Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby declares this case admissible and

1. **Rules that the Italian Government, by provisionally suspending imports of the products concerned from Member States, failed to fulfil the obligation laid down in the first paragraph of Article 31 of the Treaty;**

2. **Orders the defendant to pay the costs.**

Donner Riese Rueff

Delvaux Hammes Rossi Catalano

Delivered in open court in Luxembourg on 19 December 1961

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 29 NOVEMBER 1961[1]

Mr President,
Members of the Court,

This dispute between the Commission of the European Economic Community and the Government of the Italian Republic does not appear to me to raise very difficult questions; none the less, it deserves to be examined with special attention, owing to the fact that it is the first dispute which the Court of Justice has had to hear and determine concerning the Treaty of Rome and to the fact that it puts at issue a procedure which is particularly important for the application of the Treaty, the one which refers to the investigation of the failures of Member States to fulfil their obligations. You know that, whereas the ECSC Treaty assigns the power of investigating the failures of Member States to the executive, that is to say, the High Authority, subject to ultimate recourse to the Court, in the Treaty of Rome the Court alone has responsibility for deciding upon the matter, which decision it pronounces itself on the application either of the Commission or of another Member State. To add that the implementation of the Treaty of Rome, that is to say, the progressive implementation of all the measures necessary to attain the objectives of the Community, depends predominantly on the conduct of the Member States is to acknowledge the outstanding rôle conferred upon the Court as

1 – Translated from the French.

judge of the compliance of that conduct with the Treaty.

The failure alleged against the Italian Government in this action concerns Article 31 of the Treaty, relating to the elimination of quantitative restrictions between Member States. It is well known that the Common Market is much more than a customs union, but it is a customs union *first of all*; therefore the establishment of the Common Market had to include, among its first accomplishments, the abolition of customs duties between Member States, as well as the setting-up of a common external customs tariff, and, on the other hand, the elimination of quantitative restrictions between Member States, generally referred to as quota restrictions.

Of course, the first condition for the proper implementation of this programme is that in no case should *aggravation* of the situation existing at the date of the entry into force of the Treaty be allowed: this is referred to as *standstill*. Such is the purport of Article 12 as regards customs duties ('Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other') and of Article 31 as regards quantitative restrictions:

> 'Member States shall refrain from introducing between themselves any new quantitative restrictions or measures having equivalent effect.'

However as the Commission points out in its application, the authors of the Treaty meant to make allowance for the degree of liberalization of products reached by each of the Member States within the framework of the OEEC. Thus Article 31 goes on to provide in its second paragraph that the standstill obligation, that is to say, the prohibition on creating new quantitative restrictions, shall relate

> 'only to the degree of liberalization *attained* in pursuance of the decisions of the Council of the Organization for European Economic Co-operation of 14 January 1955. Member States,'

the text adds,

> 'shall supply the Commission, not later than six months after the entry into force of this Treaty, with lists of the products liberalized by them in pursuance of these decisions. *These lists shall be consolidated between Member States.*'

Legally, therefore, for each product on the list so supplied, it is that supplying which automatically imposes on the State concerned the prohibition against establishing any new quantitative restriction from that date onwards.

By a letter dated 17 December 1958 the Italian Government supplied the Commission with the list of products liberalized by it in pursuance of the decisions of the OEEC. Among those products are the following:

> swine, other than those for slaughter,
> pig fat,
> meat, salted, dried, smoked, cooked or simply prepared in any other way, lard of all consistencies, including oil.

However, an interministerial order of 18 June 1960 provided for the suspension until *31 August 1960* of all imports (including, therefore, those from other Member States) of the following products:

> live swine,
> pigmeat and pig offals, fresh, frozen or chilled,
> unrendered pig fat, fresh, chilled, frozen, salted, in brine, dried or smoked,
> pigmeat and edible pig offals salted, in brine, dried or smoked, lard and other rendered pig fat.

Although thes list does not correspond word for word with the list supplied on 17 December 1958, it is clear that the products defined therein were indeed consolidated products for which an import prohibition could consequently not be enacted. When informing the Commission of the interministerial order (letter of 20 June 1960), the Italian Government declared that it was a measure of an absolutely provisional nature, decided upon in response to a crisis which had arisen on the market in pigmeat, with the intention of allowing other measures adopted for the purpose of restoring the market to take effect.

A corrigendum published in the *Gazzetta Ufficiale* of 26 July extended the period of suspension of the imports to 30 September. An interministerial order of 28 July brought cooked hams within the suspension. Finally an interministerial order of 28 September, published on 30 September, extended the suspension to 31 December 1960.

The Commission had let the first suspensory measure and its one-month extension pass without reacting, but at this point it decided to set in motion the procedure laid down in Article 169 of the Treaty, the terms of which are as follows:

> 'If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.'

By a letter of 21 October 1960, addressed to the Minister for Foreign Affairs of the Italian Republic, the Commission gave the Italian Government 'the opportunity to submit its observations' within a period of one month. When no official reply had been received within this period, the Commission delivered, on 21 December 1960, a 'reasoned opinion' pointing out the infringement of Article 31 which it considered to have been committed owing to the suspensory measures taken by the Italian Government and asking that Government to terminate them within a further period of one month.

Far from acceding to the requests of the Commission, the Italian Government promulgated another interministerial order on 23 December 1960, which was published on 31 December, extending the suspension of imports of the products concerned to 31 March 1961.

However, by a letter of 5 January 1961, hence before the expiry of the one-month period set by the Commission's reasoned opinion, the Italian Government, whilst informing the Commission of the new interministerial order of extension, stated *inter alia* the following:

> 'The Italian authorities hope that the Commission will be able to agree, *pursuant to the power conferred on it in Article 226 of the Treaty of Rome,* to the measures taken to deal with the exceptional situation on the Italian market . . .'

Thus, for the first time, the Italian Government expressly alluded to Article 226, which, as you know, allows, during the transitional period, any Member State suffering from

> 'difficulties . . . which are serious and liable to persist in any sector of the economy'

to

> '*apply for authorization* to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the Common Market.'

The second paragraph of the same article lays down the procedure:

> 'On application by the State concerned, the Commission shall, *by emergency procedure,* determine without delay the protective measures which it considers necessary, specifying the circumstances and the manner in which they are to be put into effect.'

Finally, the third paragraph specifies that the measures so authorized may involve derogations from the rules of the Treaty, but only to such an extent and for such periods as are strictly necessary. The Italian Government thus seemed to consider: (1) that the crisis which had arisen on the market in pigmeat was one of the circumstances referred to in Article 226; (2) that the measures which it had already taken, that is to say, the temporary prohibitions on imports, constituted appropriate protective measures designed to

> 'rectify the situation and adjust (or readjust) the sector concerned to the economy of the Common Market',

within the meaning of Article 226.

In point of fact, by a letter of 10 March

1961, the Commission replied that it thought it should interpret this communication as an application by the Italian Government for authorization of suspension of the imports in question as a protective measure pursuant to Article 226. The Commission added, however, that the examination of such an application could not bring about the suspension of the Article 169 proceedings, and, accordingly, on 20 March 1961, it brought the matter before the Court of Justice in pursuance of the second paragraph of Article 169, with a request that the Court rule on the failure of the Italian Government to fulfil its obligations under Article 31.

Since the introduction of the action, we have learnt that the Commission, by a letter of 25 March 1961, had decided not to accede to the application made under Article 226, but had suggested to the Italian Government that it institute a system of minimum prices under the conditions referred to in Article 44 of the Treaty. we have also learnt that after extending the suspension of the imports once again, until 30 June 1961, the Italian Government finally carried out the Commission's suggestions and instituted, as from 1 July 1961, a scheme of minimum prices for some of the products concerned, whilst re-establishing complete freedom of importation for the other products.

If I have felt it necessary to dwell at such length upon the facts, and quote so fully the applicable provisions, it is because the solution of the dispute appears to me largely to flow from this exposition alone.

The first question to be asked is whether the application has any purpose any longer owing to the latest measures taken by the Italian Government subsequent to the filing of the application.

Such, as you know, is not the opinion of the Commission, which has no intention of withdrawing its action, and, as to the Italian Government, it has not lodged any conclusions for a ruling that the action has lost its purpose. It has confined itself to requesting the Court, by conclusions lodged on 18 November 1961, to invite the Commission, by order, to provide details of the contacts and discussions which took place between the parties and to lodge with the Court all the correspondence relating to the case exchanged from 1 March 1961 onwards.

The Court refused by implication to accept these conclusions. Now, since the closure of the oral procedure, it could do so only by an interlocutory judgment of after reopening the oral part of the proceedings. However, the main part of the correspondence was lodged *in extremis* and annexed to the file of the case.

Be that as it may, it falls to the Court, even of its own motion, to examine whether the conclusions in the application any longer have any purpose, so that the action should be closed by a decision that the action has lost its purpose. Let me say straightaway that, logically, this matter ought not to be examined until after that of the admissibility of the action, as admissibility takes precedence over any question of the action's having lost its purpose, which goes to the substance of the case, but, for the sake of clarity, I ask your permission to deal with it first, for its solution depends essentially on the interpretation of Articles 169 and 171 of the Treaty, and that interpretation governs in part the consideration of the objections of inadmissibility entered by the defendant.

You know the two opposing arguments.

For the Italian Government the proceedings turn on the reasoned opinion delivered by the Commission in pursuance of Article 169. The Commission may bring a matter before the Court of Justice, only if

> 'the State concerned does not comply with the opinion.'

Therefore, the Commission's conclusions should have had no other purpose than the following: to submit that the Court should find that the Italian Government did not follow the reasoned opinion delivered under Article 169, and, by so doing, failed to fulfil its obligations under the Treaty. The Court has no other duty than to say whether or not the Italian Government complied with the Commission's opinion. In the present case, so the argument continues, the Com-

mission recognizes that the Italian Government did finally fulfil its obligations. Certainly, it did not do so within the period laid down by the reasoned opinion, but the only question then is whether that few months' delay constitutes, in itself, a fresh failure which must then form the subject-matter of fresh proceedings: as to the failure which gave rise to the present proceedings, it ceases to exist owing to the fact that the opinion was eventually complied with. This, at least, is my understanding of the defendant's argument.

The Commission's argument is quite different. It maintains that the purpose of the action is to obtain the Court's finding that a Member State has failed to fulfil an obligation under the Treaty: these are the very terms of Article 171. The reasoned opinion referred to in the first paragraph of Article 169 is only one of the stages of the administrative procedure that precedes the matter's coming before the Court. When the matter has been duly brought before the Court, it falls to the Court to decide *ex tunc* whether the failure to fulfil obligations under the Treaty has occurred, without taking into account what has happened since. If, subsequent to the making of the application, the State concerned took the measures necessary to bring the infringement to an end, it is possible that the action may no longer have very much practical effect, but, so the Commission argues, it still has the highest interest in having the Court settle the issue whether the failure indeed occurred. It adds that the opposite argument would allow a State which so desired to denude the action of its purpose by bringing its illegal conduct to an end just before the judgment, thereafter remaining safe to carry on with its improper conduct in the absence of any judgment finding that it was in breach of its obligations.

It is my opinion that the Commission's argument is the one which corresponds with the Treaty.

The jurisdiction conferred on the Court by Article 171 is very clearly defined: it is to find that a member State has failed to fulfil an obligation under the Treaty, and not to pronounce on the validity of the reasoned opinion. Full power is conferred upon the Court in this respect. The dispute does not bear on the legality of a decision, and that is why it was not necessary, as in Article 88 of the ECSC Treaty, to give the Court unlimited jurisdiction. Here there is no previous administrative decision.

The reasoned opinion referred to in Article 169 in reality has a dual purpose. First, it must set out the reasons of fact and of law for which the Commission considers that the State concerned has failed to fulfil one of its obligations and, secondly, it must inform the government of the State of the measures which the Commission considers necessary to bring the failure to an end. This second purpose of the opinion follows from the terms of the second paragraph of Article 169:

> 'If the State concerned does not comply with the opinion . . .'

Therefore it does not suffice for the Commission to establish the failure to fulfil an obligation; it must, in addition, indicate the means calculated to bring it to an end.

It is clear that the Commission's demands in this connexion may vary according to the nature of the failure and the circumstances of each case. In many cases it will be difficult, not to say impossible, to demand retroactive reparation of all the effects of the failure, apart from its ceasing to exist for the future. In this connexion, the Commission has wide discretion. It is none the less possible that, among the measures which it may be led to recommend, some might precisely be intended to compensate more or less for the effects already produced by the illegal conduct of the State concerned. It is also possible that it might decide not to pursue such a course and merely secure the termination of the failure within the prescribed period.

But then, the legal situation is very different according to whether the State complies with the demands of the opinion within the prescribed period or does not so comply. In the first case, the stage before proceedings are commenced ends automatically and the Commission may not bring the matter

before the Court. If it did so, the Court, having found, *ex hypothesi,* that the State concerned had indeed complied with the opinion, would be bound to dismiss the action on those grounds.

If, on the contrary, the State has not complied with the opinion, *it loses the potential benefit arising from the more or less diminished requirements which the opinion may have imposed.* The Commission is entitled to bring the matter before the Court and the action then bears not on the issue whether the opinion has been observed, but on the existence of a failure in relation to the Treaty. Has the State concerned failed to fulfil one of its obligations? That is what the Court is called upon to 'find', according to the terms of Article 171. It appears obvious to me that given that the failure has taken place this finding must be made unless its effects had been effaced *in law,* which will seldom be the case. The difficulty may then be to know what are the 'necessary measures to comply with the judgment of the Court of Justice', the measures which the State shall be 'required to take' under the terms of Article 171. If the Commission took the view that the measures taken were inadequate and a fresh action arose in that connexion, that action should be the subject of fresh proceedings instituted by the Commission under Article 169. In such a case the State concerned ought indeed to be considered as having failed to fulfil the obligation arising from Article 171 itself. It is to be hoped that it will never be necessary to come to that.

It is my considered opinion, therefore, that there are no grounds for considering whether the Italian Government complied with the Commission's reasoned opinion since the measures by which it could have done so were not taken until after the expiry of the period prescribed by the opinion, and even subsequent to the action brought by the Commission, and since these measures do not make the effects of the failure cease to exist in law *ex tunc.* Any other solution would appear to me not only contradictory to the wording of Article 171, but apt to deprive the procedure for the establishment of failures of States to fulfil their obligations of a large part of its effectiveness. Even without assuming that a Member State may one day lend itself to the stratagem imagined by the applicant (but there is no certainty of this: economic interests are powerful and from a national point of view can be very legitimate), it is proper to reserve an advantage for such states as comply with the Commission's opinion within the period which is prescribed for them, thus avoiding the initiation of proceedings before the Court. It may be in the interest of both parties to find an area of agreement by means of the stage before proceedings are commenced, whereas once proceedings have been instituted before the Court, only the strict application of the Treaty must be considered and the only question must be whether the State concerned has failed to fulfil its obligations as they arise from the Treaty. If the failure has occurred, the Court must so find, even when it may have been brought to an end for the future since the bringing of the action. The action cannot in law be declared lacking in purpose.

I can now deal briefly with the examination—I was going to say of the 'submissions' raised by the Italian Government. Indeed, everything takes place in the, as it were, 'inverted' procedure of the treaty of Rome, as if the real applicant were the Govenment and the real defendant the Commission. That is readily explained, in the present case, by the fact that the illegality relative to Article 31 of the suspensory measures enacted by the Italian Government is not disputed, and indeed is not open to dispute, and that the Italian Government has constructed its case somewhat as if it were bringing an action against a *decision* by the Commission. But the reasoned opinion of Article 169 is not a decision.

Three objections of inadmissibility are entered against the action.

The *first* is based on the fact that the Commission's letter of 21 December 1960 cannot be considered as a 'reasoned opinion' within the meaning of Article 169. In this connexion, the defendant takes exception to the Commission's having confined itself to pointing out that the measures taken by the

Italian Government affect certain products which had been liberalized and consolidated, without examining the pertinence of the arguments advanced by the said Government concerning the existence and the seriousness of the crisis affecting the market in pigmeat and the necessity for the provisional measures decided on to bring it to an end.

A general observation must first be made. No formalism must be demanded of this document, since, as I have said, the reasoned opinion is not an administrative act subject to review by the Court of its legality. There can be no question here of 'inadequacy of reasons' producing a defect of form. The reasoned opinion is intended solely to convey the Commission's point of view in order to enlighten the government concerned and, should the need arise, the Court. If the opinion contains an inadequate statement of the reasons on which it is based, the consequence is merely the risk that the Court may not be able to find that there has been a failure to fulfil obligations and may for that reason have to dismiss the action, but that is a question of substance and not of form.

In the present case, moreover, it was proper for the Commission not to go into explanations over the factual arguments advanced by the Italian Government, since, in the Commission's view, it was solely a legal question, no circumstance being capable in law of justifying the failure to obey the rules of Article 31 concerning products duly consolidated.

The *second objection of inadmissibility*, also relating to the reasoned opinion, is merely a variation on the previous one and alleges the following: there is a contradiction between the attitude of the Commission on 21 December 1960, the date of the reasoned opinion, and that which it took on 10 March 1961, in reply to the application for Article 226 to be put into effect. At that time, the Commission stated that the application was under consideration pending the collection of the necessary information. How, then, on 21 December 1960 could the Commission consider itself in a position to appraise the situation and to deliver a reasoned opinion?

I have answered that argument in advance: the Commission considers that, in the area of Article 169 (establishment of the failure to fulfil obligations), no appraisal of facts was necessary, the failure being established by the mere fact of not having observed Article 31. On the other hand, the consideration of an application based on Article 226 clearly entails an appraisal of the facts and the bringing together of the necessary information. There is no contradiction in that.

The *third objection of inadmissibility*. The action under the second paragraph of Article 169 is admissible only if the State concerned has not complied with the reasoned opinion. The Italian Government claims that it complied with the Commission's opinion by sending to it on 5 January 1961, that is to say, within the period laid down by the opinion, an application for protective measures to be put into effect pursuant to Article 226.

I can see no merit in this argument: the only way for the Italian Government to comply with the reasoned opinion was immediately to institute the internal procedures necessary to bring the suspensory measures judged contrary to Article 31 to an end in the shortest time; the opinion is quite clear on this point. The introduction of a procedure in pursuance of Article 226, that is to say, the presentation of an application for protective clauses, obviously did not have the same purpose.

Let me come now to the examination of the substance of the case.

The first question is whether the re-establishment by a State, even temporarily, of measures restricting imports of products consolidated between Member States under the second paragraph of Article 31 is contrary to the provisions of that article.

There can be no doubt that the answer is in the affirmative. Moreover, the Commission's argument on this point is not seriously challenged by the defendant.

But the defendant puts forward a number of arguments to the effect that, none the less, in the circumstances of this case, the failure

to observe Article 31 does not constitute a failure by the Italian State to fulfil its obligations under the treaty.

First, Article 226 applies in this case and the Commission should have come to a decision about applying it, even though it was not formally invited to do so before the letter of 5 January 1961.

I am not of that opinion. The protective clauses provided by Article 226 may only be authorized within the framework of the special procedure provided for in that article, that is to say, on application by the government concerned. The measures are completely exceptional, since they may involve derogations from the rules of the Treaty and disturb the functioning of the Common Market. The least that one is entitled to demand for the setting in motion of a procedure liable to entail such serious consequences is an unequivocal, formal application by the government concerned. No application of this kind was made, either expressly or by implication, before 5 January 1961: in particular, the Italian Government's letter of 20 June 1960 refers only to the measures taken by that Government and not to any protective measures that the Commission should authorize.

Secondly, the Italian Government puts forward the need for quick action which led it to take for itself the provisional measures required by the circumstances. It calls upon the general principles of public law whereby every State is entitled to make such provisional measures as are necessary in case of serious occurrences.

Whether and to what extent these general principles of public law, which derive from the sovereignty of States, may still be relied on against the provisions of a treaty such as the Treaty of Rome, which meant, like the ECSC Treaty, to provide for every eventuality, including the unforeseen, is a very difficult question. But what is certain is that the argument may not be relied on in this instance, as it so happens that there is a formal provision, Article 226, which itself lays down an emergency procedure. Doubtless, as the defendant points out, the urgency in certain cases may be such that the situation cannot tolerate even the short delays necessitated by an emergency procedure. Thus one might have understood the Italian Government's bringing an application based on Article 226 before the Commission on the first day; as you know, this was done only after several months. Therefore it seems to me that the arguments based on urgency should be dismissed.

Finally the defendant seeks to rely on Article 36 of the Treaty, which provides as follows:

> 'The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

I admit frankly that the explanations which we have been given to the effect that the measures taken by the Government could be justified on grounds of 'public policy' or were for the 'protection of health and life' of swine in Italy did not appear to me to be very convincing. At all events, they were never put forward in the correspondence exchanged with the Commission.

Moreover, in the written procedure it is not so much this argument at bottom which is advanced but rather, here again, it is procedural arguments which are presented: having had the matter put before it, the Commission ought to have investigated itself, spontaneously, whether Article 36 was applicable.

This appears to me to be incorrect. Since nothing, *a priori*, indicated that the temporary import restrictions abruptly decided on by the Italian Government could be justified on the basis of the provisions of Article 36, the said Government would at least have had to rely on that article, which it did not do.

I am of the opinion:

that the Court should find that by suspending, in the circumstances in which it did so, imports from Member States of the following products:

live swine, other than those intended for slaughter,
unrendered pig fat, fresh, chilled, frozen, salted, in brine, dried or smoked,
lard or other rendered animal fat,
cooked hams,

the Italian Republic has failed to fulfil an obligation under the Treaty, and

that the costs should be borne by the Government of the Italian Republic.