REPORT FOR THE HEARING
delivered in Case 257/86 *

I — Facts and procedure

The first paragraph of Article 95 of the EEC Treaty prohibits Member States from imposing, directly or indirectly, on the products of other Member States any internal taxation in excess of that imposed directly or indirectly on similar domestic products.

The second paragraph of that article also prohibits Member States from imposing on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Article 14 (1) (a) of Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal L 145, 13.6.1977, p. 1) provides that Member States must exempt, under conditions which they lay down, 'final importation of goods of which the supply by a taxable person would in all circumstances be exempted within the country'. The purpose of that provision, as set out in paragraph (1), is to ensure the correct and straightforward application of such exemption and to prevent any possible evasion, avoidance or abuse.

In Italy, until 1979 value-added tax was not applicable to the supply of domestically produced free samples or their importation. The third paragraph of Article 2 of Presidential Decree No 633 of 26 October 1972 (Supplemento ordinario No 1 of the *Gazzetta ufficiale della repubblica italiana* No 292 of 11.11.1972), on the establishment of value-added tax and detailed rules for its application provides for derogations from the application of that tax covering, *inter alia*, under indent (c), 'the supply of free samples expressly described as such'. That provision was amended by indent (d) of the third paragraph of Article 2 of Presidential Decree No 687 of 23 December 1974 (*Gazzetta ufficiale della repubblica italiana* No 338 of 28.12.1974, p. 9071), which limited the derogation to 'free samples of low value expressly described as such'. Article 68 of that Decree provided that the third paragraph of Article 2 was to be applied to imports.

Ministerial Resolutions Nos 503097 of 19 November 1973 and 500307 of 18 February 1975 also stated that free samples were exempt from value-added tax provided that the packaging of the product was indelibly endorsed with a mark describing them as a free sample.

Similarly, in Resolution No 410225 of 17 August 1976, the Ministry of Finance confirmed this exemption for free samples of low value carrying a specific mark and supplied free of charge within the territory

* Language of the Case: Italian.

of the State and stated that the exemption was also applicable to imports.

Those rules were amended by Presidential Decree No 24 of 29 January 1979 (*Gazzetta ufficiale della repubblica italiana* No 30 of 31.1.1979, p. 983), which retained the exemption from value-added tax in respect of supplies within the country of free samples of low value, as provided for by the third paragraph of Article 2, which remained unchanged, but repealed Article 68, whereby that provision was also applicable to imports.

By Resolutions No 9218 of 30 June 1979 and No 392100 of 10 December 1982, in response to questions of interpretation regarding liability for VAT in respect of imports of free samples, which were raised by the Embassy of the United Kingdom, regarding samples of detergents, and by a company, regarding medical equipment, the Italian Ministry of Finance confirmed that such samples were subject to VAT from the date of the entry into force of Presidential Decree No 24 of 29 January 1979.

On 8 March 1983 the Commission addressed a letter to the Italian Government in which it put forward its view that the abovementioned Italian legislation was contrary to Article 95 of the EEC Treaty and Article 14 (1) (a) of Council Directive 77/388 of 17 May 1977 and requested the Italian Government to amend that legislation and to reply to its letter within two weeks, failing which it would be obliged to initiate the procedure provided for by Article 169 of the Treaty.

Since no reply was forthcoming the Commission invited the Italian Government, by letter of 3 May 1984, to submit its observations pursuant to Article 169 of the Treaty within two months.

Following that letter, the Commission delivered a reasoned opinion on 6 June 1985 and called on the Italian Government to comply with it within one month.

The reasoned opinion crossed with a telex from the Italian Government dated 22 May 1985 in which the latter maintained that, pending a definitive solution which was to be provided for by the consolidated law on VAT which was currently being prepared, it was possible, by applying the provisions of Presidential Decree No 633 of 26 October 1972, as amended, in conjunction with 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 Law No 1292 of 26 November 1957, to exempt from VAT imports of free samples of low value originating in States signatory to the Convention. In that telex the Italian Government indicated that the Directorate-General for Customs had instructed all the relevant departments to exempt such goods from VAT, stating that that exemption was to be limited to States signatory to the abovementioned Convention; it suggested that those measures justified the discontinuance of the legal proceedings commenced by the Commission.

By a further telex dated 8 July 1985 the Italian Government stated, in reply to the reasoned opinion, that pending better

harmonization of the tax legislation with Directive 77/388 by means of the consolidated law in preparation, the exemption from VAT of imports of samples of low value could, for the time being, be implemented *de facto* by applying Resolution No 2450/9516 of 18 June 1984 of the Directorate-General for Customs, which stated that exemption would be applied pursuant to the relevant provisions of the Geneva Convention of 7 November 1952.

In order to reply to the Italian Government's reasoning, on 13 September 1985 the Commission delivered a second reasoned opinion, supplementary to the first.

The Commission reiterated the complaint set out in its first reasoned opinion and took the view that far from terminating the alleged infringement the solutions envisaged by the Italian Government for the exemption of the imports in question from VAT did not allow the legal proceedings to be discontinued. It stressed, first, that the means proposed by the Italian Government, in particular recourse to the 1952 Geneva Convention, would not enable imports of free samples of low value from countries which were not signatories to that Convention to be exempted from VAT. Furthermore, it could not accept the practical solutions suggested by the Italian Government in its telexes of 8 July and 19 July 1985, since in the Commission's view they did not guarantee the certainty of legal relations and were not made public in any way.

By a telex dated 13 January 1986 the Italian Government informed the Commission that the preparation of the consolidated law on VAT was almost complete and that in order to bring Italian legislation into conformity with Community law a provision inserted therein expressly exempted from VAT imports of free samples of low value.

By an application lodged at the Court Registry on 15 October 1986 the Commission commenced this action.

The written procedure followed its normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The Commission claims that the Court should:

Declare that by providing that value-added tax is payable on free samples of low value that are imported, although similar free samples produced in Italy are exempted, the Italian Republic has failed to fulfil its obligations under Article 14 (1) (a) of Council Directive 77/388 of 17 May 1977 on value-added tax and under Article 95 of the Treaty;

Order the Italian Republic to pay the costs.

The Italian Republic contends that the Court should:

Take note that the defendant Government does not dispute the complaint based on the breach of Article 14 (1) (a) of Council Directive 77/388 of 17 May 1977 solely as regards imports from States which are not signatories to the Geneva Convention of 7 November 1952 and do not enjoy most favoured nation treatment, but dismiss the remainder of the Commission's application;

Order each party to bear half the costs.

III — Submissions and arguments of the parties

A — The Commission submits that inasmuch as it no longer extends exemption from VAT to imports, although the supply of similar free samples within the country remains exempted, the tax system instituted in Italy by Presidential Decree No 24 of 29 January 1979 in respect of free samples of low value constitutes, first, discriminatory treatment against imports from other Member States and, consequently, an infringement of Article 95 of the EEC Treaty.

1. It notes that the Court has held that within the system of the EEC Treaty, the provisions of Article 95 supplement the provisions on the abolition of customs duties and charges having equivalent effect. The same case-law holds that the aim of those provisions is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation which discriminates against products from other Member States. The purpose of Article 95 is to guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products. The Court adopted this strict interpretation in particular in its judgment of 27 February 1980, in Case 169/78 *Commission* v *Italian Republic* [1980] ECR 385.

2. Furthermore, the Commission states that as regards trade between Member States Article 14 of Directive 77/388 represents an application of the rule set out in Article 95 of the Treaty. It takes the view that that provision is therefore also infringed if VAT is applied to imports from other Member States. It adds, however, that Directive 77/388 goes beyond the provisions of Article 95 of the Treaty inasmuch as it is applicable to all imports, including those from non-member countries.

B — 1. The Italian Government submits that pending a definitive solution by means of the consolidated law on VAT, which is in an advanced state of preparation, it is possible, by applying Article 2 of the Geneva Convention of 7 November 1952 in conjunction with Presidential Decree No 633 of 26 October 1972, as amended, to exempt from VAT imports of free samples of low value from States which are signatories to the Convention since, first, the Convention was ratified and implemented in Italy by means of Law No 1292 of 26

November 1957 and, secondly, the first paragraph of Article 72 of Presidential Decree No 633 of 1972 maintains in force all benefits provided for by treaties and international agreements concluded prior to the entry into force of the VAT system.

2. The defendant stresses that this provisional solution is *de facto* applied pursuant to Resolution No 2450/9516 of 18 June 1984 of the Directorate-General for Customs, according to which imports of the type of samples in question from States which are signatories to the 1952 Geneva Convention are exempt from VAT.

In its defence it adds that in Note No 3499/9516 of 5 November 1986 the Ministry of Finance sent supplementary instructions to the customs authorities in which it communicated the list of signatory States to the Geneva Convention and gave instructions regarding the repayment of VAT which had already been improperly levied. That note also stated that the same tax treatment was to be applied to States with which agreements containing a most favoured nation clause had been concluded.

3. Finally, the Italian Government maintains that from 1984 onwards imports of free samples of low value expressly described as such have not been subject to VAT, with the exception of such samples from countries which are not signatories to the 1952 Geneva Convention and with which an agreement containing a most favoured nation clause has not been concluded. It states that the VAT problem raised by the latter imports, which it considers are not very numerous, is under active consideration and that in order to ensure that the Italian tax legislation is more consistent with Directive 77/388 the consolidated law which is being prepared will contain an express provision providing for the exemption in question.

C — Having regard to the statements and arguments submitted by the Italian Government the Commission put forward the following observations.

1. First, it points out that the Italian Government concedes that the discrimination at issue persists as regards imports from countries which are not signatories to the 1952 Geneva Convention.

It points out that Italy is required to adopt the measures needed to comply with Community law within the periods expressly fixed, independently of the provisions of international agreements to which it may have become a party. The Member States may choose the legislative measures to be used to ensure compliance with Community law and consequently, for the purposes of the correct application of Community law, the only significant issue is whether Community law is correctly transposed into national law.

In this respect, the Commission expresses that the means proposed by the Italian Government, in particular reliance on the Geneva Convention, is insufficient as regards imports from countries which are not signatories to that convention. It disputes the view that those imports are insignificant since the countries which have not become parties to the Convention include those of Latin America and the Maghreb as well as the ACP countries.

2. As regards imports, in particular intra-Community imports, from States which are signatories to the Geneva Convention and from countries enjoying most favoured nation status the Commission does not accept the solutions proposed by the Italian Government since in its view they do not guarantee the certainty of legal relations and are in not made public in any way.

It submits that the present legal position in Italy is one of considerable confusion following the entry into force of Presidential Decree No 24 of 1979, which discontinued the automatic treatment of imports as equivalent to domestic transactions. The requirement of clarity arising from Article 14 (1) of Directive 77/388, which states that the exemptions must be laid down under conditions ensuring their 'correct and straightforward application' was not met either for the parties concerned, in particular importers, or for the appropriate authorities, having regard to the difficulties which they experience in interpreting the applicable law.

The Commission adds that recourse to the 1952 Geneva Convention cannot change the situation described above. First, even if the parties concerned learn of the existence of that Convention they must still know which States have become parties to it; secondly, it is even less easy to determine the States which enjoy most favoured nation treatment, the list of which has not been sent to the Commission by the Italian Government.

3. Finally, the Commission submits that the requirement of a uniform application of the VAT exemption to all imports, independent of their source, reflects a concern for equal treatment, which is of a unitary and general nature and cannot be partially complied with, as the Italian Government submits.

D — In its rejoinder, the Italian Government submits that the system exempting imports of free samples of low value from VAT by application of the Geneva Convention and agreements containing a most favoured nation clause is the result not of a *de facto* administrative practice commenced in 1984 but, quite the contrary, of legislative provisions in the national legal system with which the administrative authorities must comply and upon which individuals may base their rights. By failing to apply the abovementioned legislative provisions from 1979 to 1984 the authorities committed an error which was later redressed by the reimbursement of the improperly levied sums.

Since the exemption in question is based on national legislative provisions, the Commission's allegation that the present legal position is still one of 'considerable confusion' constitutes an unacceptable amendment of the cause of action, and the Court should not take it into consideration.

In this respect, the Italian Government considers that the legal position which has existed since 1984 exhibits no greater degree of uncertainty than that which can be observed in many other legal situations, in particular those based on international conventions or agreements. In general, imports are made by specialists who are not

unaware of tax systems, even those systems which are based on particular conventions or general agreements such as the General Agreement on Tariffs and Trade (GATT), the first article of which provides for the extension of most favoured nation treatment to all the States party to that agreement.

Finally, the defendant maintains that if it is borne in mind that the exemption from VAT applies to States which are signatories to the 1952 Geneva Convention, States which are signatories to the GATT and countries which are not signatories but with which specific agreements have been concluded, the infringement of Article 14 (1) (a) of Directive 77/388 is not merely partial but extremely slight.

J. C. Moitinho de Almeida
Judge-Rapporteur