies are financed by a special charge on lubricating oils released for consumption.

In France regenerated lubricating oils are exempt from the special charge on new lubricating oils.

In Italy as we have seen the production tax levied on regenerated oils made from the used oils which have been collected is assessed at only 25% of the rate applied to products of primary distillation. It is also in Italy that the revenue from the charge on lubricants is the highest (2% of the revenue from excise duty on mineral oils while recently at least there was no duty in Denmark or Ireland) and that explains perhaps the steps taken by the Commission.

The proposal for a directive submitted to the Council by the Commission on 9 August 1973 on the harmonization of excise duties on mineral oils contains specific provisions to ensure that the

proposed harmonization does not obstruct the implementation of tax arrangements enabling an appropriate solution to be found to the problem of residuary oils (Articles 6 and 18).

The Italian Government points out opportunely that in that proposal based on Article 99 of the Treaty the Commission itself considers that "free movement between the Member States and a system ensuring that conditions of competition are not distorted can *only* be realized by harmonizing at Community level the excise duties imposed on the consumption of mineral oils" and that "to ensure uniform conditions of competition at Community level the means of collection and control of excise duty should be harmonized between the Member States as much as necessary".

Secondly a condition for the grant of an allowance or the exemption from a charge is compliance with strict requirements which must be monitored by constant supervision of the whole production cycle. In the case of imported products there is nothing (such as a certificate of origin, etc.) which at the present time makes it possible to ascertain the circumstances in which they were regenerated. As the Italian Government explained in its reply, which reached the Court on 15 October 1979, to the questions put to it by the Court (page 13) it is impossible to distinguish a new oil from a regenerated oil. Furthermore if remission of tax similar to that existing in Italy were granted in the Member State from which the lubricant is imported into Italy the application of the Italian remission of tax to the lubricant might possibly give the lubricants imported into Italy a double advantage. As it is not possible to identify a regenerated product which has benefited from a reduced rate of tax the benefit of the exemption cannot be granted to the imported products.

Finally, as the Commission itself has admitted, only two Member States, (the Federal Republic of Germany and Denmark), have adopted measures to implement the Council Directive of 16 June 1975 and the Commission has certainly not produced evidence that those products are at present subject to uniform tax rules in all the Member States.

V — In the light of that analysis it must be concluded that the divergences between the national laws on the environment may lead to disparities in the taxes charged on home-produced regenerated lubricants and similar imported products which may affect the functioning of the Common Market and distort competition.

None the less removal of those disparities must in no circumstances have the result of adversely affecting the protection of the environment, in this case the disposal and regeneration of used petroleum products, two objectives which are already part of existing Community law.

In the absence of uniform implementation of the aids provided for at Community level, the immediate removal of tax incentives which are still allowed on a national level cannot be called for solely on the basis of Article 95 without

a dangerous situation arising with regard to the protection of the environment and indeed the energy policy.

It would in any event be premature to find that Italy has failed to fulfil its obligations as preparations for new rules intended to enable the complete disposal of used oils and the reorganization of the sector to be carried out on a more rational footing have been set in motion by the Community authorities and by the Member States.

It is my opinion that the application should be dismissed and that the Commission should be ordered to pay the costs.