In Joined Cases 80/77 and 81/77

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal d'Instance, Bourg-en-Bresse, for a preliminary ruling in the action pending before that court, in Case 80/77

between

SOCIÉTÉ LES COMMISSIONNAIRES RÉUNIS S.A.R.L.

and

RECEVEUR DES DOUANES

and in Case 81/77

between

S.A.R.L. LES FILS DE HENRI RAMEL

and

RECEVEUR DES DOUANES

on the interpretation and validity of Article 31 (2) of Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine (Official Journal, English Special Edition 1970 (I), p. 234).

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The judgments making the references to the Court and the written observations submitted under Article 20 of the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. Between October 1975 and March 1976 the plaintiffs in the main actions when importing into France consignments of wine originating in Italy paid to the French customs FF 81 614.40 (Case 80/77) and FF 2 009 494.14 (Case 81/77) as duty on table wine and wine suitable for making into table wine imposed by Decree No 75/846 of 11 September 1975. This decree was repealed on 31 March 1976 with effect from 1 April 1976. The Commission had initiated proceedings on 21 November 1975 against the French Republic for failure by a Member State to fulfil an obligation but after the duty was abolished the action was discontinued on 21 April 1976. The plaintiffs in the main actions took the view that the levying of the duty was unlawful and brought actions against the customs authorities in the Tribunal d'Instance, Bourg-en-Bresse, for a refund and compensation.

The customs authorities met them with Article 31 (2) of Regulation No 816/70 of 28 April 1970 and this led the plaintiffs in the main actions to raise before the Tribunal d'Instance questions on the interpretation and validity of that provision.

Article 31 (1) and (2) of Regulation No 16/70 reads as follows:

"1. The following shall be prohibited in the internal trade of the Community:

(a) The levying of any charge having effect equivalent to a customs duty, subject to the provisions of Article 2 of Regulation (EEC) No 541/70;

(b) Any quantitative restriction or measure having equivalent effect.

2. By way of derogation from the provisions of paragraph 1, so long as all the administrative mechanisms necessary for the management of the market in wine are not in application — with the exception, until 31 December 1971, of the viticultural land register — producer Member States shall be authorized in order to avoid disturbances on their markets to take measures that may limit imports from another Member State.

These measures shall be communicated to the Commission, which shall decide without delay whether to maintain, amend or abolish such measures."

By two judgments of 30 June 1977 in Case 80/77 and Case 81/77 the Tribunal d'Instance, Bourg-en-Bresse, referred the following questions to the Court of Justice:

"(1) Does Article 31 (2) of Regulation No 816/70 of the Council accord with the EEC Treaty, having regard to the fact that that provision authorizes measures contrary to the rules of the Treaty

on the free movement of goods applicable after the end of the transitional period?

(2) If the answer to the foregoing question is in the affirmative, were the provisions of Article 31 (2) of the said regulation still applicable on 11 September 1975, having regard to the possibility that all the administrative mechanisms necessary for the management of the market in wine had been set up?"

The judgments making the references to the Court were received at the Court Registry on 4 July 1977.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court on 26 October 1977 ordered that the cases be joined and decided to open the oral procedure without any preparatory inquiry.

The plaintiffs in the main actions, the Commission of the European Communities, the Council of the European Communities and the French Government made written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

By order of 30 November 1977 the Court, after consulting the French Government, the Council and the Commission and obtaining their consent, added to the file of Joined Cases 80 & 81/77 a certain number of documents from the French Government, the Council and the Commission produced in Case 117/75, which was a case of proceedings brought by the Commission against the French Republic for a finding of failure by a Member State to fulfil an obligation under the Treaty, registered on 27 November 1975 but discontinued on 21 April 1976.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations of the plaintiffs in the main actions

The plaintiffs in the main actions claim that since the end of the transitional period Article 31 (2) of Regulation No 816/70 is repealed. They stress that in this respect it follows from the case-law of the Court of Justice that the principle of free movement of goods is fundamental and applies to every Member State as a rule basic to the very existence of the Common Market. The agricultural policy cannot derogate from this principle and the judgment in Case 48/74 *Charmasson* [1974] ECR 1383 confirmed the priority of the objective of free movement over the establishment of an agricultural policy. If there are exceptions to the principle of free movement of goods they can be only temporary and partial without becoming an "obstacle" to trade. The plaintiffs in the main actions, moreover, observe that in any case there was no longer any cause on 11 September 1975 and subsequently to apply Article 31 (2) of Regulation No 816/70 because "all the administrative mechanisms necessary for the management of the market in wine" had already been set up at that date in all Member States including Italy. Accordingly, by establishing and levying a duty on table wine and wine suitable for making into table wine originating in another Member State the French Republic was failing to fulfil the obligations imposed on it by Articles 9 and 12 of the Treaty and Article 31 (1) (a) of Regulation No 816/70 and the decree in question was unlawful thus making the levying of the said duties unlawful with the result that no payment was due.

B — Observations of the Commission

Since the parties to the main actions did not deny that the duty in question constituted a charge having an effect equivalent to a customs duty on imports prohibited by Articles 9 and 12 of the EEC Treaty and by Article 31 (1) of Regulation No 816/70, the problems arising are first whether Article 31 (2) is compatible with the EEC Treaty and, if so, whether the conditions for the application of the said Article 31 (2) were still fulfilled on 11 September 1975, the date when the duty was introduced.

1. The lawfulness of Article 31 (2) of Regulation No 816/70

The lawfulness of Article 31 (2) of Regulation No 816/70 depends on the answers to the question whether in order to resolve problems arising in the context of the Common Agricultural Policy Article 43 of the EEC Treaty enables the Community legislature to create obstacles to trade contrary to Articles 9 to 37 of the Treaty.

It follows from Articles 39 to 43 of the Treaty and in particular Article 38 (4) that

(1) The rules on the free movement of goods are fundamental principles binding the Community legislature in the agricultural sector. It may even be inferred from the judgment given by the Court of Justice on 10 December 1974 in Case 48/74 *Charmasson* [1974] ECR 1383 that if an order of precedence had to be established between the objective of free movement and the establishment of a common agricultural policy, the former would come first.

(2) Exceptions to this rule are more apparent than real. The Commission cites in this respect the monetary compensatory amounts which were conceived only to prevent disturbances to trade as appears from the judgments of the Court of Justice of 24 October 1973 (Case 5/73 *Balkan* [1973] ECR 1091; Case 9/73 *Schlüter* [1973] ECR 1135; and Case 10/73 *Rewe* [1973] ECR 1175) and the provisions of Regulation No 1876/74 of 15 July 1974 (Official Journal L 198 of 20 July 1974, p. 1). It adds that in the light of the judgments of 16 March 1977 (Case 68/76 *Commission* v *French Republic* [1977] ECR 515) and 25 January 1977 (Case 46/76 *Bauhuis* [1977] ECR 5) it must also be accepted that the Community legislature has the power to prescribe measures which, if taken unilaterally by Member States, would constitute obstacles prohibited by the Treaty to free movement of goods, in so far as such measures respect the unity of the Common Market and do not discriminate between producers or consumers of the Community.

The Commission claims that if Article 31 (2) of Regulation No 816/70 is looked at in the light of these principles it will be seen this provision was included in its proposal to the Council regarding the said regulation because at the time (1970) the Commission considered in accordance with theory that even after the expiration of the transitional period obstacles to trade inherent in an organization of a national market could continue so long as such organization was not replaced by a common organization. It followed that it must be lawful for Community institutions to incorporate such obstacles in a Community regulation. The judgment of the Court in the *Charmasson* case (judgment of 10 December 1974, Case 48/74 [1974] ECR 1383) removed the premise from this argument by ruling that after the end of the transitional period the existence of a national organization of the market for agricultural products not subject to a

common organization could not justify obstacles to intra-Community trade.

It would appear moreover that Article 31 (2) does not fulfil the conditions laid down in the above-mentioned case-law of the Court of Justice, namely that Community measures restricting the free movement of goods must preserve the unity of the Common Market and may not be of a discriminatory character. Article 31 (2) clearly discriminates against producers. The Commission considers that the judgment of the Court of 21 March 1972 (Case 82/71 *SAIL* [1972] ECR 119) does not run counter to its contention for although in that case the Court accepted the maintenance of the national system of milk centres beyond the expiry of the transitional period, it was only in order to make the abolition of that system coincide with the end of the current milk year. If the same criterion were applied in the present case, Article 31 (2) could be valid only until 31 August 1970 at the latest, the date of the end of the wine year. The Commission suggests that the Court of Justice should answer the first question put by the national court in the negative.

2. The lapse of Article 31 (2) of Regulation No 816/70

The Commission considers that even if Article 31 (2) were lawful in origin, it was in any event no longer applicable in September 1975, since by that time all the administrative mechanisms necessary for the management of the market in wine had long been set up in all the Member States.

(a) Contrary to the Council's opinion, the Council did not have to make an express finding that the condition "so long as all the administrative mechanisms necessary for the management have not been set up in all the Member States" was satisfied. This is a question of fact, which, in the event of dispute, is for a court to resolve. The Council moreover had included in the minutes of its meeting on 27 and 28 April 1970 a statement that there should be a finding, not by the Council, but by the Commission, which should make a report to the Council. Although it appears from the report submitted by the Commission to the Council on 27 July 1971, that the condition had not then been satisfied, it is apparent on the other hand from the reports submitted in January and February 1972 by the Working Party on Wine and by the Special Committee on Agriculture, both under the Council, that the necessary administrative mechanisms had in the meantime been set up, that Regulation No 816/70 was in operation in every respect and that as a result, as the Working Party expressly confirmed that "the provisions of Article 31 (2) have become redundant". This opinion was considered and confirmed by the Special Committee on Agriculture in a report to the Council. The fact that neither the Council nor the Commission returned to the question after 1972, far from justifying any argument that all the administrative mechanisms had not been set up in all Member States, shows that it was generally considered that the Commission's task had been accomplished.

(b) Article 31 (2) lapsed and could not subsequently be resuscitated once the condition for its application no longer existed. Its transitional nature precluded any intermittent application to meet shortcomings appearing after the administrative mechanisms had once been set up in all the said States. The way to deal with such shortcomings was by the procedures provided for in Articles 169 and 170 of the Treaty. The Commission adds that even assuming that the safeguard clause could be resuscitated if there were subsequently need, it should be borne in mind that the application of Article 31 (2) of Regu-

lation No 816/70 requires a general assessment and not an analysis of the administrative mechanisms set up. Article 31 (2) applies only in the *absence* and not the *malfunctioning* of the administrative mechanisms. Although this makes it unnecessary to consider whether the administrative mechanisms functioned well or not so well in Italy, the Commission observes nevertheless that to appreciate how only those administrative mechanisms (stocking and distillation) which were criticized at the time by the French Government functioned in Italy, it is necessary to consider what quantities have been stocked and distilled rather than the periods within which payments were made.

As regards the quantities *stocked* the figures for the 1974/1975 marketing year are for Italy and France respectively:

	Italy	*France*
Short-term storage contracts	Hl 4 276 000	Hl 6 435 000
Long-term storage contracts	Hl 1 900 000	Hl 5 841 000
	Hl 6 176 000	Hl 12 276 000

The difference between the two figures results from the greater credit and guarantee facilities afforded to the French wine growers.

As regards the quantities *distilled* the figures for the whole of the 1973/74 and 1974/75 (until 31 July 1975) marketing years are some Hl 6 800 000 for Italy as against some Hl 14 000 000 for France, the latter figure including, according to the Commission, Hl 3 000 000 distilled as a result of aid granted in disregard of Community law.

These figures show that the intervention measures have affected large quantities in Italy and they indicate a correct and satisfactory functioning of the administrative mechanisms necessary for the management of the market.

As regards the *harvest declarations* the difference between the provisional and final figures is, in respect of the 1974 harvest in Italy, only 0.8 % whereas in France it was 1.9 %.

As for the *checks on movement of wine* the Member States had adopted all the measures for implementation of the Community rules, drawing up accompanying documents and determining the obligations of wine producers and traders other than retailers in the wine sector (Regulation (EEC) No 1769/72, Official Journal, English Special Edition 1972 (III), p. 909, replaced by Regulation (EEC) No 1153/75, Official Journal L 113 of 1 May 1975, p. 1). The necessary particulars for the application of these rules were notified by the Member States to the Commission.

Finally, as regards *wine deliveries*, governed by Regulation (EEC) 1877/74 (Official Journal L 198 of 20 July 1974, p. 3) which provides that producers may, in total or partial discharge of the obligation to distil, produce or have produced potable spirits of grape marcs or potable spirits of wine from their own products, the Commission observes that the quantities of alcohol produced in Italy as wine deliveries have been duly notified to the Commission and that the latter has no information indicating failure in checking the wine deliveries in Italy.

The Commission suggests that in the event of the first question put by the national court being answered in the affirmative, the Court of Justice should answer the second question in the negative.

C — Observations of the French Government

First question (lawfulness of Article 31 (2) of Regulation No 816/70).

To question the conformity of Article 31 (2) of Regulation No 816/70 with the rules of the Treaty on free movement could, in the view of the French Government, lead to free movement conflicting with or even prevailing over all other considerations on the basis that the first must always prevail over the second. This would amount to a wrong interpretation of the Treaty.

The French Government takes the view that the special nature of agriculture justifies its exemption from the general application of the liberal principles which are the basis of the Common Market. It is clear from the wording of Title II of Part Two of the Treaty, and in particular from Article 39 (1) and (2) (a), that the authors of the Treaty did not intend to apply these principles just as they are to the Common Agricultural Policy but to adapt them in accordance with the objectives pursued.

Article 38 (4) which provides "the operation and development of the Common Market for agricultural products must be accompanied by the establishment of a common agricultural policy among the Member States" would have no meaning if it were a question only of applying the principles of *laisser-faire* and *laisser-aller*. Finally, Article 38 (2) undoubtedly enables the Council to derogate from the rules provided for the establishment of the Common Market where such derogations are legally justified by Articles 39 to 46. The Court of Justice has so ruled in Case 17/67 *Neumann* v *Hauptzollamt Hof/Saale* [1967] ECR 441, at p. 452.

The French Government observes that the Council has on numerous occasions derogated from the principle of freedom of movement. It is not a question only of temporary measures or of measures justified by exceptional circumstances but also of specific permanent measures characteristic of the Common Agricultural Policy and these may be divided into two categories: those relating to the rules of the Common Customs Tariff and those concerning the rules of inter-Community freedom of movement. With regard to the latter sphere the French Government cites examples of restrictions decided on by the Council to meet specific needs in the markets in oil seeds, fruit and vegetables and sugar. It is thus clear that the objectives of freedom of movement and of the Common Agricultural Policy must not be set one against the other nor in order of precedence but on the contrary combined: freedom of movement is the principle save when the special requirements of the agricultural sector call for adaptations.

To claim that there should be no exception on the ground of principle both jeopardizes the whole of the Common Agricultural Policy and substantially changes the meaning of the Treaty by depriving Articles 38 to 46 of any effect. This amounts to revising the Treaty in disregard of the special and exclusive procedure provided for this purpose in Article 236 of the Treaty.

The Court of Justice itself in its case-law has not denied the possibility of measures derogating from the principle of free movement of goods such as those provided for by Article 31 (2) of Regulation No 816/70. The aforementioned judgment in *Charmasson* and the judgment of 16 March 1977 in Case 68/76 *Commission* v *French Republic* [1977] ECR 515 show that although before the end of the transitional period two types of derogation were allowed by the Treaty, the first relating to organizations of the market established by national authorities and the second to organizations of the market established by the

Community institutions, since the end of the transitional period only those of the first type are considered by the Court as abolished whilst those of the second type remain lawful, it being understood that the Council's power to establish them is exercised subject to review by the Court. This distinction between derogating measures of a national and Community origin, the only criteria which are compatible with the letter and spirit of Articles 38 to 46 of the Treaty, is really decisive and explains the various derogations from the principle of free movement of goods accepted by the Court. The lawfulness of compensatory amounts has thus been recognized because they had been established by the Council (Case 5/73 *Balkan* [1973] ECR 1091, at p. 1108, paragraph 14, third indent). In the same way in the case of the *milk centres* (Case 82/71 cited by the Commission) the Court accepted the retention after the end of the transitional period of protective measures prolonging the derogative effect of a national organization of the market because it was a question of Community rules based on Article 43 of the EEC Treaty which had authorized the retention of the national system of milk centres until 31 March 1970.

Thus even after the expiry of the transitional period the Community institutions remained entitled to retain or establish exceptions to the principle of freedom of movement in so far as such exceptions are compatible with the provisions of Articles 38 to 46 of the Treaty.

Turning then to consideration of Article 31 (2) of Regulation No 816/70 the French Government observes that this provision cannot be separated from the regulation as a whole. If it were to be regarded as invalid, the validity of the whole of the regulation would be affected, since its adoption had been possible only by reason of the inclusion of the Article 31 (2) in question. The regulation did not consist on the one hand of a set of homogeneous principles and on the other of a heterogeneous exception naturally separable from the remainder. On the contrary they are two kinds of provisions mutually affecting each other and closely interdependent. The consequence of the principle of *indivisibility*, a principle recognized both in international law and national law is that if the Court were to declare the provision in question unlawful, it would also, in the view of the French Government have to declare that the unlawfulness of this clause involves the annulment of the whole of Regulation No 816/70.

Second question (lapse of Article 31 (2) of Regulation No 816/70).

There are two elements involved in the answer to the second question: the first *legal*, the second *factual*. It must be ascertained first whether on 11 September 1975 Article 31 (2) of Regulation No 816/70 was still valid and secondly whether the conditions of its application were satisfied on that date.

(a) As regards the first element the French Government observes that Article 31 (2) of Regulation No 816/70 was repealed only by the adoption on 17 May 1976 of Regulation No 1160/76 (Official Journal L 135 of 24 May 1976) and more particularly by Article 31 thereof. The latter provision shows clearly that in the Council's view it was a question not of terminating a situation which was regarded as irregular but of a repeal which could not therefore take effect until the date of repeal. It must accordingly be taken that Article 31 (2) of Regulation No 816/70 remained in force until 17 May 1976.

It is not possible to maintain that this express repeal was preceded by a tacit repeal so that the express repeal was to some extent superfluous. Such an argument must in the view of the French Government be dismissed both

for procedural reasons as for reasons of substance.

As regards the *procedural reasons* the French Government observes that to accept in the present case the tacit repeal (which arises in national law only when an existing provision is found to be incompatible with a subsequent provision) would mean introducing a serious element of legal uncertainty into the Community structure and would disregard the special procedure established by the Council by the declaration recorded in the minutes of the meeting of 27 and 28 April 1970 according to which the Commission was entrusted with considering whether the mechanisms for management of the market were "so set up that the ordered application of such mechanisms might be assured" and reporting to the Council with its findings. The fact that the necessity for a formal finding as to the situation referred to in Article 31 (2) derives from a declaration recorded in minutes rather than a regulation in no way affects its legal validity; this declaration throws light on the intention of the authors of the regulation. It is moreover clear that such a reconsideration was to lead to a new decision by the Council. Indeed by reason of the principle of "parallelism of powers" where the competent authority for amending or repealing a measure is not specified, such power resides in the author of the measure.

As regards the *reasons of substance* which lead to dismissing the possibility of implied repeal of Article 31 (2), the French Government states that the findings reached not only by the Council but also by the Commission on 29 and 30 May 1972 on considering the report of the Commission to the Council show that the mechanisms necessary for managing the wine market were not in application in Italy. In that report the Commission referred to the serious shortcomings in the application of the system and the Council for its part deferred its decision and limited itself to noting the said report. Both the Commission and the Council subsequently took the view that the situation remained so little changed that when difficulties appeared on the wine market the representative of the Commission himself at the meeting of the Council on 9 September 1975 referred to the possibility of taking measures based on Article 31 (2) in preference to monetary measures and this view was seriously opposed only by the Italian Government.

It is thus incontrovertible that it was only on 17 May 1976, that is to say the date of Regulation No 1160/76, that Article 31 (2) of Regulation No 816/70 ceased to be in force.

(b) The answer to the question whether in September 1975 there was still ground for applying Article 31 (2) depends on a factual assessment since it is a question whether the conditions for applying Article 31 (2) of Regulation No 816/70 were satisfied on 11 September 1975 "in view of the possibility that all the administrative mechanisms necessary for the management of the market in wine *had been set up*".

The French Government stresses that, contrary to the national court which has the words "had been set up" in respect of all the administrative mechanisms, Article 31 (2) of Regulation No 816/70 states that there may be derogation so long as the mechanisms *are not in application*. This concept of application covers not only that of being set up but also that of effectiveness: the mechanisms can be in application only so far as they have been established and are functioning.

Thus by the second question the Court is asked to make findings of pure fact, namely whether all the administrative mechanisms necessary for the management of the market in wine were

actually in application. Put in this way it raises a delicate question concerning the division of powers between the Court and the national courts of the Member States when there is a reference for a preliminary ruling under Article 177 of the EEC Treaty. The Community Court's task is to rule on the validity and interpretation of the measures taken by the institutions but not to apply them; the national courts are responsible for the direct application of these provisions in the territory of each of the Member States. In the context of this division of powers which the Court of Justice has moreover itself confirmed on several occasions the Court certainly does not consider itself bound to disregard the actual facts of the case as set forth by the national court, but it can look into the context of the question raised only through the statement which the national court submits. In these circumstances, if such statement has not been made or if it is shown to be summary to the point of inexistence the Court declines to make such an assessment itself to fill the gap (case 13/61 *De Geus* v *Boch* [1962] ECR 45).

In the view of the French Government the national court's task in applying the Community regulation was to investigate the facts and it is clear this has not been done sufficiently in the present case since the question raised involves the national court's transferring responsibility for this investigation to the Court of Justice. Other French courts dealing with similar cases considered that the question whether the conditions referred to in Article 31 (2) were fulfilled raised a question of fact which it was for them to resolve and they had first ordered inquiries to determine whether all the administrative mechanisms had been set up.

Subject to the above the French Government considers that the administrative mechanisms necessary for the management of the wine market were not in application in Italy and that they had not even been set up.

In the view of the French Government recourse to Article 31 (2) depends on two different factors:

(1) On the one hand that all the administrative mechanisms necessary for the management of the wine market should not be in application;

(2) And on the other that this circumstance should involve a disturbance on the market of the producer Member States.

As to (1)

The concept of "all the administrative mechanisms" covers all the means calculated to ensure a fair standard of living for the agricultural community, namely: stability of markets and reasonable prices. As regards the market in wine this involves a system of quantitative and qualitative adjustment of supply to demand. In this respect once the prices have been fixed it is necessary to deal with the known amount of harvest by the techniques of stocking, distillation, regulating imports, checking plantings and their quality and basically watching over oenological practices. Such management requires on the one hand *mechanisms for acquiring information* and for *checking* the basic economic facts and on the other hand effective *mechanisms* for *implementation.* Deficiencies were observed at both stages in the Member State in question. At the stage of mechanisms for *acquiring information*, the information was not always collected and in any event it was not checked at any stages of production either as regards planting, grubbing and replanting or as regards harvest declarations, checking on movements and mechanisms for watching over oenological practices. The economic facts which those responsible for the management of the market in wine had are both incomplete and uncertain. At the stage of

implementation certain essential mechanisms are also missing. It is the same as regards the contracts for stocking and distillation. These intervention measures make it necessary for there to be administrative services sufficiently elaborate for dealing with the thousands of contracts applied for each time the lists are opened. The intervention organization of the Member State in question has in all and for all purposes some 70 people and its powers extend over the whole of the agricultural markets (in France the corresponding figure for staff is 3 000). As regards aid for stocking, the average delay in payment in Italy is estimated to be 1½ years and during October 1975 less than a thousand of the files out of 5 000 had been settled as regards 1974. As for distillation the delays in January 1976 were of about one year. In these circumstances the Italian wine growers no longer had any inducement to apply for contracts for stocking or distillation and were reduced to putting their production on the market even at a low price which naturally tended to bring prices down and to render nugatory all intervention measures decided upon at a Community level.

As to (2)

The serious disturbances which the market in wine experienced at the time shows that the mechanisms necessary for management were not in application. In fact prices were exceptionally low in Italy and from the summer of 1974 everything went on as though the regulating mechanisms provided for by Regulation No 816/70 had had no effect on the maintenance of prices around Community prices. Anarchy reigned both as regards quality and price, since the c.i.f. prices were lower, according to the type of wine, by 20 to 25 % than the guide price and 14 to 20 % than the activating price. At these levels the massive influx of Italian wines on the French market obviously had a very pronounced effect. Imports of Italian wines into France for the 1974/75 and 1975/76 marketing years climbed to some 7.1 million hectolitres which represented 19 % of table wines put on the French market. The arrival of wines of all sorts of coupage, sometimes of a quite low quality and to a very large extent in no way answering the requirements of wines of high quality coupage, at prices up to 25 % lower than the activating price of wines of the R1 type cannot, if it continues, be regarded as normal, having regard to the rules of the Common Market in wine, and is intolerable for the producers. This is obviously a similar situation to the case of disturbances in the market provided for in Article 31 (2) of the regulation concerning the wine market.

D — Observations of the Council

The Council limits its observations to the first question raised by the national court in each of the cases. It maintains that Article 31 (2) of Regulation No 816/70, which has in the meantime been expressly repealed by Regulation No 1160/76 of 17 May 1976, is *objectively valid*. By objectively valid the Council means that it was lawful at the time to make such a provision. When one of the last organizations of the market, that of wine, was established in 1970, such a provision constituted a legitimate measure which the Council would describe as both a protective measure and a temporary measure accompanying the establishment of the common organization of the market in question. The Council expresses no opinion on the situation in 1975.

The idea of inserting a safeguard clause when the organization of the market was established appears clearly from the conclusions reached in the discussions by the Council on 22 December 1969. According to these conclusions it was anticipated:

— That the organization of the market would be adopted before 28 February 1970 and enter into force on 1 April 1970;

— At the same time the frontiers would be opened;

— That a producer Member State would be able to suspend the opening of the frontiers in the event of the measures for managing the market, provided for and regarded as necessary, failing to function and of its being necessary to avoid disturbances on the market of the said Member State.

Such possibility was subject to a threefold restriction. Its duration was limited "so long as all the administrative mechanisms necessary for the management of the market in wine are not in application". At the same time it was subject to Community control since the measures taken on the basis of it by the Member State concerned "shall be communicated to the Commission, which shall decide without delay whether to maintain, amend or abolish such measures". Finally, the measures were to be kept under review in that on the one hand their objective was "to avoid disturbances" on the market of the State adopting them and on the other hand they were to be taken in the absence of a management of the market equal to that which would have been ensured by the ordered application of such mechanisms.

According to the Council it was subject to possible recourse to these temporary accompanying measures that the organization of the market in wine was able to be set up in the spring of 1970.

The Council then considers whether Article 31 (2) of Regulation No 816/70 is not contrary to the case-law of the Court of Justice on the abolition in the agricultural sector by the end of the transitional period of charges, quantitative restrictions and measures having equivalent effect and observes that in the first place the judgment in *Charmasson* was concerned only with *national* measures and organizations of the market the existence of which was independent of any Community decision. Such case-law should not be applied in a case where, such as the present, the national measures were retained expressly on a temporary basis and subject to review within the terms of the establishment of a *Community* organization of the market functioning on the basis of Articles 40 and 43. The Council refers to the judgment of 21 March 1972 in Case 82/71 *SAIL* [1972] ECR 119 which ruled that "it was for the Community authority alone to decide upon the provisional maintenance of any national system of organization . . relating to the products in question."

On a more general level the Council considers that the maintenance on a temporary basis and subject to review of a quantitative restriction connected with the development by degrees of the Common Agricultural Policy as provided for in Article 40 (1) of the Treaty may legitimately derogate from Article 30 *et seq.* (Case 17/67 *Neumann* [1967] ECR 441). It also appears, by reasoning to the converse, from the judgment of 16 March 1977 (Case 68/76 *Commission* v *French Republic* [1977] ECR 515) that a Member State may derogate from the Community rule provided that it is the Community which has made such derogation possible.

Finally, as regards the case-law prohibiting charges and measures having equivalent effect, the Council considers that it follows from the aforementioned judgments in *Bauhuis* and in Case 5/73 *Balkan* [1973] ECR 1091 that intra-Community measures overcoming inherent obstacles (the obstacle inherent in the present case being the non-management of the Community market resulting from the

fact that all the administrative mechanisms necessary for it were not set up) are not prohibited.

Thus the Community institutions have arrived at a more flexible interpretation of the rules on the abolition in the agricultural sector by the end of the transitional period of charges or measures having equivalent effect. This interpretation seeks to take account of the complexity of the different interests and situations and to prevent the absence of, or delay in, the establishment of a common organization of the market from causing in a particular sector confusion highly prejudicial to the Common Market. Such interpretation comes nevertheless within the terms of the strict Community criteria: limited duration, objective of the measures and review.

There is no justification in the contention that measures permitted on the basis of Article 31 (2) of Regulation No 816/70 discriminate between Member States. The Court has recognized that "at its initiation the common organization of the market may not completely measure up to the objectives listed in Article 39 of the Treaty" and that the institutions are at liberty, pending all the difficulties on the market being overcome, "to take provisional measures, which are limited to those Member States in which the market has been more particularly affected" (judgment of 2 July 1974, Case 153/73 *Holtz & Willemsen* v *Council and Commission* [1974] ECR 675 at p. 695).

The Council proposes that the first question put by the Tribunal d'Instance, Bourg-en-Bresse, should be answered in the affirmative.

At the hearing on 22 February 1978 the plaintiffs in the main actions, represented by Mr Imbach, the French Government, represented by Mr de Lacharrière, the Commission of the European Communities, represented by its Legal Adviser, Mr Béraud, acting as Agent, and the Council of the European Communities represented by the Director of its Legal Service, Mr Vignes, submitted oral observations.

The Advocate General delivered his opinion at the hearing on 15 March 1978.

Decision

1 By two judgments of 30 June 1977, registered at the Court of Justice on 4 July 1977 under Nos 80/77 *(Société Les Commissionnaires Réunis* v *Receveur des Douanes)* and 81/77 *(Les Fils de Henri Ramel* v *Receveur des Douanes)* the Tribunal d'Instance, Bourg-en-Bresse, referred under Article 177 of the EEC Treaty in each judgment two questions, one on the validity and the other on the interpretation of Article 31 (2) of Regulation No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine (Official Journal, English Special Edition 1970 (I), p. 234).

2 These questions ask the Court:

"(1) Does ('did' in Case 81/77) Article 31 (2) of Regulation No 816/70 of the Council accord with the EEC Treaty, having regard to the fact

that that provision authorizes ('authorized' in Case 81/77) measures contrary to the rules of the Treaty on the free movement of goods applicable after the end of the transitional period?

(2) If the answer to the foregoing question is in the affirmative, were the provisions of Article 31 (2) of the said regulation still applicable on 11 September 1975, having regard to the possibility that all the administrative mechanisms necessary for the management of the market in wine had been set up?"

3 They have been raised in proceedings brought against the French customs authorities by wine traders who imported into France between the beginning of September 1975 and March 1976 consignments of wine from Italy which proceedings contest whether a duty of FF 1.13 per degree on each hectolitre introduced with effect from 12 September 1975 by Decree No 75/846 of 11 September 1975 of the President of the Republic (Journal Officiel de la République Française of 12 September 1975) and imposed at the time of the said imports was in accord with the Treaty.

4 By order of 26 October 1977 the Court ordered that the two cases be joined for the purposes of the oral procedure and judgment.

General considerations

5 Regulation No 816/70, which entered into force at the end of the transitional period, established a system of organization of the market in wine involving the setting up on the one hand of a prices and intervention system, rules concerning production and for controlling planting, rules concerning oenological processes and conditions for release to the market involving a division of the Community into wine-growing zones, aids for storage and distillation and on the other hand a system of trade with third countries involving *inter alia* the issue of import and export licences, the establishment of reference prices, countervailing charges on import and export refunds and a safeguard clause allowing appropriate measures to be taken in the event of serious disturbances.

6 This organization also involves both by virtue of Articles 12 to 15 and 30 to 33 of the EEC Treaty and of Article 31 (1) of Regulation No 816/70 the prohibition on the levying in the internal trade of the Community of any charge having an effect equivalent to a customs duty (with the sole exception of the application as regards the Grand Duchy of Luxembourg of

certain provisions of the Protocol annexed to the Treaty and concerning the agriculture of that Member State) and the prohibition of any quantitative restriction or measure having equivalent effect.

7 Article 31 (2) of the said regulation provides:

"By way of derogation from the provisions of paragraph 1, so long as all the administrative mechanisms necessary for the management of the market in wine are not in application — with the exception, until 31 December 1971, of the viticultural land register — producer Member States shall be authorized in order to avoid disturbances on their markets to take measures that may limit imports from another Member State.

These measures shall be communicated to the Commission, which shall decide without delay whether to maintain, amend or abolish such measures."

8 The year 1975 saw an exceptional influx of Italian wines especially on to the French market due, *inter alia*, to the abundant harvest and successive devaluations of the lira.

9 The Council considered this situation at its meetings on 15 April, 21 and 22 July and 9 September 1975 and contemplated various measures; after the reintroduction of compensatory amounts had been rejected it was decided that Regulation No 816/70 should be amended to take into account the resolution of the Council of 21 April 1975 on new guidelines to bring the market in wine into balance.

10 On 11 September 1975 the Government of the French Republic in reliance on Article 31 (2) of Regulation No 816/70 issued a decree imposing the above-mentioned duty on the import of certain wines originating in Italy.

11 In the communication of this measure made in accordance with the second paragraph of Article 31 (2) of Regulation No 816/70 to the Commission by a telex of 11 September 1975 it is stated:

"At the meetings of the Council of Ministers on 15 April, 21 July and 9 September 1975 the situation of the Community market in table wines was analysed at length. It was found that the present inadequacy of the Community intervention mechanisms prevented the spontaneous restoration

of the balance in this market which has been very disturbed by the depreciation of the green lira during recent years.

"The French delegation has set forth the consequences for its producers of this situation and has repeatedly proposed solutions based in the first place on the reform of Regulation No 816/70. The Council of Ministers decided on 15 April last that this reform would be adopted at the latest on 1 August 1975 for application as from the 1975/76 wine-growing year. Discussion of the Commission's proposals was adjourned at the Council meetings on 21 and 22 July 1975 and no decision was reached at the meeting on 9 September. As explained by the French Minister and French Secretary of State for Agriculture the situation created in France by the disorder of the wine market accordingly requires protective measures against the imports at very low prices from Italy. The Council has deliberated at length. In spite of the proposal by the Commission and by our partners to find a political agreement on this subject and the suggestions made by the French delegation, the Council has not been able to reach a unanimous decision. In these circumstances the French Government has decided to invoke the provisions of Article 31 (2) of Community Regulation No 816/70."

12 The Commission challenged the conformity of this measure with Community law and initiated the procedure provided for in Article 169 of the Treaty but discontinued this when by Decree No 76/287 of the President of the Republic of 31 March 1976 (Journal Officiel de la République Française of 1 April 1976) the Decree of 11 September 1975 was repealed with effect from 1 April 1976.

13 The plaintiffs in the main actions, in reliance on the direct effect of the prohibition on levying after the end of the transitional period charges having an effect equivalent to customs duties in trade between Member States challenged the validity and, in any event, the application at the date of the imports in question of Article 31 (2) of Regulation No 816/70 and brought actions before the national court claiming refund of the duties previously paid under Decree No 75/846.

First Question

14 The first question asks in substance whether Article 31 (2) of Regulation No 816/70 is valid in so far as it authorizes producer Member States to prescribe and to levy, after the end of the transitional period and in the circumstances that it specifies, charges having an effect equivalent to customs duties in intra-Community trade on a product falling within Annex II of the Treaty, in the present case table wine.

15 The answer to this question requires the interpretation of Article 38 (2) of the EEC Treaty which reads: "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."

16 According to the plaintiffs in the main actions this provision means that as regards trade in agricultural products, whether they are subject to an organization of the market or not, the Community institutions cannot after the end of the transitional period derogate, or allow Member States to derogate, from the provisions of the Treaty on the free movement of goods.

17 On the other hand in the view of the Government of the French Republic, having regard to the place of agriculture in the Common Market, its characteristics and the specific objectives of the Common Agricultural Policy, this provision allows the Council to derogate from the rules of the Treaty in general and those on the free movement of goods in particular when such derogations are based on Articles 39 to 46 of the Treaty.

18 Many mechanisms of the organization of the market, such as price fixing and intervention systems, by organizing and regulating trade involve limitations on free movement and such limitations are not therefore of a temporary nature or justified by exceptional circumstances but are characteristic of the Common Agricultural Policy.

19 The objectives of free movement and of the Common Agricultural Policy should not be set one against the other nor in order of precedence but on the contrary combined and the principle of free movement should prevail save when the special requirements of the agricultural sector call for adaptations.

20 In the view of the Council Article 38 (2) in the context of Articles 39 to 46 should be interpreted as allowing a more flexible interpretation of abolition in the agricultural sector by the end of the transitional period of charges or measures having equivalent effect so that restrictions may be maintained as temporary measures accompanying the establishment of a common organization of the market without which its setting up might otherwise not be undertaken.

21 Finally, according to the Commission, Article 38 (2) should, in conjunction with the other provisions of Title II, be interpreted as not allowing the Community institutions after the transitional period to evade the rules on free movement of goods unless it is a question of measures which exclude any discrimination between producers or consumers within the Community as provided by the second subparagraph of Article 40 (3) and do not affect the unity of the market; this straight away rules out the establishment of charges having equivalent effect in intra-Community trade.

22 Article 2 of the EEC Treaty provides that it is by establishing a common market and progressively approximating the economic policies of Member States that the Community must promote throughout the Community development of economic activities, the raising of the standard of living and closer relations between the Member States.

23 As is stressed by Article 38 (1) of the Treaty, placed at the head of the title devoted to the Common Agricultural Policy, the Common Market shall extend to agriculture and trade in agricultural products.

24 The abolition between Member States of customs duties and charges having equivalent effect constitutes a fundamental principle of the Common Market applicable to all products and goods with the result that, as has been found by the Court in its judgment of 13 November 1964 (Joined Cases 90 & 91/63 *Commission* v *Grand Duchy of Luxembourg and Kingdom of Belgium* [1964] ECR 625, at p. 633) "any possible exception, which in any event must be strictly construed, must be clearly laid down".

25 Article 38 (2) provides 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".

26 Therefore in order that the exception provided for in Article 38 (2) should apply to the introduction of charges having an effect equivalent to customs duties in intra-Community trade at the end of the transitional period, it is necessary to find in Articles 39 to 46 a provision which either expressly or by necessary implication provides for or authorizes the introduction of such charges.

27 Articles 39 to 46 contain no provision of this nature.

28 On the contrary the second paragraph of Article 40 (3) expressly stipulates that the organization of the market shall exclude any discrimination between producers or consumers within the Community.

29 Under Article 43 (3) (b) each common organization of the market "ensures conditions for trade within the Community similar to those existing in a national market".

30 Article 44 expressly mentions the progressive abolition of customs duties and quantitative restrictions during the transitional period and these words in the context of Articles 12 to 17 and 30 to 35 of the Treaty must be interpreted as also covering charges having an effect equivalent to customs duties and measures having an effect equivalent to quantitative restrictions.

31 The same article creating a provisional system valid only during the transitional period provides that in so far as progressive abolition of customs duties and quantitative restrictions between Member States may result in prices likely to jeopardize the attainment of the objectives set out in Article 39, Member States may, subject to certain conditions, apply a system of minimum prices in a non-discriminatory manner.

32 Thus even during the transitional period obstacles to trade other than minimum prices were expressly prohibited.

33 It would be obviously contrary to the Treaty to permit after the end of the transitional period other obstacles to trade as, if not more, restrictive than those which were permitted only during the transitional period.

34 The other provisions of Articles 39 to 46 either contain no derogation, express or implied, from the rules of the Treaty, such as Articles 39 and 41, or refer to a different and clearly specified sphere such as Article 42 on the rules of competition, or again expressly concern the case of the provisional maintenance during the transitional period of national organizations of the market pending the substitution of common organizations, such as Articles 45 and 46.

35 It is clear from all these provisions and their relationship *inter se* that the extensive powers, in particular of a sectorial and regional nature, granted to

the Community institutions in the conduct of the Common Agricultural Policy must, in any event as from the end of the transitional period, be exercised from the perspective of the unity of the market to the exclusion of any measure compromising the abolition between Member States of customs duties and quantitative restrictions or charges or measures having equivalent effect.

36 Any prejudice to what the Community has achieved in relation to the unity of the market moreover risks opening the way to mechanisms which would lead to disintegration contrary to the objectives of progressive approximation of the economic policies of the Member States set out in Article 2 of the Treaty.

37 It is not possible to claim in support of a different interpretation the introduction of countervailing charges since these are justified in relation to trade between Member States only by the necessity to correct the effects of variations in unstable rates of exchange which in a system of organization of markets in agricultural products based on common prices were likely to cause disturbances in trade in the products; such measures thus aim at ensuring so far as possible the maintenance of normal trade in spite of the impact of divergent monetary policies, the co-ordination of which, contrary to the provision in Article 105 of the Treaty, the Member States have not yet achieved.

38 It follows from the above considerations that the answer to the first question put by the national court should be that Article 31 (2) of Regulation No 816/70 in so far as it authorizes producer Member States to prescribe and levy, in intra-Community trade in the products covered by the organization of the market which that regulation sets up, charges having an effect equivalent to customs duties, is incompatible with Article 13, in particular paragraph (2) thereof, and with Articles 38 to 46 of the Treaty and is consequently invalid.

39 The answer given to the first question makes it unnecessary to reply to the second.

Costs

40 The costs incurred by the French Government, the Council of the European Communities and Commission of the European Communities which submitted observations to the Court are not recoverable.

41 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Tribunal d'Instance, Bourg-en-Bresse, by judgments of 30 June 1977, hereby rules:

Article 31 (2) of Regulation No 816/70 in so far as it authorizes producer Member States to prescribe and levy, in intra-Community trade in the products covered by the organization of the market which that regulation sets up, charges having an effect equivalent to customs duties, is incompatible with Article 13, in particular paragraph (2) thereof, and with Articles 38 to 46 of the Treaty and is consequently invalid.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 20 April 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 15 MARCH 1978

My Lords,

In 1975 there was an exceptional influx of Italian wine onto the French market. It is common ground that that influx was due, at all events in the main, first to the fact that in 1973 and 1974 the weather had been such that yields had