THE COURT

hereby:

1. **Declares that, by maintaining in force after 31 December 1963 a statutory system which may lead to the payment, to the advantage of products of the engineering industry exported to other Member States, of repayments of internal taxation exceeding the taxation imposed directly or indirectly on the said products, the Italian Republic has failed to fulfil its obligation under Article 96 of the Treaty;**

2. **Orders the defendant to bear the costs of the action, including the costs reserved by the judgment of 1 December 1965.**

Lecourt Pescatore

Donner Trabucchi Strauß

Delivered in open court in Luxembourg on 19 November 1969.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 23 OCTOBER 1969[1]

Mr President,
Members of the Court,

I

1. It is now almost ten years since this case, on which I have today to give an opinion, first arose between the Commission of the EEC, and now its sucessor the Commission of the European Communities, and the Italian Republic. By the Law of 10 March 1955, succeeded by Law No 639 of 5 July 1964, the Italian Republic provided that on exportation to other Member States of certain products of its engineering industry refunds should be made under a flat-rate system on a certain number of duties and taxes. Following a lengthy and unfruitful exchange of views on the compatibility of this practice, as regards the exportation of products to Member States, with Article 96 of the EEC Treaty, the Commission of the EEC brought the matter before you on 13 October 1964 in accordance with the provisions of Article 169.
Your judgment of 1 December 1965 definitively resolved one point. You ruled that the Italian Republic failed to fulfil its obligation under Article 96 by grant-

1 — Translated from the French.

ing the repayment of a certain number of duties and taxes which you specified, namely registration, stamp and mortgage duties, as well as charges on licences and concessions and on motor vehicles and advertising. In fact, repayments of internal taxation are authorized only to the extent to which they do not exceed the taxation imposed on the products whether *directly* or *indirectly*. Under that article, these two terms refer respectively to taxation imposed on the finished product and that imposed, at the various stages of manufacture, on raw materials or on semi-finished products used in the manufacture of the product. This is not the case in respect of the duties and taxes which I have cited and which are imposed on the producer undertaking itself.

As regards the other point contested by the Commission, you did not deny the Italian Republic recourse to a flat-rate system, but only on condition of remaining, *in all cases*, within the mandatory limits of Article 96. You also ordered that 'within three months from the date on which this judgment is given the Italian Republic shall show that the amount of the flat-rate repayment of internal taxation imposed on the products of the engineering industry exported to the territory of other Member States does not exceed the amount of such taxation' and you specified that the oral procedure on the second submission of the application should be reopened, on expiry of the above period, at the request of the party which first requested it.

2. But it was three years, not three months, before the Commission requested such reopening; this lapse of time serves to show the difficulties involved in the full execution of your interim judgment, difficulties which will become apparent from examination of the research made by the parties before bringing the case before you once more.

The onus, according to your judgment, is on the Italian Republic. There are 473 products benefiting from repayments by virtue of the law. The Italian Republic chose 58 of these, which are exported to other Member States and considered by it to be particularly significant. For each product chosen it drew up a table featuring the effect at the various stages of customs duties and of taxes and charges on consumption and compared it with the flat-rate repayment granted on 1 January 1966 for the exportation of the product in question to Member States. In every case it based its calculation on the industrial accounts for 1965 (in other words for the year of your judgment) of the most representative undertaking manufacturing finished products.

For this purpose, it calculated the different quantities of materials making up the product, or used and consumed in its manufacture. For materials purchased abroad, account was taken of the customs duties paid; for materials purchased in Italy, which were subdivided in accordance with the sector in which they originated (non-ferrous metals, chemical products, textiles, etc.), account was taken of the effect of taxes on consumption as well as that of customs duties which, having been imposed on the supplier of the undertaking manufacturing finished products, were included in the costs. This is the way in which the total tax burden imposed, directly or indirectly, on the product in question was arrived at and comparison of these taxes with repayments shows, in the opinion of the Italian Republic, that the latter are lower than the former.

Whilst admitting the need to limit the analysis to part of the products benefiting from the repayment, the Commission contested the reference to the most representative undertaking manufacturing finished products and the probative value of the documents produced relating to the effect of the tax burden on the materials belonging to the various sectors of industrial activity. It therefore proposed to undertake a

detailed examination of the economic and fiscal position of seven products, namely two types of saucepan, two types of refrigerator and two types of automobile, and to carry out fresh calculations with reference to undertakings which it indicated. It is in the light of the results of this examination, obtained with the cooperation of the Italian Republic, that it requested and obtained the reopening of the oral procedure.

II

One question which was the subject of lengthy discussions between the parties and which is important for the result of the case is the problem of the burden of proof.

Contrary to what the Commission requested—and what I myself advised—your judgment of 1965 did not exclude recourse to flat rates in principle but confined it within such strict limits that the power thus recognized may appear illusory. Since the amount of the repayment must, under Article 96, be less than or equal to that of the taxation, you ruled that evidence that this condition is actually fulfilled must be given in order to justify the application of a flat rate. And since the Italian Republic introduced a flat-rate system of its own free will, it is for that party to show that the system remains, *in all cases*, within the mandatory limits of Article 96. The last paragraph of the grounds of your judgment even adds that this information should be supplied, supported by figures, *for the different products in question.*

It is therefore logical that the Commission should deny that it is its duty to supply evidence to oppose that required of the Italian Republic, in other words to have to establish that the repayments are greater than the amount of the duties levied. In its opinion, its role can consist only in a critical analysis of the documents produced by the defendant. I must admit moreover that by limiting the investigation which it carried out in 1967 to seven products the Commission does not imply that it recognizes the legality of the repayment in respect of all the other products. There remains however the fact that, since the Italian Republic produced the original tables, the discussion necessarily centred around the seven products chosen by the Commission and accepted by the opposing party; the products appear even more indicative in that they were chosen after the defendant had produced information on 58 products and declared itself willing to clear up any other matter or give any other additional explanation requested by the opposing party.

III

We now come to the crux of the dispute, namely the tables submitted by the Italian Republic (58 products) and by the Commission (7 products, one of which is dealt with in more detail and serves as an example). It is not a question of considering them one by one—nor, I think, is it the role of the Court to do so—nor again is it a question of examining all the calculations shown in the tables, but only of analysing their structure, of extracting the principal characteristics and of drawing conclusions therefrom.

1. First observation. In each of the tables submitted to you, alongside the amount of taxes on consumption and manufacture, appears that of customs duties imposed either on products purchased abroad by the undertaking or on products delivered to it by suppliers. These customs duties, which are generally greater than taxes on consumption, are taken into account so that an accurate assessment can be made of the legality of the refund.

The matter at issue before you is the compatibility of Italian legislation and practice with Article 96 of the Treaty which refers only to the repayment of internal taxation. If there is one thing

which is certain, it is that customs duties do not constitute internal taxation within the meaning of the Treaty and cannot therefore be repaid in pursuance of that article. That does not mean however that they cannot give rise to a refund—even a partial one—on the basis of Article 10. You will remember that in its written and oral observations the Commission discussed the *quantum* taken into account by the Italian Republic but that it did not formally contest the principle of this refund either in its reasoned opinion or in its application, whereas it was mentioned in the title of the two laws at issue.

In fact, it seems that during the lengthy discussions which have taken place between the parties since 1960, they have recognized that the customs element does not fall within the ambit of Article 96, without however drawing all necessary consequences from this conclusion. Two documents in the file seem to indicate this. In a letter of 14 April 1962 sent to the Minister for Industry of the Italian Republic, the Commission, taking note of a decree which reduced, in conformity with the reduction following the implementation of Article 10 of the Treaty, the repayment rates then in force by a flat-rate amount of 35%, believed that it could deduce from this that the part of the refund retained represented the amount of indirect taxes, the legality of which had to be reviewed 'in the light of the fiscal provisions of the Treaty and especially Article 96'. For its part, the Italian Government considered, in a note of 4 March 1963, that fiscal repayments and drawbacks of customs duties imposed on materials contained in the exported products had to be assessed in accordance with the specific provisions of the Treaty, in other words Articles 10 and 96.

However that may be, the question was not raised before this Court and the grounds of your judgment make no reference of any sort to customs duties. But the injunction which you addressed to the Italian Republic related quite definitely to the repayment of internal taxation.

The problem confronting us is therefore as follows. In order to establish whether such repayment does not exceed the amount of taxation actually borne, the necessary condition determining the legality under Article 96 of the use of a flat rate, is it permissible to include customs duties as an item of taxation which may be taken into account? Although, as I have said, the point has never been raised, I think the reply must be in the negative, given the tenor of your judgment of 1965. In fact, to include customs duties as one of the basic elements of calculation in the process of equating taxation and repayment and to state that this practice is not contrary to Article 96, whereas that article provides only for the repayment of internal taxation, is to go against the very wording of the article.

I repeat that this does not necessarily exclude all repayment of customs duty but such repayment cannot be affected on the basis of Article 96, contrary to the belief of the Italian Republic whose error is to grant through a single legal instrument and in accordance with an overall flat-rate system the repayment of heterogeneous taxation. Although comprehensible in the national context, this practice can no longer apply by reason of the requirements of the Treaty.

If you accept my argument, you will be led, by examining the seven tables corresponding to the products examined individually, to take into account, for the purposes of the flat-rate repayment, only internal taxation within the meaning of Article 96. I think it is permissible for me to pass over the details of the calculations made and to come directly to the result, and also, so as to satisfy the wishes of the Italian Government, not to mention the names of the undertakings manufacturing the products considered. The conclusions are fairly straightforward. As we know, the Com-

mission contested more or less resolutely certain elements of the internal taxation appearing in the analytical tables; even ignoring these criticisms, if we accept the whole amount of the internal taxation, the result is as follows: the rate of the flat-rate repayment (which is X lire per kg) is lower than the total sum of the internal taxation borne by the two types of automobile (in other words Lit. 9 per kg, compared with 12.03 and 10.22 respectively); on the other hand, it exceeds this total in the case of refrigerators (again a repayment of Lit. 9 per kg, compared with 5.40 and 5.75 respectively); it is also greater in the case of saucepans (repayment of Lit. 4 per kg, compared with 24.57 and 26.36 of reimbursable internal taxation).

Accordingly, your judgment of 1 December 1965 seems to me to dictate the conclusion that since the Italian Republic has not furnished the evidence required of it and has failed to show that the flat-rate system chosen by it always remains within the mandatory limits of Article 96, recourse to such a system constitutes failure to fulfil the obligation incumbent upon it under the said article. In truth, the error is excusable and your finding will certainly not bring an end to the discussion. It is not without reason that the defendant's Agent observed at the hearing that Article 96 does not define any method for calculating repayments and that the Commission, which denies the Italian Republic the right to use a flat-rate system, has done nothing positive, either through regulation or directive (such as for example that which it proposed to the Council in pursuance of Article 112 for repayments granted by the same Law on exportation to third countries), to establish the system to be adopted. It is for the parties to come together and draw the conclusions which your judgment calls for and to find agreement on a method which meets both the requirements of Article 96 and practical needs.

2. But, although the solution which I have just proposed to you seems to me the logical consequence of your judgment of 1 December 1965, I am aware that it is open to certain criticisms inasmuch as it bases the finding of failure to fulfil an obligation on an element which has not been clearly brought out either in the reasoned opinion or in the originating application. The Commission has contested the principle of recourse to a flat-rate system and the inclusion in that system of certain taxes, but not the inclusion of customs duties of which it was certainly well aware and in relation to which it never gave notice to the Italian Republic. On the other hand, when your judgment of 1965 led the parties to draw up figures, the Commission criticized, in the light of the information supplied by the opposing party, certain elements of customs duties included by the latter, in the same way as it criticized certain elements of internal taxation.

If you consider that it is impossible for you to base your finding of failure to fulfil an obligation on a point which has not been discussed by the parties, the only possibility remaining to you at this stage of the procedure is to accept, at least by implication, as the applicant does, the *principle* of the inclusion of customs duties, without examining the amount which may be taken into account in this connexion. This is a solution which seems to me to be inelegant when considered as a principle, but which reflects the written and oral debates. It is therefore from this point of view that I will now briefly recall the criticisms made by the Commission and the conclusions which can be drawn from them. These criticisms relate first (heading 111) to the inclusion, for the purpose of calculating repayments, of all customs duties paid at the time of importation from third countries on semi-finished products or raw materials used in the manufacture of products for export. But, according to the rules adopted for the implementation of Article 10 of the

Treaty on processing traffic, the repayment of these duties is only authorized within the limits of the difference between the amount of the taxation and that of the compensatory levy. In 1966, the date when the products manufactured during the financial year to which the documentation relates could have been exported, this levy was 75% of the duties of the Common Customs Tariff. The amounts under heading 111 of the tables must therefore be reduced, as regards all imports from third countries, by the amount exceeding this difference. Taking as an example the product which it examined in greater detail in its statement of 28 May 1969—the identity of which I will not specify—the Commission has made the necessary corrections to the figures. It adds that the most important element of the materials purchased abroad (heading 111) relates to products imported under the rules relating to temporary importation and then incorporated in the product exported. In this case, therefore, there can be no refund.

Despite the defendant's objections, this criticism seems to me to be as a whole well founded. It does not suffice to state that since the repayments are very much lower than the amount of the duties the compensatory levy is absorbed by this difference; the fact remains that the tables indicated the repayment of all customs duties.

An additional factor is that as from 1 July 1968 heading 111 entirely lost its purpose since customs duties completely disappeared in intra-Community trade and the compensatory levy is now equal to the customs duty for imports from third countries. Although it is true that this situation is subsequent to that which was the subject of examination by the parties, it does not seem to have entailed any change in the machinery of repayments.

A second criticism also relating to customs duties (heading 112): the amounts under this heading refer to durable stock-in-trade such as machines for the manufacture of the products in question or of subsidiary stock.

It appears to me, as it does to the Commission, that such duties cannot be reimbursed since they are imposed neither on the finished product nor on raw materials or semi-finished products used in the manufacture of the products.

I will not dwell on the criticisms made with regard to the inclusion of taxation paid by suppliers of undertakings manufacturing finished products (headings 121 to 128) and on the inclusion of State taxes on manufacture and consumption paid by the undertakings manufacturing finished products (heading 129). Rather than being criticisms, these are in fact reservations of principle tending to emphasize that these elements are not verifiable during the stage of final manufacture and that their amount may vary according to the intended uses of the material.

In short, if one considers only the abatements of customs duties brought into operation by the Commission and which I consider justified, it seems to me that in the case of the product considered in the detailed table the amount of taxation, which is reimbursable and adequately established, is lower than the repayment of Lit. 9 per kg granted by the Italian Republic.

Undoubtedly, it is only a single product, but it is the one which was examined in the greatest detail. If, on the other hand, one examines all the cards produced, one cannot fail to observe, as was done at the hearing, the strangeness of a system in which taxation, the amount of which varies according to the products from 16 to at least 50, is repaid on a uniform basis at the rate of Lit. 4 per kg. One can cite in this connexion reasons of economic or fiscal policy but they do not provide a complete explanation. I have no hesitation, even on the basis of the second aspect which I examined, in advising you to rule that the defendant has not produced the

evidence incumbent upon it and to find, as has been alleged, that the defendant has failed to fulfil its obligation. However, it is on the basis of the reasons which I gave earlier in this opinion that I advise you to make this finding.

I must confess—and it is with this remark that I conclude—that these proceedings have been rather unsatisfactory. Commenced almost ten years ago on an administrative level, and the subject of a judgment in 1965, it has taken another four years of study by the parties to come to a solution which will certainly not put an end to all discussion. I can only regret it and form the opinion that the Court should find that, by establishing a flat-rate system for the repayment of internal taxation under Article 96 of the Treaty, the Italian Republic has failed to fulfil one of its obligations under the said Treaty, and that the costs should be borne by the Government of the Italian Republic.