

JUDGMENT OF THE COURT

5 June 1986 \*

In Case 103/84

**Commission of the European Communities**, represented by its Legal Adviser, Gianluigi Campogrande and Thomas van Rijn, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Manfred Beschel, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

**Italian Republic**, represented by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by Pier Giorgio Ferri, avvocato dello Stato, acting as Agent, with an address for service in Luxembourg at the Italian Embassy,

defendant,

APPLICATION for a declaration that by requiring municipal transport undertakings to purchase vehicles of national manufacture in order to qualify for the subsidies provided for in Article 13 of Law No. 308 of 29 May 1982 the Italian Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling and R. Joliet, (Presidents of Chambers), G. Bosco, Y. Galmot and T. F. O'Higgins, Judges,

Advocate General: C. O. Lenz

Registrar: P. Heim

after hearing the Opinion of the Advocate General delivered at the sitting on 28 January 1986,

\* Language of the Case: Italian.

gives the following

## JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

### Decision

- 1 By an application lodged at the Court Registry on 13 April 1984, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by requiring municipal transport undertakings to purchase vehicles of national manufacture in order to qualify for the subsidies provided for in Article 13 of Law No 308 of 29 May 1982 the Italian Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty.
- 2 According to the documents in the case Article 13 of Law No 308 of 29 May 1982, published in the Gazzetta Ufficiale della Repubblica Italiana No 154 of 7 June 1982, provides for an appropriation of LIT 6 000 million, consisting of LIT 2 000 million for 1982 and LIT 4 000 million for 1983, for grants in aid of up to 20% of the cost of vehicles and fixed installations for undertakings operating public transport services on behalf of the local authorities in cities with a population of over 300 000 if those undertakings buy battery electric or bi-mode vehicles for urban service manufactured in Italy.
- 3 After receiving a complaint from the Unione nazionale rappresentanti autoveicoli esteri [National Union of Distributors of Foreign Motor Vehicles] of Rome concerning that provision, the Commission, by letter of 29 November 1982, called upon the Italian Government to submit its observations on the measure complained of. It considered that the condition to which the aid was made subject by the above-mentioned Law infringed Article 30 of the EEC Treaty.
- 4 In a letter of 10 February 1983 from the Permanent Representation of Italy to the European Communities, the Italian Government replied that Law No 308 was

intended to achieve objectives in regard to energy policy and in regard to research and development. The purpose of the Law was to enable municipal transport undertakings to purchase vehicles which consumed less energy, and thus to encourage Italian manufacturers to build such vehicles. The Italian Government also contested the proposition that Article 13 of the said Law constituted a measure having an effect equivalent to a quantitative restriction on imports, contending that the purpose of that article was not to finance the complete renewal of public transport fleets.

- 5 Since the Italian Government's observations did not change the Commission's opinion, it delivered a reasoned opinion on 2 August 1983 in which the Italian Republic was called upon to adopt the measures necessary to comply with the opinion within one month from the date on which notice of it was received. No reply was given to the reasoned opinion. However, at meetings which took place between the Italian authorities and the Commission's representatives in July and October 1983, the Italian authorities gave an undertaking to eliminate from the Italian legislation the condition concerning the national origin of public transport vehicles. However, since it received no notification of a formal amendment of the contested provision, the Commission brought the present action.

### Admissibility

- 6 According to the Italian Government, the Commission has no legal interest in bringing the action, which should therefore be dismissed as inadmissible. It contends that Article 13 of Law No 308 had merely temporary effects and that the appropriation was valid for only two years, namely 1982 and 1983. During that period, no subsidy was paid and payment after the expiry of the period of validity of the Law is not possible; in practical terms, therefore, the Law remained a dead letter. On the other hand, a new draft law has been prepared for the following period which does not contain the contested provision. The measure will not, therefore, be repeated.
- 7 The Commission observes that it is not certain that Article 13 of Law No 308 is in fact no longer capable of producing effects. On the basis of that article subsidies could still be granted for applications submitted in 1982 or 1983.

- 8 The Italian Government's argument cannot be accepted. It should be noted first that the reasoned opinion was delivered during the period covered by Article 13 of Law No 308 and that the Italian Government did not adopt any measures to comply with that opinion within the time-limit. The fact that time elapsed between the end of the period during which the said law was in force and the bringing of this action cannot lead to the conclusion that the Commission no longer has a live interest in bringing the action. According to the judgment of the Court of 7 February 1973 (Case 39/72 *Commission v Italian Republic* [1973] ECR 101), the subject-matter of an action brought under Article 169 is established by the Commission's reasoned opinion and even where the default has been remedied after the period prescribed in the second paragraph of that same article has elapsed, an interest still subsists in pursuing the action.
- 9 Secondly, it is not possible to conclude that Law No 308 has remained a dead letter. The Italian Government indicates in its replies to the questions put by the Court that of the 11 applications received for aid under Article 13 of Law No 308, nine were in the form of mere statements of an intention to buy vehicles and were not followed up, and the two others must be regarded as 'shelved' because all the documents necessary for the granting of aid were not supplied. However, at the hearing, the Italian Government was not able to exclude the possibility that Article 13 might still produce effects in regard to the latter two applications, which may not yet therefore be regarded as rejected. Under those circumstances, it cannot be concluded that Law No 308 will produce no effects and there is thus no lack of interest from that point of view in obtaining a declaration that it is incompatible with the Treaty. The Court has held that such an interest may consist in establishing the basis for a liability which a Member State may incur, by reason of its failure to fulfil its obligations, towards those to whom rights accrue as a result of that failure (judgment of 7 February 1973, cited above, and judgment of 20 February 1986 in Case 309/84 *Commission v Italian Republic* [1986] ECR 599).
- 10 The objection raised by the defendant must therefore be rejected.

**Substance of the case**

- 11 The Commission considers that Article 13 of Law No 308 must be regarded as a measure having an effect equivalent to a quantitative restriction on imports because it encourages the purchase of vehicles of national manufacture. Undertakings operating regional transport services may only be granted aid if they purchase vehicles manufactured in Italy. Thus, vehicles not originating in Italy are the subject of discrimination. The Commission also draws attention in this connection to Directive 70/50 of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 17) which provides in Article 2(3)(k) that measures having an effect equivalent to quantitative restrictions on imports include those which 'hinder the purchase by private individuals of imported products only, or encourage, require or give preference to the purchase of domestic products only'. The second recital in the preamble to the directive states that such encouragement may lie in 'any instruments issuing from a public authority which, while not legally binding on the addressees thereof, cause them to pursue a certain conduct'.
- 12 The Commission adds that the condition to which the aid is subject is necessary neither to achieve its object nor for administrative reasons. It observes that the objective of establishing a fleet of vehicles which consume less energy may be attained without its being necessary to make the aid subject to the condition that the vehicles be made in Italy. The second objective, namely the development by Italian manufacturers of vehicles consuming less energy, also does not require such a condition because if transport undertakings were free to purchase, under the same conditions as regards subsidies, vehicles manufactured in other Member States that could not but encourage Italian manufacturers to develop the production of vehicles capable of competing with those of foreign manufacturers.
- 13 During the procedure before the Court, the Italian Government put forward several arguments in its defence.
- 14 In the first place, it contends that the persons to whom the recommendations were addressed constitute a limited category of traders and that the purchases which are being encouraged concern experimental products and not products already on the market. The total amount of the financing shows that the subsidies are intended not to permit municipal transport undertakings to renew their fleets but merely to

encourage the construction by manufacturers of genuine prototype vehicles ordered by transport undertakings.

- 15 In the second place, the Italian Government considers that the conditions regarding to the purchase of prototype vehicles made in Italy possess the objective characteristics of State aid, which means that they must be assessed not in the light of Article 30 but in the light of Articles 92 and 93 of the Treaty.
- 16 Finally, the Italian Government contends that Article 2 (3) (k) of Directive 70/50, which was relied on by the Commission, refers only to private persons and appears to cover all traders in the market. It is therefore not relevant to this case because, in the first place, the number of persons to whom the measure is addressed is limited to a maximum of 20, namely the urban transport undertakings operating in cities of more than 300 000 inhabitants and, in the second place the products concerned are experimental products, not products already available on the market.
- 17 The following observations must be made on those arguments.
- 18 The first argument, which asserts essentially that the national measure in question is of relatively limited economic significance and therefore does not really constitute a hindrance to the free movement of goods, cannot be accepted. It is the settled case-law of the Court that all trading rules of Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade must be regarded as measures having an effect equivalent to a quantitative restriction on imports. Even if Article 13 of Law No 308 may be regarded as a measure of relatively minor economic importance, which is not in fact the case because the subsidy represents 20% of the purchase price of a vehicle and is capable of affecting trade between the Member States having regard to the substantial sums available, it must not be forgotten, as the Court has said on several occasions, that a national measure does not fall outside the scope of the prohibition in Article 30 merely because the hindrance to imports which it creates is slight and because it is possible for imported products to be marketed in other ways (judgment of 5 April 1984 in Joined Cases 177 and 178/82 *van de Haar and Another* [1984] ECR 1797 and judgment of 14 March 1985 in Case 269/83 *Commission v French Republic* [1985] ECR 837).

- 19 With regard to the question of whether the subsidies provided for in Law No 308 may be regarded as State aid within the meaning of Article 92 of the Treaty, it must be pointed out, in the first place, that the measure was never notified to the Commission under that article. In the second place, as the Court emphasized in its judgment of 7 May 1985 (Case 18/84 *Commission v French Republic* [1985] ECR 1339), Article 92 may in no case be used to frustrate the rules of the Treaty on the free movement of goods. The Court has consistently held that the provisions relating to the free movement of goods and those relating to State aid have a common purpose, namely to ensure the free movement of goods between Member States under normal conditions of competition (judgment of 22 March 1977 in Case 74/76 *Iannelli and Volpi v Meroni* [1977] ECR 557 and judgment of 7 May 1985, cited above). As the Court also made clear in the latter judgment, the fact that a national measure might be regarded as aid within the meaning of Article 92 is therefore not a sufficient reason to exempt it from the prohibition contained in Article 30. The Italian Republic's argument based on the Community rules concerning State aid cannot therefore be accepted.
- 20 With regard to the applicability of the criteria in Directive 70/50, it must be pointed out, as can be seen from the terms of Article 2 (3) of that directive, that the measures having equivalent effect listed therein are advanced by way of example. Moreover, Directive 70/50 must be read in the light of Article 30 of the Treaty and it may not be relied upon as a means of defeating the objective set out in that article, an objective which it itself is also intended to achieve. The Italian Republic's argument based on Directive 70/50 must therefore be rejected.
- 21 With regard to the possible application of Article 36 of the Treaty, the Commission observes (and except that it considers that the scheme for granting the subsidies at issue must first be assessed in the light of Article 92 of the Treaty, the Italian Republic does not dispute) that Article 36 cannot be applied to this case so as to permit the contested provision to be justified by means of arguments based on energy or research and development policy because that article refers to non-economic measures.
- 22 With regard to that point, it should not be forgotten that, according to settled case-law, Article 36 of the Treaty must be interpreted strictly, the exceptions therein contained may not be extended to cases other than those expressly referred

to and, furthermore, the article refers to non-economic matters (judgment of 19 December 1961 in Case 7/61 *Commission v Italy* [1961] ECR 317 and judgment of 7 February 1984 in Case 238/82 *Duphar v Netherlands* [1984] ECR 523).

23 Article 13 of Law No 308, however, according to the explanations supplied by the Italian Republic during the procedure before the Court, was designed to achieve two objectives of an economic nature concerning both energy policy and research and development policy. Application of Article 36 of the Treaty must therefore be excluded.

24 On the basis of the foregoing, and in accordance with the Court's previous decisions, including the judgment of 11 December 1985 (Case 192/84 *Commission v Hellenic Republic* [1985] ECR 3967), it appears that the Italian provision at issue, by virtue of the fact that it encourages the purchase of vehicles of national manufacture, must be regarded as a measure having an effect equivalent to a quantitative restriction on imports, and as such is prohibited by Article 30 of the Treaty.

25 It must therefore be held that by requiring municipal transport undertakings to purchase vehicles of national manufacture in order to qualify for the subsidies provided for in Article 30 of Law No 308 of 29 May 1982, the Italian Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty.

### Costs

26 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- (1) Declares that by requiring municipal transport undertakings to purchase vehicles of national manufacture in order to qualify for the subsidies provided for in Article 13 in Law No 308 of 29 May 1982 the Italian Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty;**
- (2) Orders the Italian Republic to pay the costs.**

Mackenzie Stuart

Koopmans

Everling

Joliet

Bosco

Galmot

O'Higgins

Delivered in open court in Luxembourg on 5 June 1986.

P. Heim

A. J. Mackenzie Stuart

Registrar

President