It may be that an aid properly so-called can be acknowledged as permissible but that the disturbance which it creates is increased by the method of financing it which would render the scheme as a whole incompatible with a single market and the common interest.

4. A system whereby an aid is serviced by a charge designed for that purpose leads to a system of permanent aids, the amount of which is unforeseeable and difficult to review. If this system were to become general it would have the effect of opening a loophole in Article 92 of the Treaty and of reducing the Commission's possibilities of keeping it under constant review.

In Case 47/69

GOVERNMENT OF THE FRENCH REPUBLIC, represented by His Excellency Renaud Sivan, Ambassador Extraordinary and Plenipotentiary, with an address for service in Luxembourg at the French Embassy,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser Joseph Griesmar, with an address for service in Luxembourg at the offices of Émile Reuter, Legal Adviser to the Commission, 4 boulevard Royal,

defendant,

Application for the annulment of the Commission's decision of 18 July 1969 concerning the French system of aids to the textile industry,

THE COURT

composed of: R. Lecourt, President, R. Monaco (Rapporteur) and P. Pescatore, Presidents of Chambers, A. M. Donner, A. Trabucchi, W. Strauß and J. Mertens de Wilmars, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

1. Both home-manufactured and imported textile products sold in France are liable in accordance with Decree No 65/1163 of 24 December 1965 to a quasi-fiscal charge the rate of which was fixed at 0.20% by order (arrêté) of the same date.
Of the revenue from this charge, 5/7 goes to the Union des Industries Textiles (Union of Textile Industries) (UIT) to renew the industrial and commercial structures of the textile undertakings, and 2/7 to the Institut Textile de France (French Textile Institute) (ITF) to refund in part its expenditure on collective research.
The Commission was informed by the French Government that this system was being introduced and acknowledged that, in the light of the objective of the aids considered, the measures which had been adopted might support the development of the textile industry. However, as it considered that these aids did not appear to be able to benefit from the exception laid down in Article 92 (3) (c) of the EEC Treaty, it began the review procedure laid down in Article 93 (2) of the Treaty.
Accordingly, it called upon the French Government to suspend the application of the measures in question until it had taken a final decision and to submit its comments within six weeks.
The French Government submitted its comments in a letter of 12 July 1967.
As the Commission had not made a decision in the meantime, the French Government decided by Decree No 68/383 of 27 April 1968 to maintain the system of aid and increased the rate of the quasi-fiscal charge to 0.35% by an order of the same day.
By a decision of 18 July 1968, the Commission declared that aids financed by the revenue from this charge were not compatible with the common market under Article 92 of the Treaty 'because of the way in which they are financed', and ordered the French Government not to apply this system of aid as from 1 April 1970 unless it altered it beforehand 'so that products imported from Member States no longer attract the quasi-fiscal charge or ... any other exceptional taxation of textile products'.
On 26 September 1969 the French Government lodged the present application against this decision.

2. After 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.
The parties presented oral argument at the hearing on 10 March 1970.
The Advocate-General delivered his opinion at the hearing on 21 April 1970.

II — Conclusions of the parties

The *applicant* claims that the Court should:

— annul the decision of the Commission of the European Communities of 18 July 1969 and order the defendant to bear the costs.

The *defendant* contends that the Court should:

(a) dismiss the application brought by the Government of the French Republic;

(b) order the applicant to bear the costs.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

1 — *Principal submissions*

The *French Government* points out that in its decision of 18 July 1969 the Commission, acting in accordance with Article 93 of the Treaty, did not criticize the French system of aid to the textile industry but only the method by which it was financed, namely the quasi-fiscal charge.

It claims that this provision cannot be relied upon to justify decisions the purpose of which is to alter the basis of a tax; in support of this argument it refers to:

— the work in progress at the Council regarding the application of Articles 92 and 93 during which it maintains that it was never acknowledged that a charge could be considered to be an aid or an integral part of an aid;

— the interpretation of the concept of aid given by the Court in Case 30/59.

Secondly, it maintains that since in this case what is concerned is a charge levied on products of domestic manufacture and imported products alike and not having an effect equivalent to customs duties, the only provisions the application of which could be considered, namely Articles 12 and 95 of the Treaty, are not applicable either.

It asserts that in these circumstances it must be acknowledged that the charge in question complies with the Treaty.

By ordering the French Government to alter a charge as a condition for being allowed to apply an aid which is in itself compatible with the Common Market, the Commission has acted *ultra vires*.

Its decision has no legal basis and constitutes an infringement of an essential procedural requirement and a misuse of powers.

The *defendant* observes that this system of aid consists of two components, the quasi-fiscal charge and the aid itself, and that, irrespective of the merits of each part in the context of the Community, their combined action is calculated to produce effects of their own having adverse effects on trading conditions.

Because of this, the effects of this combined action had to be and must be assessed in relation to the Treaty.

However, having regard to the wording of the Treaty this assessment could and can only be made by means of the provisions which relate to one of these components, that is, either by means of the provisions relating to the charge or those relating to the aid (cf. the case-law of the Court in its judgments in Cases 24/68 and 2 and 3/69).

It is evident that the French system of aid to the textile industry causes distortion of competition to the detriment of the other Member States and that therefore the combined action of these two parts heightens their effects on trade and competition and that this is not indispensable in order to achieve the aims pursued in conformity with Article 92 (3) of the Treaty.

This provision confers on the Commission quite a wide discretionary power, in particular as regards the question whether, in the case of aids intended to facilitate the development of certain activities, trading conditions are altered 'to an extent contrary to the common interest' (Article 92 (3) (c)).

Therefore in taking the contested decision, the Commission only carried out its task by using this discretionary power and following the principle that, when applying Articles 92 and 93, it must also have regard to Articles 2 and 3 and ensure that a system is set up which guarantees normal competition in the Common Market.

In applying other provisions such as, for example, Article 85 (3) (a) or as regards the safeguard clauses laid down in the third paragraph of Article 115 and in Article 226 (3) it is expressly bound to follow the same principle.

Finally, the case-law of the Court upon which the applicant relies is neither conclusive nor relevant, since the judgment in Case 30/59 merely analysed the result of an aid without ruling on the method whereby it was financed.

In its reply, the *French Government* adds that Article 93 of the Treaty only enables the Commission to decide whether an aid should be abolished or altered, whilst in this case the aim of the contested measure was not the abolition of the aid, which was acknowledged to be compatible with the Treaty, and the alteration which was requested did not concern this aid but the method whereby it was financed.

It deduces from this that on this occasion the Commission put the concept of aid on the same footing as and indeed even identified it with the method of financing, which was in this case the quasi-fiscal charge.

Although these two concepts are to some extent connected to each other, the connexion is however insufficient for them to be considered indissociable and for Article 93 of the Treaty to be interpreted as enabling the Commission to take a decision either to abolish or alter the charge.

In fact, the Commission attempted by its decision of 18 July 1969 to obtain the alteration of a charge which complied with the Treaty by using a 'device'; this explains, moreover, why it merely 'tried to obtain it' in an indirect way by threatening to abolish the aid instead of 'deciding' that the tax should be altered.

The *defendant* answers in the rejoinder that the distinction or indeed the contrast which the applicant makes between the aid and the quasi-fiscal charge is artificial. In fact there is a close interdependence between these two components since the effects of the aid are inevitably influenced by the method whereby it is financed, so that they must be examined together.

It is precisely because of this interdependence and the evaluation of it that the Commission found that the combined action of these components led to actual distortion of competition in the present case to the detriment of foreign products in spite of the appearance of non-discrimination given by the system, and therefore adopted the contested measure.

Moreover, the French Conseil d'État confirmed that the Commission's action was correct when, in a judgment of 16 October 1968, it gave precedence to actual equality of treatment over nominal equality of treatment.

Far from using Community rules as a 'device', the Commission assessed the problem 'in the light of' the relevant provisions.

Far from amounting merely to a 'hopeful attempt' the contested decision consists of two distinct obligations, expressed as alternatives.

The complaint which was raised—in so far as it was actually raised—has therefore no legal foundation.

2 — *Alternative submissions*

Moreover the *French Government* maintains that the contested decision is based on a false evaluation of the facts since neither the aid in question nor the method by which it is financed, namely the quasi-fiscal charge, adversely affect trade 'to an extent contrary to the common interest'.

As regards the aid,

— it does not exclusively serve French interests since research organizations from other Member States are informed of the work in progress at the ITF and the research work the ITF carries out on a contractual basis for private undertakings is open to all undertakings in the Common Market on the same financial conditions as for French undertakings;

— the result of promoting the rehabilitation of a sector of the economy which is suffering from excess production capacity in all Member States is to strengthen the market position and profit-earning capacity of textile undertakings in general, including those in other Member States.

As regards the quasi-fiscal charge:

— since it is a tax which supplements VAT it would, like the latter, normally have to be included in invoices and therefore be passed on to the consumer; this is much easier because it applies to all textile products sold on the French market with no distinction as to nature or origin;

— an increase in price of 0.35% cannot produce 'substantial' effects on the volume of sales of textile products in France by appreciably reducing sales;

— in any case, it is for the Commission to prove its declaration that the charge in question is incompatible with the Treaty; the French Government, for its part, states that textile imports have considerably increased since 1967.

In comparison with this system, the one which the Commission advocates has several disadvantages, in particular that:

— the burden of financing the aid, instead of being indirectly carried by the consumer, would be borne only by French undertakings who would thus be exposed to discrimination, in contravention of the Treaty;

— if it were extended to the entire Common Market, only articles sold in the State in which they were produced would be caught by the charge so that to avoid payment they would only have to be sold outside their home market.

The *defendant* points out that the last argument is hardly relevant in the context of this action and is based on a completely hypothetical situation and maintains that the system which it advocated in its decision does not have the disadvantages mentioned by the applicant and is not in any way discriminatory.

In fact the abolition of distortion of competition which favours a national industry cannot create a discriminatory situation to the detriment of that industry.

Aid granted to an industry must be financed by the national economy of the State concerned either by a charge on the general budget or by a quasi-fiscal charge levied on the branch in question if it is not to increase unilaterally effects which are already discriminatory in themselves, and it cannot directly or indirectly make competing foreign industry contribute even a reduced amount.

The defendant raises the following objections to the arguments put forward by the French Government to justify the aid and the charge in question by reference to the common interest:

As regards the aid:

— considering the method by which the aid is financed, it cannot be inferred from the fact that its aim is to renew the industrial and technical structures of textile undertakings that it benefits not only French but also foreign undertakings, since it aims chiefly to reinforce the competitive position of French industry and this precludes its effect from being 'exactly the same for industries in other Member States';

— 'placing the resources and works of the ITF at the disposal of all undertakings without distinction' does not necessarily bring about an actual and equal beneficial share for everyone in these advantages, as even if equality of treatment were guaranteed by legislation, in practice French undertakings would be in a more favourable position by force of circumstances.

As regards the quasi-fiscal charge:

— the problem of what economic consequences follow from the increase in the consumer price by the amount of the charge is not solved by the fact that a charge which supplements VAT is passed on to the consumer;

— in the Commission's opinion, it would be better in this respect to investigate whether the charge is calculated to affect profit margins or producers' sales volume since increasing the price to the consumer because of the tax could reduce the sales possibilities of foreign producers;

— the low rate of the charge is of no significance for the determination of this dispute which basically raises a problem of principle as to the nature of the charge, and not a quantitative problem because the question is not to determine whether the effect of the charge, the result of which is indirectly a support measure which in itself infringes Article 92 of the Treaty, is greater or less 'substantial', but to examine whether it could produce a distortion of competition, independently of the extent of this effect;

— the increase in imports of textile products from other Member States into France during recent years is in fact connected with a short-term economic phenomenon, characterized by a considerable development in French imports in several

fields, and there is nothing to show that these imports would not have been greater if they had not been caught by the charge.

In any case, to make the application of the Treaty to a system of aid such as the one in question depend on the extent of the injurious effects which it might produce is tantamount to introducing into rules of Community law an element of legal uncertainty which is detrimental to all concerned.

Grounds of judgment

1 By an application made on 26 September 1969, the Government of the French Republic requested the annulment of the decision of the Commission of 18 July 1968, which in the first place ordered the abolition of the aid given in France to the textile industry and, alternatively, gave its approval to the said aid subject to amendments being made to the quasi-fiscal charge designed to finance it.

The first submission

2 The French Government maintains, first, that the contested decision has no legal foundation and amounts to a misuse of powers since Article 93 (2) of the Treaty, which empowers the Commission only to take a decision that aid which is recognized as incompatible with the common market must be abolished or altered, cannot serve as the basis for a decision which is concerned with procuring the alteration of the basis of assessment of a charge intended to finance that aid.

3 Under Article 93 (2) of the Treaty, if the Commission finds 'that aid granted by a State or through State resources is not compatible with the Common Market having regard to Article 92 or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission'.

4 This provision, by thus taking into account the connexion which may exist between the aid granted by a Member State and the method by which it is financed through the resources of that State, does not therefore allow the Commission to isolate the aid as such from the method by which it is financed and to disregard this method if, in conjunction with the aid in its narrow sense, it renders the whole incompatible with the Common Market.

5 Under Article 92 (1): 'Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so

far as it affects trade between Member States, be incompatible with the Common Market'.

6 Nevertheless under Article 92 (3) (c): 'The following may be considered to be compatible with the Common Market: ... aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

7 In order to determine whether an aid 'affects trade between Member States', 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' and 'adversely affects trading conditions to an extent contrary to the common interest', it is necessary to consider all the legal and factual circumstances surrounding that aid, in particular whether there is an imbalance between the charges imposed on the undertakings or producers concerned on the one hand and the benefits derived from the aid in question on the other.

8 Consequently the aid cannot be considered separately from the effects of its method of financing.

9 The Commission therefore had power to decide whether the French Republic should abolish or alter the disputed system of aid as a whole.

The second submission

10 The French Government claims that Articles 12 and 95 are alone applicable in this case and can afford no grounds for objecting to the charge in question, since it was levied both on national and imported products and did not have any effects equivalent to a customs duty.

11 This argument amounts to asserting that when an aid is financed by internal taxation, this method of financing can only be examined in relation to its compatibility with Article 95 and that the requirements of Articles 92 and 93 must be disregarded.

12 However these two types of provision have different aims in view.

13 The fact that a national measure complies with the requirements of Article 95 does not imply that it is valid in relation to other provisions, such as those of Articles 92 and 93.

14 When an aid is financed by taxation of certain undertakings or certain producers, the Commission is required to consider not only whether the method by which it is financed complies with Article 95 of the Treaty but also whether in conjunction with the aid which it services it is compatible with the requirements of Articles 92 and 93.

15 The French Government further maintains that in admitting that the French textile industry needed aid, the Commission could not refuse it without contradicting itself nor require an alteration of the method whereby it was financed since on the one hand this method does not adversely affect trade to an extent contrary to the common interest, and on the other hand the same result could be achieved if the aid in question, instead of being serviced by a charge designed for the purpose, were serviced by budgetary means financed by the value-added tax.

16 It may be that aid properly so-called, although not in comformity with Community law, does not substantially affect trade between States and may thus be acknowledged as permissible but that the disturbance which it creates is increased by a method of financing it which would render the scheme as a whole incompatible with a single market and the common interest.

17 In its appraisal the Commission must therefore take into account all those factors which directly or indirectly characterize the measure in question, that is, not only aid, properly so-called, for selected national activities, but also the indirect aid which may be constituted both by the method of financing and by the close connexion which makes the amount of aid dependent upon the revenue from the charge.

18 If such a system whereby an aid is serviced by a charge designed for that purpose, were to become general, it would have the effect of opening a loophole in Article 92 of the Treaty and of reducing the Commission's opportunities of keeping the position under constant review.

19 In fact it leads to a system of permanent aids, the amount of which is unforeseeable and which would be difficult to review.

20 By automatically increasing the amount of national aid in proportion to the increase in the revenue from the charge and more especially the revenue from the charge levied on competing foreign products, the method of financing in question has a protective effect which goes beyond aid properly so-called.

21 In particular, the more Community undertakings succeed in increasing sales in a Member State by marketing efforts and by price-cutting, the more they have to contribute under the system of the servicing charge to an aid which is essentially intended for those of their own competitors who have not made such efforts.

22 Thus the Commission was entitled to take the view that the fact that foreign undertakings can have access to research work done in France could not eliminate the adverse effects on the Common Market of an aid incorporating a charge designed to service it.

23 Therefore it has rightly decided that this aid, whatever might be the rate of the said charge, has the effect, because of the method by which it is financed, of adversely affecting trade to an extent contrary to the common interest within the meaning of Article 92 (3) (c).

24 It follows from these considerations that the Commission in assessing as a whole the aid granted by the French Republic through State resources was justified in considering this aid as contrary to 'the common interest' and in requesting the French Government to abolish it, whilst acknowledging both the useful nature of the aid properly so-called and the fact that it conformed with 'the common interest' if the method whereby it was financed could be modified.

25 Consequently the application must be dismissed.

Costs

26 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

27 The applicant has failed in its submissions.

28 It must therefore be ordered to pay the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;

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.