such a measure is intended partially to exempt those undertakings from the financial charges arising from the normal application of the general system of compulsory contributions imposed by law.

In Case 173/73,

GOVERNMENT OF THE ITALIAN REPUBLIC, represented by A. Maresca, Ambassador, acting as agent, assisted by 'Vice Avvocato dello Stato' I. M. Braguglia, with an address for service in Luxembourg at the Italian Embassy

applicant,

v

THE COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Advisers A. Marchini-Camia and M. van Ackere, acting as agents, with an address for service in Luxembourg at the office of its Legal Adviser P. Lamoureux, 4, boulevard Royal

defendant,

Application for the annulment of the Commission Decision of 25 July 1973, taken on the basis of Article 93 (2), first subparagraph, and (3) of the EEC Treaty, on Article 20 of Italian Law No 1101 of 1 December 1971 on the restructuring, reorganization and conversion of the textile industry.

THE COURT

composed of: R. Lecourt, President, A. M. Donner (Rapporteur) and M. Sørensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher, C. Ó Dálaigh and A. J. Mackenzie Stuart, Judges,

Advocate-General: J. P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments of the parties submitted during the course of the written procedure may be summarized as follows:

I — Facts and procedure

1. In a letter of 24 April 1969 the Italian Government notified the

Commission of a draft law on the restructuring, reorganization and conversion of the textile industry.

As the Commission could not obtain from the Italian Government all the information necessary to submit its comments under Article 93 (3) of the EEC Treaty, it adopted, on the basis of the first subparagraph of Article 93 (2), an interim Decision of 27 May 1970 (OJ 1970 L 128, p. 33). This Decision imposed on the Italian Republic the obligation to modify Articles 5 and 12 of the draft law which the Commission considered then and henceforth incompatible with the common market. Italy complied with this Decision. However, Law No 1101 of 1 December 1971 included, in Article 20, a provision which had not appeared in the draft law sent to the Commission and which had been added without the Commission being informed. This provision established for the benefit of the textile and garment-making industry and small crafts, for a period of three years, a reduction in the social charges appertaining to family allowances, consisting in a reduction in their rate of contribution from 15 % to 10 %.

2. In a letter of 9 August 1972, the Italian Government informed the Council of the European-Communities that, because of the length of time required for the administrative procedures, the undertakings concerned could not take advantage before 1 July 1973 of the benefits provided by Law No 1101 of 1 December 1971. Consequently, one of the measures which had been adopted in July 1971 to meet the short-term crisis in the Italian economy — namely the exemption in respect of 5 % of the amount of salaries liable for contribution by employers to the compulsory unemployment insurance fund — was extended by one year in the case of the textile sector (Decree No 286 of 1 July 1972).

Although it had not ooposed the urgent temporary measures adopted in July and August 1971 because, as measures of short-term economic policy, they applied generally, the Commission initiated, by telex of 31 July 1972, the procedure under Article 93 (2) of the EEC Treaty with regard to the decision to extend the validity of these measures in relation to the textile sector, taken on 1 July 1972. This is the reason for the letter of 9 August 1972 of the Italian Government requesting the Council to apply the provisions of the third subparagraph of Article 93 (2). As the Council did not give its decision within the period of three months prescribed by this provision, the Commission resumed the procedure under the first subparagraph of Article 93 (2). The Accession of the new Member States prolonged this procedure since they had to be given the opportunity to submit their comments. As the measure in question was not subsequently extended beyond 30 June 1973 the Commission adopted the Decision which is contested in this dispute against the measure reducing the charges, contained in Law No 1101 which actually came into force as from 30 June 1973.

3. By application of 9 October, entered in the Registry of the Court on 11 October 1973, the Italian Government brought this action.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General the Court decided to open the oral procedure without any preliminary inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should: declare null and void the Commission Decision of 25 July 1973 and all legal effects thereof.

The *defendant* contends that the Court should:

1. dismiss the action as unfounded;

2. order the applicant to bear the costs.

III — Submissions and arguments of the parties

In support of its case, the *applicant* makes three principal submissions, on a preliminary basis, and three subsidiary submissions on the substances of the case.

1. From the words of Article 1 of the Decision in question: 'The Italian Republic *shall abolish* the temporary and partial reduction of social charges . . . .' it emerges that the Decision must be regarded in law as an act intended to produce direct effects in the internal legal order, and not to create an obligation which the State to which it is addressed is called upon to discharge. Even if the words 'shall abolish' in Article 1 of the Decision must be understood only to impose on Italy the obligation to act under the first subparagraph of Article 93 (2), the purpose of this provision is the direct repeal of Article 20 of Law No 1101. This appears to be confirmed by the fact that the Decision provides no period of time for compliance. This Decision must accordingly be considered as having no existence at law since the Commission does not have the power, on the basis of Article 93 (2), of the EEC Treaty, to adopt legislative acts having direct application within the domestic legal orders.

The *Commission* maintains that the words 'shall abolish' as used in Article 1 of the contested Decision have solely an imperative character, as has the expression 'must abolish', and are intended to impose on the Member State only the obligation to act under the first subparagraph of Article 93 (2) of the EEC Treaty. The use for this purpose of the present indicative in the Italian version is grammatically correct and corresponds moreover to a 'common legislative practice' which is never challenged.

In the Commission's opinion, the submission is so clearly devoid of any foundation that it does not consider it necessary to go on to examine the question of the direct applicability of decisions taken pursuant to the first subparagraph of Article 93 (2).

2. According to the *applicant* the Decision must be regarded as void on the ground of failure to fix a period of time for compliance, as prescribed by Article 93 (2). The grant of a period of time for compliance is an essential condition for the legality of the Decision.

The aid referred to in the contested Decision is an 'existing' aid within the meaning of Article 93 (1), as the Law of 23 December 1971 came into force on 8 January 1972. The failure to give the Commission prior notice has no effect on the classification of the aid in question in the category of 'existing' aids. Even where aid is granted without the Commission being informed in due time, the finding by the Commission of its incompatibility with Article 92 is *constitutive* of the obligation to abolish them. It is therefore necessary in all cases to fix a time limit so that the moment when the aid must come to an end can be determined.

Moreover, the Italian Government was unable to put an immediate end to this alleged aid. As this measure was instituted by means of a law, it could have been abolished only in accordance with the formal procedure of repeal prescribed by law.

The *Commission* points out that the provision for aid which is the subject of the contested Decision belongs to the category of irregular aids, since it was granted without prior notification to the Commission, thereby infringing the first sentence of Article 93 (3). Consequently, it is illegal under Community law as from the date of its entry into force. The period of time mentioned in the first

subparagraph of Article 93 (2) only applies to aids granted in a regular manner and a Member State cannot take advantage of this safeguard when it has, through its own fault, prevented the proper functioning of the mechanism prescribed. The Commission has not therefore infringed the procedural requirement imposed by Article 93 by failing to stipulate a period of time for the abolition of the aid in question; in this case it has done nothing but bring to an end a situation which is illegal under Community law and which ought never to have existed.

If the argument of the applicant was accepted it would open a breach in the system provided by Article 93 and there would be a danger that Member States might unilaterally establish new provisions for aid which even though subsequently recognized as incompatible with the proper functioning of the common market would, in the meantime, have become established as part of the category of existing aids.

The Italian State could not ignore the legal effects of the contested Decision. There was nothing to prevent the Italian Government from ending the illegal aid immediately.

3. The *Italian Government* asserts that the preliminary procedure prescribed by Article 93 (2) of the EEC Treaty is vitiated by being in violation of essential procedural requirements.

The *Commission* replies that this submission is incorrect and totally unfounded. In fact, the applicant has not specified the formalities which, in its opinion, were lacking from or were irregular in the procedure prior to the adoption of the Decision.

4. As a subsidiary plea the *Italian Government* maintains that the Decision encroaches upon the field of domestic taxation, an area reserved for the sovereignty of Member States. The contested provision of Law No 1101 is a measure relating to taxation, reducing the charge imposed by law on textile undertakings for the purpose of financing social security benefits for employees. Provisions of this nature do not fall within the ambit of Article 92. Even if one were forced to accept the argument that certain measures which, as exceptions to the general system of internal taxation, aim 'at the reduction of charges normally payable out of the profits of an undertaking' constitute aids within the meaning of Article 92, Article 20 of Law No 1101 is not subject to the application of Articles 92 to 94. This provision, by laying down measures for the partial and temporary financing of contributions for family allowances by means of tax revenue has no purpose or effect other than that of restructuring, within the Italian State, the general system of social security contributions. It has been established that the general system of family allowance contributions, as regards the textile industry, was clearly distorted. The Italian State wished to remedy this by enacting Article 20 of Law No 1101. If the national legislature had been aware of this situation it would, from the adoption of the first law on family allowances, have allowed for a reduction in the charge devolving upon the employers concerned. If matters had proceeded in this manner, there would have been no objections. It is difficult to understand why such objections can be made now in respect of a provision whose sole purpose is to compensate for the present handicap suffered by the textile sector.

The *Commission* explains that the financial rules on family allowances involve a disadvantage for sectors employing a preponderance of women. Although a fundamental change in the general system could be made by reducing the rate of contributions for all sectors of industry employing a high proportion of female labour, such a 'rectification', when restricted to a single sector and for a period of three years, would have, by reason of its specific

nature, the effect of a sectoral aid. The contested measure therefore constitutes an 'intervention reducing charges normally payable out of the profits of an undertaking', which is the definition of the concept of aid employed on a number of occasions by the Court.

5. The *applicant* asserts that the provision of Article 20 of Law No 1101 is not concerned with an 'aid' within the meaning of Article 92 (1). The Italian textile industry is handicapped by the imposition of social charges which do not take into account the peculiarities of the industry, in particular the high proportion of female employees. During the course of 1971, 65·7 thousand million lire in social security contributions were paid by undertakings in the textile sector whereas the social security benefits received in this sector only amounted to 42·4 thousand million lire. The contested measure only partially made up for this deficit.

Furthermore, according to Article 92 (1), for an aid to be considered as such it must be granted by the State or 'through State resources', in other words in the form of an item of expenditure or of a reduction in revenue incurred by the whole community. The loss of revenue resulting from the reduction in contributions relating to family allowances is offset by revenue accruing from contributions made by employers to the unemployment insurance fund, in other words through charges which do not fall on the community as a whole.

The *Commission* maintains that the temporary reduction in contributions payable by the textile industry in respect of family allowances should be considered as an aid to employers in the textile industry and not to their employees.

The exemption in favour of undertakings in a particular sector from payment of fiscal or 'social' charges which apply generally to industry can have the aim and in any case the effect of favouring these undertakings in the sphere of intra-Community competition. First of all, a comparison must be made between the social charges imposed on the Italian textile industry and those incurred by other sectors of industry in that Member State. Only secondly is it useful to make a comparison with the charges relating to the textile industry in the other Member States. In this connexion it is wrong to compare the proportion represented by the 'employer's charge' in costs per hour in the various Member States; instead, a comparison must be made of total labour costs per hour. Applying this criterion, the comparison shows clearly that the competitive position of Italian industry is reasonably strong in relation to the textile industries of the other Member States.

To state that the fall in revenue is compensated by means of levies on the funds of another social security system does not constitute a valid argument because it cannot affect the classification of the reduction as an aid. In fact, public revenue does not necessarily derive from 'the community as a whole' but more often from a particular category of tax payers. With regard to this point the Commission refers to the judgment of the Court of 25 June 1970 (Case 47/69), *French Republic v Commission*, Rec. 1970, p. 487).

6. Finally, the *Italian Government* contends that the measure in question cannot be regarded as an aid within the meaning of Article 92 (1) because it is not capable of producing adverse effects within the Community. Article 92 (1) requires that the aid in question must have a material effect on trade between Member States. With regard to this point the contested Decision, which merely considers, in the abstract, the potential influence of the alleged aid on intra-Community trade, is wholly devoid of precision. From this point of view, the Decision fails to particularize the grounds on which it is based and thereby infringes Article 93 (2) since the Commission has failed to 'establish' the

incompatibility of the aid with the common market.

The *Commission* explains that in the economic sectors where there exist important patterns of intra-Community trade, Community undertakings are, by the very nature of things, in competition with each other. Consequently, any State aid which has an effect on competitive conditions, for example by the reduction of production costs, is likely to distort this competition. The Commission supplied figures showing, on the one hand, the volume and growth of intra-Community trade in textile products and, on the other hand, the strong competitive position of Italy in this sector.

Even assuming that some branches of the Italian textile industry may have difficulties of a structural nature, the measure granting aid is unwarranted. It is not capable of providing a lasting solution to these problems in the Community context and, further, it may increase the difficulties of textile undertakings in other Member States which are confronted with a similar structural crisis.

In the course of the oral procedure on 26 March 1974 the parties developed the arguments submitted in the written procedure.

The Advocate-General delivered his opinion on 15 May 1974.

Grounds of judgment

1 By application of 9 October 1973 the Government of the Italian Republic asked, on the basis of Article 173 of the EEC Treaty, that the Court should annul the Commission Decision of 25 July 1973 on Article 20 of the Italian Law No 1101 of 1 December 1971 on the restructuring, reorganization and conversion of the textile industry (OJ of 11 September 1973, No L 254, p. 14).

2 The action is based on three submissions described as 'preliminary', relating to the form and preliminary procedure of the Decision, and three submissions described as 'subsidiary', relating to its substance.

Because of the connexion between the first three submissions and that between the three subsidiary submissions they should be examined under two separate headings.

As to the preliminary submissions

3 The applicant Government objects first of all to the fact that it is declared in Article 1 of the contested Decision that: 'The Italian Republic shall abolish the

temporary and partial reduction of social charges pertaining to family allowances provided for in Article 20 of Law No 1101 ...; it feels that the terms of this Article imply that the Decision is intended to have a direct effect in Italy's domestic legal order.

Such an effect is alleged to be incompatible with Article 93 (2) of the Treaty which provides that if the Commission finds that a Member State has infringed the rules under Article 92 it shall decide that the State concerned shall abolish or alter the aid in question within a period of time to be determined by the Commission.

4 By its second submission the applicant complains that the Decision did not fix a period of time for compliance and submits that in the absence of this element, which is essential to the legality of the Decision, the latter be considered void.

5 The third submission contends that the preliminary procedure under Article 93 (1) was not properly conducted.

6 It is accepted that though Article 20 of Italian Law No 1101 created an innovation with regard to the previous legal position of the Italian textile industry and small crafts, there was no prior notification to the Commission of the adoption of this provision as prescribed by Article 93 (3).

After having sought the comments of the Italian authorities and of experts in the other Member States, the Commission, considering that the provision in issue constituted an aid within the meaning of Articles 92 and 93, adopted the contested Decision.

7 In order to ensure the progressive developement and functioning of the common market in accordance with the provisions of Article 92, Article 93 provides for constant review of aids granted or planned by the Member States, an operation which assumes constant cooperation between these States and the Commission.

Article 93 (2) envisages the case where during the course of such a review the Commission finds that aid granted by a Member State is not compatible with the provisions of Article 92, and provides for the situation to be

resolved by decision of the Commission subject to appeal to the Court of Justice.

Because the Article is based on the idea of cooperation, the Commission must, in such a case, allow the State concerned a period of time within which to comply with the decision taken.

However, in the situation envisaged by Article 93 (3) where a proposed aid is considered incompatible with Article 92, the fixing of a time limit is unnecessary, as the aid in question cannot be put into effect.

8 The submissions amount to the assertion that a new aid granted by a Member State in contravention of paragraph (3) must be treated in the same way as aids granted legally and, consequently, should be subject only to the procedure prescribed by Article 93 (2), including the compulsory fixing of a time limit.

This interpretation of Article 93 is however unacceptable because it would have the effect of depriving the provisions of Article 93 (3) of their binding force and even that of encouraging their non-observance.

9 Moreover, the spirit and general scheme of Article 93 imply that the Commission, when it establishes that an aid has been granted or altered in disregard of paragraph (3), must be able, in particular when it considers that this aid is not compatible with the common market having regard to Article 92, to decide that the State concerned must abolish or alter it, without being bound to fix a period of time for this purpose and with the possibility of referring the matter to the Court if the State in question does not comply with the required speed.

In such a case, the means of recourse open to the Commission are not restricted to the more complicated procedure under Article 169.

Consequently, the submission that the Decision is intended to take direct effect in the internal legal order of the Italian Republic is unfounded, since Article 2 of the Decision stipulates that: 'This Decision is addressed to the Italian Republic'. From this wording it emerges clearly that the Decision is intended to impose the obligation laid down in Article 1 on the State concerned.

10 Finally, the third submission relating to procedural irregularities has not been adequately developed and is thus inadmissible

11 The above submissions must therefore be dismissed.

As to the subsidiary submissions

12 The applicant Government maintains first that, by encroaching upon a field reserved by the Treaty to the sovereignty of Member States — that of the levying of internal taxation — the Decision is vitiated by reason of abuse of powers.

Secondly, the applicant asserts that the reduction of social charges in issue must be regarded as a measure of a social nature and that accordingly it falls outside the scope of Articles 92 and 93.

Because the system for financing family allowances which was previously in force placed sectors employing a high proportion of female labour in a disadvantageous position, the measure in issue is said simply to make up for a handicap suffered by the Italian textile industry.

Furthermore, this industry is alleged to be at a disadvantage as compared with the textile industries of the other Member States by reason of the fact that the social charges devolving upon employers are appreciably higher in Italy than in the other Member States.

Finally, the partial reduction in social charges is stated not to be such as to affect intra-Community trade or distort competition within the common market.

13 The aim of Article 92 is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods.

Accordingly, Article 92 does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects.

Consequently, the alleged fiscal nature or social aim of the measure in issue cannot suffice to shield it from the application of Article 92.

14 As to the argument that the contested measure has no purpose other than to rectify the amount of charges payable by the textile industry to the state insurance scheme, in this case relating to family allowances, it is clear that the Italian family allowance scheme is intended, as is the case with all similar schemes, to ensure that the worker obtains a salary which meets the needs of his family..

Since in a system of this kind employers' contributions are assessed in accordance with the wage costs of each undertaking, the fact that a relatively small number of the employees of an undertaking can, on the basis of their position as heads of household, claim actual payment of these allowances, cannot constitute either an advantage or a specific disadvantage for the undertaking in question as compared with other undertakings where a higher proportion of employees receive these allowances; the burden of payment of these allowances is rendered exactly the same for all undertakings.

15 The above observations in respect of charges under the family allowance scheme payable out of the profits of an undertaking applies, on the same basis, to the relationship between the different branches of industry.

Consequently, the figures submitted by the applicant Government showing that during 1971 the sum of 65·7 thousand million lire was paid in contributions by the textile sector, whereas the social security benefits pertaining to family allowances in this sector only amounted to 42·4 thousand million lire, cannot prove that, in respect of its production costs, the textile sector was placed in a disadvantageous position in relation to other sectors of industry.

It must be concluded that the partial reduction of social charges pertaining to family allowances devolving upon employers in the textile sector is a measure intended partially to exempt undertakings of a particular industrial sector from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system.

16 The argument that the contested reduction is not a 'State aid', because the loss of revenue resulting from it is made good through funds accruing from contributions paid to the unemployment insurance fund, cannot be accepted.

As the funds in question are financed through compulsory contributions imposed by State legislation and as, as this case shows, they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as State resources within the meaning of Article 92, even if they are administered by institutions distinct from the public authorities.

17 As to the argument that the social charges devolving upon employers in the textile sector are higher in Italy than in the other Member States, it should be observed that, in the application of Article 92 (1), the point of departure must necessarily be the competitive position existing within the common market before the adoption of the measure in issue.

This position is the result of numerous factors having varying effects on production costs in the different Member States.

Moreover, Articles 92 to 102 of the Treaty provide for detailed rules for the abolition of generic distortions resulting from differences between the tax and social security systems of the different Member States whilst taking account of structural difficulties in certain sectors of industry.

On the other hand, the unilateral modification of a particular factor of the cost of production in a given sector of the economy of a Member State may have the effect of disturbing the existing equilibrium.

Consequently, there is no point in comparing the relative proportions of total production costs which a particular category of costs represents, since the decisive factor is the reduction itself and not the category of costs to which it relates.

18 In addition, the social charges payable by employers are part of the more general category of labour costs.

It emerges from the file that labour costs in the Italian textile sector are, in relation to those in the textile sector in the other Member States, relatively low.

It is clear that the reduction in social charges provided for by Article 20 of Law No 1101 has the effect of reducing labour costs in the Italian textile sector.

19 The Italian textile industry is in competition with textile undertakings in the other Member States, as is shown by the substantial and growing volume of Italian textile exports to other Member States of the Common Market.

The modification of production costs in the Italian textile industry by the reduction of the social charges in question necessarily affects trade between the Member States.

20 Accordingly, the subsidiary submissions must also be dismissed.

Costs

21 In pursuance of Article 69 (2) of the Rules of Procedure of the Court of Justice the unsuccessful party shall be ordered to pay the costs.

The applicant has failed in its submissions.

On those grounds,

THE COURT

hereby:

1. **Dismisses the action;**
2. **Orders the applicant to bear the costs.**

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 2 July 1974.

A. Van Houtte
Registrar

R. Lecourt
President