**2. For the rest, dismisses the application as inadmissible;**

**3. Orders the parties to bear their own costs.**

Mertens de Wilmars Koopmans Bahlmann Galmot

Pescatore O'Keeffe Bosco Due Everling

Delivered in open court in Luxembourg on 7 February 1984.

P. Heim
Registrar

J. Mertens de Wilmars
President

## OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 8 NOVEMBER 1983 [1]

*Mr President*
*Members of the Court,*

In this case, which concerns the alleged failure of a State to fulfil its obligations under the EEC Treaty, the Court must decide on the compatibility of the provisions introduced by Italian Law No 306 of 8 July 1975 (Gazetta Ufficiale No 194 of 23 July 1975), fixing a producer price for milk, with the common organization of the market in milk and milk products created by Regulation (EEC) No 804/68 of the Council of 27 June 1968 (Official Journal, English Special Edition 1968 (I), p 176). Since both legislative texts were the subject of the Court's judgment in the *Toffoli* case [2] and were set forth in detail therein, it is sufficient to recall their basic features in so far as they are relevant to the present case.

As the Court of Justice has already emphasized in the *Toffoli* case [2] it is one of the principal objectives of the common organization of the market in milk and milk products to guarantee to producers a milk price related to a target price, the machinery provided for that purpose in the regulation being controlled *exclusively* by the Community.

Italian Law No 306, on the one hand, provides that the sale of milk by members of a cooperative is to be effected through the cooperative alone

1 — Translated from the German.

2 — Judgment of 6 November 1979, Case 10/79 *Gaetano Toffoli and Others* v *Regione Veneto* [1979] ECR 3301.

and in accordance with the rules laid down by the cooperative and, on the other, lays down provisions concerning the fixing of the producer price for milk. Under Article 8 thereof the producer price for every marketing year and every region is determined, in accordance with the criteria set out in Articles 8 and 9, in collective negotiations involving participation of the various economic groups concerned (producers, associations, processing concerns and dairies). If no agreement is thereby reached, the region, acting under Article 10 and at the request of one of the parties, convenes a meeting without delay — and at least two months before commencement of the marketing year — between the Regional Economic Committee provided for by Article 3, the relevant processing concerns and the dairies, in order to promote negotiations aimed at fixing the selling price for milk ("allo scopo di favorire la contrattazione per la determinazione del prezzo di vendita del latte"). Under Article 10 (3), the resultant agreement is published by the aforesaid committee in the Regional Official Gazette and becomes binding on the contracting parties ("e vincolante per le parti contraenti"). If the agreement provided for in Article 10 is not reached within 30 days of commencement of the marketing year, the producer price for milk is, in accordance with Article 11, fixed by a committee appointed by order of the Chairman of the Regional Authority. Under Article 11 (4), the decision of that body, reached by a majority of the votes cast, becomes binding on those concerned ("e vincolante tra le parti") immediately after its publication in the Regional Official Gazette.

The Commission, taking the view that those provisions represented unilateral action by a Member State interfering with the fixing of the producer price for milk and were therefore incompatible with the common organization of the market in milk and milk products, commenced the preliminary procedure under Article 169 of the EEC Treaty, by a letter dated 28 July 1977. In its reply of 4 November 1977, however, the Italian Government contended that the Law in question did not contain mandatory rules on prices and did not make the agreements reached by the trade groups officially binding or even extend the scope of the agreements to persons who had not taken part in the collective negotiations.

Subsequently, in the judgment in the *Toffoli*[1] case, the Court of Justice, in reply to a similar question from the Tribunale Amministrativo Regionale per il Veneto [Regional Administrative Tribunal for Veneto], ruled that it was incompatible with the common organization of the market in milk and milk products established in Regulation No 804/68 for a Member State to fix, directly or indirectly, the producer price for milk; finally, therefore, in a reasoned opinion of 22 May 1981, the Commission, referring to the aforesaid judgment, stated that the Italian Republic had failed to fulfil its obligations under the EEC Treaty by applying the provisions of the Law in question concerning the fixing of a producer sale price for milk and called upon the Italian Republic to put an end to the infringement of the Treaty within a period of two months.

By a telex message of 5 October 1981, the Italian Government announced a draft law intended to bring about the

1 — Judgment of 6 November 1979, Case 10/79 *Gaetano Toffoli and Others* v *Regione Veneto* [1979] ECR 3301.

repeal of Article 11 of the Law in question. Since, however, the Commission took the view that the draft merely replaced the original Articles 11 and 12 by provisions which represented an even graver infringement of the Treaty than the original legislation, the Commission called upon the Italian Government, by a letter of 9 March 1982, to replace the draft law as soon as possible with a fresh text which actually repealed Article 11, furthermore to refrain from applying Article 11 in the meantime and, finally, to make it clear that the milk prices published in the Regional Official Gazettes operated only in private law. Lastly, the Commission called on the Italian Government to notify it within one month of the measures taken.

In its reply of 15 April 1982 the Italian Government attempted in particular to justify the draft law, whereupon the Commission brought the present action on 4 June 1982, seeking a declaration that the Italian Republic had failed to fulfil its obligations under the Treaty establishing the European Economic Community, by applying the provisions of Law No 306, concerning the fixing of a producer sale price for milk.

The Italian Government, whilst conceding that it has not formally repealed Article 11, contends that the Court should confine its declaration of the Italian Government's failure to fulfil its Treaty obligations to that point alone and should dismiss the remainder of the Commission's application as inadmissible.

My opinion on the above claims is as follows:

## 1. Admissibility of the application

There are differences of opinion between the parties as to the precise scope of the action. As the Commission has stated, in particular in reply to questions put by the Court, it charges the Italian Republic with offending against the objectives of the common organization of the market in milk and milk products by maintaining in force Articles 10 and 11 of the Law in question, because, in its opinion, under both those provisions influence is to be exerted by a public authority on the fixing of the producer price for milk. According to the Italian Government, however, the action is confined to Article 11 of the Law in question. Whilst conceding that Article 10 — although not expressly mentioned — may have been included within the scope of the reasoned opinion of 22 May 1981, it maintains that, as is shown in particular by the subsequent correspondence, the application to the Court was limited to Article 11. That was further demonstrated by the written procedure, in the course of which the Italian Government referred exclusively to Article 11, despite which the Commission made no objection.

In considering those arguments, it should be borne in mind that the Court has consistently held (see in particular Cases 7/69 [1], 232/78 [2], 193/80 [3], 211/81 [4] and 124/81 [5], that the scope of an action

1 — Judgment of 10 March 1970, Case 7/69 *Commission of the European Communities* v *Italian Republic* [1970] ECR 111.

2 — Judgment of 25 September 1979, Case 232/78 *Commission of the European Communities* v *French Republic* [1979] ECR 2729.

3 — Judgment of 9 December 1981, Case 193/80 *Commission of the European Communities* v *Italian Republic* [1981] ECR 3019.

4 — Judgment of 15 December 1982, Case 211/81 *Commission of the European Communities* v *Kingdom of Denmark* [1982] ECR 4547.

5 — Judgment of 8. February 1983, Case 124/81 *Commission of the European Communities* v *United Kingdom of Great Britain and Northern Ireland* [1983] ECR 203.

brought under Article 169 is limited by the preliminary procedure provided for therein and by the application to the Court, both of which must essentially be based on the same submissions. From the purpose of the preliminary procedure, which is to inform the Member State concerned in good time of the complaint made against it and to give it the opportunity of defending itself, it follows, first, that the letter formally inviting the Member State to submit its observations and the reasoned opinion must disclose clearly the legal and factual considerations on which the Commission bases its objections and, secondly, that the scope of the complaint cannot be enlarged after closure of the preliminary procedure.

If the preliminary procedure followed in this instance is appraised in the light of those objectives, it may be observed that both the letter of 23 July 1977 formally inviting the Italian Republic to submit its observations and the reasoned opinion of 22 May 1981 unequivocally state that the provisions concerning the fixing of the producer price for milk contained in Law No 306, including Articles 10 and 11 thereof, are incompatible with the common organization of the market in milk and milk products. It also emerges clearly from those documents, which both refer expressly to the aforesaid provisions, that the Commission's complaint is directed particularly against the effect which the price-fixing has as a result of its publication in the Regional Official Gazette.

Finally, the complaint contained in the Commission's application to the Court coincides exactly with the formal complaint made in the reasoned opinion. The Commission, having described once again in its presentation of the facts the price-fixing machinery contained in the two provisions, and having reiterated the complaint contained in the reasoned opinion, quotes verbatim the remarks of the Court of Justice in paragraph 12 of the *Toffoli* [1] judgment, which establishes *inter alia* that Member States can no longer take action, through national provisions adopted unilaterally, affecting the machinery of price formation established under the common organization of the market. By underlining certain word the Commission makes it clear, in particular, that in its opinion the Court of Justice did not take the view that it was solely the fixing of a producer price by a public authority which was incompatible with the common organization of the market, but it also regarded as contrary to Community law any national legislation which was designed to promote and encourage the fixing of such a price by agreement. If regard is had also to the applicant's formal conclusions and to the reasoned opinion, it is in my view sufficiently clear from the application, and must also have been clear to the Italian Republic, that the Commission intended to include not only article 11 but also Article 10 within the scope of its action. Moreover, that view is not, contrary to the contention of the Italian Government, called in question by the fact that the Commission, in paragraphs 7 and 8 of its application, expressly discusses only Article 11 of the

1 — Judgment of 6 November 1979, Case 10/79 *Gaetano Toffoli and Others* v *Regione Veneto* [1979] ECR 3301.

Law in question, together with the draft law designed to amend it. Those observations were, as is shown in particular by the opening phrase "d'altra parte", intended merely to *supplement* the previous observations.

Since it may thus be concluded that the subject-matter of the complaint, as described during the preliminary procedure, coincides with the subject-matter of the action brought, it remains to be considered whether, as the Italian Government asserts, the scope of the complaint was subsequently limited to Article 11 by the correspondence which followed the delivery of the reasoned opinion. In that regard it should not indeed be overlooked that the Commission, in conducting the correspondence, which was obviously occasioned by the submission of the draft law amending Article 11, dealt primarily with that provision alone and with the proposed amendment thereto, without expressly mentioning Article 10 again.

Even though such conduct may be surprising, it is in my view quite impossible to infer from it a limitation of the subject-matter of the complaint as outlined in the reasoned opinion. That is clear from the fact that, as Article 169 indicates, the preliminary procedure, during which Member States have the opportunity of justifying or modifying the conduct complained of, comes to an end on expiry of the period specified in the reasoned opinion, whereupon it lies within the discretion of the Commission to decide whether or not to bring the matter before the Court of Justice. Even if the Commission resolves not to proceed with a case, this does not, as is shown by the judgment in Joined Cases 15 and 16/76, [1] indicate *ipso facto* an acknowledgement of the legality of the conduct originally objected to. Since Article 169 does not lay down a period within which proceedings before the Court must be instituted, the Commission must in principle be permitted, if it concludes that the breach of the Treaty has not been rectified, to bring such proceedings within a reasonable period, without making any further request to the State concerned. consequentliy, the fact that the Commission, in the correspondence which followed the reasoned opinion and which it was not obliged to conduct, stated its opinion only on the issues associated with Article 11 of the Law in question and not on Article 10, cannot support the inference that it thereby intended, by implication, to alter the scope of the complaint. In the light of the foregoing, it might perhaps have been possible to regard the Commission as having limited the scope of its complaint, as a matter of procedural law, if it had done so *expressly* in a further reasoned opinion, identified as such; that, however, is not the case.

Finally, the fact that the Commisssion did not deal with Article 10 of the Law in question during the written procedure before the Court of Justice is not to be regarded as evidence of a restriction of the scope of the action, because, as Article 38 of the Rules of Procedure shows, this has already been defined in the application.

To conclude the question of admissibility, it should be said as a corollary of the foregoing that the Court of Justice cannot rule on the legality of national measures which were not covered by the preliminary procedure under Article 169. Since the Italian *draft law* was not covered by the preliminary procedure, the Court of Justice is, as the Italian Government rightly emphasizes, pre-

1 — Judgment of 7 February 1979, Joined Cases 15 and 16/76 *French Government* v *Commission of the European Communities* [1979] ECR 321.

cluded on that ground alone from ruling on the legality of the Italian draft law amending the article in question, quite apart from the fact that, as is clear in particular from Article 171 of the EEC Treaty, the Court may only give judgment on *breaches* of the Treaty *which have already occurred.*

## 2. Substance

With regard to the substance of the application, it may, on the basis of the judgment in the *Toffoli*[1] case, be concluded without further discussion that, as the Italian Government itself concedes, the maintenance in force of Article 11 of the Law in question constitutes a breach of the Treaty, even if the article has, as the Italian government states, ceased to be applied. Indeed, the main action in that case, in which the Court held that it was incompatible with the common organization of the market in milk and milk products for a Member State to fix directly or indirectly the producer price for milk, arose from a decision adopted under Article 11 of Italian Law No 306. Accordingly, the only question to be examined is whether, on the basis of that judgment, the provisions of Article 10 of the Law in question are — as the Commission claims — to be regarded as contrary to the Treaty.

In my view that question must be answered in the affirmative. The reason is that the parties to those proceedings entered into a detailed discussion, as the summary of the facts and issues contained in the judgment shows, concerning the legality of the whole price-fixing procedure laid down by the Italian Law in question. Both the plaintiff in the main action and the Commission rightly took the view that the price-fixing mechanisms provided for in the two articles were to be regarded as closely related, since failure to reach agreement under Article 10 set in motion the procedure laid down by Article 11 for fixing a producer price. It was not least the effect produced by the publication of the price in the Official Gazette which was regarded as being contrary to the Treaty. The Regione Veneto (the defendant in the main proceedings) admitted that the provisions at issue encouraged negotiations on the producer price, and it denied only that they led to the producer price being fixed by a public authority.

The above debate led the Court of Justice, after making a detailed exposition of the Community provisions and of the entire price-fixing machinery laid down by the national legislation, to make the general statement (paragraph 12 of the decision) that Member States could no longer take action, through national provisions adopted unilaterally, affecting the machinery of price formation established under the common organization and controlled by the Community alone. With regard to the provisions in question, the Court of Justice added, by way of clarification, that national legislation designed to promote and encourage, *by any method,* the establishment of a uniform producer price for milk by *agreement* — as is the case in Article 10 — or by authority, at the national or regional level, is, by its nature, outside the bounds of the powers

1 — Judgment of 6 November 1979, Case 10/79 *Gaetano Toffoli and Others* v *Regione Veneto* [1979] ECR 3301.

given to Member States and runs contrary to the principle established by Regulation No 804/68, namely that of attaining a target producer for the milk in line with the available marketing opportunities. In making that statement, which clearly relates to the wording of Article 10 of Italian Law No 306, and also in adopting the formula used in the operative part, whereby not only the direct but also the *indirect fixing* of the producer price for milk is incompatible with the common organization of the market in milk and milk products, the Court of Justice wished to make it clear that Member States must refrain from any activity which is liable to jeopardize in any way whatsoever the price-formation machinery established under the common organization of the market. The *convocation*, by the regional authority, of the economic groups specified in Article 10, for the purpose of promoting agreement on *price-fixing*, and the subsequent *publication* of the agreement in the Regional Official Gazette constitute action, albeit indirect, affecting the machinery of price formation controlled by the Community alone. Moreover, it is shown in particular by the judgment in *Commission* v *Ireland*[1] that the indirect influencing of the operation of the market by public authorities may also constitute a breach of the Treaty. Without there being any need to examine in further detail the effect of the publication of the price, it may be stated that even the market information which is thereby made available could in principle have an adverse effect on price formation, which is determined by supply and demand, and thus undermine the effectiveness of the Community's intervention machinery, as described exhaustively in the *Toffoli*[2] judgment and in my opinion thereon.

Since it must therefore be accepted that both Article 10 and Article 11 of Italian Law No 306 are incompatible with the common organization of the market in milk and milk products established by Regulation No 804/68, it only remains, in conclusion, to consider the Italian Government's submission that the application of Article 11 was no more than sporadic, that efforts were, moreover, made to repeal it by the introduction of new legislation and, finally, that, at the Commission's request, instructions were given to the regions not to apply the article until its amendment; in a consistent line of decisions, the Court has held that such representations are, as far as any breach of the Treaty is concerned, essentially irrelevant. As the Italian Government itself ultimately conceded, a breach of the Treaty takes place whenever national legislation incompatible with Community law has not been formally abolished. In that connection it is immaterial how often the legislation in question has been applied; moreover Member States may not plead that internal difficulties have prevented its early repeal. Finally, the Court of Justice has also consistently emphasized (see, for example, Case 102/79, *Commission* v *Belgium*[3], and Case 145/82,

1 — Judgment of 24 November 1982, Case 249/81 *Commission of the European Communities* v *Ireland* [1982] ECR 4005.

2 — Judgment of 6 November 1979, Case 10/79 *Gaetano Toffoli and Others* v *Regione Veneto* [1979] ECR 3301.

3 — Judgment of 6 May 1980, Case 102/79 *Commission of the European Communities* v *Kingdom of Belgium* [1980] ECR 1473.

*Commission* v *Italian Republic*[1] that obligations under Community law are not fulfilled until the clarity and certainty of national law are fully guaranteed. It follows that mere administrative instructions not to apply a legislative provision, which by their very nature may be amended at any time, cannot be regarded as legally effective compliance with the obligations arising under Community law.

3. In conclusion, I therefore propose that the Court of Justice should declare that the Italian Republic, by introducing and maintaining in force the procedure leid down by Articles 10 and 11 of Law No 306 for fixing a producer sale price for milk, has failed to fulfil its obligations under the Treaty establishing the European Economic Community. Moreover, as requested in the application, the defendant should be ordered to pay the costs.

1 — Judgment of 15 March 1983, Case 145/82 *Commission of the European Communities* v *Italian Republic* [1983] ECR 711.