OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 4 June 1987 *

Mr President,
Members of the Court,

1. The action, lodged on 20 August 1985, which is before the Court has been brought by the French Republic against the Commission of the European Communities. The French Government asks the Court to declare void Commission Decision 85/380/EEC of 5 June 1985 (Official Journal 1985, L 217, p. 20) which held to be incompatible with the common market two aid schemes for the textile and clothing industry provided for by Decrees Nos 84-389 and 84-390 (*Journal officiel de la République française* 1984, p. 1651 *et seq.*).

Those measures authorized the continued collection until 31 December 1985 of two parafiscal charges levied, using VAT mechanisms, on sales in France of textile products and clothing, with the exception of sales or transfers of products originating in other Member States or in free circulation in those States. The revenue from those charges — which were introduced to foster research, on the one hand, and the modernization and renewal of industrial and commercial structures, on the other — was allocated to a body set up by Decree No 84-388 (*Journal officiel de la République française* 1984, p. 1650) known as the comité de développement et de promotion du textile et de l'habillement (CDPTH-DEFI) (Committee for the development and promotion of the textile and clothing industry, hereinafter referred to as 'the Committee'), for distribution among undertakings, joint promotion activities and technical centres of the industries concerned (the textile, clothing and knitwear industries).

That system amended a system set up in 1982 which had also been held to conflict with Article 92 of the Treaty (Decision 83/486 of 20 July 1983, Official Journal 1983, L 268, p. 48). Upon being informed of the new measures and of the setting-up of the Committee, the Commission sent a letter to the French Government (30 July 1984) in which it charged it with reintroducing aid which had already been held to be unlawful, and initiated the procedure provided for in Article 93 (2) of the EEC Treaty. The French Government rejected those charges but its arguments did not win over the Commission. Hence the decision at issue. The decision was also contested by the Committee (Case 282/85) but, by judgment of 10 July 1986 (*DEFI* v *Commission* [1986] ECR 2469, at p. 2475), the Court declared the latter's application to be inadmissible.

In the course of these proceedings the Court authorized the Federal Republic of Germany to intervene in support of the Commission (order of 15 January 1986).

2. The French Government puts forward four submissions in support of its application:

(a) misapplication of Article 93 (3) of the EEC Treaty;

(b) infringement of the right to be heard;

* Translated from the Italian.

(c) inadequate statement of reasons with regard to the conditions set out in Article 92 (1) and the refusal to apply Article 92 (3);

(d) erroneous statement of reasons in so far as the Commission failed to acknowledge that the aid was compatible with the common market pursuant to Article 92 (3) (c).

I shall deal straight away with the first submission, which concerns the French Government's fulfilment of the duty to notify the aid plan in time, since, in its reply, the French Government dropped this submission and, at all accounts, it does not appear that the contested decision was based on the charge to which the submission is a reaction. Accordingly, I shall deal with the last two submissions jointly. I shall cover the fourth when I deal with the third.

Submission (b) is in two parts. In the first place, it is argued that the Commission adopted the contested decision without the preliminary of appropriate adversary proceedings or, at least, without going some way to meet the efforts made by the French Government to intensify the dialogue: for instance, a letter sent on 3 June 1985 by the French Minister for Labour, Mr Delebarre, did not receive an answer from the responsible member of the Commission, Mr Sutherland, until four days later, that is to say after the decision was issued. Moreover, the French Government claims that it was never informed of the objections made to its plan by three Member States and a federation of German textile undertakings. As a result, it was unable to answer those criticisms, even though the decision uses and mentions them.

The first objection is unfounded. The Commission points out that the broad thrust, at least, of its feelings has been known to the French Government ever since its Decision of 20 July 1983. In any event, whilst it is true that it sent the French Government an initial telex message on 21 June 1984 and a further communication on 30 July 1984, the adversary procedure commenced approximately one year before the contested decision was issued. In response, the French Government argues that, since the plan was notified to the Commission on 18 April 1985, the Commission could not have initiated the adversary procedure until that date. But that argument does not hold good. The notification requirement laid down in Article 93 (3) is binding on the Member State concerned but does not bind the Commission as well; otherwise a failure on the part of the Member State to fulfil that obligation would be sufficient to frustrate the supervisory duties which the Treaty confers on the Commission. It must be added — as the French Government itself recognizes — that the Commission always regarded the memorandum of 18 April 1985 as providing supplementary particulars in connection with the procedure initiated on 30 July 1984.

Accordingly it is beyond doubt that on that date the French Government was fully cognizant with the Commission's views; neither can it be said that in the following 11 months the Commission changed its view or added new aspects thereto. On the contrary, in that period the parties had numerous meetings (the most recent on 30 and 31 May 1985) and had frequent correspondence with each other. In such circumstances, the delay with which Mr Sutherland answered Mr Delbarre's letter seems to me to be open to criticism from the point of view of etiquette or common courtesy but certainly is not evidence that the adversary procedure was inadequate.

The Commission answers the second criticism as follows:

(a) there is no adversary procedure provided for in the field of aid of the kind that is provided for in the area of the rules on competition;

(b) if it had made known the objections lodged by three Member States and a German textile federation this would have led third parties with useful information not to pass that information on to it.

However, those arguments must be dismissed. According to an established line of cases of the Court, compliance with the right to be heard in administrative procedures conducted by the Commission means that the person concerned must — even in the absence of any rules governing the procedure in question — have been afforded the opportunity to make known his views on the truth and relevance of the facts and documents used by the Commission to support its claim. Neither is the Commission entitled to rely on the confidentiality of its information. In so far as the Member State concerned was not afforded an opportunity to comment on that information, the Commission may not use it in its decisions to which that procedure gives rise (see most recently the judgments of 10 July 1986 in Case 234/84 and in Case 40/85 *Belgium* v *Commission* [1986] ECR 2263 and 2321, paragraphs 27 *et seq.*).

Nevertheless, the fact that the line adopted by the Commission in its defence is weak does not signify that the French Government's claim can be accepted. In view of the fact that the infringement of the right to be heard results in the contested measure's being declared void, a further element is required according to the Court's case-law — that is to say, the information supplied to the Commission must have been decisive for the adoption of the contested decision in the sense that the content of that decision would have been different had the Commission not received and utilized that information. In that connection it is sufficient to skim through the brief communications made by Denmark, the United Kingdom, the Federal Republic of Germany and the German textile federation to appreciate at once that they contain no data which are really important or, in any event, which were not identified during the long and detailed discussions between France and the Commission.

Let us take, for example, the minutes of the meeting of 30 May 1985 (referred to in Annex IV of the defence). According to those minutes the discussion touched on subjects such as the favourable trend in the French textile industry, the French Government's intention not to increase production capacity or employment in that industry and the favourable outcome of the restructuring of the sector. The most significant observations set out in the four written submissions refer essentially to those subjects.

3. As I have already stated, I shall deal with the last two arguments together. In its argument under (c) above, the French Government claims that the reasons stated by the Commission are inadequate and that hence Article 190 of the EEC Treaty has been infringed. In particular, the grounds are inadequate: (a) in so far as they do not evidence the incompatibility of the aid with the common market within the meaning of Article 92 (1) by means of an in-depth assessment of their actual effect on the market (in accordance with the requirement laid down in the judgment of 14 November 1984 in Case 323/82 *Intermills* [1984] ECR 3809, and the judgment of 13 March 1985 in Joined Cases 296 and 318/82 *Leeuwarder Papierwarenfabriek* [1985] ECR 809) and of the damage which the aid is alleged to have caused to competing undertakings, and (b) in so far as they do not show the reasons which led the Commission not to apply the exception provided for in respect of 'aid to

facilitate the development of certain economic activities' (Article 92 (3) (c)).

The final submission set out in the application concerns the merits of the non-application of that exception. The French Government maintains that, not only was the aid negligible in terms of amount, it was also 'neutral' with regard to intra-Community competition. Since the aid was financed out of taxation levied on products manufactured and sold in France, it resulted in a straightforward redistribution of resources within the textile and clothing sector and was designed simply to encourage investment in the face of imports from non-member countries with low labour costs. Consequently, any tendency on the part of the aid to affect trading conditions with the other Member States is to be ruled out.

The Commission deploys three arguments against those charges. Firstly, the aid was not channelled to a single firm but to a whole sector of industry, which makes it impossible to assess its effects at the level of analysis referred to by the French Government. Secondly, it is not true to say that the impact of the contested measures on recipient undertakings' balance-sheets is negligible; profit margins have declined in the textile industry and, in those circumstances, aid which reduces the cost of investment by 5.5% may prove decisive in the field of competition. Lastly, it is wrong to claim that the system is 'neutral'. Only 10.7% of textiles imported into France comes from non-member countries, 69.3% originates in other Member States. As a result, the changes brought about by the aid are more apparent within the Community than outside it.

In my opinion, the statement of reasons of the contested decision is faultless. This is so, to start with, as regards the aid's distorting or threatening to distort competition. The Commission has derived from the case-law of the Court (see the judgment of 17 September 1980 in Case 730/79 *Philip Morris Holland BV* v *Commission* [1980] ECR 2671, paragraph 11) the incontestable principle that 'State financial aid [which] strengthens the position of an undertaking compared with other undertakings competing [with it] in intra-Community trade' must be regarded as affecting those other undertakings (see Decision 85/380, Official Journal 1985, L 217, at p. 22). But that observation is not, as France maintains, merely a hypothetical proposition. It is sufficiently substantiated by a series of facts; for instance, the figure, which has already been quoted, for the impact of the aid on undertakings' costs (5.5%), the narrow margins of competitiveness within the sector, the importance of the percentage indicated for that very reason and the very considerable market penetration of the French textile industry in the other Community markets.

A further valid observation, in my view, is that since the aid in this case is earmarked for an indeterminable number of businesses (in practice to anyone who has invested in his own firm), it is not possible to identify in advance and in detail its impact on the textile products market as a whole. The references made by the applicant to two decided cases, both of which concern individual undertakings, are therefore inconclusive.

To turn now to the second limb of the third argument, it must be borne in mind that, unlike Article 92 (2), Article 92 (3) confers a large measure of discretion on the Commission. If the aid in question matches one of the descriptions set out in that

provision it *may* — not shall — be considered to be compatible with the common market (see paragraph 17 of the judgment in the *Philip Morris* case, cited above). Accordingly, provided that they are supported by a logical and adequate statement of reasons, decisions taken by the Commission cannot be challenged from the point of view of expediency.

In my estimation the consistency and adequacy of the reasons in question are undeniable. The Commission has shown with a wealth of detail and statistics that the French textile industry has not gone through a dramatic period of crisis and that, on the contrary, partly because of aid received in the past, it is in a healthy condition, which is all the more enviable when compared with the situation of the textile sector in the rest of the Community. That impression is supported by numerous documents submitted by the German Government (see, above all, the report of Professor Messerlin, 'Structural adjustments: Experience in France') and is further confirmed by the data — which, albeit not uniform, are not conflicting — which the parties provided at the Court's request after the sitting.

If those data are examined it will be observed that France submitted figures relating only to the situation in France. For their part, the Commission's figures refer to the Community as a whole. Those figures — which, it is stressed, are fully reliable since as far as France is concerned they coincide with those provided by the French Government — manifestly show the better state of health enjoyed by the French textile industry. For example, with the sole exception of 1984-85 the level of unemployment in the industry has invariably been significantly lower in France than in the other Member States.

Moreover, if that is the situation and if it is true that 'the compatibility . . . of the aid . . . must be determined in the context of the Community and not of a single Member State' (judgment in the *Philip Morris* case, cited above, paragraph 26) the statement of reasons in question is not only adequate but also correct. As the decision states, because French textile undertakings are operating in a relatively flourishing sector they can invest 'using their own financial resources without State aid'. Consequently, that aid is not intended 'to facilitate the development of certain economic activities' within the meaning of Article 92 (3) (c) thus harmonizing trading conditions in the various Member States; on the contrary, it accentuates the disparities between trading conditions in the Member States and, to utilize once again the terminology of the Treaty, it does so 'to an extent contrary to the common interest'. Nor can it be said that the aid distorts only competition from non-member countries. The figures provided by the Commission give the lie to that argument; in any event, products from outside the Community usually show such a great price differential that such effects are in practice ruled out as far as they are concerned.

4. In view of all the foregoing considerations I propose that the Court should dismiss the application brought on 20 August 1985 by the Government of the French Republic against the Commission of the European Communities and order the applicant to pay the costs under Article 69 (2) of the Rules of Procedure.