or marketing at a higher rate than the similar domestic product the prohibition of Article 95 is infringed;

6. It is nevertheless for the national court within the framework of its own legal system to decide whether the whole of any internal taxation which is discriminatory within the meaning of Article 95 or only that part of it which exceeds the tax assessed on the domestic product is to be regarded as not payable.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 22 March 1977.

A. Van Houtte — Registrar

H. Kutscher — President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 10 FEBRUARY 1977

My Lords,

Of these two cases, one, Case 74/76, which I shall for convenience call 'the Italian case', comes to the Court by way of a reference for a preliminary ruling under Article 177 of the EEC Treaty by the Pretura of Milan; the other, Case 78/76, which I shall call 'the German case', comes to the Court by way of a reference for such a ruling by the Verwaltungsgericht of Frankfurt-am-Main.

Putting it very simply, both cases are about charges imposed by national law on imported goods and payable to bodies whose resources are used to promote certain sectors of the economy of the Member State concerned. Both cases raise questions relating to the interpretation of and interrelationship between the provisions of the EEC Treaty on aids granted by Member States (Articles 92 and 93), on internal taxation (Article 95), and, in the Italian case, on measures having equivalent effect to quantitative restrictions on imports (Article 30), and, in the German case, on charges having equivalent effect to customs duties (Articles 9 (1), 12 and 13 (2)). In addition the German case raises a question of interpretation of Article 177 itself.

I think it convenient to deal first with the German case.

The legislation there in question is the Absatzfondsgesetz of 26 June 1969 (BGBl. I S. 635) as amended on 5 August 1970 (BGBl. I S. 1177) and a Regulation made thereunder on 29 April 1970 (BGBl. I S. 443). Under this legislation there was set up a central Fund (Absatzförderungsfonds) for the promotion of German agriculture, the German food industries and German forestry. By virtue of Article 10 of the Absatzfondsgesetz the resources of the Fund consist in part of interest derived from assets managed by the Landwirtschaftliche Rentenbank, in part of grants from the Federal Government (which are said to be diminishing) and in part of contributions from those engaged in agriculture, the food industries and forestry. It apperars that these contributions are assessed both on domestic German products and on imported products but, in the case of the latter, only when they are processed. It also appears that the money thus raised is not spent by the Fund itself but is passed on to an agency created under paragraph 2 (2) of the Absatzfondsgesetz the 'centrale Marketing-Gesellschaft der deutschen Agrarwirtschaft mbH' (or 'CMA') which uses it for market research and advertising both in Germany and abroad. The products that benefit from these activities include those of the German food industries whether manufactured from home-produced or from imported raw materials.

In compliance with Article 93 (3) of the Treaty the Federal Government, on 11 March 1969, that is when the Absatzfondsgesetz was still in draft, informed the Commission of its plans to introduce it. The Commission did not object to the proposed legislation as being 'not compatible with the common market having regard to Article 92'. Thus, so far as regards Articles 92 and 93, that legislation entered into force lawfully. The Court has not been told whether the Commission was similarly informed in advance of the amendment made in August 1970, but since that amendment was a trivial one concerned only with the computation of the contributions payable by hatcheries, that question can for present purposes be ignored.

The plaintiffs in the proceedings before the Verwaltungsgericht, the Firma Steinike und Weinlig, import from Italy and from third countries citrus concentrates which they process at their factory into what are described by the Verwaltungsgericht as 'intermediate products intended for the soft drinks industry'. The plaintiffs sell these products exclusively on the German market. By a notice dated 20 August 1974, the plaintiffs were called upon to pay a contribution of DM 20 000 for the period 1 January 1970 to 30 September 1971. This demand was founded upon Article 10 (8) (e) of the Absatzfondsgesetz which rendered liable to contribution undertakings processing fruit and vegetables acquired in an unprocessed, processed, or semi-processed state, subject to an exception which is not here relevant. Your Lordships see that under that provision liability to contribution is dependent on the 'acquisition' and processing of the goods; importation as such is not mentioned.

It seems that, by an amendment of the Absatzfondsgesetz enacted in March 1972, products of a kind covered by the legislation but which do not grow naturally in the climatic conditions of Germany are exempted from contribution. Since, as is agreed between the parties, citrus fruit do not grow naturally in Germany, this means that the concentrates imported by the plaintiffs are no longer subject to contribution.

The plaintiffs, however, contend that, even before that amendment, the contribution they were required to pay was unlawful, both as a matter of German law — with that this Court is not concerned — and as a matter of

Community law. Hence their present action before the Verwaltungsgericht, in which the defendant is the Federal Republic of Germany, and in which they challenge the validity of the assessment made on them.

The first question referred to this Court by the Verwaltungsgericht is whether 'the procedural rules prescribed in Article 93 of the EEC Treaty preclude a national court from obtaining a preliminary ruling on Article 92 of the EEC Treaty and from subsequently deciding upon the application of that provision'. It is clear from the terms of the Order for Reference that the Verwaltungsgericht is in fact inviting the Court to reconsider the question whether Article 92 can have direct effect in the sense of conferring on private persons rights enforceable in the national Courts. The law as laid down in the Judgments of the Court in Cases 6/64 *Costa* v *ENEL* [1964] ECR, 585, 77/72 *Capolongo* v *Maya* [1973] ECR 611, and 120/73 *Lorenz* v *Germany* [1973] ECR 1471 is that, whilst the prohibition in Article 93 (3) on the introduction of a new aid, or the alteration of an existing one, without notification to and acquiescence by the Commission has direct effect in that sense, the provisions of Article 92 (1) can produce such an effect only 'where they have been put in concrete form by acts having general application provided for by Article 94 or by decisions in particular cases envisaged by Article 93 (2) ([1973] ECR at pp. 621-622). The Verwaltungsgericht expresses its misgivings at having possibly to accept the validity of legislation in its view contravening Article 92 of the EEC Treaty and it suggests that since the Court, in Case 166/73 *Rheinmühlen-Düsseldorf* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33, held that a national Court was free to make a reference to this Court notwithstanding the binding effect of national rules, the same should apply as regards the relationship between the Commission and a national Court.

My Lords, with all respect to the Verwaltungsgericht, I cannot agree. The reason why Article 92 has been held not to have direct effect is not procedural; it is that Article 92 does not impose a clear and unconditional prohibition on State aids. It imposes a prohibition tempered by the Commission's power to take economic, social and political considerations into account, and also by the powers given to the Council by Article 92 (3) (d) and by Article 93 (2). It is quite conceivable that an aid might be held by the Commission or the Council to be 'compatible with the common market' even though a national Court felt strongly that it contravened Article 92.

So, in my opinion, Your Lordships should not depart from the previous authorities on that matter. On behalf of the plaintiffs it was suggested that Your Lordships should depart from them to the extent of saying that, whilst Article 92 did not have direct effect so as to confer on private persons rights which they themselves could invoke in the national Courts, it did at least contain a body of rules which those Courts could enforce of their own motion. This seems to me an odd suggestion because it would involve in effect conferring on a national Court power to take on behalf of a litigant a point that he was precluded from taking himself. The fundamental objection to the suggestion is, however, that it would result in a transfer to the national Courts of powers and discretions vested by the Treaty in the Council and the Commission.

Reliance was also placed on behalf of the plaintiffs on Article 12 of Council Regulation (EEC) No 865/68 of 28 June 1968 (OJ L 153 of 1. 7. 1968). That Regulation established the common organization of the market in 'products processed from fruit and vegetables'. Those products are listed in Article 1 of the Regulation and include citrus fruit juices. Article 12 is in these terms:

'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.'

In my opinion, as I said in Case 31/74 *Galli* [1975] ECR 47 at p. 70, the fact that a provision in a Regulation is directly applicable (by virtue of Article 189) does not necessarily mean that it has direct effect: it can do so only in so far as it satisfies the familiar tests of being clear and unconditional and of requiring no further legislative action for its implementation. There are numerous Regulations of the Council conferring on the Commission powers the exercise of which may result in benefit to private persons, but which do not of themselves confer on those persons rights which they can enforce in the national Courts. Take for example a Regulation of the Council empowering the Commission to fix export refunds. It is only when the Commission has exercised that power that an exporter acquires the right to sue for a refund. Here it can hardly be said that Article 12 put the prohibition enshrined in Article 92 (1) ' in a concrete form'. All that it did and all that it was designed to do was to remove the bar placed by Article 42 of the Treaty on the application of Articles 92 to 94 to the production of and trade in the products covered by the Regulation. I observe, incidentally, that, in its preamble, the Regulation is expressed to have been adopted 'Having regard to the Treaty establishing the European Economic Community, and in particular Articles 42 and 43 thereof'. There is no mention there of Article 94.

It does not follow, of course, that national Courts are precluded from referring to this Court under Article 177 questions of interpretation of Article 92. It may well be necessary for such a Court to do so for instance where it is alleged before it that measures put into effect by a Member State without informing the Commission amounted to the grant of an aid to which Article 92 (1) applied so that their adoption was in breach of Article 93 (3): in such as case that Court may well need a ruling of this Court on the interpretation of Article 92 (1) in order to decide whether the measures in question are or are not aids within that provision. This is different from deciding whether the measures, if aids, are compatible with the common market. One can also imagine cases where a national Court would require such a ruling to help it to interpret some Community measure having direct effect, such as a Regulation made under Article 94, or to help it interpret some national measure, such as one adopted to comply with a decision of the Commission under Article 93 (2).

So I would answer the first question posed by the Verwaltungsgericht by declaring that the provisions of Article 93 do not preclude a national Court from referring to this Court a question of interpretation of Article 92 where that Court considers that a decision on the question is necessary to enable it to give judgment, but that such a Court has no jurisdiction to decide as to the application of that Article to measures put into effect by a Member State in compliance with Article 93 (3).

Next, the Verwaltungsgericht asks a series of questions, lettered from (b) to (e), as to the interpretation of Article 92. They are these:

'(b) Is the meaning of the expression "undertakings or the production of certain goods" in Article 92 of the EEC Treaty restricted to private businesses or does it also include non-profit-making institutions governed by public law?

(c) Is the concept "any aid granted *through* State resources" satisfied even if the State agency itself receives aid from the State or private undertakings?

(d) Is there aid in the sense of granting a gratuitous advantage if the recipient of aid is not a private undertaking but a State agency, and can there be said to be gratuitousness when the charge on the individual undertaking

is insignificant in relation to the total amount of contributions?

(e) Is competition distorted and trade between Member States affected if the market research and advertising carried on by the State agency in its own country and abroad is also carried on by similar institutions of other Community countries?'

Manifestly those questions are framed on the footing that the Verwaltungsgericht has in this case jurisdiction to decide as to the application of Article 92 to the aids introduced by the Absatzfondsgesetz. If Your Lordships agree with me that the Verwaltungsgericht does not have such jurisdiction, those questions need not be answered, for, although it is well established that, under Article 177, the national Court concerned is the judge of the relevance of questions to be referred to this Court, it is equally well established that, where the answer given by this Court to one of a number of questions so referred renders the answers to others irrelevant, the Court need not answer the latter — see for instance *Capolongo* v *Maya* (already cited, paragraph 15 of the Judgment), the *Galli* case (already cited, paragraph 36 of the Judgment) and, most recently, Case 47/76 *De Norre* v *Concordia* (not yet reported, paragraphs 38 and 39 of the Judgment). I will therefore confine myself, so far as this series of questions is concerned, to three brief observations.

The first is that the position of public undertakings so far as Articles 92 to 94 are concerned is chiefly governed by Article 90. Subject to that, Article 92 draws no distinction between public undertakings and private undertakings, or between profit-making and non-profit-making undertakings, or between the goods produced by them respectively.

Secondly, it is in my opinion a mistake to regard the Fund in this case or the CMA as being the recipient of the relevant aid. The word 'aid' in Article 92 has a much wider meaning than 'subsidy'. It includes assistance 'in any form whatsoever... favouring certain undertakings or the production of certain goods'. Here the aid consists in the market research and advertising activities of the CMA, and the undertakings thereby favoured are those engaged in agriculture, the food industries and forestry in Germany which benefit from those activities. The contributions of those undertakings and of the Federal Government to the Fund are 'resources' out of which the aid is financed.

Thirdly, in the absence at all events of an exercise by the Council of its powers under Article 92 (3) (d) or 93 (2), the compatibility of an aid with the common market cannot depend upon whether there are similar aids in other Member States.

The last two questions asked by the Verwaltungsgericht are as follows:

'(f) If the charge is not levied on the imported goods themselves but on their processing, is it a charge having equivalent effect under Articles 9 (1), 12 and 13 (2) of the EEC Treaty?

(g) Does the imposition of taxation on "the products of other Member States" not when they are imported but only when they are processed amount to discrimination within the meaning of Article 95 of the EEC Treaty?'

In answering those questions it is, I think, right to have in mind certain general propositions that have been established by decisions of this Court.

The first is that the concept of ' a charge having an effect equivalent to a customs duty' (in Articles 9 (1), 12 and 13 (2)) and the concept of 'internal taxation' in Article 95 are mutually exclusive: the same impost cannot be both such a charge and such taxation — see for instance Cases 10/65 *Deutschmann* v *Germany* [1965] 1 ECR 469, 57/65 *Lütticke* v *Hauptzollamt Saarlouis* [1966] ECR 205, 27/67 *Fink-Frucht* v

Hauptzollamt München [1968] ECR 223, and 94/74 *IGAV* v *ENCC* [1975] ECR 699.

The essential difference between a charge having an effect equivalent to a customs duty and an internal tax is that the former is imposed exclusively on imported products whereas the latter is imposed on both imported and domestic products. Exceptionally, however, it may be found that what is, by that test, at first sight an internal tax is in reality a charge having an effect equivalent to a customs duty. This will be so where the proceeds of the tax are intended to be used exclusively to support activities which specifically benefit the taxed domestic products — see *Capolongo* v *Maya* and *IGAV* v *ENCC* (both already cited). As was explained by Mr Advocate-General Trabucchi in *IGAV* v *ENCC* ([1975] ECR at p. 718), in such a case the incidence of the tax on the domestic product is offset by the specific benefit that it derives from it, so that that product is only in appearance subject to the tax. Economically, the burden of the tax falls to all intents and purposes on the imported product alone.

Thus the first step in the present case must be to classify the contributions levied under the Absatzfondsgesetz into the category either of charges having an effect equivalent to customs duties or into the category of internal taxation. It is of course for the Verwaltungsgericht, and not for this Court, to do that, but if, as I understand to be the case, the Absatzfondsgesetz imposes those contributions on both imported and domestic products and if the market research and advertising activities that the contributions go to finance benefit the products of the German food industry whether manufactured from domestic or from imported raw materials, I do not think that they could be classified as charges having an effect equivalent to a customs duty.

As I understand the Order for Reference the Verwaltungsgericht's hesitation on this point is due fundamentally to the fact that no citrus fruit is grown in Germany so that 'it is not practicable in this case to group together on a systematic basis domestic and imported products in accordance with the same criteria'. I think that the answer to this is that, as is made clear by the Judgment of this Court in the *Fink-Frucht* case (already cited), Article 95 envisages three possibilities. The first possibility, which is envisaged by the first paragraph of that Article, is that there should be domestic products 'similar' to the 'products of other Member States'. In that case Article 95 forbids the imposition on the latter of taxation in excess of that imposed on the former. The second possibility, envisaged by the second paragraph of the Article, is that there should be in the Member State concerned 'other products' competing with the 'products of other Member States'. In such a case the Article forbids the imposition on the latter of 'taxation of such a nature as to afford indirect protection to' the former. The third possiblity is that there should be in the Member State concerned no product either similar to or competing with an imported product. In that case Article 95 does not forbid the imposition of a tax on the imported product where the purpose of such tax 'is to put every kind of product, whatever its origin, in a comparable fiscal situation in the territory of the State imposing the tax' ([1968] ECR at p. 231). Thus, in this context, it is only where a tax is imposed specifically on an imported product of which it cannot be said either that it is similar to or that it competes with a domestic product that the concept of a 'charge having an effect equivalent to a customs duty' may become relevant — consider Cases 2 and 3/69 *Diamantarbeiders* v *Brachfeld* [1969] ECR 211. In the present case I should have thought, though it is of course for the Verwaltungsgericht to decide the matter, that there were products derived from fruit grown in Germany, e.g. apple juice, which, if not 'similar' to citrus fruit juices, at least competed with

them, so that Article 95 applied on that score and that it was not even necessary to consider the third possibility suggested by the Judgment in the *Fink-Frucht* case. I observe, incidentally, that, in Case 34/62 *Germany* v *Commission* [1963] ECR 131, the Court, albeit in relation to other provisions of the Treaty, accepted that oranges, apples and pears could be regarded as competing products.

So I come back to questions (f) and (g) asked by the Verwaltungsgericht. These are really parallel, one being in point if the contributions here in question are 'charges having an effect equivalent to customs duties', the other being in point if those contributions are 'internal taxation'. In either case the Verwaltungsgericht asks whether the relevant provisions of the Treaty can apply having regard to the circumstance that the contributions are levied, not when the goods are imported, but when they are processed.

To that the answer, in my opinion, must be 'Yes'. In either case the provisions of the Treaty look, not to the stage at which an impost is levied, but to its effect (consider *IGAV* v *ENCC*, paragraph 1 of the Judgment).

I turn to the Italian case.

The national legislation in question there is that which was before the Court in *Capolongo* v *Maya* and in *IGAV* v *ENCC*, i.e. the legislation concerning the ENCC — the 'Ente nazionale per la cellulosa e per la carta'.

Your Lordships will remember that the ENCC was set up by statute No 1453 of 13 June 1935, and that another statute, No 868 of 13 June 1940, amended by statute No 168 of 28 March 1956, provided for contributions to be levied by the ENCC to finance its activities.

Those activities were and are various, but, having regard to the terms of the Order for Reference made by the Pretura of Milan, and to the contentions of the parties, the only one with which the Court is concerned in the present case is the system under which the ENCC subsidizes purchases of newsprint by the Italian press. It seems that, in fact, those subsidies absorb the greater part of the ENCC's resources — 70 % we were told.

As to that system, one must distinguish between two periods. The first is the period up to 1 January 1974. During that period the system enabled newspaper publishers to buy newsprint manufactured in Italy, or imported by the ENCC itself, at below market price, the difference being made up by the subsidy ('integrazione di prezzo') granted by the ENCC. After 1 January 1974, as a result of action taken by the Commission under Articles 92 and 93, the subsidy was extended to newsprint imported into Italy otherwise than by the ENCC. The element of discrimination in the system was thereby ended.

As regards the details of the system of contributions by which the ENCC is financed one must distinguish between the period before and that after June 1976. Before then the position was governed by a ministerial decree dated 3 July 1940. In June 1976 that decree was replaced by one dated 26 June 1976. There was much discussion, particularly at the hearing, of the effects of this change in the legislation. That discussion, which was largely provoked by a question put to the Commission by the Court, was enlightening. But, since none of the events in the actual case before the Pretura of Milan occurred as late as 1976, I propose to confine my attention to the position as it stood before the change.

By the combined effect of the statutes of 1940 and 1956 and of the decree of 1940, contributions were payable at the rate of 3 % by both domestic producers and importers of paper and cardboard and of products manufactured from them, e.g.

stationery, wallpaper, cardboard boxes and the like — but not newsprint: this was expressly exempt. Anyone who had paid the contribution was entitled to recoup himself to the extent of 2·5 % from anyone purchasing the relevant products from him. Where paper or cardboard as such was sold by an Italian mill or imported into Italy, contribution was payable on 100 % of its value. Any product manufactured from it was then exempt. Where however paper or cardboard made by an Italian integrated undertaking was not sold as such but was used by that undertaking to manufacture a more sophisticated product which it sold, or where such a product was imported, contribution was prima facie payable on 70 % of the value of that product, this being deemed to represent the value of its paper or cardboard content. I say 'prima facie' because there was power in Article 9 of the decree of 1940 for the responsible Minister, on a proposal from the ENCC, to reduce the percentage in any case where it was shown that the paper or cardboard content of a particular product represented less than 70 % of its value.

It might seem at first sight that that system involved no discrimination as between domestic Italian Products and imported products. There is however a dispute as to whether it did or did not, having regard to the methods of assessment of domestic and imported products respectively. I think that it will probably be more convenient if I defer entering into more detail about that until I come to deal with those of the questions referred to the Court by the Pretore that relate to Article 95. To complete, however, the outline of the relevant legislation I should mention that we were told that, apart from the contributions payable to the ENCC, there is in Italy a tax on cellulose, both home-produced and imported. This of course is borne by Italian paper-mills, but does not affect imported paper or cardboard, or imported paper or cardboard products.

Compared with the relevant legislation, the facts in the Italian case are simple. In August 1971, Iannelli & Volpi S.p.a., the Plaintiff in the proceedings before the Pretura, imported from France two rolls of wallpaper on which it paid to the ENCC a contribution of Lit 9 433, representing 3 % of 70 % of the value of the goods. In December 1974, the plaintiff sold the wallpaper to a firm trading under the name of Paolo Meroni, which is the defendant in those proceedings. The plaintiff claimed from the defendant, in addition to the price of the goods, the sum of Lit 7 875 representing the 2·5 % recoverable from a purchaser under the ENCC legislation. The defendant refused to pay this sum, contending that the claim was incompatible with Community law. On 23 April 1976, the plaintiff commenced the proceedings before the Pretura. On 7 May 1976 the Pretore ordered that the ENCC be summoned to intervene in the proceedings. On 25 June 1976, having heard the ENCC as well as the plaintiff and the defendant, he made the Order for Reference.

There is no suggestion in this case that Article 92 has any direct effect or that the contributions payable to the ENCC are charges having an effect equivalent to customs duties. In other words, on those points the effect of this Court's previous decisions is accepted.

The first argument put forward on behalf of the defendant is, in a nutshell, that the aids granted to the Italian press by the ENCC constituted, before the system was altered in 1974, measures having an effect equivalent to quantitative restrictions on imports from other Member States, because they discouraged imports of newsprint from those States. Those aids were therefore unlawful by virtue of Article 30 of the Treaty and so the levying of contributions to finance them was also unlawful. The plaintiff's correct remedy was accordingly to sue the ENCC for restitution and not to claim against the defendant under the ENCC legislation.

The first three questions referred to the Court by the Pretore reflect that argument. In the formulation of the first of those questions, the circumstance was overlooked that newsprint imported by th ENCC itself carried the subsidy, but this does not, I think, matter. The questions are these:

'(1) Does a system of subsidies involving a public body and based on national regulations which (with reference to the period in question) enable domestic publishers to obtain at reduced prices only newsprint produced by national papermills, whilst newsprint imported from Member States can be obtained only at the full price since it does not benefit from any subsidy, constitute a measure having equivalent effect to a quantitative restriction on imports prohibited by Articles 30 *et seq.* of the EEC Treaty?

(2) Does the fact that the abovementioned system of subsidies may be illegal within the meaning of Article 30 or another rule of the EEC Treaty (in particular Directive No 70/50/EEC of 22 December 1969), taking into account that it is financed by levies similar to taxes imposed upon paper products imported from the other Member States, in its turn render such levies illegal in so far as they are imposed upon imported Community products – since the revenue concerned which is gathered is intended to finance an activity contrary to the provisions of the Treaty and so illegal?

(3) If an affirmative answer is given to the questions set out above, are the rules in Articles 30 *et seq.* of the EEC Treaty directly applicable and do they create an individual right for the importers of Community products to request the reimbursement of levies paid (further, from what date can such right be enforced)?'

My opinion, shortly expressed, is that the first questions should be answered in the negative, so that the second and the third do not arise.

To my mind there is, if anything, greater objection to holding that Article 30 may apply to a system of aids than there is to holding that Article 92 may have direct effect. Since the end of the transitional period, Article 30 has, subject only to the limited exceptions provided for by Article 36, imposed an absolute and unconditional prohibition on measures having an effect equivalent to quantitative restrictions on imports between Member States. There is nothing in that Article resembling the powers and discretions conferred on the Commission and the Council by Articles 92 and 93, nor anything resembling the possibility afforded by Article 93 (2) for a Member State to alter an aid instead of abolishing it. So, to hold that Article 30 applied in this field would be in effect to obliterate Articles 92 and 93, at all events as respects aids taking the form of a subsidy to domestic products. It would be to substitute in that field a blunt instrument for the precision instrument that the authors of the Treaty intended should apply there.

The Commission, whilst submitting that the first question should indeed be answered in the negative, suggested that circumstances could arise in which there might be segregated from a system of aids a feature of it which could be identified as a measure having an effect equivalent to a quantitative restriction on imports, and that Article 30, whilst not applying to the system of aids as a whole, might operate to invalidate that feature. But, in order to illustrate that suggestion, the Commission referred to the fact that, in this very case, Italy had removed the discriminatory feature of its system of aids by extending them to newsprint imported from other Member States by others than the ENCC. That result, however, was achieved through the exercise by the Commission of its powers under Articles 92 and 93 and is precisely the kind of result that the machinery of those Articles was designed to achieve.

In my opinion the Commission was better advised when, in Article 2 (2) of its Directive of 22 December 1969 (70/50/EEC) 'on the abolition of measures which have an effect equivalent to quantitative restrictions on imports, etc.' (to which reference is parenthetically made in the Pretore's second question), it made it clear that that provision did not apply to aids.

So, in my opinion, not only should Your Lordships' answer to the Pretore's first question be in the negative, but that negative should be unqualified.

I should perhaps add that I have not overlooked the dictum of this Court in its Judgment in *IGAV* v *ENCC* (paragraph 30) to the effect that the system of aids administered by the ENCC might be incompatible with Article 30. But that dictum was manifestly obiter and was, I think, no more than an expression of the view that the question might fall to be considered in a future case. It may well be indeed that it was that dictum which prompted the defendant to raise the question in this case.

The second argument put forward on behalf of the defendant before the Pretore was similar to the first, but based on Article 95 of the Treaty instead of Article 30.

There is not the same objection to the application of Article 95 in a case such as this as there is to the application of Article 30, because Article 95, by its nature, cannot apply to the aids themselves, which are the exclusive subject matter of Articles 92 to 94. Article 95 can apply, if at all, only to the way in which the resources to finance those aids are raised. In terms of the present case, Article 95 cannot apply to the subsidies paid by the ENCC to the Italian press; it can apply, if at all, only to the contributions levied by the ENCC to finance those subsidies. As was recognized and indeed asserted by the Court in Case 47/69 *France* v *Commission* [1970] 1 ECR 487 (see in particular paragraph 14 of the Judgment) some overlap between Articles 92 and 93 on the one hand and Article 95 on the other is inevitable. There are, I think, three possible situations:

(1) an aid may be financed out of general taxation, so that there is no nexus between the aid and the way in which it is financed — in that case only Articles 92 and 93 can apply;
(2) an aid may be financed by means of a tax which does not itself offend against Article 95 but the incidence of which is such as to render the aid 'incompatible with the common market' — in that case too only Articles 92 and 93 can apply (this was the actual situation in *France* v *Commission);*
(3) an aid may be financed by means of a tax which considered independently of the aid, offends against Article 95 — such a case is within the ambit not only of Articles 92 and 93, but also, as regards the tax, within that of Article 95. (To hold otherwise would be to hold that a tax could be removed from the ambit of Article 95 by the circumstance that its proceeds were destined to finance an aid, although it would be within that ambit if they were destined for any other purpose.)

So I turn to the questions asked by the Pretore in relation to Article 95. The first, which presents no difficulty, is this:

'(4) ... does the prohibition against tax discrimination established by Article 95 of the Treaty also cover special levies imposed upon both domestic goods and imported goods the revenue from which is intended for minor public bodies other than the State?'

To that the answer must in my opinion be 'Yes'. Indeed the Court in *IGAV* v *ENCC* gave an affirmative answer to a similar question in relation to taxes having an effect equivalent to customs

duties (see paragraph 1 of the Judgment) and there is no conceivable reason for giving a different answer in the case of internal taxation.

The Pretore's next question is:

'Does discrimination prohibited by Article 95 of the EEC Treaty obtain if the abovementioned levies upon domestic products (in the present case, wallpaper), are imposed on the basis of the price of paper regarded solely as a raw material whilst the basis for the imposition of the levy upon the corresponding imported product is derived from its overall value; by the overall value of the imported product is understood the cost of the finished product shown on the invoice (composed therefore of the cost of the original raw material together with the added value) increased by the 'expense of loading, shipping, commission, insurance, transport etc. as far as the frontier, even if the said expenses are not included in whole or in part in the invoice"?'

I mentioned earlier that there was a dispute between the parties as to whether the system under which contributions were at the material time levied by the ENCC discriminated against imports, having regard to the methods of assessment of domestic and imported goods respectively.

It is apparently common ground that there was no discrimination in the case of imports of paper and cardboard as such. This may be right, even though different provisions of the decree of 1940 applied to the valuation of imports on the one hand and to the valuation of domestic products on the other. In the case of domestic products the relevant provisions were contained in Article 3 whereas in the case of imports they were in Article 7, and they were differently worded. (It is part of the latter Article that is quoted by the Pretore in his question.) We were told, however, by the Commission among others, that in fact the effect of those provisions was the same. I need not pursue that matter, not only because it is one of interpretation of Italian legislation, but also because we are not concerned in this case with an importation of paper or of cardboard, but with an importation of a more sophisticated product, wallpaper.

The defendant's complaint is that an Italian manufacturer of wallpaper (assuming that his undertaking was not integrated, so that he did not manufacture wallpaper from paper made in his own mill) suffered contribution only on the value of the paper that he bought, whereas an importer of wallpaper suffered contribution on 70 % of the value of the wallpaper itself. This might result in the imported wallpaper suffering a greater burden than the domestic product.

To this, as I understand it, the ENCC offered two answers. The first was that the importer of wallpaper should be compared, not with the Italian manufacturer who made wallpaper from paper he had bought, but with the integrated Italian manufacturer who also paid contribution on 70 % of the value of his finished product. The second was that, if an importer considered that 70 % was too high a percentage to attribute to the value of the paper in the imported product, it was open to him to make an application for a reduction under Article 9.

To that the defendant (backed up by the Commission) retorted, again as I understand it, that to compare wallpaper produced by a non-integrated French undertaking with wallpaper made by an integrated Italian undertaking was not to compare like with like. As to Article 9, the defendant and the Commission said, first, that that Article did not apply to imports and, secondly, that, if it did, it offended against Article 95 because it left the rights conferred by that Article on private persons at the mercy of a Minister's discretion.

My Lords, I think that the less I say about Article 9 the better, first, because it is common ground that no application under that Article was made in the present case, secondly, because the Pretore asks no question about it, and thirdly because the compatibility of that Article with Article 95 of the Treaty — or rather the compatibility of its successor, Article 5 of the decree of 26 June 1976, with Article 95 — is, as we were told by the Commission at the hearing, still the subject of discussion between the Commission and the Italian Government within the framework of Article 169 of the Treaty. I will say only, in fairness to the ENCC, that it produced evidence of the application of Article 9 to imported goods (namely various sorts of waxed cardboard milk containers), in 1965, 1966 and 1968 (Annexes 4, 5 and 6 to the ENCC's Observations).

We do not in fact know whether the wallpaper imported by the plaintiff was made by an integrated or by a non-integrated French manufacturer. Indeed we do not even know for certain that it was made in France: it could have been imported into France and thence re-exported to Italy. I think therefore that the Pretore's question calls for a cautious answer.

Let me assume, however, that that wallpaper was made in France. It seems to me clear that, if it was made there by an integrated manufacturer, there was (leaving aside any question as to Article 9) no element of discrimination in its being assessed on the same basis as if it had been made by such a manufacturer in Italy. It is only if it was made in France by a non-integrated manufacturer that any possibility of discrimination arises.

As to that, it is established by a number of decisions of this Court that Article 95 requires, not only that a Member State should not impose on the products of other Member States taxation at higher rates than it imposes on its domestic products, but that the basis on which tax is assessed on the products of other Member States should not differ from the basis on which it is assessed on the corresponding domestic products in such a way as to create a possibility of the former bearing a higher tax: see for instance Cases 77/69 *Commission* v *Belgium* [1970] 1 ECR 237, 54/72 *FOR* v *VKS* [1973] 1 ECR 193, 45/75 *Rewe* v *Hauptzollamt Landau* [1976] ECR 181 and 127/75 *Bobie* v *Hauptzollamt Aachen-Nord* [1976] ECR 1079. Of those authorities, it seems to me that the *Bobie* case is particularly in point here because it shows that, where the basis of assessment to tax of the domestic product takes into account any characteristic of its manufacturer, the basis of assessment of the similar product imported from other Member States must do so too. In that case the product was beer and the relevant characteristic was the volume of each brewery's annual output. In my opinion the same principle must apply where the product is wallpaper and the relevant characteristic is whether its manufacturer is or is not integrated. Only by applying that principle can one secure that a manufacturer of wallpaper is treated in the same way under the Italian legislation wherever in the common market he may be established.

I would therefore answer the Pretore's question by saying that Article 95 forbids the levying by a Member State of internal taxation on the products of other Member States on a basis different from that on which it levies such taxation on its own similar products where such a difference may lead to the former products bearing more tax than the latter and that, where the basis of

assessment of any product of the Member State concerned takes into account any characteristic of its manufacturer, similar account must be taken of the characteristics of manufacturers of the corresponding product in other Member States.

The Pretore's last question is as follows:

'(6) If, from the answer to the question under point (5) above, it follows that the imposition of a levy in a discriminatory manner is prohibited because the basis for its calculation is higher only for imported products, does Article 95 of the Treaty create for importers of products coming from Community countries the individual right to request the reimbursement of that part of the said levy paid in excess as from 1 January 1962, the date of the beginning of the second stage?'

With that question, my Lords, I think I can deal in three sentences. Firstly, that Article 95 has had direct effect since 1 January 1962 is established by decisions of this Court so numerous that it is unnecessary to cite them. Secondly, the remedies available in consequence of such direct effect to an importer from whom a Member State has exacted tax in excess of what is permitted by Article 95 depend on the national law of that State — see Cases 33/76 *Rewe* v *Landwirtschaftskammer für das Saarland* and 45/76 *Comet* v *Produktschap voor Siergewassen* (not yet reported). It follows, thirdly, that it is for the national law of that State to determine whether, in such a case, the importer is entitled to reimbursement of the whole of the tax he has paid or only of the unlawful excess — see Cases 28/67 *Molkerei-Zentrale Westfalen* v *Hauptzollamt Paderborn* [1968] ECR 143 and 34/67 *Lück* v *Hauptzollamt Köln-Rheinau,* ibid. p. 245.