OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 11 JANUARY 1973 [1]

Mr President,
Members of the Court,

I — Facts

In the autumn of 1969 substantial and growing surpluses of milk and milk products had been found to exist throughout the Common Market, while on the other hand there was a considerable shortage of beef and veal. With a view to encouraging breeders to restrict milk production, the Council, on the advice of the Commission, adopted on 6 October 1969 a Regulation. This Regulation introduced, as a temporary measure, a double system of premiums, the first intended to encourage the slaughter of dairy cows, the second intended to dissuade farmers from marketing milk and milk products.

The right to the premium for slaughtering was limited to farmers who owned at least two dairy cows, and undertook to abandon milk production entirely and to carry out, by 30 April 1970 at the latest, the slaughter of all the dairy cows forming part of their enterprise.

The premiums for withholding milk and milk products from the market were to be paid to producers who owned more than 10 dairy cows and who gave an undertaking entirely and finally to refrain from the supplying of milk and milk products by way of sale or gift.

The European Agricultural Guidance and Guarantee Fund was charged with financing, up to 50 %, the payments made by each of the Member States to their nationals.

By Regulation No 2195/69 of 4 November following, the Commission laid down the detailed methods of implementing these systems.

The Member States, by reason of these Regulations, were under an obligation to take the necessary steps to implement them within the time limits imposed by the Community institutions.

These steps consisted, so far as premiums for slaughtering are concerned, in providing for applications to be submitted in due time, in ensuring the verification of the applications by the branding of dairy cows, in specifying the number of animals giving right to the premium, account being taken of the cows kept on each holding at a given date of reference, in registering the farmer's undertaking to abandon milk production and to have all his dairy cows slaughtered, and finally in arranging a descriptive form allowing each beast to be followed in all transactions right up to the slaughter.

As regards the premiums for withholding milk and milk products from the market, the competent authorities of the Member States were required similarly to satisfy themselves that applications were presented in conformity with the Regulations, verify the number of cows giving right to the premium, register the undertaking signed by the farmer to abandon entirely and finally the supply of milk or milk products, and finally supervise the collection centres for these product operating in the area of the farm in question.

Time limits were imposed upon the States for the payment of the premiums, that is to say, two months after production of proof of slaughter in the case of premiums in that category, three months counted from the producer's undertaking in the case of payment of the first instalment of the premiums for non-marketing.

1 — Translated from the French.

The report of the Commission of control on the operations of the European Agricultural Guidance and Guarantee Fund, for the budgetary period 1971, shows that five of the six Member States, of the Community at that period carried out their obligation and actually paid the compensation to their farmers. The Italian Republic alone, at least up to the Autumn of 1971, had taken none of the legislative or administrative measures necessary in that country to bring into operation the Community Regulations and to pay the premiums, either for slaughtering or for nonmarketing, apart from a circular of the Ministry of Agriculture and Forestry dated 23 March 1970, which was of a conservative character, and merely gave provincial agricultural inspectors directions for processing applications for premiums for slaughtering already submitted while awaiting legislation required for opening the credits necessary for payment.

For this reason, on 24 June 1971, the Commission warned the Italian Government of the damaging consequences of this failure to act, both to the smooth running of the Common Market and to the farmers affected, and requested it to communicate its explanations to the Commission within one month in accordance with Article 169 of the Treaty of Rome.

In reply this Government merely informed the Commission that it had laid a draft law before Parliament intended to authorize the implementation of the Community Regulations in question.

In reality the Law applying these Regulations in 'the sector of zoo technology and in the sector of milk products' was not to be passed until 26 October 1971. Further it must be explained that to become effective, this Law itself, which opened a credit of a thousand million lire for financing only the premiums for slaughtering dairy cows, had to be supplemented by decrees both from the Minister of the Treasury in order to introduce the necessary modifications into the budget for 1971, and from the Minister of Agriculture and Forestry in order to fix the conditions under which applications were to be processed and premiums for slaughtering paid.

The finance decree only came into force on 30 December 1971, that is to say at the end of the budgetary period, thus making necessary a new decree of 27 March 1972 opening an additional credit for the financial year 1972.

As for the decree of the Minister of Agriculture, this was not signed until 22 March of the same year. It applies moreover only to the premiums for slaughtering.

No measures of any kind, legislative, financial or administrative, were taken with regard to the premiums for withholding milk and milk products from the market.

The Commission, in consequence, gave effect to the intention which it had expressed in its letter to the Italian Government, and, on 21 February 1972, issued a reasoned opinion requiring Italy to take the necessary measures within one month for the effective application of the Communtiy Regulations in questions. Then on 3 July following, applying the second paragraph of Article 169 of the Treaty, it brought an action before you seeking a declaration that the Italian Republic has failed to fulfil the obligations imposed upon it by the said Regulations.

The actions, provided for by Article 169 of the Treaty can bring before the Court either the action of a Member State in enacting or maintaining legislation or regulations incompatibel with the Treaty or the secondary Community law or else the failure on the part of this State to implement, or even incomplete or dilatory implementation of, obligations which are imposed upon it under Community Regulations in the adoption of which it has itself, furthermore, taken part.

If often happens, in fact, particularly in the sphere of the common agricultural policy, that Community Regulations

impose on Member States the obligation of ensuring effective application in their territory.

This is so especially when these Regulations create an obligation on the part of the States to make certain payments as, for example, refunds on exports to third countries. You have held in that connection that non-feasance, as much as positive malfeasance, on the part of a Member State, may constitute failure to fulfil an obligation imposed upon it (Judgment of 17 February 1970, *Commission v Italian Republic,* Case 31/69, Recueil 1970, p. 33).

Such is equally the case here. Regulations Nos 1975/69 and 2195/69 require the Member States to pay their breeders, subject to the conditions and within the time limits which we have recalled, the premiums for slaughtering dairy cows and the premiums for withholding milk and milk products from the market.

In the case of premiums in the first category it is the dilatory implementation of the Regulation, in the case of premiums in the second category it is the complete and utter lack of any implementation which is the cause of the Commission laying a complaint against Italy.

The Italian Government does not contest the facts on which these complaints are based, and further it does not submit that the action brought by the Commission should be rejected, but only that you should decide that there is no need to give a decision in the case, for reasons which are different in the case of each of the two systems of premiums.

II System of premiums for slaughtering of dairy cows

With regard to the premiums for the slaughtering of dairy cows, the defendant Government admits that, in view of the time limits set by the Regulations, the delay in making payment is indisputable.

But on the one hand it maintains that it has, after all, fulfilled its obligations, and on the other hand it attempts to justify the delay shown in doing so by pointing out that the opening of the credits necessary to finance this system was made difficult by the weight of simultaneous financial charges to be undertaken by the State for the adaptation of the economic and social structures of the country necessitated by the very existence of the Common Market.

Besides, the fact that the draft law laid before Parliament dealt at the same time both with premiums for slaughtering and which premiums for withholding milk and milk products from the market explains the slowness with which this project was adapted. The legislature raised objections concerning the premiums in the second category and these led to the deletion from the draft law of the measures seeking to ensure application of these premiums.

Now the precise point with which the Commission reproaches Italy and considers as a failure to fulfil its obligations is the fact of not having paid the premiums for slaughtering at the proper time, that is to say within the time limits provided by the Regulations, and within these time limits not even having taken the measures, whether legislative, financial or administrative, necessary to allow the system to be applied effectively.

It may be that in a case where the Regulations set no time limit for the fulfilment of the obligations imposed on Member States a slight delay can be permitted, especially when putting the Community Regulation into operation requires the setting up of a complex administrative procedure such as verifications and detailed controls, but it is not the same when definite time limits have been set. Such was the case before you. The period had been fixed during which the farmers who gave the undertaking to give up milk production had to have their dairy cows slaughtered; a time limit had been set to

allow them to submit their applications; finally the payment of the premium had itself to take place within two months from the day when the proof of slaughter was produced.

In the second place, Members of the Court, surely the Regulations in question are 'binding in their entirety' under Article 189 of the Treaty first of all on each Member State, just as they are directly applicable and create rights for private parties, as you affirmed in your judgment of 17 May 1972 in Case 93/71, *Leonesio,* when giving a ruling on a question referred to the Court by the Pretore di Lonato under Article 177 of the Treaty, on the precise subject of the premiums for the slaughtering of dairy cows.

You have, moreover, established that these Regulations confer on the farmers the right to demand payment of the premium without the Member State concerned being able to oppose such payment by arguments drawn from any element whatsoever of its legislation or administrative practice.

As you have stated in your judgment 17 February 1970, *Commission v Italy,* the existence of the possibility of proceedings before national courts cannot prejudice in any respect the exercise of the right of action envisaged by Article 169, the two actions serving different ends and having different effects. When the application of Community Regulations in each Member State requires a re-arrangement of certain public services or of the rules which govern them, the fact that the authorities concerned refrain from taking the necessary measures by its very nature constitutes a default within the meaning of Article 169.

Similarly, it is incontestable that not only failure to act but equally prolonged delay in taking the measures required for carrying out a Community Regulation may constitute a default, when in order to ensure at the same time both the uniform application in each of the Member States and also the efficacy of Community law, the Regulation has set time limits for its implementation.

Consequently the arguments invoked by the Italian Government cannot be accepted.

The very fact that the implementing decrees intended to allow the payment of the premiums for slaughtering were only published in March 1972 and that the first payments only took place, as the representatives of this Government have told us, at the end of last year, should lead you to conclude, on this first point, that the Italian Government has failed to fulfil its obligations by uncontested and serious delay in adopting the measures necessary to implement them.

It is certain that at the time at which the action of the Commission was brought, the Community Regulations in question, even in so far as concerns the system of premiums for slaughtering, had not yet begun to be applied at all in the territory of the Italian Republic.

As you found in a judgment dated 19 December 1961 in Case 7/61, *Commission v Italy,* 'it is for the Court to state whether the default has occurred without the necessity of considering whether, subsequent to the commencement of the action, the defendant State has taken the necessary measures to put an end to the infringement'.

III — System of premiums for withholding milk and milk products from the market

In so far as concerns, at the present time, the premiums for withholding milk and milk products from the market, the argument of the Italian Government is essentially that in the absence of the appropriate statistical support and of the necessary means of control, and equally because of the peculiar type of farming and breeding which exists in at least part of the country, it found it impossible to put into application a system which required a precise inventory of the dairy cows on each farm and an exhaustive

control of the collection and marketing circuits. Further, the policy of the Community tending to encourage artificially, as we are told, abstention from marketing milk has proved contrary to the specific needs of the Italian economy, which is characterized by insufficient production, especially in the southern areas of the country, and risked provoking a state of crisis with repercussions throughout the economic and social life of Italy.

Further, the Community authorities themselves, recognizing that this policy was inappropriate for regions of poor milk production, later adapted and modified it in the way desired by the Italian Government, thus recognizing the legitimacy of its position and the reasons which led it to hold back from hastily putting into application measures which had proved damaging to its economy.

Having said this, the Italian Government does not in any way deny that no measure whatever has been taken with a view to putting into effect the Regulations in question, and it admits that there has not even been an attempt at bringing them into execution. It adds that, the facts being as they are and its failure to act being complete and irrevocable, the action brought by the Commission has no object: there is therefore no need to give a decision on it.

Before rejecting this line of argument it is appropriate to consider a problem which has in fact been raised by the Commission itself. The Commission, in presenting its case, drew attention to the fact that the Italian Republic, like the other Member States, has been intimately associated with the formation and development of the Regulations in question; it would have been possible for it, at this stage, to present all the technical, economic or political arguments which it might have considered cogent, in the general interests of the Community or in the particular interests of Italy, to ensure that these Regulations were not adopted, at least in so far as concerns the premiums for non-marketing.

But, at the hearing, one of the representatives of the Italian Government himself returned to this question, relying on the statements of the Italian delegation to the Council at the time of the discussion of the draft Regulation No 1975/69. This delegation, in fact, 'recalled the extremely serious doubts that it had always expressed concerning the efficacy of the measure envisaged for the purpose of granting a premium for giving up milk production', and stated that 'after a profound examination of the problem, it was strongly opposed to such a measure since it did not provide a practical solution to the problem of surplus milk'. Finally it clearly stated that this measure would not be practicable in Italy and that its costs would be out of all proportion to the results expected.

It is true, then, that the defendant Government, through the mouth of its representative, expressed serious reservations about the Regulation in question, at least in so far as concerns the system of premiums for withholding milk and milk products from the market. But, Members of the Court, the legal nature of this Community decision is clearly defined; we are concerned with a Regulation within the meaning of Article 189 of the Treaty, with the act, therefore, of a Community institution which is binding, we repeat, on Member States. Reservations, or even opposition, manifested before its adoption by one of these States cannot in any way justify a refusal to implement the Regulation on its own territory. Moreover, it is established that this Regulation of the Council was finally adopted unanimously by its members.

In Case 38/69, *Commission v Italy,* on the subject of a so-called acceleration decision under Article 235 of the Treaty when the Italian Government had maintained that this was in the nature of an 'international act' to which the Italian Republic had refused adherence, you

held that an act marked as a Community decision both by its purpose and by the institutional framework within which it was worked out cannot be described as an international agreement.

A fortiori, the force and the binding effect of a Regulation, the most usual expression of the Community institutions' power of decision, cannot be affected by reservations or statements made during the course of its preparation.

Let us merely add, for the sake of completeness on this point, that if the Italian Government considered it could convince the Council of the correctness of its point of view, it had the opportunity later of requesting either an extension of the time limits within which the measure adopted had to be applied on its territory, or even a derogation, as has happened on several occasions in the case of agricultural Regulations in so far as concerns Italy. But this was not even attempted.

It remains then to assess the value of the arguments put forward by the defendant Government in an attempt to justify its complete and utter failure to put into application the system of premiums for non-marketing of milk.

In the statement of defence it seems necessary to distinguish two arguments, although at the hearing this Government's representatives laid stress exclusively upon the second.

In the first place, we are told that taking into account the serious consequences to the national economy that the application of the system of premiums for non-marketing would have presented and because, it is added, the Italian deputies knew of the doubts also expressed at the Community level on the reasonableness of the measures on the subject, Parliament, faced with a draft law to bring Regulation No 1975/69 in all its provisions into operation, deleted the provisions concerning this system and deferred its decision. Let us accept that Parliament thus rejected on this point the Government's proposals.

But this is an argument, Members of the Court, which you have already rejected by your judgment of 5 May 1970, *Commission v Kingdom of Belgium* (Recueil 1970, p. 244) recalling that obligations deriving from the Treaty — and it cannot be otherwise with those which derive from Community Regulations — are binding upon the States as such; and adding that the responsibility of a Member State in relation to Article 169 is involved, whatever be the organ of the State whose action — or inaction — is at the base of the default, even if the organ in question is a constitutionally independent institution such as Parliament.

As for the second argument, this is drawn, we are told, from the physical impossibility which the Italian Government experienced in effectively putting into application the system of premiums in question, partly for lack of statistical resources and methods of control and partly because of the scattered nature and the small average size of the farms concerned and because of the methods of breeding practised.

This is so to speak to appeal to the concept of *force majeure,* to maintain that no one is obliged to do the impossible. But it is, at the same time, to forget that 'the subjects of the law' — or of the obligation — (as your Advocate-General Gand, recalled in Case 77/69 mentioned above) are the Member States themselves, who are bound under Article 5 of the Treaty to take all appropriate measures whether general or particular to ensure fulfilment of the obligations arising out of the Treaty, or of the Regulations made to implement them.

There is no purpose served, then, in discussing here whether the difficulties — which we believe, by the way, to have been real — encountered by the national authorities in the matter of statistical equipment and methods of investigation at their disposal were or were not insurmountable. We have no means of verifying this. At the most we may allow ourselves to express certain doubts on

the absolute impossibility on which reliance has been placed. Even if the resources of the Ministry of Agriculture were insufficient, even if the necessary controls were not as exact and efficient as could have been desired, these gaps and insufficiencies would not have altogether prevented the system of premiums from being put into force, with no doubt a margin of error and uncertainty unfortunately common enough in the application of economic regulations, particularly in the domain of agriculture.

But in law the argument appealed to seems to me destitute of value, for the Italian Government cannot rely on an outside event unforeseeable and irresistible, constituting *force majeure*. Bound by a Community Regulation, that is to say by a decision of the Community of which it is itself a member, it was under a legal duty to apply the Regulation, or at the very least to make every effort to apply it, whatever difficulties there may have been stemming from the structure of its agricultural economy and the shortcomings of its administrative procedures.

Its failure to act falls within the ambit of Article 169 of the Treaty, the aim of which is to ensure that Community interests prevail in face of the inertia or resistance of the Member States. To decide otherwise would be to disregard the very foundations and aims of the Community, which cannot be attained, as you have held in your judgments, unless the rules laid down by its institutions are applied automatically at the same moment and with identical effects throughout the length and breadth of the Common Market.

Certainly, the decisions taken by the Council or by the Commission, particularly in the sphere of the common agricultural policy, may well prove to be more or less effective, more or less advantageous, or, on the other hand, may present greater or lesser difficulties and can encounter greater or lesser obstacles according to the Member States concerned. But none of these decisions can be isolated from the totality of the agricultural policy, the strength of which lies precisely in its being common to all these States. It is understandable that Italy considers herself more particularly affected by measures intended to eliminate surplus production of milk, since her own milk production, at least in certain regions, is insufficient; but when it is a question of the fruit and vegetable market, or of viticulture, will there not be other States who think they are suffering under decisions which the Italian Government will consider, for itself, eminently useful or even indispensable?

Thus it is the total balance of the agricultural common market which is in question. To admit that, for reasons of convenience or even of economic necessity, a Member State may escape the application of the Community Regulations would amount to a denial of the very fact of the economic Community.

I submit then that judgment should be given as follows:

— that in not taking, within the time limits set, the measures necessary to ensure effective application of the system of premiums for slaughtering of dairy cows and in not taking any measures whatever with a view to ensuring effective application of the system of premiums for witholding milk and milk products from the market, the Italian Republic has failed to fulfil the obligations imposed upon it by virtue of Regulations No 1975/69 of the Council and No 2195/69 of the Commission.

— that the defendant be ordered to pay the costs.