OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 28 January 1986 *

Mr President,
Members of the Court,

A — Article 13 of Italian Law No 308 of 29 May 1982 provided for an appropriation of LIT 2 000 million in 1982 and LIT 4 000 million in 1983 for the purpose of subsidizing purchases of electric vehicles or vehicles equipped with both electric and diesel engines by municipal transport undertakings in cities with a population of more than 300 000 for the purpose of replacing traditional vehicles. The grant was subject to the condition that the vehicles be produced *in Italy.*

The Commission, whose attention was drawn to that condition by the Unione nazionale rappresentanti autoveicoli esteri [National Union of Distributors of Foreign Motor Vehicles], considers that the condition is not compatible with the prohibition of quantitative restrictions on imports and all measures having equivalent effect contained in Article 30 of the EEC Treaty, and with the guidelines for the implementation of that provision contained in Commission Directive 70/50 of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 17), particularly Article 2 (3) (k) thereof. It informed the Italian Government of that view in a letter dated 29 November 1982. It was pointed out in that letter that the rule attached to the aid was not necessary for the attainment of the object which the measure sought to achieve and that that was sufficient for it to be regarded as contrary to Article 30 of the EEC Treaty.

The Permanent Representation of Italy expressed its views on that letter in February 1983. It pointed out that the measure in question was valid only for a limited period (two years) and also referred to the objectives in regard to energy policy and research policy (domestic production to be influenced by promoting the purchase of prototypes of the vehicles in question) which the measures sought to achieve. It concluded that the measure could not genuinely be regarded as a restriction on imports.

As it found that reply unconvincing, the applicant delivered a reasoned opinion in August 1983 under Article 169 of the EEC Treaty. In that opinion, it explained why it regarded the provision it was criticizing as a form of aid which was not essential to attaining the object of the measure. If it was intended to be merely an inducement to buy energy-saving vehicles, the limitation of the measure to vehicles produced in Italy could not be regarded as logical. If it was also intended to encourage the development of the relevant Italian industry, however, it was evident that such development would have taken place even in the absence of the aforementioned condition because the fact that foreign vehicles of that type could be purchased with the help of grants from public funds would itself have spurred Italian manufacturers to carry out the development necessary to obtain a share of that market. Discrimination against foreign products in the context of those rules must therefore be regarded as a measure having equivalent effect to a quantitative restriction

* Translated from the German.

within the meaning of Article 30 of the EEC Treaty; the defendant was therefore called upon to bring the breach of the Treaty to an end within one month from the date of reception of the reasoned opinion.

As the Court will be aware, that did not happen. However, as the Court was informed, subsequent contacts between the applicant and the Italian authorities led to the latter giving an undertaking to abolish the condition to which the Commission objected, and thus a bill was laid before the Chamber of Deputies in March 1984 providing for grants for the years 1984 to 1986 which were not to be subject to the contested condition.

Since it appears that that bill has never been enacted into law, since the law of 29 May 1982 has not actually been amended (and it cannot be excluded that that law might still produce legal effects) and since the defendant has not altered its view that provisions such as the one of which the applicant complains are not in fact contrary to the Treaty, the applicant brought an action before this Court in April 1984.

The applicant claims that the Court should declare that, by requiring municipal public transport undertakings to purchase only vehicles produced in Italy in order to qualify for the financial aid provided for in Article 13 of Law No 308 of 29 May 1982, the defendant has failed to fulfil its obligations under Article 30 of the EEC Treaty.

B — My opinion on this case is as follows:

1. The first problem which must be considered is the defendant's contention that the Commission has no *interest in bringing this action*, which should therefore be declared inadmissible.

The defendant points out that the provision of which the applicant is complaining was contained in a law authorizing expenditure only for the years 1982 and 1983. During that period, no subsidies of the kind in question were ever actually paid and payment after the expiry of the law is not possible, so that it may be said that the law remained a dead letter. It is also important to note that a new bill was prepared for the succeeding period which did not contain the contested provision. There is therefore no question of the provision which the applicant regards as contrary to the Treaty remaining in effect.

In my view, that argument is not particularly convincing.

(a) The terms of Article 169 of the EEC Treaty leave no doubt that, in principle, even a breach of the Treaty committed *in the past* and no longer in existence may be the subject of proceedings for a declaration that a Member State has failed to fulfil its obligations. Having regard to the time necessary to carry out all the steps in the procedure provided for in Article 169, the situation could not be otherwise because if it were, it would no longer be possible in many cases for the Court to exercise its power of review in regard to laws which are only in force for a short time. Thus, it may also be deduced from Article 169 that the most important factor in determining the admissibility of an action is whether the Member State in question has adopted measures within the time-limit laid down by the applicant in the reasoned opinion (see judgment in Case 52/84 [1]). That was what happened in this case and it must also not

1 — Judgment of 15 January 1986 in Case 52/84 Commission v Belgium [1986] ECR 89.

be overlooked that the reasoned opinion was delivered during the period of validity of the law and measures should have been adopted by the defendant during that same period.

(b) In reply to a question posed by it, the Court learned that with regard to the practical application of Law No 308, 11 enquiries were received from interested local authorities during the period when it was in force. Nine of those were apparently mere expressions of intent which were not followed up. Two formal applications were made but they were merely 'filed' because they did not include all the necessary documents.

It is thus difficult to argue, not least because two applications have not been definitively dealt with, that the contested law will have absolutely no effects and that there are therefore no grounds for seeking a declaration that it is contrary to the Treaty. Moreover, it would also be inappropriate to assume that since the law could only be applied in at most two cases, the breach of the Treaty was so limited as not to justify legal proceedings. If the matter is viewed — as it should be — in the light of the situation existing at the time that the procedure was initiated, it will be seen that the amount of money which was to be made available at that time, and which would have permitted the purchase of several hundred vehicles,[2] could certainly have had a significant effect on trade between the Member States, and no doubt could have arisen as to the appropriateness of proceedings alleging a breach of the Treaty on that account.

2 — The amount of LIT 6 000 million was sufficient, in 1982 and 1983, to acquire goods to the value of LIT 30 000 million, that is to say, about 4.5 million ECU, on the basis of a subsidy of 20%.

(c) Finally, with regard to the bill covering the years 1984 to 1986, it must be stated that it is not at all certain, since the legislative procedure has not yet been terminated, whether the condition to which the applicant objects will in fact be abandoned. Furthermore, the most important factor is that, as has emerged in these proceedings, the defendant has not altered its view that the rules under consideration are not contrary to the Treaty. It is therefore perfectly possible, even if in a different context, that measures such as the one contained in Law No 308 will once again be adopted: in other words, there is a definite possibility that the alleged breach of the Treaty will be repeated.

(d) That brings me to the conclusion that if it is necessary to prove that there is an interest in bringing proceedings under Article 169 of the EEC Treaty, that fact has been sufficiently proved in this case and that the action should therefore not be dismissed as inadmissible.

2. Let me now consider whether or not the claim is *well founded.* With regard to the question of whether the contested Italian rules are to be regarded as a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the EEC Treaty, there is no doubt that subsidies granted from public funds for the purchase of particular goods, when they are subject to a condition that only domestically-produced goods may be acquired, constitute discrimination against similar goods coming from other Member States. Such a clear inducement would undoubtedly have the effect of directing demand towards domestic products rather than imported goods, thus reducing the flow of imports. It is also significant that, as the Court was told, the statement of reasons on which the bill

covering the years 1984 to 1986 was based, and which no longer contains the nationality clause, states that a *protectionist* clause is no longer necessary. One is thus compelled to conclude that the Italian measure is covered by the formula which the Court has developed in interpreting Article 30: that is, it constitutes trading rules enacted by a Member State 'which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' (Case 8/74 [1974] ECR 837, at p. 852).[3]

That view is strengthened by the Court's judgment in Case 249/81.[4] That case concerned measures adopted by the State for the purpose of promoting sales of Irish products. As the Court is aware, it was decided that since the measures were an incentive to buy domestic products and thus were intended to influence the conduct of consumers, and because they were designed to achieve the substitution of domestic products for foreign products and thereby reduce imports, they were liable 'to affect the volume of trade between Member States' (paragraph 25 of the decision). The judgment in Case 192/84,[5] a case recently brought against the Hellenic Republic, is also of interest. It was decided in that case that the grant of more favourable credit terms for the purchase of machinery made in Greece was a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 because it was an inducement to purchasers to buy machines produced in Greece.

3. There is thus nothing further of interest to this case to be deduced from the aforementioned *Commission directive* and in particular Article 2 (3) (k) thereof, according to which measures having equivalent effect to quantitative restrictions include those measures which 'hinder the purchase by private individuals of imported products only, or encourage, require or give preference to the purchase of domestic products only'.

As the Court is aware, the defendant considers that that provision refers only to measures which are addressed to private individuals and to all consumers. That is not so in this case because the measure at issue concerns only a small group of about 20 beneficiaries (identifiable municipal transport undertakings without independent legal personality) and because it calls only for the acquisition of prototypes, not ordinary market products.

If an opinion on that point is needed, I would say only that it is not certain that that interpretation of the provision in question is in fact the correct one. It is well known that the directive does not seek to provide a complete list of the measures covered by Article 30 but merely a series of particularly noteworthy examples thereof. From that point of view, it is important to note that the Italian measures under consideration are very similar to the measures described in Article 2 (3) (k) as regards their purpose and effects. Furthermore, the applicant can also rely in this case on that part of Article 2 (2) which refers to measures which *favour* domestic products. The least that can be said is that there is no doubt that the Court is dealing with such a situation.

The applicant was thus right to refer to the definitions contained in the directive, which

3 — Judgment of 11 July 1974 in Case 8/74 *Procureur du Roi* v *Benoit and Gustave Dassonville* [1974] ECR 837.

4 — Judgment of 24 November 1982 in Case 249/81 *Commission* v *Ireland* [1982] ECR 4005.

5 — Judgment of 11 December 1985 in Case 192/84 *Commission* v *Hellenic Republic* [1985] ECR 3967.

in fact provides support for its assessment of the Italian measures.

4. Before making a final judgment of the applicant's position, two objections put forward by the defendant must be considered.

It referred in its defence to the fact that its aim was not to induce municipal transport undertakings to replace their entire fleet, but merely to provide an incentive to buy a limited number of prototypes: thus it sought to make clear the relatively limited economic scope of the measures. It also pointed out that Article 30 was not relevant because the measure in question related to aid. The Treaty provides for a special procedure in such cases and only an assessment in the light of Article 92 is relevant.

(a) Since I have already made some reference to the first point, I can deal with it very quickly here. Having regard to the amount of money which Law No 308 made available (and which was intended to finance one-fifth of the purchase price of each vehicle), it certainly cannot be said that the measure is of no economic importance and it is certain that it would have a noticeable effect on intra-Community trade. It is also clear that according to the Court's case-law such considerations of quantity are irrelevant for the purposes of Article 30, and that that article also applies even when only a limited hindrance is likely to result (see judgment in Case 269/83). [6]

(b) With regard to the second point, I do not wish to dwell further on the fact that, as the applicant has pointed out, the defendant's position is somewhat contradictory. At one point, it expressly emphasizes that the contested measure was not a subsidy likely to distort competition because all the transport undertakings concerned have a geographical monopoly, and it was also for that reason that no notice was given to the applicant and the procedure under Article 93 of the EEC Treaty was not initiated.

It is certainly true that a subsidy which is accorded only to certain domestic undertakings cannot be regarded as a measure having equivalent effect to a quantitative restriction within the meaning of Article 30. That is abundantly clear from the judgment in Case 74/76. [7] With regard to the present case, it must be noted, on the one hand, that it appears very questionable whether the Italian measure is actually covered by Article 92. On the other hand, the applicant places particular emphasis on the significance of the fact that in the aforementioned judgment it was also emphasized that aspects of aid which are not necessary for the attainment of the object of the aid may be distinguished from the rest and may be regarded as infringing particular provisions of the Treaty, including Article 30 thereof.

Inasmuch as the Italian measure provides for aid to municipal transport undertakings and encourages them to make use of energy-saving vehicles, it would appear that Article 92 is not applicable because the beneficiaries do not compete with one another, and thus the public subsidies provided for cannot give rise to any

6 — Judgment of 14 March 1985 in Case 269/83 *Commission* v *France* [1985] ECR 837.

7 — Judgment of 22 March 1977 in Case 74/76 *Iannelli & Volpi SpA.* v *Ditta Paolo Meroni* [1977] ECR 557.

distortion of competition, which is the relevant factor in regard to Article 92. In so far as the purpose of the measure and, more particularly, of the nationality clause, may also be regarded as that of granting indirect aid to vehicle manufacturers, with a view to promoting research into and development of energy-saving vehicles, it is also questionable whether it is correct to speak of aid to producers within the meaning of Article 92. They do not receive any financial aid which would permit them to reduce their costs but rather, through the purchaser of the vehicle, who receives part of the purchase price from the State, they receive consideration for goods which they supply. It is thus difficult to speak of aid granted to the vehicle manufacturers. The measure is in fact one designed to direct demand towards particular products and that, as has been shown, is clearly covered by Article 30.

That question does not require a thoroughgoing investigation since the applicant's argument based on the second basic principle mentioned in Case 74/76[7] appears to be convincing in this case. If it were to be assumed that the measure concerned is in fact in the nature of aid, it would also be clear, in view of its purpose which relates to energy policy (promotion of the use of electric vehicles by the transport undertakings), that the contested clause is not essential for that purpose and that the same result could also be achieved by promoting the purchase of similar foreign vehicles. To that extent, it can therefore be said that the condition constitutes an unnecessary aspect of the aid which is undoubtedly contrary to other provisions of the Treaty, including Article 30. The same can also be said in regard to the measure's other objective, namely promotion of the development of domestic production of electric vehicles. In fact, it must be supposed that if the purpose of the measure was in any way to induce municipal transport undertakings to buy such vehicles, the mere possibility that the Italian undertakings in question might make such a purchase abroad, would be a sufficient incentive to produce vehicles of that kind without there being any need for discrimination of the kind involved in the measures contested here. From that point of view also it is thus difficult to deny that the measure is in the nature of a subsidy and it cannot therefore be argued that it may only be assessed with reference to Article 92 of the EEC Treaty.

5. It can be seen from the foregoing that the applicant's interpretation of the contested measure cannot be refuted and it is thus correct to speak of an infringement of Article 30. Although the defendant did not seek to justify the measure under *Article 36*, it can be shown fairly quickly that such a justification is not possible. The essential point is quite simply that, as was emphasized in the judgment in Case 238/82,[8] Article 36 relates only to measures of a *non-economic* nature. The measure in question in this case is not of such a nature since, as the Court was expressly assured, Article 13 of Law No 308 is designed to attain objectives in the fields of energy policy and research policy, which cannot easily be excluded from the economic sphere.

7 — Judgment of 22 March 1977 in Case 74/76 *Iannelli & Volpi SpA.* v *Ditta Paolo Meroni* [1977] ECR 557.

8 — Judgment of 7 February 1984 in Case 238/82 *Duphar BV and Others* v *The Netherlands State* [1984] ECR 523.

C — I can thus only propose that the Court decide in favour of the applicant and declare that by requiring municipal transport undertakings to purchase domestically produced vehicles in order to qualify for the financial benefits provided for in Article 13 of Law No 308 of 29 May 1982, the defendant has failed to fulfil its obligations under Article 30 of the EEC Treaty. In acordance with the Commission's claim, the Italian Republic should also be ordered to pay the costs.