OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 3 MARCH 1977 [1]

Mr President,
Members of the Court,

1. The present case is submitted for a decision as a matter brought before the Court by the Commission under Article 169 of the Treaty of Rome. The defendant is the French Government, which, in the Commission's view, has been guilty of an infringement of Article 34 of the Treaty.

The facts which led to the proceedings are as follows.

As a result of the sharp drop in potato production witnessed in Europe in 1975, the French Government, by a provision published in the Official Gazette of the French Republic on 25 October 1975, made the export of all potatoes coming under heading 07.01 A III (b) of the Common Customs Tariff subject to the production of an export certificate endorsed by the Fonds d'Orientation et de Régularisation des Marchés Agricoles (Fund for the Guidance and Stabilization of Agricultural Markets) (FORMA). A few days earlier, on 22 October, the French Government had notified the Commission of its intention to subject potato exports to a 'monitoring' procedure.

The said French provision takes the form of a 'Notice to exporters to all countries of certain categories of potatoes'. It refers to the procedure provided for by order of the Director-General of Customs of 30 January 1967, as amended by order of 20 October 1975 (Journal Officiel, 31 January 1967, p. 1127 and 30 October 1975, p. 11212) under which *inter alia* the export of certain goods may be subject to the production of a certificate previously endorsed by a branch of the administration. The order prescribes the form of the certificate and the arrangements for affixing the endorsement without, however, specifying whether and in what circumstances the endorsement may be refused.

In Information Bulletins Nos 702 and 703 of 8 and 15 November 1975, the French Minister for Agriculture stated that the provision of 25 October was designed to restrain and stabilize the exportation of potatoes and that a quota would be laid down each week by the Minister for Economic Affairs and Finance 'for the granting of export applications'. The amount of the quota was to be determined in accordance with the state of the market. An inter-departmental committee would meet on Thursdays to apportion the quota among the various applicants. Priority would be given to satisfying export applications to countries which were traditional purchasers from France (the Federal Republic of Germany, Italy and the French-speaking countries of Africa), submitted by established exporters or by those who had concluded individual storage contracts.

By telex message of 3 December 1975 the Commission informed the French Government that it considered the procedure described above as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 34 of the EEC Treaty. After having requested and obtained further information on the subject from the French Government, the Commission, by letter of 26 December 1975, confirmed its view and, in accordance with Article 169 of the EEC Treaty, laid down a period for that government to submit its observations.

1 — Translated from the Italian.

After receiving them, the Commission, by letter of 24 March 1976, delivered to the abovementioned government the reasoned opinion prescribed by Article 169 of the Treaty alleging the infringement of Article 34 (1).

In its reply of 22 June 1976, the French Government stated *inter alia* that the system of control which it had established for exports was an exceptional measure designed to protect the traditional patterns of trade. In its view, such a measure is justified in the absence of relevant Community provisions and, in any case, is not such as to give rise to quantitative restrictions in intra-Community trade.

In view of the intention of the French Government to continue with the contested measure, the Commission brought the matter before the Court of Justice on 16 July 1976 for a declaration that, in making the export of potatoes to Member States subject, with effect from 25 October 1975, to the production of an export certificate endorsed by the FORMA, the defendant acted contrary to the obligation imposed on it under Article 34 of the EEC Treaty.

2. Article 34 (1) of the EEC Treaty reads: 'Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States'. The Commission maintains that the measure adopted by the French Government infringes that rule and, in support of its case, refers to the relevant precedents established by this Court.

The French Government puts forward its defence on two different levels. First, it denies that the purpose of the measure in question is to restrict exports to other Member States. Secondly, it advances an argument of more general application to the effect that, in agricultural matters, Article 38 (2) of the Treaty permits the States to adopt unilaterally all the measures necessary where the Community has not yet legislated for a particular industry, regardless of the provisions of Title I of the Treaty. This field of autonomy of the Member States must be respected, especially when exceptional situations arise (as, in the present case, drought and a potato shortage) and call for action to stabilize the market and trade.

On the first point, the defendant states that the object of the system of control adopted for potatoes is to restrain exports to third countries, and that this is evidenced by the marked increase in French exports to other Member States compared with the quantity of potatoes exported to non-member countries after the entry into force of the contested measure. Counsel for the defendant sought to minimize the importance of the information supplied in the abovementioned Information Bulletins of the Minister for Agriculture and contended that they were really designed to placate certain sections of opinion and that, in any case, they could not take precedence over the official viewpoint of the French Government to which expression was given, in particular, in the telex message of 22 October 1975 and in the letter of 27 January 1976 from its Permanent Representative to the Commission. In that correspondence, the French Government denied that the procedure in question was intended to impose quantitative restrictions on trade with the other Member States.

During the proceedings, the defendant also stated that the sole purpose of the formalities involved was to enable the French authorities to discover the intentions of exporters and thus, in the case of exports to other Member States, to prevent any diversion of trade which might occur if goods exported to another Member State were in fact intended for non-member States.

I cannot regard this initial defence by the French Government as a valid one.

In its judgment of 15 December 1971 in Joined Cases 51 and 54/71 *(International Fruit Company* v *Produktschap voor Groenten en Fruit* [1971] ECR 1107), the Court held that, apart from the exceptions for which provision is made by Community law itself, Articles 30 and 34 of the Treaty preclude the application to intra-Community trade of a national provision which requires, even purely as a formality, import or export licences or any other similar procedure, even when the licence is automatically issued and free of charge. This principle was recently reaffirmed in the judgment of 15 December 1976 in Case 41/76, *Criel née Donckerwolcke* v *Procureur de la République* and, in connexion with a different kind of formality accepted in place of an export certificate, in the judgment of 3 February 1977 in Case 53/76, *Ministère Publique* v *Bouhelier.*

I do not think there can be any doubt that the same principle also applies to a procedure, such as that at issue in this case, whereunder the endorsement of a public authority on export certificates is an essential condition before exportation can be effected. Whether, as in the case of the issue of export licences, this involves a formality which a customs authority is competent to fulfil or whether (as happened in the *Bouhelier* case, which involved the issue of a quality certificate by the Cetehor, and in the present case, which involves the provision of an endorsement by the FORMA) an indication is, on the other hand, required of the approval of a different institution, this does not affect the appraisal of the resulting situation in terms of Community legislation prohibiting all measures having an effect equivalent to quantitative restrictions.

In the present case, I must say at once that I cannot really understand why we should ignore the information contained in the Information Bulletins of the responsible French Minister for Agriculture and should address ourselves simply to what was stated by the French Government in its correspondence with the Commission. It must be emphasized that the abovementioned bulletins disclose two specific conditions for priority and, therefore, for discrimination in favour of particular countries and of particular exporters. There is, on the other hand, no evidence at all of the alleged intention merely to control the trade in potatoes to non-member States. In any case, even if the only authentic statement of the French Government's point of view were that communicated in the letters to the Commission, the measure at issue would, in the light of the Court's interpretation of the rule in Article 34 (1), still have to be regarded as imposing restrictions contrary to that rule. There can be no doubt that the mere fact that a special formality is imposed involves delay and, above all, may act as a disincentive to exporters who are by no means certain of obtaining the endorsement. Such a situation of uncertainty may inhibit the conclusion of export contracts even in the context of intra-Community trade and, regardless of the actual application of selective control, constitute of itself an infringement of the prohibition laid down in Article 34 (1). Nor is it of any avail to point to the fact, alleged by the defendant, that there has been an increase of French potato exports to the other Member States compared with the volume of exports of the same product to non-member States. No one can tell what, in the absence of the said measure, the volume of French exports to the other Member States would have been.

3. It is true that, as I had occasion to point out in my opinion of 24 November last, in Case 41/76, *Criel née Donckerwolcke* v *Procureur de la République,* the conclusion can be drawn from the precedents established by this Court that certain national measures which are liable to render intra-Community trade more difficult may escape the prohibition in Articles 30 and 34, even apart from the express provision

in Article 36, if they are adopted for a purpose which accords with the Community's interests and which is therefore worthy of protection, always provided that the restrictive effect is in proportion to the object thereby being pursued.

This may give rise to the question whether the stated purpose of guaranteeing Community supplies which, according to the statements of the French Government, is served by the contested measure, may not justify the restrictions which it imposes on intra-Community trade.

In this connexion the defendant has referred to the judgment of 14 July 1976 in Joined Cases 3, 4 and 6/76, *Kramer and Others* ([1976] ECR 1279). Although the situation under review by the Court in that case involved action by the States designed to limit production and, in consequence, trade in a sector of the economy subject to the Treaty, it was held to be compatible with the Community prohibition of quantitative restrictions because it was concerned with measures necessary to conserve the resources of the sea. This objective could be achieved only by means of an agreement with the non-member States engaged in fishing in the areas of the sea in question: in view of this, all the Member States did was to anticipate, at international level, action entrusted to the Community by Article 102 of the Act of Accession. It is worth noting that, as the result of adoption of uniform principles for the control of fishing and, in particular, of catch quotas, the international obligations undertaken by the Member States which have fishing fleets in the sea areas involved do not create any discrimination in respect of the freedom of movement of the fishery products between the Member States.

The position with regard to the national regulations involved in the present case is different. As I pointed out earlier, they not only restrict the free movement of a particular product but they are discriminatory from two points of view: from that of the Member States, some of whom are given preferential treatment in the allocation of the weekly quota, and from that of the exporters, among whom some categories are treated better than others.

On the other hand, the question referred to above is to some extent connected with the issues raised in the arguments of the French Government relating to its second line of defence. I must now consider these arguments.

4. According to the French Government, in the absence of a common organization of the market in a particular sector of agricultural production, each Member State remains entitled to lay down rules for that sector pending the appearance of Community legislation. This entitlement must extend to the adoption of the provisions necessary to cope with particular situations without their being limited by the rules in Title I of the Treaty. The French Government contends that it is possible to find evidence in support of its argument in the judgment of the Court of 31 March 1971 in Case 22/70 *(Commission* v *Council* [1971] ECR 263), the famous case involving the European Agreement concerning the work of crews of vehicles engaged in international road transport ('AETR'). In that judgment it was held that when, in pursuance of a common policy provided for by the Treaty, the Community has, in a given field, adopted common rules, this excludes the powers of the Member States. The defendant in the present case concludes from this that as long as such rules are lacking, as they are in the case of the potato industry, national powers remain intact.

However, this reference to the 'AETR' judgment may tend to confuse two issues and two very different situations. On the one hand there is the question, which was under consideration by the Court in that case, whether the Community alone

has power to conclude international agreements on matters in regard to which the Treaty has not expressly provided for such powers. On the other hand there is the issue, to which I must now address myself, of the continued power possessed by each Member State to adopt national provisions in a sector which without doubt falls within the competence of the Community but in regard to which the Community has not yet established a common organization of the market.

In the 'AETR' case, the powers of the Community in external affairs could, in the absence of any reference in the Treaty, be inferred only from the existence of exhaustive Community legislation governing, within the Community, the specific matters which were also the subject of the international agreement with third States. The conclusion which the French Government wishes to draw from that judgment involves a *non sequitur:* there is no question here of excluding any actual power of the Community in international matters in the absence of internal rules of its own (as would be correct) or, which amounts to the same thing, of stating that, in such circumstances, the Member States continue to be competent in international matters; the view being urged is that the States have internal authority in a sector which the Treaty expressly brings within the competence of the Community.

The absence of a common organization of the market for specific agricultural products can certainly justify the maintenance and even the adoption of national provisions for the sector but only inasmuch as they do not conflict with the general Community rules which already apply, and here it must be clearly emphasized that the fundamental and irrefragable rules of the common market contained in Title I of the Treaty, in particular in Article 34, also apply to trade in those agricultural products for which a market organization has not yet been established. To conclude from Article 38 (2) of the Treaty of Rome that the rules in Title I are not applicable until Article 49 (2) has been wholly put into effect would be to distort the meaning of the provision. It is clearly provided in Article 38 (2) that 'Save as *otherwise provided* in Articles 39 to 46, the rules laid down for the establishment of the common market *shall apply to agricultural products*'. The absence of a common organization of the market in a particular agricultural sector certainly does not amount to a *provision contrary* to the rules laid down for the establishment of the common market.

In its judgment of 10 December 1974, in Case 48/74, *Charmasson* v *Minister for Economic Affairs and Finance* ([1974] ECR 1383) the Court rightly held that 'the derogations which a national organization may effect from the general rules of the Treaty are only permissible provisionally ... this cannot, however, be the case after the expiration of that transitional period, when the provisions of Article 33 must be fully effective'. This decision has two very important implications. In the first place, Article 33 is grouped with the general rules of the Treaty, from which no derogations are permissible after the end of the transitional period (and the same condition no doubt applies to Article 34 which was, in fact, already fully effective during the transitional period). Secondly, the Member States are prohibited from *retaining,* after the end of the transitional period, restrictions on the movement of, *inter alia,* agricultural products which have not been made the subject of a common organization of the market, which *a fortiori* makes it impossible for the Member States to adopt *new restrictive measures.*

5. The defendant tries to overcome the difficulty of these decisions in the first place by saying that if the failure of the Council to make regulations for certain agricultural sectors does not prevent the

application of the principles of the Treaty concerning the free movement of goods, neither should it constitute an obstacle for the exceptions allowed by the Treaty to the application of those principles. It states that the need for some flexibility in agricultural matters is clear from the said provision of Article 38 (2) of the Treaty in that, while it provides that the rules laid down for the establishment of the common market shall apply to agricultural products, it makes an exception where otherwise provided in Articles 39 to 46. It is accordingly possible for the Community institutions to derogate from the general rules relating to the establishment of the common market for agricultural products which are subject to specific common legislation. According to the defendant, the States should be acknowledged to have the same option in the case of products which are not yet the subject of a common organization and which, accordingly, have remained subject to action on their part. In the defendant's view, to take the opposite view might create a legislative vacuum.

The defendant further states that the *Charmasson* judgment refers only to derogations from the principle of the free movement of goods based on the existence of a national organization of the market but does not affect those derogations which, without being connected with the normal functioning of a national organization of the market, are intended, by means of temporary departures from the principles of the common market, to cope with a difficult situation in a particular agricultural sector, failing and pending action by the Community institutions.

As regards the French Government's first observation, it must be borne in mind that the Community authorities did take action concerning potatoes in the form of common protective measures in the nature of tariffs to be applied against non-member countries, though only after the adoption of the national measures which we are considering. The fact is that on 20 January 1976 the Council, in Regulation (EEC) No 128/76, totally suspended the Common Customs Tariff duty for certain kinds of potatoes in view of the potato shortage in the Community. Furthermore, in view of the fact that potatoes were in short supply in the common market the Council, on 17 February 1976, temporarily imposed a tax on exports of that product to non-member countries, at the same time providing for the possibility of adjusting the amount of this tax to take account of changing prices on the Community market and on the world market and of any import subsidies granted by non-member countries.

The defendant was not at pains to demonstrate or even to argue that this Community action had been insufficient to cope with the situation which arose in the potato sector. Consequently, the conclusions which the French Government wishes to draw from the alleged absence of legislative measures by the Council can only relate to the period prior to the adoption of the Community measures referred to (at most, from October 1975 to February 1976).

In any case the basic weakness of the defendant's contentions lies, in my view, in the fact that the Treaty lays down that freedom of movement shall be achieved by the end of the transitional period through the abolition of customs duties and quantitative restrictions on all agricultural products, whether or not they are subject to a common organization of the market. It does not give the States the right, after the end of the transitional period, to derogate unilaterally from the general principles of the common market save for the possible exception of the temporary maintenance, in substitution for quotas, of minimum prices for imports (Article 44 (1) and (6)).

Apart from this possibility, the general qualification arising from the provision of Article 38 (2) of the Treaty can, after

the end of the transitional period, be applied only as the result of action by the Community institutions. The purpose of the provisions of Title II of the Treaty is, in fact, to enable the Community institutions to take account, when adopting common provisions for the agricultural markets, of the particular needs of agriculture and, to this end, to adopt special arrangements which in certain respects may depart from the strict application of the general rules of the common market. But the conferment of power on the Community to adapt those rules to a special type of product is no justification for the contention that the States should be acknowledged to have a corresponding power in relation to products for which a common organization of the market has not been established.

Moreover, as the Commission has pointed out, not even the special measures intervening in and organizing production and trade within the framework of the common agricultural policy can involve the denial of freedom of trade between the Member States. The restrictive effect on trade which may be caused, for example, by the possible repercussions of certain measures, such as intervention prices, export refunds and so on, on the quantities produced is in any case merely an indirect one. And, above all, such actions, which are based on considerations which are valid throughout the territory of the Community, do not endanger the unity of the market.

While, therefore, it is true that the common organizations of the market give rise to intervention on the agricultural market by public authorities to an extent which would not be permissible in the industrial field, those organizations still have to abide by the fundamental principle of the freedom of trade throughout the Community.

It does not seem acceptable therefore to contend, as the defendant does, that the application of the general rules of the market to agricultural products which are not subject to a common organization has the consequence that agricultural products are sometimes treated as such and at other times as industrial products, according to whether the Community has or has not provided for them to be subject to a market organization. On the other hand, it must be emphasized that the principle of free movement applies to all agricultural products, whether or not subject to a common organization of the market.

In consequence, the fact that, in agricultural sectors not subject to a market organization, the States have retained the right to adopt steps of their own does not permit them, in exercising this residual power, to refrain from observing the general rules on which the common market is based and, in particular, to ignore the rules designed to preserve freedom of trade within the Community.

6. The question may still arise whether, in cases of emergency, it is permissible for the States to adopt restrictive provisions on an exceptional and temporary basis in so far as there is a lack of Community provisions capable of coping with a particular situation and to the extent to which the provisions in question are, accordingly, necessary in order to deal with serious difficulties.

This is an issue of general interest; I do not think that it can be tackled solely in the agricultural context. It involves the question whether, under the Treaty of Rome, there is a residual power of intervention by the State to adopt protective measures at national level in the absence of and pending Community action. And it is not enough to dismiss the view contended for by the Commission that national intervention measures, which are necessarily limited in their territorial application, are insufficient to satisfy the needs of the Community, which requires measures

conceived in comprehensive terms and valid for the whole Community. Undoubtedly the general needs of the Community can be met only through measures of this kind but the question is whether, in the absence of such measures, the States can be acknowledged to have a sort of inherent power to act in order to overcome difficulties produced by unusual and unforeseen occurrences in a particular sector of the economy.

I should briefly recall that ever since the EEC Treaty began to be applied, the Court has upheld the principle that a State cannot unilaterally derogate from the fundamental rules which govern the functioning of the common market even in cases of dire need or as a purely protective measure if the Treaty provides procedures and means whereby those difficulties can be overcome (see the judgment of 19 December 1961 in Case 7/61, *Commission* v *Italy*, Rec. 1961, p. 625 *et seq.*). Not even the fact that an application for an authorization to institute derogative measures had been made to the Community institutions, pursuant to Article 226 of the Treaty, was considered sufficient to justify the unilateral adoption of measures restricting the free movement of goods within the Community: this is the tenor of the Court's judgment of 14 December 1962 in Joined Cases 2 and 3/62, *Commission* v *Grand Duchy of Luxembourg and Kingdom of Belgium* ([1962] ECR 425).

Measures which derogate from the normal functioning of the market, as for example in the case of monetary compensatory amounts, may be adopted by way of exception and to avoid major difficulties, by the Community authorities alone or under authority granted by them, on the basis of an appraisal of the seriousness of the situation and of the most appropriate means of coping with it in the common interest. The defendant has itself recognized that a major consideration which is to be found in all the case-law of the Court concerning the system of compensatory amounts and which enables them to be accepted as a protective measure consistent with the Treaty is the Community character of that system.

Without venturing outside the context of the present case or attempting to give a comprehensive and exhaustive reply to the question concerning the emergency measures of individual States, I must emphasize that at the time when the French Government adopted the measures in question, it could have taken steps to cope with the difficulties which had appeared in the potato sector by taking action at Community level. There was absolutely nothing to prevent it from seeking the adoption by the Council of suitable measures to meet the situation on the basis of an appraisal of the Community's interests. However, the French Government does not appear to have even considered such a possibility, and this is shown by the fact that, even when the Council took the steps described above concerning potatoes, the French Government maintained its own measures in force.

7. Finally, it must be borne in mind that, even if the unilateral actions of the State were to be recognized as being of unavoidable necessity and urgency, it would nevertheless be necessary to determine whether the measures taken were not more restrictive than was necessary for the achievement of their purpose.

On the question of their purpose, the inconsistency between the various statements made by the French authorities has already been pointed out.

In the course of these proceedings the defendant stated that the measures adopted were designed merely to restrain exports to non-member countries on the same lines as the measures which were subsequently adopted by the Council.

But the official information bulletins of the responsible French Ministry took a very different line. The very fact that traders were in a state of uncertainty represented a source of interference with Community trade, whatever may have been the object of the national legislation. Moreover, in the absence of conditions, capable of being objectively checked, for the grant or refusal of the endorsement by the FORMA, it still remained possible that goods would be treated differently according to their destination, even within the common market. At the hearing, Counsel for the defendant State admitted, in answer to a specific question, that the French Government reserved the right to take action, by means of the FORMA endorsement, restricting exports to other Member States in order to avoid the danger of a diversion of trade to non-member States.

At the same time, the defendant suggested the possibility that the restrictive measure in issue could be justified as being for statistical purposes and, more particularly, as part of the arrangements for collecting the information necessary to give effect to Council Regulation (EEC) No 348/76 of 17 February 1976. But that regulation does no more than impose a tax on exports of potatoes to non-member countries, whereas the French arrangements involve the possibility of restrictions being placed, as the result of refusal of the FORMA endorsement, on the quantities of the product to be exported.

The conclusion is, therefore, inevitable that, even supposing the national measures in question were introduced in order to restrict the flow of trade to non-member States, their effect was more restrictive than necessary. And this, I repeat, is so whether or not this purpose is or is not sufficient justification for the unilateral action of the French Government.

8. For all the foregoing reasons, I recommend the Court to declare that, in issuing the 'Avis aux Exportateurs' of 25 October 1975, whereunder the export of potatoes was made subject to the production of an export certificate endorsed by the FORMA, the French Government has infringed Article 34 of the EEC Treaty.

The defendant should, accordingly, be ordered to pay the costs.