Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, in particular Articles 2, 3, 7, 12, 85, 92, 93, 95 and 173;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear the costs.**

Delivered in open court in Luxembourg on 25 June 1970.

Lecourt Monaco Pescatore

Donner Trabucchi Strauß Mertens de Wilmars

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 21 APRIL 1970[1]

Mr President,
Members of the Court,

This case, in which the oral procedure took place on 10 March 1970, concerns the interpretation of the provisions of the EEC Treaty relating to aid. The following are the facts which gave rise to the case:
In its effort to help the textile industry established in France to overcome the difficulties which face the industry in many countries and in other Member States as well, the French Government introduced a system of aid which came into force on 1 January 1966. This system serves to promote research in the textiles sector and is supposed to facilitate the renewal of its industrial and commercial structure. The

1 — Translated from the German.

resources for this aid are supplied by a charge which is levied on the sale of certain textile products in France and which applies equally to home-produced and imported products. The resources are shared in accordance with a certain scale. The Institut Textile de France (French Textile Institute) receives some of the proceeds to help finance its research and some of the proceeds go to the budget of the trade association 'Union des Industries Textiles' (Union of Textile Undertakings). There they are used in the programme for renewing the industrial and commercial structures of the textile undertakings or, more precisely, to refund part of their non-productive expenditure and, exceptionally, for modernization or collective trade promotion in certain sectors. This scheme was in the first place governed by the Decree of 24 December 1965 which introduced the charge referred to. At first the rate of the charge was fixed at 0.20% by an order (arrêté) of 24 December 1965. The first detailed rules governing the use of the revenue from the charge were made by orders of 29 March and 21 April 1966. They provided in particular that 40% should go to the Institut Textile de France and 60% to the Union des Industries Textiles.

In reply to a request of the Commission of the European Economic Community dated 10 January 1966, the French Government informed them of the details of this scheme in a letter of 4 May 1966. The system of aid was first reviewed at a multilateral meeting of representatives of all the Member States. This prompted the Commission to initiate the investigatory procedure under Article 93 (2) of the EEC Treaty, and it notified the French Government of this in a letter of 30 May 1967. This letter pointed out that the aid was justified as regarded its *aim*, but that the Commission had reservations as to the method whereby it was financed, that is, to the fact that the charge was also levied on products which were imported from other Member States. In the Commission's view this is not indispensable. Therefore it said that there was a presumption of incompatibility with the Treaty and asked that the application of the scheme be suspended until it had taken a definitive decision. As further prescribed in the Commission's letter the French Government responded to the initiation of the said procedure with a note dated 12 July 1967.

It took the view that the Commission could not examine the method of financing since the aid was compatible with the Treaty as regards its aim, and that this was so chiefly because the provisions of Articles 12 and 95 of the EEC Treaty relating to taxation did not apply to it. Accordingly, the French Government upheld the system of aid which had been criticized in a Decree of 27 April 1968. The rate of tax was increased to as much as 0.35% by an order (arrêté) of the same day and in addition the ratio of distribution of the revenue was altered so that 2/7 of the receipts went to research and 5/7 was given to the French association of textile undertakings. Finally, as the multilateral meeting held on 18 June 1969 did not lead to agreement being reached between the French Government and the Commission, the Commission took a decision on 18 July 1969 in accordance with the first paragraph of Article 93 (2) and with Article 93 (3) of the EEC Treaty, in which it repeated its view that the aid was compatible with Article 92 (3) (c) as regards its aim. However, as it had done before, it maintained that, to the extent that products imported from other Member States were caught by the charge, the method of financing was not indispensable. In the Commission's view, the result was that foreign undertakings were put at a competitive disadvantage, that is, trading conditions were adversely affected, which is prohibited by Article 92. Finally, therefore, the decision ordered that the French Republic should not give any more aid under the scheme contained in the Decrees of 24 December 1965 and 27 April 1968 unless it previously modified the system so that products imported from other Member States would no longer be caught by the charge.

The French Government was notified of this decision in a letter of the same date which it received on 22 July 1969. As the French Government was unwilling to accept its contents, it brought an action before the Court of Justice in accordance with Article 173 of the EEC Treaty and instituted these proceedings on 26 September 1969.

Thus we shall have to deal with the question

whether the French Government's application for the annulment of the decision, in support of which it puts forward several arguments, is well founded or whether the application must be dismissed as unfounded, as the Commission thinks is correct.

Legal consideration

1. The manner in which the French Government contests the decision of the Commission is clearly indicated in the statement of facts. It is of the opinion that the Treaty makes a clear distinction between schemes of aid to which certain provisions (Articles 92 to 94) apply, and national taxes relating to trade which are subject to other Treaty provisions, namely Articles 12 and 95. It claims that Articles 92 and 93, the application of which is now at issue, only deal with aids, that is, with favouring specific undertakings by giving them certain advantages. Article 93 only provides that the Community has jurisdiction to abolish or alter aids. Since however no objection was made in this case to the aim of the French aids, which even the Commission admits, this logically precludes the Community from taking any action in respect of the granting of the aid. On the other hand there can be no question of the Commission's proceeding on the basis of the Treaty provisions relating to taxation because in view of the fact that home-manufactured and imported products are affected alike, it cannot be said that the requirements of these provisions are satisfied. But if that is so, if the components of the French system of aid, the grant of financial benefits on the one hand and the levying of national taxation on the other, appear to be valid as regards the Treaty provisions when they are considered separately, it is not possible to declare that one of these components is contrary to the Treaty when they are examined together and, as the Commission proposes, to demand on the basis of Article 93 that it be altered or, to be more exact, that the levying of the charge be altered.

It cannot be denied that at first sight the way in which the applicant presents its argument seems to be plausibly logical. However certain reservations immediately spring to mind.

When one is faced with a situation where a national economic sector, or rather, a sector of the economy established in the territory of a Member State, is being given help to improve its organization by modernizing and rationalizing it so that it can better meet the 'pressure of international competition', according to the very words of the letter of 4 May 1966 from the French Government, and when one realizes that the intention is to achieve this improvement in its ability to compete with other industries *inter alia* by means of charges (taxes parafiscales) which are levied on imports and the origin of which leads one to suppose that they represented a burden on foreign competitiors with comparable structural difficulties, then, in view of this situation, it is in my opinion difficult to conceive that the Treaty can provide no remedy against an obvious case of distortion of competition because of the division between the spheres of 'aids' and 'charges' which the French Government propounds. On closer inspection however it also appears that the French Government's view of the scope of the Treaty provisions relating to aid is too narrow. To discover their true scope the following considerations must first be recalled. It must be observed that the basic idea of the Treaty is the *prohibition in principle* of State aids, and that it clearly emphasizes that this type of aid is *incompatible* with the common market. The words used are 'aid... in any form whatsoever', and it is enough for it to *threaten* to distort competition; this certainly argues in favour of a wide range of application of the prohibition. Moreover Article 93 uses the words 'systems of aid' ('régimes d'aides', 'regimi di aiuti', 'steunregelingen') and also says that the Commission shall propose any 'appropriate measurss' required by the progressive development or by the functioning of the common market.

Accordingly, this seems already to justify a broad interpretation of the ways open to the Commission to intervene and to show that a narrow view of the terms of the Treaty is not reasonable. As the Commission rightly points out, the case-law of the Court can also be quoted in support of this view, namely in Case 6/64 ([1964] E.C.R. 1141) where the Court spoke not only of direct but also indirect ways of favouring certain

industries with regard to the concept of aid. Apart from this it seems in fact unnatural, or, as the Commission says, artificial, to separate the action whereby undertakings are favoured from its origins and method of finance in a case where the national legislation expressly provides for this relationship between the two. There is no doubt that it is more accurate to work on the basis that the system is to be taken as a unit and a homogeneous whole even if the Council never mentioned charges as components of aid when it was working out the detailed rules for the application of Articles 92 and 93. As the Commission has quite rightly done, a distinction must be made between the different effects of a system of aid. The system naturally produces directly beneficial effects by using certain resources for certain purposes, in this case, paying certain sums of money to two establishments which form part of French economic and research activity which is, as you know, permitted. However, the method by which aid is financed can also produce *indirect* repercussions which must likewise be described as unavoidable reactions which are a result of the system of aid. In the present case, these repercussions connected with the method of financing and the aid are such that the burden which (as will be seen later) is placed on foreign manufacturers at least to a certain degree and without being offset by equivalent benefits confers an additional advantage on French textile undertakings so far as competition is concerned. If these repercussions were not taken into consideration it would in fact mean that the extent of the examination was being artificially narrowed down and the scope of the application of the provisions relating to aid illogically reduced.

Thus to conclude this first part of my opinion it may be stated that the Commission cannot be accused of having wrongly criticized the method of financing of the French system of aid by relying on the Treaty provisions relating to aid or of having based its decision on these alone, that is, merely having said that the method of financing was not indispensable to attain the aims of the system of aid.

2. In its principal submissions the French Government further objects to the *form* taken by the contested decision, or more exactly, to the fact that it made the modification of the system of levying taxes a condition of the continued existence of the aid which is *per se* compatible with the Treaty, and thus to the fact that it ordered that the aid be abolished if this condition were not satisfied. The French Government claims that the decision is thereby made ambiguous because it does not directly demand the modification of the method of financing but only tries to obtain this by an indirect method. The French Government regards this procedure as a 'détournement de procédure' (misuse of procedure). It says that if it were carried to the limit, it could lead to the ridiculous result that the aid was abolished in spite of its being compatible with the Treaty and the common interest leaving the charge to which there can be no objection under the Treaty, that is, precisely the component which according to the Commission leads in the context of the system of aid to a change for the worse in trading conditions.

I must say at once that I cannot follow the view of the French Government here either. It is quite clear what the Commission's opinion is from the text of the decision and from the events leading up to it, in particular from the Commission's letter of 18 July 1969: it objects to the method of financing as a component of the French system of aid and above all it is anxious to modify it. As we have seen, the Commission has power to take a decision in this respect, and I have no doubt that it exercised this power when it took the contested decision. Therefore I cannot see on what grounds the form chosen by the Commission could be criticized. In fact we are faced with a decision which is couched *in the alternative*, as was explained during the proceedings, and which leaves the addressee a choice and, properly understood, provides for a degree of latitude *to the advantage* of the French Government. Accordingly, it can lead either to the abolition of a system of aid which, taken as a whole, is unacceptable or merely to the alteration of the method whereby it is financed. However, as the Commission was empowered to demand directly that the method of financing be

modified, it must also have been able to choose to adopt the comparatively less drastic procedure of a *conditional* decision. Contrary to the view of the French Government, what the Commission says in its decision certainly does not amount merely to a suggestion.

Finally, remembering that the possibility can of course be discounted that the French Government envisages completely abolishing the system of aid to the textile industry, there is in my opinion no reason to talk about a 'détournement de procédure' (misuse of procedure) or 'détournement de pouvoir' (misuse of powers).

All these reasons support the finding that none of the French Government's principal submissions justify the annulment of the contested decision.

3. The French Government's alternative arguments concern the economic repercussions of the system of aid, in particular the alleged oppression of foreign producers. It attempts to show by these arguments that the method of financing which it chose 'does not adversely affect trading conditions to an extent contrary to the common interest', that is, that an essential requirement laid down in Article 92 (3) (c) for taking the contested decision was not fulfilled.

In this respect it refers to the low rate of the charge in question and the fact that it can be passed on the French consumers in its entirety, and alleges that it is thereby impossible for foreign producers to be placed at a disadvantage. It claims that this is shown by the fact that textile imports into France from other Member States have considerably increased during the past two years. In addition, the French Government maintains that it should be acknowledged that the aid also has beneficial effects for foreign producers both by promoting research and improving industrial and commercial structures. Finally it says that it must be seen that if the Commission's decision is applied, that is, if the charge is not levied on foreign products, the result is that French undertakings suffer discrimination and that they alone bear the burden of financing the aid, thus producing a system which it is impossible to justify on economic grounds and indeed a situation which is absurd if it becomes general.

Now let us look more closely at these arguments and see what is to be made of them. First of all, the proposition that imposing the charge cannot have detrimental effects on foreign producers because the charge can be passed on to French consumers in its entirety seems to me to be extremely doubtful. Certainly the technical legal argument that the charge must be included in invoices, since it supplements value-added tax, cannot be taken into consideration. In fact no opinion in this way can be reached as to its *economic* effects. However, as regards the repercussions on the economy it could only be said that the charge is being passed on to the consumer in its entirety if there is absolutely no elasticity of demand. However it cannot be supposed that this applies to textiles, especially considering the problems of excess production capacity which face this sector of industry. It follows from this that the result of imposing the charge on foreign products might be a loss of profit or sales for their manufacturers and that there is therefore a danger that trading conditions might be adversely affected.

As for the rate of tax imposed, which has now been increased from 0.20% to 0.44% because the tax is now assessed on the value of the goods before tax, it must certainly be admitted that the French Government is right when it says that these rates of tax could only cause small increases in price, smaller for instance than those caused by fluctuations in world market prices for raw materials. However it is doubtful on the whole whether the question should be considered in such *quantitative* terms. Certainly the French and Italian versions of Article 92 could lead to this conclusion, since they use the terms 'dans une mesure contraire à l'intérêt commun' and 'in misura contraria al commune interesse'. However the German and Dutch versions use terms which suggest rather that the question should be considered qualitatively, since they state that trading conditions must not be altered in a manner ('in einer Weise', 'zodanig') contrary to the common interest. This qualitative method of viewing the problem must however be chosen having regard to what has already been said as to

the rigorous character of the Treaty provisions on aid which under Article 92 prohibit even aid which *threatens* to distort competition. Moreover it should not be forgotten that if the problem were viewed quantitatively this would introduce a factor of considerable uncertainty into the assessment because naturally the determination of what must be regarded as a noticeable or substantial alteration in trading conditions would vary according to market conditions and the time when the question was being considered. In fact in the present case this seems just as intolerable as in the case of the assessment of charges having an effect equivalent to customs duty in respect of which the Court, as you know, expressly ruled out the quantitative method of viewing the problem.[1]

However, if a quantitative method of viewing the problem is adopted, which all these considerations compel one to do, that is, if one asks the question what alteration in trading conditions is intrinsically contrary to the common interest within the meaning of Article 92, I have no doubt that this consists of any method whereby foreign manufacturers are placed at a disadvantage, especially if it is with the help of rules imposing a charge within the framework of a system of aid. Thus the extent to which foreign producers are in fact placed at a disadvantage is quite irrelevant. Consequently there is no need to deal any further with the argument that textile imports into France from other Member States have considerably increased during the last two years. At the most it might be observed, as the Commission has done, that this can be explained by general short-term economic developments which applied to many sectors of the French economy and that, moreover, it is not known how imports would have developed if the charge in question had not been imposed.

Further, the following remarks must be made as regards the French Government's argument that imposing a charge on foreign products is justified because the systems of aid thereby financed also have beneficial effects for foreign producers. The applicant's argument might apply, at least in part, to the support given to the *Institut Textile de France*, since all interested parties are free to use the library and information service, the results of the Institute's research work are published and research contracts are accepted from domestic and foreign undertakings on the same conditions. However, it is impossible to say that there is complete equality of treatment and equal benefit derived from these facilities, not only because foreign subscribers, of whom there are significantly fewer than French subscribers, must pay more for the Institute's publications but also because they have language difficulties and because naturally a certain national bias in the research work, which is more strongly influenced by French undertakings, cannot be denied. It is even clearer that there is no question that the *structural* measures encouraged by the system of aid has equally beneficial effects for foreign undertakings. In fact it is not confined to eliminating unprofitable businesses, that is, to *decreasing* production capacity, but it aims to rationalize and increase productivity so that French undertakings can better meet competition from foreign industries, for which structural measures of the same kind have not been arranged. Moreover, against the submission that foreign undertakings benefit to the same degree from the favourable effects of the measures in question, it must be remembered that in a comparable case involving an Italian statistical duty it was pointed out with regard to the submission that there was a consideration which, it was claimed, justified the duty, that this was a general benefit and that the assessment of its scope was uncertain. (Case 24/68 [1969] E.C.R. 202). Indeed the same applies to the promotion of structural measures for the French textile industry and its bearing on foreign producers, on whose products is imposed a charge to finance the system of aid. Chiefly for this reason it seems impossible to justify the imposition of a charge on foreign products.

Finally there is not much to be said for the arguments on the part of the applicant that if French undertakings only were taxed they would suffer discrimination and that there

1 — Cf. for instance Case 24/68 [1969] ECR 200 and Joined Cases 2 and 3/69 [1969] ECR 221.

is a danger of effects which would be hard to justify on economic grounds. Indeed it is impossible to say that French undertakings would suffer discrimination because they are clearly in a most favourable position since they are the main beneficiaries of the system of aid which is financed by the charge.

As regards the danger of undesirable effects from the economic point of view, it must be said that this vague kind of argument certainly cannot do anything to set aside the requirements which can in this case be clearly deduced from the Treaty provisions relating to aid. Quite apart from this, the fundamental consideration is really one of pure theory, that is, the consideration that the application of the system desired by the Commission would deprive the system of aid of its basis because goods would then only be produced for export (which would not attract the charge).

Therefore the alternative arguments of the applicant also fail to enable it to justify its application for annulment.

4. Finally, the summary of my deliberations on this situation can be quite short. My opinion is that although the application which has been lodged is admissible, all the arguments which have been put forward in its favour fail. Therefore is must be dismissed, with the further consequence that the applicant must further be ordered to bear the costs of the action.