OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 24 JANUARY 1980 [1]

Mr President,
Members of the Court,

I should like in this opinion to treat Cases 72 & 73/79 together, raising as they do questions which for the most part are closely connected.

Further, I regret having to provide somewhat dry technical and financial details but they are essential to a proper understanding of these cases.

I — On 6 March 1979 in the course of the oral procedure in the *I.C.A.P.* case, in which the Court delivered its judgment on 28 March 1979, the Agent of the Commission stated that the Commission had decided at the end of January 1979 to bring before the Court of Justice under Article 169 of the Treaty proceedings covering two distinct failures on the part of the Italian Republic to fulfil its obligations under the Treaty.

In the first place the Commission considered that the Italian Republic had infringed Article 95 of the Treaty by imposing on imported sugar and home-produced sugar a parafiscal charge ("sovrapprezzo" [surcharge]) within the framework of the Italian rules on the marketing of sugar since the revenue from that charge, which was imposed for the benefit of the Cassa Conguaglio Zucchero (the Sugar Equalization Fund which I shall from now on refer to as "the Fund"), was used at the expense of sugar imported from other Member States to reduce the charges borne *by the domestic product.*

The Commission recalled that five years previously it had by a letter of 4 December 1974 (No 74/31908) opened the procedure against the Italian Republic for failure to fulfil an obligation by reason of the breach of Article 95 of the Treaty which the Commission considered was constituted by the arrangements concerning the surcharge set up by Decision ("provvedimento") No 1195 of the Comitato Interministeriale dei Prezzi [Interdepartmental Price Committee, which I shall call "the Price Committee"] of 22 June 1968 in order to finance the aids authorized in Article 34 of Regulation (EEC) No 1009/67 of the Council of 18 December 1967, the first regulation on the common organization of the market in sugar. After the entry into force on 1 July 1975 of Article 38 of Regulation No 3330/74, which replaced Regulation No 1009/67, that surcharge was fixed, for the 1975/76 marketing year, at 5 600 lire per 100 kg of sugar by paragraph 5 of Price Committee Decision No 14/1975 and, for the 1976/77 marketing year at 7 000 lire per 100 kg by paragraph 4 of Price Committee Decision No 20/1976.

In connexion with the second failure to fulfil its obligations the Commission considered that the Italian Republic had infringed certain provisions of Regulation No 3330/74 of the Council of 19 December 1974 on the common organization of the market in sugar by granting domestic producers certain aids in excess of those authorized under the Community rules.

The Agent of the Commission added that proceedings would be instituted

1 — Translated from the French.

before the Court prior to Easter 1979 regarding these two breaches of duty.

That was finally done, with regard to the first infringement by Application No 73/79 which was received at the Court Registry on 2 May and with regard to the second by Application No 72/79 which was registered on the same day.

II — The Agent of the Commission accordingly stated at the same time that the Commission's officers were in the course of drafting for the end of April 1979 the decision referred to in Article 93 (2) of the Treaty concerning the means of financing the adaptation aids authorized by Article 38 of Regulation No 3330/74 and certain aids granted by the Italian Republic in respect of sugar in excess of the basic quantity allocated to Italy (1 400 000 tonnes of white sugar) for the 1978/79 marketing year.

It should be recalled that by derogation from Articles 92 to 94 of the Treaty, which were applied to the market in sugar by Article 36 of Regulation No 1009/67 and then by Article 41 if Regulation No 3330/74, Article 38 of the latter regulation, replacing Article 34 of the former regulation, authorized for five marketing years the temporary grant of adaptation aids amounting to 5.9 units of account per tonne of domestically produced beet with a sugar content of 16%. Paragraph 3 of Price Committee Decision No 18/1975 converted the rate to 5 056.30 lire per tonne which, in the Commission's view, exhausted the authorization to the Italian Republic.

By Council Regulation No 1487/76 of 22 June 1976 the amount of such aids was increased to 9.9 units of account per tonne of beet for the 1976/77 marketing year. Furthermore during the same marketing year the Italian Republic was authorized to grant for that marketing year an additional production aid. That aid was granted in respect of a quantity of white sugar not exceeding the maximum quota up to a limit of 100 000 tonnes.

That maximum was increased to 170 000 tonnes by Article 5 of Council Regulation No 1110/77 of 17 May 1977. However, if the total production were to exceed 1 400 000 tonnes of white sugar the Italian Republic was authorized to grant a maximum of 106 620 000 units of account to be applied to the total production on its territory during that marketing year. Finally, for the marketing year 1978/79 Article 2 of Council Regulation No 1396/78 of 20 June 1978 increased the amount of the aid to 11 units of account, a portion of which might be granted to the processing industry in respect of the quantities of sugar-beet used to produce 1 400 000 tonnes of white sugar.

The implementation by Italy of these various authorizations prompted the following reactions by the Commission *before* it instituted these proceedings:

1. By notice in accordance with the first sentence of Article 93 (2) of the Treaty to the persons concerned, other than the Member States, published in the Official Journal of the European Communities of 17 December 1975 the Commission intimated that it had (by letter No S/75/32772 of 3 December 1975) opened the procedure prescribed in Article 93 (2) of the Treaty with regard to paragraph 4 of Decision No 18/1975 and to paragraph 5 (d) of

Decision No 19/1975 of the Price Committee.

In addition to the aids granted pursuant to Article 38 of Regulation No 3330/74 these measures made respective provision for:

— The grant to beet-producers of an aid amounting to 3 165.11 lire per tonne of beet with a sugar content of 16%;

— The grant to the processing industry of an aid of 2 156.30 lire per quintal of white sugar produced in Italy.

As was explained in greater detail in its letter of 3 December 1975 the Commission considered that these measures had been taken without prior notification, contrary to Article 93 (3) of the Treaty. The aids which they established in addition to those provided within the framework of the common organization of the market in sugar had a direct incidence on production costs; they accordingly fell under Article 92 (1) of the Treaty and the exceptions laid down in Article 92 (2) and (3) could not apply to them.

Consequently the Commission gave notice requiring all persons concerned other than the Member States to submit their comments on the above-mentioned aids within a period of four weeks from the date of publication of that notice.

Having regard to the increase for the 1976/77 marketing year from 5.9 to 9.9 units of account in the adaptation aids authorized by Article 4 of the Council regulation of 22 June 1976 the Commission (by letter No SG (77) D/3552 of 23 March 1977) closed the procedure under Article 93 (2) which it had opened with regard to the above-mentioned aids.

2. By a communication published in the Official Journal of the European Communities, C 81 of 1 April 1977 the Commission gave notice that (by that same letter No SG (77) D/3552 of 23 March 1977) it had opened the procedure prescribed in Article 93 (2) with regard to the following Italian measures:

(a) Paragraph 3 of Price Committee Decision No 23/1976 of 1 October 1976, paragraph 5 (b) of Price Committee Decision No 24/1976 of the same date and paragraph 5 (f) of the same decision which, in implementation of the authorization of the Council, fixed the amounts to be granted for the 1976/77 marketing year as follows:

— 6 132.30 lire (6.3679 units of account) per tonne of beet having a sugar content of 16% used for the manufacture of 1 330 000 tonnes of white sugar (that is, the basic quantity allocated to Italy by Article 38 (2a) of Regulation No 3330/74, increased by 100 000 tonnes); in fact that amount was reduced to 5 832.30 lire (6.0564 units of account) by a levy of 300 lire used to finance the additional aids which will be referred to below;

— 2 706.06 lire per quintal of white sugar up to the same maximum quantity, that is 3.5321 units of account per tonne of such beet;

(The total, formed by 6 132.30 lire (6.3679 units of account) and 2 706.06 lire (3.5321 units of account), corresponds to 9.9 units of account per tonne of beet being the amount auth-

orized in the first sentence of Article 38 (2a). The above-mentioned letter, addressed by the Commission to the Italian Government on 23 May 1977, explains that the effect of the levy on beet-producers of 300 lire (provided for in the inter-trade agreement concluded between the sugar-manufacturers and the beet-producers for the 1976/77 marketing year) was to reduce the aid paid to the beet-producers to 6.0564 units of account which, taken together with the aid to manufacturers of 3.5321 units of account, amounted to 9.5885 units of account. The authorization contained in the first sentence of Article 38 (2a) was exhausted as regards the quantitative ceiling of such aids but not as regards their financial ceiling. Such aids were indeed authorized in principle by Article 38 (2a) of Regulation No 3330/74, as supplemented by Regulation No 1487/76 but the Commission considered that under Article 92 of the Treaty they were not compatible with the common market by reason of their method of financing by means of the collection of the surcharge on sugar marketed in Italy whether it was of domestic origin or imported from other Member States.);

— An amount equal to the production levy which would probably be fixed at 9 units of account per quintal for the above-mentioned 100 000 tonnes of white sugar.

(b) The Commission also gave notice by the same communication that it had opened (by its above-mentioned letter to the Italian Government of 23 March 1977) the procedure under Article 93 (2) of the Treaty with regard to paragraph 4 of Price Committee Decision No 23/1976, to paragraph 6 (b) of Price Committee Decision No 24/1976 and to paragraph 6 (c) of that decision which respectively made provision for the following additional aids:

— 4 640 lire per quintal of white sugar (6.0564 units of account per tonne of beet) for the quantities of beet corresponding to the quantities of B quota sugar produced in excess of the ceiling of 100 000 tonnes authorized under Article 38 (2a) of Regulation No 3330/74;

(As the letter addressed to the Italian Government explains, the sugar in question was the 242 227 tonnes of sugar in excess of the above-mentioned ceiling although included in the maximum quota. That aid was to be paid to the beet-producers through the sugar manufacturers before 20 December 1976);

— 5 681.70 lire (5.9 units of account) per tonne of beet having a sugar content of 16% used for the manufacture of white sugar which was to be carried forward to the following marketing years (the sugar in question amounts to 30 345 tonnes) supplemented by a payment of 119.82 lire (the difference between 6.0564 and 5.9 units of account) per quintal of sugar also for the benefit of producers of beet used for the manufacture of such sugar; that payment corresponded to the revenue from the said levy of 300 lire. In all the amount granted in this form came, like the foregoing amount, to 6.0564 units of account;

— The reimbursement through the sugar manufacturers to the beet-producers of the portion of the

production levy (60%) remaining in principle to be borne by the latter in respect of the quantities of beet corresponding to the quantities of *quota B sugar* produced in excess of the ceiling of 100 000 tonnes authorized under Article 38 (2a) of Regulation No 3330/74.

The Commission considered that, although these additional aids did not exceed the financial ceiling fixed by Article 38 (2a) of Regulation No 3330/74 as regards either the individual amounts or the total amount of the funds employed, they benefited quantities of beet and sugar in excess of the ceilings fixed by that article; it gave notice that it had opened the procedure under Article 93 (2) not only because these aids were financed by the revenue from the surcharge but also with regard to the actual principle of such aids. As in the previous case it gave notice to all those concerned to submit their observations within a period of four weeks from 1 April 1977 on the contested aids in general with regard to the means of financing them and, with regard to the additional aids, in relation to their character as aids.

(c) Mention must finally be made of two other aids not referred to in the communication to the Official Journal but which also form the subject-matter of the now familiar letter of 23 March 1977 addressed to the Italian Government;

— Under paragraph 6 (a) of Price Committee Decision No 24/1976 a payment for the account of the beet-growers to the manufacturers of quantities of sugar carried forward to succeeding marketing years corresponding to 60% of the monthly amount fixed by the Community rules under the arrangements regarding the setting off of storage costs;

— With regard to paragraph 5 (e) of the same decision, a payment to sugar-manufacturers, for the entire domestic production, of an amount covering the difference between the rate of the financial charges borne by them for the financing of their storage costs and the flat rate fixed therefor for the whole Community by Article 8 of Regulation No 3330/74.

According to the Commission, although the first of those aids was financed from the reserve set up by the Fund from the levy of 300 lire it was contrary to the provisions of Article 31 (2) of Regulation No 3330/74 which prohibits the reimbursement of storage costs for 12 months where sugar is carried forward and to Article 2 of Regulation No 748/68 of the Council of 18 June 1968 laying down general rules for postponing part of the sugar production to the following marketing year. With regard to the second aid not only did it fail to keep within the ceiling fixed by the Community rules but was financed, as indeed was the first aid, by a charge imposed on both sugar imported from other Member States and domestic sugar whilst it benefited Italian beet-producers and sugar-manufacturers alone.

In the *I.C.A.P.* case the Agent of the Commission maintained that the means of financing the surcharge constituted the most serious infringement and that if the final decision which the Commission was required to give under Article 93 (2) were negative the entire system would collapse.

III — It must be stated that the Commission no longer appears to attach the same importance to that aspect of the situation and that it has altered its angle of attack, reverting to the one which it adopted five years previously: it considers that it will be possible for it to settle the problem by means of the procedure under Article 169 and that it will thereby be released from the requirement of following the procedure under Article 93 (2). In this connexion it requests the Court to declare that:

(1) By the grant to sugar manufacturers of an aid covering the difference between the amount of the financial charges borne by them for their storage costs and the amount laid down under the Community rules for the calculation of the reimbursement of such expenses and by the payment to manufacturers of quantities of sugar carried forward of an amount corresponding to 60% of the monthly amount fixed by the Community on the basis of the system for offsetting storage costs, the Italian Republic has infringed Articles 8 and 31 (2) of Regulation No 3330/74 *(Case 72/79);* and

(2) By imposing on domestically-produced sugar and sugar imported from other Member States internal taxation applying to these two products in accordance with the same criteria but allocated to financing aids for the exclusive benefit of domestic sugar, so that the tax on the latter is partially neutralized, the Italian Republic has failed to fulfil its obligations under Article 95 of the Treaty *(Case 73/79).*

As I stated at the beginning, these two cases are closely related both with regard to their origins and to the legal arguments relied upon; the measures criticized by the Commission are contained in the same national provisions and the corrrespondence between the parties prior to the proceedings relates both to problems concerning the financing of the storage of the sugar and the charge established for that purpose. The Commission separated the two cases only at the stage of its reasoned opinion. In both cases the same preliminary issue of admissibility arises. In order to take account of that close connexion and to avoid repetition I am taking the liberty, with a view to the proper administration of justice, of combining my opinions in the two cases.

IV — First of all we must consider an important question of principle which arises in connexion with the objection of inadmissibility raised by the Government of the Italian Republic with regard to these two applications.

The Italian Government maintains that, since the contested national measures constitute aids, as the Commission itself has recognized, and as the two applications call in question the whole of the Italian provisions on adaptation aids for the sugar industry, the procedure under Article 93, which was, moreover, initiated by the Commission in its letters (No S/75/032772) of 3 December 1975, (SG(77)D/3552 and SG(77)D/3554) of 23 March 1977 and subsequently afresh by its letter of 3 July 1979, must be followed and concluded before recourse is had to the procedure under Article

169. This argument is thus in accordance with the point of view advanced by the French Government in its observations in Case 104/79, *Foglia.* If it were declared that a national system of aids, on the basis of the State's detailed fiscal or parafiscal arrangements which it involves, was contrary to Article 95 of the Treaty this would amount in fact to rendering nugatory Articles 92 and 93 of the Treaty which permit certain aids to be excepted, having regard to their economic and social aspects, from the prohibition contained in Article 92. These articles establish a system for keeping under review and supervising arrangements concerning aids granted by States. They make it possible to keep a more specific check on any breach of the basic Community principles applicable in that sphere. The particular concerns which gave rise to such arrangements prompted the authors of the Treaty to set up a special procedure, in particular enabling the Member States to assert their legitimate interests before the Commission and in certain circumstances the Council which may, acting unanimously, decide that the aid must be considered compatible with the Treaty; an application submitted by a Member State to the Council in fact suspends for three months the procedure described in Article 93 (2) if that procedure has been initiated by the Commission. If on the conclusion of the discussions with the Member State concerned the Commission nevertheless considers that the aid is not justified it adopts a decision to the effect that the Member State must abolish or alter such aid within a period of time to be determined by the Commission. Only after that may the matter be referred to the Court of Justice by the Commission or any other interested State (second subparagraph of Article 93 (2)). To concede that the Commission might subsequently alter its views would amount to depriving a Member State of the procedural guarantees which it is entitled to rely on.

The case-law previously developed provides a number of arguments in support of the view that Article 93 takes precedence over Article 169 in relation to aids granted by States.

In its judgment of 25 June 1970 *(France* v *Commission* [1970] ECR 493 to 495) the Court stated that Article 93 (2), "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 ... it renders the whole incompatible with the common market"; and "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".

In its judgment of 11 December 1973 *(Lorenz* v *Germany* [1973] ECR 1481, paragraph 4,) the Court recalled that "the objective pursued by Article 93 (3), which is to prevent the implementation of aid contrary to the Treaty, implies that this prohibition *is effective during the whole of the preliminary period.* While this period must allow the Commission sufficient time, this latter must, however,

act diligently and take account of the interest of Member States in being informed of the position quickly in spheres where the necessity to intervene can be of an urgent nature by reason of the effect that these Member States expect from the proposed measures of encouragement". The Commission, however, "could not be regarded as acting with proper diligence if it omitted to define its attitude within a reasonable period" — which the Court fixed at two months.

The Court also stated in that judgment ([1973] ECR 1482, paragraph 5) that "aid implemented, during the Commission's silence, after a period necessary for its preliminary examination, is thus subject, as an existing aid, to the provisions of Article 93 (1) and (2)".

If it were conceded that the Italian measures were exempted under Article 94 from the procedure prescribed by Article 93 (3) or that they had become "aids existing" coming under Article 93 (1) and (2) the normal procedure would have been for the Commission then to decide, if it considered that they were not compatible with the common market, that Italy must abolish them within a specified time. In that case, if Italy had failed to comply with that decision the Commission could have referred the matter directly to the Court, independently of Articles 169 and 170.

In its judgment of 2 July 1974 ([1974] ECR at p. 717, *Italy* v *Commission)* the Court held that the procedure under Article 169 was more complicated than that under Article 93, which enables the Commission, when it establishes that an aid has been granted or altered in disregard of paragraph (3) of the latter and that such 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".

Finally, in the *Iannelli* case, which was cited on many occasions in the course of the oral procedures, the Court ruled in its judgment of 22 March 1977 (ECR [1977] 557 *et seq.)* that "the effect of an interpretation of Article 30 which is so wide as to treat an aid as such within the meaning of Article 92 as being similar to a quantitative restriction referred to in Article 30 would be to alter the scope *of Articles 92 and 93 of the Treaty* and to *interfere with the system adopted in the Treaty for the division of powers* by means of the procedure for keeping aids under constant review as described in Article 93" (paragraph 12). "Those *aspects* of aid which contravene specific provisions of the Treaty other than Articles 92 and 93 may be so *indissolubly linked* to the object of the aid that it is impossible to evaluate them separately so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore *of necessity be determined in the light of the procedure prescribed in Article 93".*

In connexion with that case-law reference may be made to the judgment of the Court of 10 October 1978 in the case of *Hansen & Balle* v *Hauptzollamt Flensburg* ([1978] ECR 1801 *et seq.)* in which the Court considered, on the sole ground that Article 37 is based on the

same principle as Article 95, that is, the elimination of all discrimination in trade between Member States, that it appeared *"preferable* to examine the problem raised by the national court [of the German tax provisions concerning spirits] primarily from the point of view of the rule on taxation laid down in Article 95, because it is of a general nature, and not from the point of view of Article 37, which is specific to arrangements for State monopolies".

The Court added that "it also appears *preferable* to consider the question raised by the national court from the point of view of Article 95 rather than in the light of the provisions on aid contained in Articles 92 to 94, since the latter also rest on the same basic idea as Article 95 . . .".

With regard to the substance of the case the Court stated that fiscal aid might be provided through taxation but that, "according to the requirements of Article 95, such preferential systems must be extended without discrimination to spirits coming from other Member States".

The Court also recalled that the compatibility of aids must be considerred in the light of Article 95 (as well as all the other provisions of the Treaty) but it at no point stated that the consideration of a system of aids does not come under the procedure under Articles 92 and 93, which would deprive the Member States of the guarantees to which I have drawn attention. In fact that judgment does not release the Commission from its obligation to observe the terms of those articles. On the contrary when the Commission is considering an aid it must have recourse to the procedure under Article 93 and any incompatibility between the aid and Article 95 constitutes *one* of the arguments which it may rely upon in giving notice to the Member State to abolish the aid in question.

The reluctance displayed by the Court in its judgment of 13 March 1979 in the second *Hansen* case to include systems of national aids is explained by the consideration in paragraph 9 that the application of Article 37 on the one hand and Articles 92 and 93 on the other "presupposes distinct conditions peculiar to the two kinds of State measure which they are intended to govern and they differ furthermore as to their legal consequences, *above all* in that the intervention of the Commission plays a large part in the implementation of Articles 92 and 93 whilst Article 37 is *intended to be directly applicable".*

The criterion which led the Court in that case to view the question submitted in the light of Article 37 rather than in relation to Articles 92 and 93 is accordingly the fact that that article is "intended to be directly applicable".

That criterion cannot apply to the present cases since both the implementation of Articles 92 and 93 and that of Article 169 leave a wide scope for the intervention of the Commission. It would even be more accurate to state that Article 169 can be implemented *only* by the Commission whilst, in certain conditions, Article 93 confers direct rights upon individuals and that, if the criterion of direct applicability were to be adopted, the provisions of Articles 92 and 93 must be considered as more "specific" than those of Article 169.

Finally the Court of Justice, under the heading "Preliminary considerations on the scope of the questions raised", in its judgment of 26 June 1979 in the *Pigs and Bacon Commission* case (Case 177/78) recognized the precedence necessitated by Article 38 (2) of the Treaty "for the

specific provisions adopted in the context of the common agricultural policy over the general provisions of the Treaty relating to the establishment of the common market". That finding, however, merely returns us to our point of departure since Article 41 of the basic regulation provides that "save as otherwise provided in this regulation, Articles 92, 93 and 94 of the Treaty shall apply to the production of and trade in the products listed in Article 1 (1)".

Comparison of Article 95 of the Treaty on the one hand and Articles 92 and 93 on the other shows that these provisions pursue the same objective, namely to prevent the two categories of intervention by Member States, through tax discrimination or the grant of aids, from distorting the conditions of competition in the common market or from creating discrimination at the expense of the products or trade of other Member States. However, distinct conditions are required for the application of those provisions, which are peculiar to the two categories of State measures which those provisions are respectively concerned to control and they differ moreover in their legal consequences, above all inasmuch as the implementation of Articles 92 and 93 produces a much greater effect than an interpretation given by the Court in a preliminary ruling under or a finding under Article 169 that a Member State has failed to fulfil an obligation.

In fact since the national provision is not exempted from the scope of Article 92 *et seq.* an infringement of those articles automatically means that the Member State is in breach of its obligations and the fact that the Commission has instituted the procedure under Article 92 has the effect of automatically preventing the application of the national measure whilst any finding by the Court under Article 169 leads to the cessation of the infringement found only as regards the future. The initiation of the procedure under Article 93 means that the Member State cannot in the meantime apply the aid and that, if it does so, it is automatically in breach of the law as the Court held in its order of 21 May 1977 ([1977] ECR 921, *Commission* v *United Kingdom).* However this naturally assumes that the Commission applies the procedure under Article 93 energetically and does not delay indefinitely before adopting a final decision. On the other hand if the procedure under Article 169 is preferred the grant of the aid can cease only when the Court finds that there has been a failure to fulfil an obligation and after the Member State has complied with that finding (Article 171) whilst the procedure under Article 93 makes it possible to "freeze" the aid immediately without prejudice to the substance of the matter.

Thus both from the point of view of the guarantees which it provides for the Member States and from that of effectiveness and legal certainty the procedure under Article 93, properly applied, affords a number of advantages: it results in an immediately enforceable decision by the Commission determining precisely the respect in which and the time from which the aid is illegal; the Commission thus accepts all its responsibilities whilst by having recourse to Article 169 it transfers that responsibility to the Court of Justice. Acceptance of the Commission's position would amount to provisionally

"legalizing" the aid granted by the Member State and justifying the Commission's failure actively to pursue the procedure under Article 93.

After those considerations, which I feel may be somewhat severe with regard to the Commission but which are indispensable, I nevertheless do not propose that the Court should uphold the objection of inadmissibility raised by the Italian Government. Ultimately that view is not based on the fact that, as the Commission claims, independently of the general economic objectives and of the means of financing the surcharge, the incidence of the fiscal element of that surcharge on the free movement of sugar is manifest: if that were the case there would be grounds for wondering why the Commission has waited until the review of the basic regulation on sugar is already under way, to be completed in the spring of 1980, before introducing these proceedings for failure to fulfil an obligation when it had at its disposal the much more effective procedure under Article 93. But in any case it is high time to clarify a situation which will have existed practically without interruption from 1 July 1968 to 1 July 1980 whilst — and this is a basic difference as compared with the arrangements for the ethyl alcohol of agricultural origin which were at issue in the *Hansen* case — a common organization of the market in sugar has been long established. Having set out the foregoing observations I shall now briefly give my views on the substance of the case.

V — The first instance of failure to fulfil its obligations which is urged against the Italian Republic concerns the allocation of the revenue from the surcharge for the financing of storage aids which are not authorized under the Community provisions.

1. The compensatory allowance for storage costs granted to sugar-producers under paragraph 5 (e) and (f) of Price Committee Decisions Nos 24/1976 and 37/1977 is calculated monthly in terms of the variations in the financial charges actually borne by the undertakings; it accordingly disregards the principle of the flat rate and uniform nature of the reimbursement of such expenses throughout the entire Community. The objective of the Community provisions which is to avoid generalized and immediate recourse to intervention and thus to stabilize the market, may only be attained by the methods laid down by Article 8 of Regulation No 3330/74, as amended by Regulation No 1487/76. Storage costs arising from the avoidance of recourse to intervention may be reimbursed only in accordance with the procedures laid down by that article. Storage costs entailed by carrying sugar forward are dealt with in Article 31. In so far as the Italian measure goes beyond that objective it is certainly not in accordance with that article.

The fact that that measure was extended, with effect from the 1978/79 marketing year, by the Price Committee Decision of 26 May 1978 to sugar imported from other Member States and the abolition of its formerly discriminatory nature does not alter the previous situation in any way.

2. Paragraph 6 (a) of Price Committee Decisions Nos 24/1976 and 37/1977 which makes provision for the partial offsetting of storage costs incurred in connexion with the carrying forward of sugar is intended to authorize the Fund to administer, for the account of the

beet-producers, a reserve fund built up with sums allocated to such producers.

Unlike storage costs, the reimbursement of which is fixed at a flat rate applicable throughout the entire Community, the reimbursement of carry-forward costs is covered only by general rules (Regulation No 748/68, as amended by Regulation No 2829/71 of 24 December 1971). According to Article 2 of that regulation sugar-manufacturers may claim from beet-producers the reimbursement of storage costs for carrying sugar forward *on the basis of a contract* and within the limits fixed by the Community institutions.

Consequently the detailed provisions on such reimbursement must be stipulated by contractual arrangements; the sole intervention on the part of the public authorities which is prescribed is that of the *Community* institutions.

In fact the objective of the Italian inter-trade agreement and its subordinate nature in relation to the decisions of the Price Committee are clearly shown in its final provision which reads as follows:

"This agreement shall enter into force on the adoption of the necessary Price Committee measures which, from 1 July 1976, shall determine for the entire production of sugar for the 1976 marketing year the exact amount to be allocated each month to the Italian sugar industry on the basis of the difference between the rate of interest actually borne by it and that fixed by the European Economic Community".

The ratification of the inter-trade agreement by paragraph 6 (a) of Decisions No 24/1976 and 37/1977 thus constitutes an improper intrusion on the part of the Italian authorities on behalf of producers who have carried sugar forward.

As to their practical effect, such inter-trade agreements involve in respect of sugar carried forward an officially determined reimbursement amounting to 60 % of the monthly Community amount not reimbursed for the storage costs for the entire excess sugar production which does not qualify for that reimbursement.

Accordingly part of the adaptation aids allocated and reserved to beet-producers is compulsorily deducted from the fund thus set up and managed by the Equalization Fund. The measures in question share out amongst all beet-producers, whether or not their products are used to produce sugar which is carried forward, sums allocated by the Fund for financing the reimbursement in question. From the Community point of view the additional facilities and guarantees (State resources) thereby provided for the sugar-manufacturers are contrary to the spirit of Articles 8 and 31 (2) of the basic regulation.

VI — The second failure in its obligations with which Italy is charged concerns the surcharge, regarding the legality of which I expressed serious reservations in my opinion of 16 and 17 June 1975 on the sugar competition cases ([1975] ECR at p. 2076).

It should be recalled that the surcharge is a charge on white sugar released for consumption in Italy, regardless of whether such sugar is imported into or

produced in Italy. The revenue from it is paid into the Fund set up to carry out equalization operations relating to the integration of the Italian sugar industry into the common organization of the market in sugar and is intended to finance the adaptation aids granted to Italian sugar-manufacturers and beet-producers by Article 38 of Regulation No 3330/74 even though it is also used to finance other adaptation measures for the benefit not only of sugar-manufacturers but also of beet-producers.

Although there is no doubt that the basic regulation permits Italy to grant the aids it is still necessary that the means of financing them should be in accordance with Article 95 of the Treaty or that the aid should not be misused, to adopt the term used in Article 93 (2).

Even though, from a technical point of view, the surcharge constitutes a measure equalizing the cost of sugar produced in Italy and that of imported sugar it constitutes a fiscal or parafiscal charge. Likewise the fact that it is calculated on the basis of the amount of sugar released for consumption and that it is ultimately borne by the consumer rather like a value added tax does not affect the situation in any way. The fact that such "equalization" depends on the arrangements concerning the maximum selling price prevailing in Italy likewise is not decisive. In its judgment of 26 February 1976 *(Tasca,* [1976] ECR 291) the Court itself expressed serious doubts as to the legality under Community law of the system of maximum retail prices for sugar in Italy: an illegal system cannot justify a measure necessary to the operation of such a system.

In any event the Community provisions do not confer authority to finance such aids, even in part, by means of a parafiscal charge applying also to imported sugar which itself does not benefit from such aids. Discrimination between imported sugar and domestic sugar only appears to be absent since the revenue from the charge goes to the Fund which is for the exclusive benefit of domestic sugar.

I accordingly propose that the Court should accede to the Commission's two applications. Nevertheless having regard to the ambiguities which existed both in the stage preceding the reasoned opinion and in the court proceedings in this case and to the failure of the institution to act in relation to Articles 92 and 93 I consider that the parties should bear their own costs which, moreover, have only a symbolical value in proceedings of this nature.

Without prejudice to any decisions which may be taken in relation to Article 93, it is my opinion that the Court should declare that:

(1) The grant to Italian sugar-manufacturers of an amount covering the difference between the amount of the charges actually borne by them for the storage of sugar and the amount of the reimbursement provided for in Regulation No 3330/74 and also the payment to manufacturers of

Italian sugar which is carried forward of an amount corresponding to 60% of the monthly amount fixed under the Community provisions on the reimbursement of storage costs are contrary to Articles 8 and 31 (2) of the regulation;

(2) In so far as the surcharge is applied uniformly to Italian sugar and sugar imported from other Member States whilst it is allocated to the financing of aids for the sole benefit of domestic sugar it is contrary to Article 95 (1) of the Treaty.

I am also of the opinion that the parties should bear their own costs.