to a customs duty on imports, when such duty is intended exclusively to support activities which specifically benefit the taxed domestic product.

Lecourt Monaco Pescatore

Donner Kutscher Ó Dálaigh Sørensen

Delivered in open court in Luxembourg on 19 June 1973.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 7 MAY 1973 [1]

Mr President,
Members of the Court,

By law dated 13 June 1935, there was founded in Italy the Ente Nazionale per la Cellulosa e per la Carta (abbreviated to: ENCC). This is a Corporation under public law consisting of producers of paper and cellulose as well as undertakings using cellulose, and it has legal status. Its objects might in essence be described as: promoting the development of cellulose production in Italy, facilitating the production and use of national raw materials for the production of cellulose; organizing the production and sale of paper. As means of achieving these objects there exist: the grant of subsidies to the national press, the grant of subsidies for the export of newsprint to third countries, the purchase of paper in foreign countries, research in the fields of forestry and paper as well as the grant of aid in afforestation. The activities of the ENCC are financed by a government charge. This is levied pursuant to a law of 13 June 1940 and a law of 28 March 1956 — disregarding some exceptions of no interest for the present purpose — on cellulose paper and cardboard arising from national production and the importation of such products. It is specifically provided that the producers and importers are entitled to obtain a contribution of part of this levy from their customers.

This situation is likewise of importance to the plaintiff in the national proceedings. He acquired from the defendants a quantity of eggs which were delivered in packing material (cardboard and boxes) that had been imported from the Federal Republic of

1 — Translated from the German.

Germany. In respect thereof there was imposed the abovementioned charge to ENCC amounting to 1·75 % of the value of the packaging material and evidently this was duly paid by the plaintiff.

For a variety of reasons rooted in Community law, the plaintiff considers the assessment of this charge to be unlawful. He considers that such a charge offends against Article 13 of the EEC Treaty directly applicable since the end of the transitional period, i.e. the prohibition of the levy of customs duties and charges having an effect equivalent to customs duties. — He further considers that the charge cannot be reconciled with Article 92 of the EEC Treaty (the provision as to aid granted by Member States) the purpose being to finance an activity encouraging the development of the Italian cellulose and paper production and thus causing distortion of competition. He further maintains that the import restrictions connected with the charge offend against Article 30 *et seq.* of the EEC Treaty, i. e. the prohibition against quantitative restrictions on import and all measures having equivalent effect. Finally, he regards the collection of the charge on imports as an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty, since the application of the proceeds of the levy tends to strengthen the Italian paper industry on the market.

For that reason he addressed himself to the Pretore of Conegliano and applied for the issue of an 'order to pay' against his supplier in order thus to achieve *inter alia* repayment of the charge that had been passed on to him.

As regards the arguments derived from Community law, the Pretore of Conegliano, acceding to a suggestion by the plaintiff and even before hearing the other side, adjourned the case and by Decision dated 20 November 1972 pursuant to Article 177 of the EEC Treaty referred the following questions for a preliminary ruling:

1. Is the provision of Article 92 (1) of the Treaty, prohibiting the granting of any aid through financing introduced in such a way that it distorts competition within the common market, a rule directly applicable in the legal systems of Member States, giving rise to personal rights for individuals which the national courts must safeguard?
2. If the reply to question 1 is in the affirmative, what is the initial date on which the abovementioned personal rights came into being (i. e. did they come into being on the date of the entry into force of the Treaty of Rome or as from 31 December 1969, which date marks the end of the transitional period)?
3. Does the levying of a tax (or a financial charge) collected on the basis of a percentage calculated in relation to the value of the product imported from other Member States constitute an infringement of Article 13 (2) of the Treaty, or any other rule of the Treaty of Rome prohibiting any special taxation on imports coming from other Member States?
4. Are Articles 30 and 86 of the Treaty provisions which are directly applicable in the Member States?
5. Can the imposition on imported products coming from other Member States of a charge intended to finance the activity of a body governed by public law other than the State constitute an infringement of Article 30 and Article 86, first paragraph, of the Treaty?

On these questions there have been written and oral arguments on the part of the plaintiff in the national proceedings, the Government of the Italian Republic and the Commission of the European Communities.

I now propose to examine what answers might be given.

In this connection we do not have to spend time on the fact that the reference

arises from proceedings for an order to pay and that even before hearing the other party, i. e. before the litigation before the national court concerning the problems that are before us, had been concluded. We have in the past repeatedly had to deal with such situations and as yet we have never had to conclude that the reference for a preliminary ruling was inadmissible (cf. Cases 18/71, Rec. 1971, p. 811, and 43/71, Rec. 1971, p. 1039). We ought to act in a similar manner now and this is so even though it must certainly be conceded in favour of the Italian Government that in the interest of an effective submission of questions it is as a rule better to give an opportunity to the defending party to make its comments in the national proceedings, before a reference is submitted to this Court.

1. On the first question

The first question of the Pretore of Conegliano concerns the provision as to aid in Article 92 of the EEC Treaty. In relation thereto he wishes to know whether Article 92 (1) constitutes a directly applicable provision which gives rise to personal rights of the individual. Since the question has been put in reference to the aid provision applicable to ENCC, i. e. in reference to a regime *already existing* at the time of coming into force of the EEC Treaty, one has to render the question more specific, by asking whether Article 92 contains directly applicable law in relation to such circumstances.

As you know, the Commission in the course of the proceedings was in favour of a negative answer to the question and the Italian Government likewise appears to tend towards this view. As against this, the plaintiff in the national proceedings argued the view that Article 92 (1), at any rate under certain conditions and at least since the expiry of the transitional period, was to be directly applicable by the national courts even in relation to aid provisions already existing at the time of coming into force of the Treaty.

This problem has to some extent already played a part in Case 9/70 (Rec. 1970, p. 856). In my opinion on that case, I argued at the time against direct applicability of Article 92, following in this respect the Commission's own view. I have to concede that arguments and deductions as they have been presented in the present case by the plaintiff in the national proceedings, were not argued at the time. I cannot, therefore, today make such easy work for myself as merely to refer to my point of view in case 9/70; it will have to be a case of the problem again being gone into in all its dimensions.

According to the constant decisions of the Court, provisions of Community law are directly applicable and confer subjective rights on individuals where obligations are defined with sufficient clarity and precision, where they are not subject to conditions and where they are complete in themselves and do not require any further implementing action (cf. in this connection the judgments in cases 6/64, Rec. 1964, p. 1253, and 9/70, Rec. 1970, p. 825).

If one applies this test to the aids provisions of Article 92 then one can certainly deduce good grounds from the total system created by Article 92 *et seq.* which argue against direct applicability.

It is noteworthy that the provisions of Article 92 are not an *unqualified* prohibition. Already in Article 92 (2) there are exceptions; a series of aids is there explicitly termed compatible with the Common Market. In this connection it is clear from the wording used ('exceptional occurences', 'compensation for the economic disadvantages caused by the division of Germany') that in so far as a considerable margin of discretion does exist, its exercise certainly cannot be left to the national Courts but rather that it ought to be implemented *in a uniform manner throughout the Community.*

Furthermore — and this is even more significant — in Article 92 (3) instances of aid are enumerated, which *may* be considered compatible with the Common Market. It is noteworthy in this connection that a reference to discretionary power and to the necessity of promulgating derived legislation can already be found in the introductory sentence to this paragraph. Besides, also clearly hinting at discretionary power are the different wordings used for the purpose of defining the different cases (e.g. the fact that under (b), there is talk of 'important projects of common European interest' or that under (c) there is talk of 'common interest'). Furthermore one must not overlook the fact that according to (d) aid (without being defined any further) may be considered compatible with the Common Market by Decision of the Council, from which it is rightly deduced that there is indeed an element of incompleteness about Article 92.

That already — as I believed until now — would suffice to deny to Article 92 direct applicability. In this connection one will recall the conclusions in preliminary reference 13/68 (Rec. 1968, p. 692), which due to a clearly recognizable margin of discretion and because of lack of precision denied direct applicability to certain Treaty provisions in the Chapter on elimination of quantitative restrictions.

This appraisal is further confirmed by weighty conclusions drawn from the following Treaty provisions. Thus one can clearly conclude from Article 23 that the Commission is entrusted with keeping under review existing systems of aid. There exists in this respect — as has already been pointed out in Judgment 6/64 — a special procedure involving the cooperation of Member States and of the interested parties. In the course of this procedure the Commission can suggest appropriate measures for adapting systems of aid. If the Commission arrives at the conclusion that certain aids are not compatible with the Treaty, then it gives a decision and lays down a period of time within which the system in question is to be abolished or altered. The law on aids in the Community therefore also requires an act of the Community executive and this precisely is a fact which in the light of the existing case law tends to exclude direct applicability.

It is further noteworthy that the Council in any event possesses the power in the event of 'exceptional circumstances' pursuant to Article 93 to decide that aid shall be considered compatible with the Common Market in derogation from the provisions of Article 92 or from the Regulations provided for in Article 94. Finally one might draw attention to Article 94 of the Treaty since this refers to regulations for the application af Articles 92 and 93. That too is doubtless a factor which points to a lack of completeness within the meaning of the existing case law and which argues against direct applicability of the aid provisions.

Now, the plaintiff in the national proceedings attempts to counter these weighty views with several arguments. He draws attention to the fact that Judgment 6/64 has, as regards Article 93 (3) i.e. as regards the introduction of new aids, decided in favour of direct applicability from which one ought to deduce that Article 92 did not in its *structure* exclude direct applicability. He furthermore believes that it is possible to deduce from Article 93 and other Treaty provisions an obligation upon Member States *to notify* existing aid schemes, and to attach certain consequences to non-compliance therewith. Finally, the fact that the transitional period has expired is in his view significant. In this connection, the plaintiff extracts from Article 8 (1) of the Treaty the principle that everything necessary for establishing the Common Market had to occur before the expiry of the transitional period and that consequently one also had to work towards the removal of aids that were not compatible with the Treaty. With the end of the transitional

period, the necessity ceased to exist specifically to order the removal of aids in a decision of the Commission; but rather, by analogy with the provision in Article 13 (concerning the removal of charges having an effect equivalent to customs duties) the prohibition of Article 92 (1) had become directly applicable as from that date.

Can these arguments — we now have to ask ourselves this question — carry the day against the views of the Commission and against the concept that has already been hinted at in Judgment 6/64, with reference to Article 92, that is the concept that Article 92 contained no law establishing rights of the individual which could be directly applied by the national courts of the Member States? Let me state my conclusion right at the outset; I cannot really see any possibility of following the plaintiff's arguments.

First of all, the plaintiff must allow me to say that his conclusions drawn from the findings in Judgment 6/64 in reference to Article 93 (3) go much too far. For it must not be overlooked that this provision only contains a provision for a bar in relation to new aids, to which alone the concept of subvention applies. On the other hand, this provision in no way justifies the conclusion that the *total system* of Article 92, which also envisages aids that are indeed compatible with the Common Market, is structurally suited to direct application.

It also seems to me unjustifiably daring to extract from Article 93 (1) (possibly in conjunction with the general Treaty provision of Article 5) an implicit obligation upon Member States to notify an existing system of aid and to attach to the non-performance of this obligation within an appropriate period the consequence that the prohibition in Article 92 (1) was directly applicable. Since Article 93 (3) expressly provides such a duty to notify, one would have to assume that had such a duty been intended in relating to existing aid, it would in this context have been expressly provided for. Also, it appears to me just as intolerable to tie to the expiry of such a period within which to notify (and nothing is said about how this period is to be measured) the consequence that aid is prohibited altogether, i.e. to take away from Article 92 part of its area of application, as it is to assume that thereafter the consideration of the relevant aid under all the provisions of Article 92 lies in the hands of the national Court. This can hardly be reconciled either with the principle of legal certainty or with the uniform application of law within the Community.

Finally, as regards the expiry of the transitional period and as regards the analogy with Article 13 of the EEC Treaty, of which the plaintiff expressed himself in favour, one must say the following: It is important to note that after the expiry of the transitional period the measures aimed at by Article 12 are prohibited without any more ado. Here, therefore, we were only dealing — as regards charges having an effect equivalent to customs duties — with the laying down of a programme for their abolition. The aid provisions on the other hand also contain a proviso in favour of *permissible* aid, which would require consideration by the Community organs. From the wording of these provisions it cannot make sense to assume that on expiry of the transitional period the powers of the Commission in this field ceased and that solely a prohibition similar to that in Article 13 remained in force. Furthermore, one may well, in relation to the plaintiff's argument which we are now dealing, argue that in Article 93 (3) (c) there was a specific reference — as regards aid granted to shipbuilding — to the expiry of the transitional period. This special limitation would not in fact make sense, if the abolition during the transitional period of all existing aid that was not compatible with the Treaty had in any event been intended.

I think, therefore, that the adoption of the plaintiff's skilful thesis (which in part

also refers to the quite different system of Article 85 of the EEC Treaty) is not justified; rather that one has to deny that Article 92 has any direct applicability. Judging the permissibility of the ENCC aid scheme cannot, therefore, be a matter for the national Court. It is the preserve of the Commission and it will therefore only emerge at the conclusion of the examination, undertaken as a result of the Decision of 15 September 1972 and possibly after the conclusion of legal proceedings, whether the prohibition of Article 92 does or does not take effect.

2. On the second question

Having regard to the reply given to the first question, there will be no need for me to go into the second question, i.e. to examine whether rights to be derived from Article 92 had already arisen at the time of the coming into force of the Treaty or only on the expiry of the transitional period; nor to consider the scope of this Regulation, that is to say whether it also brings the rules concerning ENCC within its ambit.

3. On the third question

In his third question the Pretore wishes to know whether the levy of a charge on the basis of the value of a product imported from another Member State constitutes an infringement of Article 13 (2) of the EEC Treaty or of some other Treaty provisions — obviously thinking in terms of Article 95.

In this connection one can first of all draw attention to the relevant case law.

As regards Article 13, one can deduce from this that charges having an effect equivalent to customs duties refer to financial duties which a product has to bear, consequent upon its crossing the frontier (Cases 24/68, Rec. 1969, p. 193, 2 and 3/69, Rec. 1969, p. 211) or *(vide* the judgment in Case 29/72) in cases in which charges specially affect imported goods. As against this, Article 13 does not bring within its ambit such charges as within the territory of the State concerned are equally imposed upon comparable domestic products or which are levied within the framework of a general internal charge (Case 24/68); this Regulation — as is stated in Judgment 29/72 — does not apply in relation to such charges as are imposed on similar national products, i.e. if it constitutes a general regime which systematically brings within its scope according to identical or at least comparable criteria, both imported and national products.

According to the decided cases, one must in relation to Article 95 realise that it prohibits discrimination against imported products in connection with the imposition of charges. Accordingly imported goods must not bear higher taxation than domestic products. From the case law, however, it is not a matter solely of a comparison of the scale applied but also of looking at the basis of taxation and at the method of assessment of the charges (cf. Cases 28/69, Rec. 1970, p. 187, 77/69, Rec. 1970, p. 237, and 54/71, Rec. 1971, p. 1107).

By means of these criteria the national Court will have to consider the charge in question and will be able to arrive at the necessary conclusions.

Beyond this however, I must, referring to some remarks made by the parties in regard to some special features attaching to the facts of this case make the following remarks:

As you know, the plaintiff in the national proceedings takes the view that Article 95 applies only to *purely fiscal* charges serving the general financing of State expenditure and that it does not bring within its ambit quasi-fiscal charges intended for providing for the expenditure of particular recipients; that since this was the case with charges for the benefit of ENCC, they were logically not to be judged under Article 95 but had to be termed charges having an effect equivalent to customs duties.

This thesis, which is based upon the system under Article 95 *et seq.* and upon

certain formulations to be found in the case law, is not new. In substance it has already been before the Court in Case 29/72, without however having been accepted by the Court. I myself did not at the time find these arguments convincing and now likewise I see no reason to depart from this view. In fact I think that there is no support for it in case law. I feel entitled to say this, since the judgment in Cases 2 and 3/62 (Rec. 1962, p. 867) (to which the plaintiff has drawn attention) not only speaks of *fiscal* measures but going further, speaks of charges which in *any way* bear more heavily on imported products than upon domestic products. In this connection it is also significant that in Judgment 31/67 (Rec. 1968, p. 351) there is a reference to charges which pursue *mainly* fiscal purposes.

Beyond this I consider it important — and the Commission in Case 29/72 did already draw attention to this fact — that placing upon Article 95 the interpretation pleaded by the plaintiff, would constitute a gap in the Treaty system which cannot have been intended by the Treaty's authors. I therefore consider that the application of Article 95 to the present case cannot be excluded because of the purpose of the charge (the financing of the activities of a corporation under public law).

It is then argued that in dealing with the charge before the Court, it is relevant that by means of it aid to national industries is financed. It followed that the burden imposed upon them by means of the paper and cellulose charge is in the final resort smaller or even non-existent and that for this reason the charge upon imported goods was caught by Article 95 or even Article 13 of the EEC Treaty. On this point the Commission did however stress that such a conclusion was permissible, only if the effect of such aid to national industries could be calculated in respect of *each unit of production.* If this was not possible — as is the case of the aid financed by means of the cellulose charge — then recourse to Articles 13 and 95 of the EEC Treaty could not arise. In my view one has to agree with this. It is a fact that in such circumstances a possible element of relief in favour of national industries can only be dealt with by means of the aid provisions of the Treaty.

Finally, the plaintiff also points out that Article 95 could only be applied in the case of an identical subject of taxation and by applying the same criteria in assessing the value of on the one hand the imported and on the other hand the national products. He argued that these factors were absent in the present case, since for the purpose of taxing the imported products, we only had regard to the crossing of the frontier, whilst for the purpose of internal taxation what mattered was the transfer of property. Furthermore, one had to have regard to the fact that the domestic charge was calculated on the basis of the amount shown in the invoice, whilst in the case of imported products, the objective value was relevant and that the import duty also applied to finished products of a higher value than the similarly taxed local raw materials. It was therefore claimed that because of lack of comparable factors, Article 95 was not applicable and that the charge consequently had to be regarded as one having an effect equivalent to customs duties. In reply to this argument one must however point out, first, that it was not argued that the national proceedings were concerned with a business dealing in which on importation the element of the transfer of property had been lacking and that for that reason a comparable subject of taxation within the country had not been available. On the other hand, one could well argue that the different method of levying the charges (a charge on unfinished products on the one hand and on raw materials on the other; a calculation of the charge according to the invoiced amount on the one hand and on the other hand on the basis of the value of the product) did not — if indeed there were any real

variations — preclude the possibility of comparison and a finding of possible discrimination against imported products. There was therefore no reason in the present case to fall back on the principles of the Judgment 39/72 (in which the lack comparability of tax criteria had played a role) and on these grounds to deny the applicability of Article 95.

From the point of view of Community law, this appears to be all that can be said within the ambit of the third question and in reference to the problems posed in the national proceedings. Thereafter the assumption lies close at hand — and one might at least lightly touch upon this; the precise conclusions will naturally have to be arrived at by the national Court — that the charges in dispute do not offend against Article 13 of the Treaty, but that under certain circumstances a discrimination under Article 95 might be said to exist.

4. On the fourth and fifth questions

The last two questions refer to Articles 30 and 86 of the EEC Treaty. In this connection the national Court wishes to know whether these are directly applicable provisions and whether the imposition of charges on imports intended to finance the activity of a corporation under public law constitutes an infringement of these provisions.

This does not in my opinion call for lengthy comments.

As regards the first question, i.e. the problem of direct applicability of these provisions, this obviously calls for an affirmative answer. As regards Article 30, one can point to the judgment in Case 13/68 (Rec. 1968, p. 679). It is probably the accepted view that this direct applicability has existed at least since the end of the transitional period (whether it already existed since the coming into force of the acceleration decisions, i.e. from 1 July 1968, might well, having regard to the arguments in the national proceedings, be left open). As regards Article 86, it suffices to draw attention to Article 88 of the Treaty and to Article 9 (3) of Regulation 17.

On the second question one can say — in this respect going along with the Commission — that it does not bring within its ambit cases in which imported goods and domestic products are taxed to the same extent (where therefore there is no element of special taxation on the importer and where one cannot find that there existed impediments on imports by administrative procedure. These principles have already been laid down by the Commission in its Directive of 22 December 1969 (OJ L 13, 19. 1. 1970, p. 29) on the abolition of measures which have an effect equivalent to quantitative restrictions. One must especially recall Article 2 of this Directive which reads: 'This Directive covers measures, other than those applicable equally to domestic or imported products, which hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production'. On the other hand one probably does not in the present context have to go into further matters put forward by the plaintiffs in the national proceedings (e.g. the factor that within the framework of this charges system, there existed rules concerning the compliance with special sizes, the marking of goods in order to ensure a particular use, the fact that a particular format and special packing are prescribed in cases of exemption from the charge and the fact that an administration practice on the part of ENCC is said to exist, which is of a kind tending to hinder imports.) I think I am right in saying that these details are only of importance in the case of cellulose and newsprint and not for products such as those that were the subject matter of the national proceedings. One might therefore leave open the question whether the practices cited are compatible with Articles 30 *et seq.*

As regards Article 86 of the Treaty, one ought at any rate to draw the attention of the national Court to the fact that its possible application can arise only in cases where it is possible to allege against an undertaking an abuse of a dominant position. This Regulation accordingly intervenes only in cases where an *undertaking* is responsible for certain measures. On the other hand, it does not come into play if the State orders the levy of charges in favour of an undertaking or a group of undertakings which are said to be in a dominant position.

In my view these remarks suffice in answering the last two questions. At the same time they will show that both the regulations mentioned are probably without importance in dealing with the national proceedings.

5. Summary

In the light of all this one might reply as follows to the questions submitted by the Pretore of Conegliano:

(a) Article 92 of the EEC Treaty does not constitute a provision directly applicable within the national legal systems of Member States giving rise to personal rights of the individual.

(b) Under Article 13 of the EEC Treaty, there are prohibited financial charges which are unilaterally imposed by Member States upon goods crossing frontiers. On the other hand, charges levied on importation do not come within the ambit of Article 13 if comparable domestic products are taxed in a similar manner, if such taxation occurs within the framework of a general internal tax which consistently applies according to comparable criteria to imported and domestic products alike. Article 95 prohibits taxation of imported products in excess of that imposed on comparable domestic products. Its application depends not only on a comparison of the rates of taxation but also on a comparison of the basis of taxation and the method of its collection.

(c) Articles 30 and 86 are directly applicable within the Member States; as regards Article 30 this is so at any rate from the end of the transitional period.

Article 30 applies only in cases of discrimination against imported products as compared with comparable national products, or if imports are hindered by an administrative procedure.

Article 86 applies only if an undertaking or a group of undertakings in a dominant position are responsible for a certain kind of conduct. It does not apply if the levy of a charge in favour of an undertaking or a group of undertakings has been ordered by State action.