within the meaning of Article 169 and consequently comes within the jurisdiction of the Court.

4. Even if the Member State concerned does not consider it necessary to avail itself of the opportunity to submit its observations, such an opportunity constitutes an essential guarantee required by the Treaty, and amounts to an essential procedural requirement in proceedings relating to the finding of a failure on the part of a Member State.

5. The entry into force on 1 July 1967 of an organization of the markets in various agricultural products with a single price and uniform levies and refunds for the entire Community involves for the exporters concerned the right to receive the said refunds and a duty on the part of the Member States to advance them. Although those provisions, and especially Regulation No 1041/67/EEC, allow the Member States a certain area of discretion *inter alia* in fixing the documents which constitute proof of the right to the refund, they nevertheless involve a duty for the States to make the payment within a reasonable period in order to avoid treating exporters differently according to the frontier over which their products are exported.

In Case 31/69

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Armando Toledano-Laredo, acting as Agent, with an address for service in Luxembourg at the offices of Émile Reuter, its Legal Adviser, 4 boulevard Royal,

applicant,

v

ITALIAN REPUBLIC, represented by Adolfo Maresca, Minister Plenipotentiary, acting as Agent, assisted by Antonio Freni, with an address for service in Luxembourg at the Italian Embassy,

defendant,

Application for a declaration that the Italian Republic, by failing to pay promptly to exporters the refunds on products coming under the common organizations of the market established after 1 July 1967, has failed to fulfil an obligation under the Treaty,

THE COURT

composed of: R. Lecourt, President, R. Monaco, President of Chamber, A. M. Donner, W. Strauß and J. Mertens de Wilmars (Rapporteur), Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

The establishment of a single market in a large number of agricultural sectors involved the merging of the stabilization machinery consisting of refunds on the export of agricultural products to third countries.

Such refunds are periodically fixed by the Commission at the same level for the whole Community and, pursuant to the relevant basic regulations, are to be paid by each Member State to exporters.

Under the regulations implementing those basic provisions, the said refunds must be paid 'upon proof that the products have been exported'; proof that the products are of Community origin and that the products have reached their destination is also required in certain cases.[1]

By letter of 27 February 1968 the Commission *inter alia* pointed out to the Italian Government that no export refunds had been paid for any product since 1 July 1967, which appeared to it to contradict both the provisions of Article 7 of Regulation No 139/67/EEC relating to the grant of refunds in the cereals sector and similar provisions for other sectors.

1 — Article 16 (2) of Regulation No 120/67/EEC of the Council of 13 June 1967, on the common organization of the market in cereals (OJ 1967, Special Edition, p. 33);
Article 7 of Regulation No 139/67/EEC of the Council of 21 June 1967, laying down general rules for granting export refunds on cereals and criteria for fixing the amount of such refunds (OJ 1967, Special Edition, p. 88);
Article 15 (2) of Regulation No 121/67/EEC of the Council of 13 June 1967, on the common organization of the market in pigmeat (OJ 1967, Special Edition, p. 46);
Article 6 of Regulation No 177/67/EEC of the Council of 27 June 1967, laying down general rules for granting export refunds on pigmeat and criteria for fixing the amount of such refunds (OJ 1967, Special Edition, p. 146);
Article 9 (2) of Regulation No 122/67/EEC of the Council, on the common organization of the market in eggs (OJ 1967, Special Edition, p. 55);
Article 6 of Regulation No 175/67/EEC of the Council of 27 June 1967, laying down general rules for granting export refunds on eggs and criteria for fixing the amount of such refunds (OJ 1967, Special Edition, p. 142);
Article 9 (2) of Regulation No 123/67/EEC of the Council on the common organization of the market in poultrymeat (OJ 1967, Special Edition, p. 63);
Article 6 of Regulation No 176/67/EEC of the Council of 27 June 1967, laying down general rules for granting export refunds on poultrymeat and criteria for fixing the amount of such refunds (OJ 1967, Special Edition, p. 144);
Article 18 (1) of Regulation No 136/66/EEC of the Council of 22 September 1966, on the establishment of a common organization of the market in oils and fats (OJ 1966, Special Edition, p. 221);
Article 2 of Regulation No 171/67/EEC of the Council of 27 June 1967, on export refunds and levies on olive oil (OJ 1967, Special Edition, p. 136);
Article 28 (1) of Regulation No 136/66/EEC of the Council of 22 September 1966, on the establishment of a common organization of the market in oils and fats (OJ 1966, Special Edition, p. 221);
Article 2 (1) of Regulation No 142/67/EEC of the Council of 21 June 1967, on export refunds on colza, rape and sunflower seeds (OJ 1967, Special Edition, p. 94);
Article 17 (2) of Regulation No 359/67/EEC of the Council of 25 July 1967, on the common organization of the market in rice (OJ 1967, Special Edition, p. 193);
Article 6 of Regulation No 366/67/EEC of the Council of 25 July 1967, laying down general rules for granting export refunds on rice and criteria for fixing the amount of such refunds (OJ 1967, Special Edition, p. 213);
Article 17 (2) of Regultaion No 1009/67/EEC of the Council of 18 December 1967, on the common organization of the market in sugar (OJ 1967, Special Edition, p. 304);
Article 3 (1) of Regulation No 865/68/EEC of the Council of 28 June 1968, on the common organization of the market in products processed from fruit and vegetables (OJ 1968, Special Edition, p. 225);
Article 14 of Regulation No 766/68/EEC of the Council of 18 June 1968, laying down general rules for granting export refunds on sugar (OJ 1968, Special Edition, p. 155);
Article 17 (2) of Regulation No 804/68/EEC of the Council of 27 June 1968, on the common organization of the market in milk and milk products (OJ 1968, Special Edition, p. 176);
Article 6 of Regulation No 876/68/EEC of the Council of 28 June 1968, laying down general rules for granting export refunds on milk and milk products and the criteria for fixing the amount of such refunds (OJ 1968, Special Edition, p. 234);
Article 18 (2) of Regulation No 805/68/EEC of the Council of 27 June 1968, on the common organization of the market in beef and veal (OJ 1968, Special Edition, p. 187);
Article 6 of Regulation No 885/68/EEC of the Council of 28 June 1968, laying down general rules for granting export refunds on beef and veal and criteria for fixing the amount of such refunds (OJ 1968, Special Edition, p. 237);
Regulation No 1041/67/EEC of 21 December 1967 on detailed rules for the application of export refunds on products subject to a single price system (OJ 1967, Special Edition, p. 323).

On 22 April 1968 the Italian Government replied that Decree-Law No 59 of 20 February 1968 contained basic provisions intended to put the said refunds into operation and had made available 99 milliard lire to meet the costs arising therefrom for 1968 but that certain ministerial orders were still required to define the administrative procedures particularly with regard to the payment to exporters of the sums referred to in Article 9 of Regulation No 1041/67/EEC.

In its letter of 20 June 1968 the Commission observed that, except in respect of very small quantities, refunds had not yet been paid for any of the products subject to the single market system and exported after 1 July 1967.

The Commission declared that it would therefore initiate the procedure provided for in Article 169 of the Treaty and, after requiring the Italian Republic to submit its observations on the alleged failure, on 4 November 1968 it delivered a reasoned opinion charging it with the delays in question.

On 21 July 1969 it lodged the present application.

II — Conclusions of the parties

The *applicant* claims that the Court should:

(a) Declare that the Italian Republic, by its failure promptly to pay to exporters the refunds on the export of products coming under the common organizations of the market established on 1 July 1967, has failed to fulfil an obligation under the provisions of the said Community regulations establishing the common organizations of the agricultural markets and of the respective implementing regulations;

(b) Order the defendant to pay the entire costs.

The *defendant* contends that the Court should:

— Dismiss the application made by the Commission of the European Communities as set out at the beginning of this statement;

— Order the Commission to pay the costs.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

The applicant claims that the above-mentioned agricultural regulations make compulsory the payment of refunds on the export of products coming under the common organizations of the market and prescribed when such payment shall be made.

According to the applicant, those refunds have not been promptly paid by the Italian authorities. Such delay makes the export of products from Italy more difficult by reducing the effectiveness of the machinery for refunds and distorting competition between Italian exporters and those in other Member States which pay the refunds promptly. Those factors are the cause of serious hindrances to the administration of the Common Market.

The *defendant* replies that the application is inadmissible because its object exceeds the framework of the infringements alleged in the preliminary procedure referred to in Article 169 and because the Court has no jurisdiction to find an infringement constituted by failure to act in pursuance of a directly applicable regulation.

The defendant further considers that the application is unfounded because the date of payment of the refunds is not stated in the regulations and moreover no proof of the delays has been produced.

A — *Admissibility*

1. In its submissions the *defendant* alleges that the dispute must be restricted solely to the refunds for those products which were subject to a common organization of the market after 1 July 1967, to the exclusion of those pertaining to products which were only subsequently made subject to a common organization; in fact only the former products formed the subject of the request for observations contained in the letter of 12 July 1968, and only with regard to them have the necessary preliminaries been fulfilled for any proceedings with regard to a failure by the State to fulfil its obligations.

The *applicant* replies that the above-mentioned letter itself states that it refers not only to the refunds in the cereals sector but the relevant refunds in other sectors subject to the single market system.
Furthermore the opinion provided for in Article 169 has the sole object of giving the Member State concerned the opportunity to submit its observations.

2. Again in its submissions, the *defendant* puts forward the view that, although the regulations providing for the refunds are directly applicable in the Member States and do not involve the subsequent intervention of a State, a finding of a failure to fulfil an obligation within the meaning of Article 169 of the Treaty can only be made if the State concerned has taken positive action in order to prevent the direct application of the said regulations.
A mere omission in the form of a failure to comply with such provisions constitutes, as a direct consequence of such direct applicability, an infringement of an internal law of the national legal system giving rise to remedies before those national courts.
If, on the other hand, as the defendant thinks, the regulations provide for the application of national refund procedures, the application of those procedures cannot constitute an infringement of the Treaty and can only constitute grounds for proceedings under Article 101. Consequently the Court of Justice has no jurisdiction in this matter.
The *applicant* replies that the plea of inadmissibility must be rejected as it is out of time and adds that a failure to fulfil a provision of the Treaty or of secondary legislation may be constituted by a failure to take action as well as by a positive act.

B — *Substance of the case*

1. The *applicant* alleges that the Community agricultural regulations have been mandatory since 1 July 1967.
According to the applicant, when the Commission decides that there is a difference between the costs or the prices of certain agricultural products in the Community and the world market, it fixes for this an identical refund for the whole Community, which the Member States are obliged to pay at the request of the persons concerned. The corollary of this obligation is the right of dealers in the Member State to receive those refunds.
The present case is concerned not with directives but with regulations which, taking into account a reasonable period to allow the States to carry out the necessary formalities, are directly applicable.
The Commission fixed the limit of this reasonable period when adopting Regulation No 1041/67/EEC of 21 December 1967 on the detailed rules for the application of export refunds on products subject to a single price system (Official Journal 1967, Special Edition, p. 323) which defines *inter alia* the concepts of 'exports' and of the 'Community origin' of the products and governs the issue of export certificates. This regulation authorizes Member States to pay dealers the amount of the refund; the Ministerial Decree of 24 April 1968 (Gazzetta Ufficiale No 142 of 5 June 1968) was made in implementation of this regulation.
The applicant deduces from this that, since the basic regulations established that the payment of the refunds to exporters was compulsory and since the methods and criteria of repayment were stated in the implementing regulations and in Regulation No 1041/67/EEC, there can be no doubt as to when those payments must be made; in the interests of the exporters and of the good administration of the market that occasion cannot be postponed. The fact that in the five other Member States the refunds are paid within appreciably shorter periods means that the delays occurring in Italy cause distortion of competition harming the exporters in that country who are induced to export their goods through other Member States in order to benefit from the quicker procedure applied there.
The *defendant* replies that the various relevant regulations merely stipulate in almost identical terms that the refund shall be granted on the request of the person concerned and, in general, that it shall be paid upon proof that the products in question have been exported from the Community.

According to the defendant those provisions merely confer the right to the refund in the sense that they lay down the conditions whereby it is acquired but do not govern the procedure whereby they are realized.
Since they merely require from the person concerned a 'request' without specifying either the means, the content, the addressee or how certain conditions shall be proved, and neither specify the necessary procedures nor designate the relevant bodies and methods for solving any disputes, the regulations leave to the legislation of the Member States the procedures whereby the repayments are in fact to be made.
From this the defendant deduces that the regulation must be interpreted as meaning that it is at the point when the required conditions are fulfilled that there arises the right to the refund, to be complied with by the various Member States according to their national procedures which are left untouched by the Community provisions.
To say that a State must pay the refunds when certain conditions are fulfilled can, from a legal point of view, only mean that it is at this point that there shall be and must be initiated the procedure which, according to the national legal system, governs the State's payments. During this procedure the periods of repayment may thus vary from State to State.
Whilst the defendant declares that it has considered methods of accelerating the payment of the refunds, it states that it has made and continues to make those payments in accordance with the rules obtaining in Italy governing payments by the State and that consequently no complaint may be made against it on the grounds of any delay.

2. Furthermore the defendant claims that the application lacks the factual basis which would give grounds for establishing actual delays, their character, causes and still less their widespread nature, nor does it indicate how an average period of repayments in the various Member States might be arrived at.
It further observes that the complexity of the procedures for payment does not preclude the possibility that dealers might benefit from the sums in question through other machinery, in particular by assignment of debt, and moreover that the system of refunds was not the sole method employed to encourage the export of Community products. Nor can its disadvantages be considered as the cause of the distortions, which moreover have not been proved, and of which the Commission complains, since other measures to encourage exports such as export credits or the grant of favourable rates can avoid or reduce the alleged distortions.
The applicant replies that in the correspondence leading up to the reasoned opinion the Italian Government did not dispute the alleged delay. As additional proof it produces various documents annexed to the reply, in particular requests for payment on account for the various accounting periods providing grounds for the finding in fact that delays occurred in the payments since each request contains the figure corresponding to the payment pertaining to the current half year and the figure referring to earlier periods.
Finally an inquiry carried out by the European Agricultural Guidance and Guarantee Fund in March 1967 showed that in Italy during the period before 1 July 1967 since no provision had been made for them in the budget refunds were sometimes one year in arrears.
The applicant concludes by remarking that the various remedies, such as assignment of debts or credits favouring exports, which are put forward by the defendant and which have as their object the removal of the disadvantages of the system of paying refunds as applied in Italy, would be ineffective. In fact, the common machinery for stabilization provided for in Article 40 (3) of the EEC Treaty is based on two principal factors;

— a levy aligning the prices of imported products with the prices within the Community market;
— a refund allowing the Community exporter to penetrate and operate on the world market where prices are lower than on the Community market.

If, through interest payable to him, the Community exporter were to lose part of his refund, calculated with utmost precision and periodically fixed by the Commission, the balance of the machinery would be

disturbed. Moreover in Italy only long and medium term export credits are granted.
The *defendant* replies that the proof adduced by the Commission is unconvincing and that the delays in other countries are much longer than it claims.
The requests for payment on account do not justify the conclusions arrived at by the Commission. Such requests reflect an objective situation: the amount of refunds paid in the course of the period examined. They give no ground for concluding that delays or errors in payment have occurred, and likewise no such conclusion may be drawn on the basis of the tables summarizing the different objective situations according to each State.
Finally the replies to the European Agricultural Guidance and Guarantee Fund merely reflect the diversity of the average periods both between the request for a refund and the actual refund and between the export and the request for a refund.

IV — Procedure

The present application was lodged at the Court of Justice on 21 July 1969. The procedure followed the normal course. On hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to dispense with any preparatory inquiry. The oral observations of the parties were presented at the hearing on 14 January 1970. The Advocate-General delivered his opinion at the hearing on 29 January 1970.

Grounds of judgment

1 By various regulations which became applicable from July 1967, the Council established for certain agricultural products, in particular oils and fats, pigmeat, eggs, poultrymeat and rice, a common organization of the market involving, *inter alia*, the fixing by the Commission of refunds on exports to third countries at an identical amount throughout the Community.

2 On 21 December 1967 the Commission adopted Regulation No 1041/67/EEC (OJ 1967, Special Edition, p. 323) on detailed rules for the application of the said refunds.

3 This system was extended to sugar by a regulation of 18 December 1967 and to products processed from fruit and vegetables, to milk and milk products and to beef and veal by other regulations dated 27 and 28 June 1968.

4 According to those regulations the Member State in whose territory the customs export formalities have been completed is bound to pay the refunds to exporters who comply with the conditions laid down for the receipt thereof and who apply for them.

5 The Commission by letter 12 July 1968 gave the Italian Government the opportunity to submit its observations and then on 4 November 1968 it delivered a reasoned opinion finding that the Italian Republic had failed to fulfil an obligation under the provisions of the above-mentioned regulations and calling on it to comply with the said opinion with the period prescribed therein.

6 By an application lodged on 21 July 1969 the Commission applied to the Court under Article 169 of the Treaty for a declaration that, by its failure promptly to pay to exporters concerned the export refunds for products coming under the common organizations of the market established after 1 July 1967, the Italian Republic has failed to fulfil its obligations under the provisions of the Community regulations establishing the common organizations of the agricultural markets and of the relevant implementing regulations referred to in the application.

The jurisdiction of the Court and the subject-matter of the dispute

7 The defendant has claimed that if the alleged failure consists in a Member State's failure to implement directly applicable Community legislation and is consequently to be classified as a pure omission the sanction for this omission does not come within the scope of Article 169 but falls within the jurisdiction of the national courts before whom the persons concerned may bring such matters.

8 Although this submission is out of time it relates to the jurisdiction of the Court of Justice and must be examined by the Court of its own motion.

9 A failure to act, like a positive act, may constitute a failure on the part of a Member State to fulfil an obligation.

Furthermore the existence of remedies available through the national courts cannot in any way prejudice the making of the application referred to in Article 169 since the two procedures have different objectives and effects.

Finally, when the application of Community regulations in each Member State requires a modification of certain public services or of the rules governing them, the failure of the authorities concerned to take the necessary measures constitutes a failure within the meaning of Article 169 and consequently comes within the jurisdiction of the Court.

10 The submission must be rejected.

11 The Italian Government further claims that the present proceedings can only concern its obligations relating to products made subject to an organization of the markets during the year 1967 and not to obligations relating to products which were only made so from 1 July 1968.

12 Despite the general nature of its wording, the Commission's letter of 12 July 1968 requesting the Italian Government to submit its observations in accordance with Article 169 cannot relate to delays in payment for products which were not then subject to the system of uniform refunds or which had at most only been so for several days.

13 Even if the Member State concerned does not consider it necessary to avail itself of the opportunity to submit its observations, such an opportunity constitutes an essential guarantee required by the Treaty and amounts to an essential procedural requirement in proceedings relating to the finding of a failure on the part of a Member State.

14 Respect for this guarantee means that the alleged failure to fufil an obligation under regulations issued during or after the month of June 1968 must be excluded from these proceedings.

Substance

15 The entry into force on 1 July 1967 of an organization of the markets in various agricultural products with a single price and uniform levies and refunds for the entire Community involves for the exporters concerned the right to receive the said refunds and a duty on the part of the Member States to advance them, the sums advanced being reimbursed half-yearly to the States by the Commission. Although those provisions, and especially Regulation No 1041/67/EEC, allow the Member States a certain area of discretion, *inter alia*, in fixing the documents which constitute proof of the right to the refund, they nevertheless involve a duty for the States to make the payment within a reasonable period in order to avoid treating exporters differently according to the frontier over which their products are exported.

16 The Commission complains that the Italian Government paid the refunds after periods of between 12 and 18 months whilst the other Member States made the payments within much shorter periods.

Nevertheless the factors which it adduces in support of its application do not lead to the conclusion that it is well founded.

17 The first notification which it addressed to the Italian Government was dated 27 February 1968, that is to say, two months after the publication on 23 December 1967 of Regulation No 1041/67/EEC, whereas on 31 January and 20 February 1968 the defendant had taken the first measures intended to facilitate the implementation of the said regulation and paid a certain number of refunds, albeit for very small amounts.

18 Moreover, in its request for observations of 12 July 1968, the applicant states that at this stage payments have only been made for 'very small' amounts whilst it emerges from the table annexed to the written reply given to the questions put by the Court that in the first half of 1968 the Italian Government had paid refunds

amounting to 6 841 million lire, 5 800 000 lire of which relate to refunds for the previous half-year.

During the second half of 1968 it paid 10 442 million lire, 4 044 million of which relate to the two previous six-monthly periods, that is to say, the period from 1 July 1967 to 30 June 1968.

19 In the first half of 1969 it paid 6 950 million lire, 1 169 million of which relate to the three previous six-monthly periods.

Nevertheless amongst the sums quoted as refunds paid in arrears during this six-monthly period there appears an amount of 718 800 000 lire which plainly relates to the optional system of refunds in force before 1 July 1968 relating to milk and milk products and beef and veal and which is consequently irrelevant to the dispute.

20 Although those facts reveal the existence of delays, which were sometimes considerable, in the payment of the refunds they do not however convey a precise impression of their extent which might in theory have been between one to two months and 18 months.

Furthermore, examination of the figures supplied tends to indicate that the delay fundamentally related to the exports effected in the second half of 1967 and that subsequently these arrears were gradually absorbed.

Finally, although mention has been made of figures greater than those shown by the documents submitted to the Court, no evidence has been supplied capable of proving them.

21 The fact that two undertakings have initiated proceedings against the Italian State in the national courts for the payment of very considerable sums cannot, in the absence of information as to the nature of the disputes, constitute proof of the existence of a failure.

Furthermore the findings in this case cannot prejudice any claims which the persons concerned may be entitled to advance before the national courts of the Member States.

22 In those circumstances, taking into account the fact that the figures supplied do not lead to the conclusion that there were delays as long as those alleged by the Commission, the factors produced by it are insufficient to prove the existence of a failure within the meaning of Article 169.

23 The application must be dismissed.

Costs

24 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. The applicant has failed in all its submissions.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 40 and 169;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby:

1. **Dismisses the application;**
2. **Orders the Commission of the European Communities to pay the costs.**

Lecourt Monaco

Donner Strauß Mertens de Wilmars

Delivered in open court in Luxembourg on 17 February 1970.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 29 JANUARY 1970[1]

Mr President,
Members of the Court,

By an application made under Article 169 of the Treaty of Rome the Commission of the European Communities asks you to rule that the Republic of Italy, 'by failing promptly to pay to exporters the refunds on products coming under the common organization of the market established

1 — Translated from the French.