OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 15 MAY 1974

My Lords,

In the words of Mr Advocate-General Lagrange in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* (Rec. 1961, p. 76) 'Il n'y a pas de vrai marché commun d'une industrie entre plusieurs pays si l'un d'eux subventionne sa propre industrie'.

So, as Your Lordships will remember, Articles 92 to 94 of the EEC Treaty contain provisions designed to ensure that aids granted by Member States to industry do not distort competition in the common market.

Paragraph (1) of Article 92 is in these terms:

'Save as otherwise provided in this Treaty, 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.'

Certain categories of aid which are, or which may be considered to be, compatible with the common market, are specified in paragraphs (2) and (3) respectively of that Article. As was pointed out again by Mr Advocate-General Lagrange, this time in his Opinion in Case 6/64 *Costa v Enel* (Rec. 1964, pp. 1185-1186), and as, indeed, is implicit in a number of decisions of the Court, it is for the Commission to decide, at all events in the first instance, whether any of the derogations contained in those paragraphs are applicable in a particular case.

Article 93 (1) enjoins the Commission, in cooperation with Member States, to keep under constant review all systems of aid existing in those States, and to propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

Article 93 (2) provides:

'If, after giving notice to the parties concerned to submit their comments, 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.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 169 and 170, refer the matter to the Court of Justice direct.'

There follow provisions in effect empowering the Council, in exceptional circumstances, to exempt a Member State from the requirements of Article 92.

Article 93 (3) provides:

'The Commission shall be informed, in sufficient time to enable it to submit its comments of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

Finally Article 94 empowers the Council to make regulations for the application of Articles 92 and 93.

Certain fairly obvious propositions are underlined by decisions of this Court.

First, the concept of 'aid' is a wider one than that of 'subsidy'. It includes not only positive assistance in money or kind but also any measure that relieves an undertaking of a burden it would otherwise have to bear and so has the same effect as a subsidy: see the Judgment of the Court in Case 30/59 (Rec. 1961, p. 39). Examples of the latter kind of aid are to be found in Cases 6 & 11/69 *Commission v French Republic* (Rec. 1969, p. 523), where the Bank of France granted a preferential rediscount rate on book debts arising from export trade, and in Case 70/72 *Commission v Federal Republic of Germany* [1973] ECR Rep. 813, where German undertakings making certain types of investment were allowed a deduction equal to 10 % of the amount so invested from their liability to income or corporation tax.

Secondly, it is important to bear in mind the distinction made in Article 93 between 'existing aids' and 'new aids'. That distinction was first brought out in Case 6/64 (see in particular Rec. 1964, pp. 1161-1162) and was emphasized in Case 70/72 by Mr Advocate-General Mayras (see [1973] ECR, pp. 834-836) and in Cases 120 to 122 and 141/73 *Lorenz v Federal Republic of Germany, Markmann v Same, Nordsee v Same,* and *Lohrey v Same* (not yet reported) both in the Opinion of Mr Advocate-General Reischl and in the Judgments of the Court.

An 'existing' aid is one which was either in operation at the time when the Treaty came into force or put into operation subsequently with the consent (express or implied) of the Commission. In the case of such an aid, the Commission has the duties and powers given to it by paragraphs (1) and (2) of Article 93. It is particularly to be observed that the power of the Commission to decide that the State concerned is to abolish or alter an existing aid can be exercised only for the future. It cannot have any retroactive or declaratory effect. Moreover the exercise of that power is subject to the requirement that the Commission must prescribe 'a period of time' within which the aid is to be abolished or altered — though the opinion was expressed by Mr Advocate-General Mayras in Case 70/72 (see [1973] ECR, pp. 841-843) that, in an appropriate case, this requirement can be satisfied by the Commission saying that the aid is to be abolished or altered 'without delay'.

By virtue of paragraph (3) of Article 93 a Member State may not introduce a new aid (or alter an existing one) without first informing the Commission of its plans to do so and giving the Commission sufficient time to decide whether such aid would or would not, prima facie, be compatible with the common market having regard to Article 92. If, as a result of this preliminary consideration, the Commission concludes that the aid (or the alteration) would prima facie be compatible with the common market, the Member State becomes free to introduce it (as it does if the Commission fails to express a view within a reasonable time). If on the other hand the Commission forms the opposite view, it must initiate the procedure provided for in Article 93 (2), which involves consultation with 'the parties concerned', in particular the other Member States. In that event the prohibition on the introduction (or alteration) of the aid continues until the procedure has resulted in a final decision. The decision may either authorize the introduction (or alteration) of the aid, with or without qualifications, or forbid it altogether.

With three exceptions the provisions of Articles 92 and 93 do not have direct effect in the legal systems of Member States. First, a decision of the Commission under Article 93 (2) renders Article 92 (1) directly effective as respects the subject-matter of that decision. Secondly, a similar result may follow from a regulation made under Article 94. (See as to these two exceptions the Judgment of the Court in Case 77/72 *Carmine Capolongo v*

Azienda Agricola Maya [1973] ECR, pp. 621-622). Thirdly, the prohibition in Article 93 (3) on the introduction of a new aid without notification to and acquiescence of the Commission has direct effect (see the Judgments of the Court in Case 6/64 — Rec. 1964, p. 1162 — and in Cases 120 to 122 and 141/73). In the words of the Judgment in Case 120/73, (recital 8):

'The direct effect of the prohibition extends to all aid which has been implemented without being notified and, in the event of notification, operates during the preliminary period, and where the Commission sets in motion the contentious procedure, up to the final decision.'

The Court has never yet had to decide what procedure the Commission should adopt in a case where a Member State, in breach of Article 93 (3), introduces a new aid (or alters an existing one) without notifying the Commission of its plans to do so or without waiting for the outcome of the Commission's consideration of those plans. But, in Case 6/64 (see Rec. 1964, p. 1185) Mr Advocate-General Lagrange envisaged that the Commission's proper course in such a case would be to proceed under Article 169. My Lords, I respectfully agree with him.

It seems to me that in such a case the procedure provided for in Article 93 (2) is inapplicable. According to the express terms of Article 93, that procedure is appropriate in only three types of situation:

1. Where the question to be determined is whether an existing aid is or is not compatible with the common market having regard to Article 92;
2. Where the question to be determined is whether an existing aid is or is not being 'misused'; and
3. Where the question to be determined is whether a proposed new aid or alteration of an existing aid, the plans for which have been notified to the Commission and as to which the Commission has formed the prima facie view that it would not be compatible with the common market having regard to Article 92, is or is not indeed so compatible.

I can see no reason for regarding it as implicit in Article 93 that the procedure is available also in a case where the question is whether a Member State has introduced or altered an aid in contravention of the prohibition in paragraph (3). In such a case the issue, if any, will normally be whether the measure introduced by the Member State is in truth an aid, and will not be the more complex one whether if so, such aid is compatible with the common market having regard to Article 92.

It is not as though the procedure under Article 93 (2) were swifter or more flexible than that under Article 169. In fact it is more cumbersome, since under Article 93 (2) the Commission must consult all 'the parties concerned' before reaching its decision, whereas under Article 169 it need only consider the observations of the Member State actually involved before delivering its opinion. Moreover the same remedies are open to the Commission under Article 169 as would be open to it under Article 93 (2) — consider the Judgment of the Court in Case 70/72 [1973] ECR, p. 829.

I now turn to the facts of this case.

On 24 April 1969, in compliance with the first sentence of Article 93 (3), the Italian Government sent to the Commission the text of a Bill for the 'restructuring' reorganization and conversion' of the Italian textile industry. On 3 December 1969 the Commission initiated the procedure provided for in Article 93 (2) in relation to the Bill as a whole. On 27 May 1970, considering that it did not have all the information that it needed to enable it to reach a comprehensive decision on the provisions of the Bill, the Commission issued a partial Decision, which required Italy to amend certain provisions of the Bill as to which the

Commission had already come to the conclusion that they were not compatible with the common market.

Italy complied with this Decision. However, when the Bill became law as Statute No 1101 of 1 December 1971, it included, in Article 20, a provision which had not appeared in the Bill sent to the Commission, and which had been added without the Commission being informed. This provision granted to textile undertakings, for a period of three years, a reduction from 15 to 10 % in the rate of contributions payable in respect of family allowances. This reduction was at the time estimated to be equivalent to 0.8 % of the industry's turnover. On 25 July 1973 the Commission, in purported pursuance of Article 93 (2), issued a Decision requiring the Italian Republic to 'abolish the temporary and partial reduction of social charges pertaining to family allowances provided for in Article 20' (OJ L 254 of 11. 9. 1973, p. 14). It is that Decision which the Italian Republic now asks the Court to declare void under Articles 173 and 174 of the Treaty.

My Lords, there can be no doubt that, if the relief afforded to the Italian textile industry by Article 20 was an aid within the meaning of that term in Articles 92 and 93 (which the Italian Republic disputes) it was introduced in contravention of the prohibition in Article 93 (3), so that, if I am right in the views I have expressed, the Commission's proper course was to proceed under Article 169 and it had no power to act by way of decision under Article 93 (2).

Your Lordships will remember that I put this point to Counsel for the Commission at the hearing. His answer to it was in essence that, in this case, the procedure under Article 93 (2) had already been initiated in relation to the Bill as a whole so that it seemed more appropriate to pursue that procedure to a decision on the question of substance whether the relief afforded by Article 20 was compatible with the common market rather than deal with the more formal question whether it had been validly introduced. He suggested that in this matter the Commission had a choice. My Lords, I do not think it did. In the first place no procedure under Article 93 (2) had ever been validly initiated in relation to the relief in question: in the circumstances it could not have been. Secondly, to adopt the view put forward on behalf of the Commission would involve accepting that a Member State may steal a march on the Commission: that (if I may change the metaphor) it can by-pass the requirements of Article 93 (3) and have the question of the compatibility of a new aid with the common market considered after its introduction. This means nothing less than placing a Member State which infringes Article 93 (3) in a more advantageous position than one which complies with it. To insist, on the other hand, upon the procedure under Article 169 being adopted in such a case means that the infringing Member State can be required to abolish the new aid on the simple ground that it was invalidly introduced and compelled, if it wishes to reintroduce it, to comply with Article 93 (3).

I am therefore of the opinion that the Decision of the Commission should be declared void. I reach this conclusion with less regret than I would otherwise have done in that it appears from the written answers given on behalf of the Italian Republic to certain questions that were asked by the Court — and indeed it was reiterated on its behalf at the hearing — that Article 20 ceased to have effect as from 1 January last. As from that date new rates of contributions to the Italian family allowances fund were introduced by statutory instrument, ranging from 3·5 % for certain agricultural employers to 7·5 % for the generality of industrial employers, with intermediate rates for certain other specified categories of employers. This instrument prescribed a special rate of

4·85 % for employers in the textile industry applicable until the expiry of the three-year period fixed by Article 20. It is of course for the Commission to consider whether in this new situation some fresh action on its part is called for.

Having regard to the conclusion I have reached, I can, I think, deal fairly shortly with the arguments actually put forward on behalf of the Italian Republic. These fall into two groups. The first is a group of three arguments of a formal character, the second a group of arguments designed to show that the relief in question was not an aid of the kind specified in Article 92 (1).

The first argument of a formal character is that the Commission's Decision should have been expressed so as to impose an obligation on Italy, but purported instead, by the form of its wording, to take direct effect in Italian law.

This is in my opinion misconceived. As I have already mentioned a decision taken by the Commission under Article 93 (2) may render Article 92 (1) directly effective as regards the aid or proposed aid to which it relates; and in any case, the Decision did, it seems to me, purport to impose an obligation on Italy. It provided, in Article 1, that the Italian Republic 'shall abolish ('sopprime' in the Italian text which alone is authentic) the temporary and partial reduction of social charges provided for in Article 20, and Article 2 stated 'This decision is addressed to the Italian Republic'. It was conceded by Counsel for the Italian Republic at the hearing that the present indicative could be used in Italian legislative parlance to impose an obligation.

The Decision, whilst overriding (if it had been valid) the provision of Italian law against which it was directed, could not of itself have repealed it: so it purported to require the Italian Republic to repeal it.

Secondly, the Italian Republic submits that the Decision is void because it did not fix a period of time within which it must be complied with, as required by the first subparagraph of Article 93 (2). My Lords, in my opinion, that requirement, by its very nature, can apply only to a decision ordering the abolition or alteration of an existing aid lawfully introduced. Since the relief in question here was not such an aid, but was, if an aid at all within Article 92 (1), one unlawfully introduced, it was under Community law invalid *ab initio,* and no question of a time limit for its abolition could arise.

I would add that in my opinion no question of fixing a time limit can arise in the case of a decision of the Commission precluding the introduction of a proposed new aid, or the adoption of a proposed alteration of an existing aid, duly notified under Article 93 (3).

The Italian Republic's third ground of attack was that the procedure under Article 93 (2) was not properly conducted. But it did not in its pleadings condescend to particulars about this.

In its written answers to the questions put by the Court, it did ask that the Commission should be ordered to produce the text of the comments submitted by the other Member States and by any other parties concerned. This request was repeated at the hearing, when, for the first time, it emerged that underlying it lay a doubt whether certain Italian trade associations concerned had been consulted. It was thereupon asserted on behalf of the Commission that they had been. My Lords, be that as it may, I think it clear that, under the Rules of Procedure of this Court, an application by a party for the production of documents by another party should be made in the former's pleadings and cannot be made after the close of pleadings. It might exceptionally be made in answer to questions put by the Court, but then only if related to those questions, which was not the case here.

The remaining arguments put forward on behalf of the Italian Republic go to the merits of the Commission's Decision.

In the first place, it is said on Italy's behalf that the reason for the enactment of Article 20 was that the Italian textile industry had been placed at an unfair disadvantage by the incidence of social security charges. These did not take into account that industry's peculiarities, in particular its high proportion of female employees. The effect was that the industry's social security contributions far exceeded in amount the benefits receivable by its employees. The purpose of Article 20 was to reduce the imbalance between the burden thus suffered by the textile industry as compared with other sectors of Italian industry.

On that two submissions were founded.

The first was that Article 20 constituted an amendment to the Italian fiscal system which experience had shown to be called for. As such it was outside the scope of Articles 92 to 94 of the Treaty and belonged to the field covered by Articles 95 to 99, which deal with tax provisions. The argument was that apart from those provisions Member States are free to organize their fiscal systems as they choose. Of course, and Italy concedes this, an aid is none the less an aid because it takes the form of a relief from a fiscal burden. That is clear from the very terms of Article 92 (1), which refers to 'any aid granted by a Member State or through State resources in any form whatsoever' and is well illustrated by Case 70/72 to which I have already referred. Italy's submission is that a distinction must be drawn between a selective measure of exemption or relief from this or that fiscal burden and a measure designed to complete and form part of the general fiscal system of a Member State.

Secondly, Italy submits that Article 20 fell outside the scope of Article 92 on the ground that it did not, in the words of Article 92 (1), 'favour certain undertakings or the production of certain goods'. It did not favour the textile industry, but partially removed a special handicap from which that industry suffered, and thereby partially restored fair conditions of competition.

My Lords, as the Commission has pointed out, many industries in many of the Member States are subject to special handicaps of one kind or another. If measures taken to meet those handicaps were not to be regarded as aids, Article 92 would soon be a dead letter. A general reform of the social security system in a Member State, with the incidental effect of reducing the rate of employers' contributions, might as such be outside the scope of that Article. But the measure in issue here was not, and was not part of, such a reform. It was designed to meet the special case of a particular industry. It was enacted for a limited period of three years as part of a statute for the 'restructuring, reorganization and conversion' of that industry. Nor was it based on any general criterion related to the proportion of female workers in different industries. It was stated at the hearing, on behalf of Italy, that other industries, in particular the electronics industry, also have a high proportion of female workers: but no corresponding provision has been made for them. The selectiveness of the measure in my opinion shows of itself that it was, and was intended to be, an aid.

In its Reply Italy added a new argument: that the reduction in contributions relating to family allowances did not, in the present case, constitute an 'aid granted by a Member State or through State resources' within Article 92 (1), because the cost was transferred to the unemployment insurance fund, to which only employers contribute. But surely, my Lords, the expression 'State resources' in Article 92 (1) covers all public funds, whatever their source and whatever their destination.

Finally Italy attacks the Decision of the Commission on the ground that it failed adequately to establish that the measure in question, assuming it to be an 'laid' within the meaning of Article 92 (1), did 'affect trade between Member States'

and did 'distort or threaten to distort competition'.

As to this the Commission's Decision recited that 'the aid is such as to affect competition and trade directly, because it has a direct effect on manufacturing costs and, consequently, on the competitiveness of the undertakings', and that 'the very strong competition and the large volume of trade in textiles within the Community, as well as the difficulties of adaptation now facing the whole of the Community textile industry, are factors which do not allow aid of this kind to be tolerated'.

Italy's contention is that, in a case such as this, it is not enough for the Commission to consider the nature of an aid and its possible effects in the abstract. The Commission must find on actual evidence that there is a real, specific interference with competition in trade between Member States.

My Lords, I think that the Commission's Decision was adequately founded. One is here in a field where the difficulties of positive proof must often be insurmountable. Once it is clear that the natural consequence of the grant of an aid to an industry in a Member State must be to increase that industry's competitiveness *vis-à-vis* its competitors in other Member States the inference can, in my opinion, properly be drawn that the aid does (or would if introduced) distort competition and affect trade between Member States.

In those circumstances I am of the opinion that, whilst the Decision of the Commission should be declared void, there should be no order as to the costs of this action.