THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs of the action.**

Lecourt Trabucchi Mertens de Wilmars

Donner Strauß Monaco Pescatore

Delivered in open court in Luxembourg on 9 July 1969.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 19 JUNE 1969[1]

Mr President,
Members of the Court,

The action in which I am required to give my opinion concerns the application of Article 80 of the EEC Treaty, according to which 'the imposition by a Member State, in respect of transport operations carried out within the Community, of rates and conditions involving any element of support or protection in the interest of one or more particular undertakings or industries shall be prohibited as from the beginning of the second stage, unless authorized by the Commission'. Before it is possible to give a judgment in this case, it is important to know the facts which have given rise to it.

From before the entry into force of the EEC Treaty Italy applied special tariffs to the transport of foodstuffs by the State Railways. These were, first, Special Tariff No 201, which provided for various reductions as regards the transport of certain foodstuffs from the South of Italy to any station on the State Railway. There were also export tariffs which involved various reductions and were applicable to products exported to other Member States or to third countries (that is, Tariff No 251 for exports by land and No 252 for exports by sea). In some cases, these reductions were in addition to those in Tariff No 201.

When, in accordance with Article 80 of the Treaty, the Commission of the EEC undertook a systematic examination of the tariffs involving an element of support applied in each of the Member States, it reached the conclusion that the application of Special Tariff No 201 could be authorized as a measure of regional aid. A decision of 16 February 1962 granted this authorization, which is still in force and has not been affected by the decision which I have to consider in the present case. In the same way

1 — Translated from the German.

the Commission gave a limited authorization to an *export* tariff, that is, Tariff No 251-A, which applied to the transport of agricultural products from the South of Italy to other Member States. This authorization was never more than temporary, but its validity has been extended on several occasions, the most recent extension being, by a decision of 22 December 1966, until 31 March 1967.

As regards this *export* tariff, the Commission has on several occasions pointed out the need to replace it by other forms of aid more in keeping with the requirements of the Common Market. In this connexion the Commission stated that it had in mind particularly the development of a common organization of the market in fruit and vegetables. This is the factor which had led it, in its decision of 15 December 1965, to reserve the right to amend or abolish the authorization before the expiry of the time-limit if no doubt remained that it was no longer justified, particularly if a common organization of the market in fruit and vegetables was achieved. In the decision which granted a final extension until 31 March 1967 the Commission emphasized that it was unable to regard Special Tariff No 251-A as the most rational means of achieving the purpose for which the authorization was granted, since it did not conform with the measures laid down or advocated for the implementation of the common agricultural policy. The Commission referred especially to Regulation No 159/66/EEC, which introduced supplementary provisions for the common organization of the markets in fruit and vegetables, whose effect was to guarantee, at any rate from 1 January 1967, adequate protection to Italian producers of the products in question.

As the extension until 31 March 1967 had nevertheless expired without the Italian Government's having abolished the tariff reductions in question, the Commission sent a telex message to the Italian Government on 28 April 1967 requesting an explanation. After a temporizing reply given on 13 May 1967 by the Permanent Representative of the Italian Republic, the Commission sent a further telex message to the Italian Government on 2 June 1967. In September 1967, this Government submitted a draft Ministerial Decree (No 12811) which provided for a series of tariff measures the particulars of which were as follows: the abolition of Tariff No 251-A, applicable to agricultural products exported from the South of Italy; abolition of Tariff No 252 in respect of agricultural products transported by sea to third countries; the reduction, on the basis of distance, of General Tariff No 103-C (applicable to agricultural products) and of General Tariff No 2 (applicable to potatoes). Finally, it provided for an additional reduction in the basic rates of Special Tariff No 201 (Series C) which had been originally authorized by a decision of 16 February 1962. This additional reduction was intended to apply to the transport of citrus fruits, fresh vegetables and other fresh fruits from the South of Italy over certain minimum distances.

The Commission consulted the representatives of all the Member States on 9 November 1967 on the subject of the Italian Government's proposals. It subsequently reached the conclusion that it need not take any stand in relation to the abolition of Tariffs Nos 251 — A and 252 or to the reductions affecting Tariffs Nos 103 — C and 2. It considered that the reductions concerning Special Tariff No 201 — C constituted a support, in favour of the agricultural producers in the South of Italy, which fell within the ambit of Article 80(1) of the EEC Treaty. By a decision of 31 October 1968 the Commission authorized the proposed measure, but at the same time stipulated that the reductions could only remain in force in the form proposed by the Italian Government until 31 December 1969, and that as

from 1 January 1970 they were to be reduced by at least 50% and completely abolished by 1 January 1971.

This is the decision contested by the Italian Government in its application which was received at the Court of Justice on 10 January 1969 (after the entry into force on 1 January 1969 of the abovementioned Ministerial Decree No 12811). The Italian Government seeks the annulment of the Commission's decision concerning the amendments to be made to the 'Condizioni e tariffe per i trasporti delle cose sulle F.S.' so far as they concern Part II — Chapter VI — Table entitled 'Rates' of Title I of Special Tariff No 201 — series C — of the Italian State Railways.

The Commission opposes the application and submits that it should be dismissed.

Let me now consider which of the arguments advanced by the parties may be accepted.

Legal consideration

You will remember that the Italian Government has put forward a series of complaints against the contested decision. It develops them on the basis of three submissions, sometimes under the same heading (infringement of Article 80(2) and of Article 2 of the Treaty, infringement of an essential procedural requirement), sometimes relying on another provision of the Treaty (Article 3(d)) and also on misuse of powers. As a result, the applicant's arguments repeat themselves and overlap to a certain extent, a disadvantage which I believe may be avoided in the course of my consideration of the problem. Therefore, instead of following the scheme adopted by the Italian Government, let me endeavour to analyse its arguments in what I consider to be a logical order, whilst of course dealing exhaustively with all the arguments.

The main objection put forward by the Italian Government is that in authorizing its amendments to Special Tariff No 201 — C the Commission *expressly attached a time-limit to its authorization.* According to the applicant, once it is recognized that the conditions laid down in Article 80 are fulfilled, the application of exceptional tariffs must continue in force as long as such conditions exist: this is even more so when it appears impossible to predict the development of the circumstances which led to the grant of the authorization. The Italian Government considers that at the very least the Commission should have provided for the possibility of extending its authorization, as it had done on previous occasions. In other words, the Commission was not entitled to exclude the possibility of an extension.

First let me say, with regard to this last point, that it is irrelevant to an assessment of the present case. The decision in question does not expressly rule out the possibility of any extension of the authorization. It might, therefore, be said in reply to the applicant that the decision cannot be criticized on the basis of a factor which is not contained therein. Moreover, it is certain that even if the Commission did not expressly refer to the possibility of extending the authorization, the powers conferred on it by Article 80 enable it to consider whether such extension is necessary after, or even before, the time-limit has expired.

However, we should not be delayed by such considerations since the Commission apparently considers that the authorization granted in this instance was not capable of being extended (and that it was therefore unable to refer to the possibility of an extension, as it had done on 29 May 1964 when replying to the Italian Government's objections to its decision of 19 March 1964). In the present case, on the contrary, the Commission maintains that the authorization may only be granted for a strictly limited period. Let me, therefore, consider this statement.

The Commission maintains that it follows from the meaning and object of Article 80 of the EEC Treaty that it is bound to set a time-limit to authorizations in exceptional cases. The Italian Government expresses surprise at this statement and points out that by its decision of 16 February 1962 the Commission authorized the application of Special Tariff No 201 (which is still in force) without imposing any time-limit. The Commission in turn explains the change in its practice, not only by pointing out that in 1962 the common agricultural policy in horticultural products was not yet formulated, but also by referring in particular to the case-law relating to the fourth paragraph of Article 70 of the ECSC Treaty as it was subsequently developed (see the judgment in Case 28/66). The Court of Justice did indeed annul a decision of the High Authority relating to the authorization of special rates applied by the German Federal Railways to the carriage of coal and steel products to and from the Saarland on the ground that no time limitation was imposed on that decision. According to the Commission, however, the same principles must apply to the interpretation of Article 80 of the EEC Treaty because of the parallel existing between this provision and Article 70 of the Treaty.

Like the Italian Government, I do not accept that this conclusion must necessarily be drawn. It is of course undeniable that the two texts in question agree on a number of important points. Both impose a prohibition in principle on special tariffs which may be set aside under certain conditions. According to the general rules of interpretation one is entitled to deduce from such a system that the conditions to which the authorization of exceptions are subject are to be interpreted *strictly*.

Nevertheless, some significant differences exist between these two Articles. First, there is a difference between the category of undertakings which benefit from these provisions: this is wider under Article 80 of the EEC Treaty, which refers not only to one or more particular undertakings (of whatever type they may be) but also to whole industries, then under the fourth paragraph of Article 70 of the ECSC Treaty which is only concerned with one or more undertakings producing iron or steel. Further differences appear in the factors which must be taken into account in authorizing special tariffs. Under the fourth paragraph of Article 70 of the ECSC Treaty the decisive criterion is whether the tariff measure is 'in accordance with the principles of this Treaty'. It is clear from the case-law that this requirement is primarily a reference to the principle set out in Article 2, according to which 'the Community shall progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity', and this distribution is that 'which is based in particular on the composition of production costs resulting from output, that is, from the physical and technical conditions of each of the various producers and on their individual efforts',[1] According to this principle the authorization of support tariffs may only be considered in order to allow the undertakings in whose favour they were made 'to overcome exceptional and temporary difficulties which arose from unforeseeable circumstances'. According to the judgment in Case 28/66[2] the application of exceptional tariffs is only permissible 'to the extent to which they make it possible to re-establish within the appropriate time-limits conditions which will of themselves ensure the distribution of production at the highest possible level of productivity'. In this respect, the role of the limitation attached to the dura-

1 — Judgment in Joined Cases 27, 28, 29/58, Rec. 1960, p.527.
2 — Case 28/66, Rec. 1968, p.22.

tion of the agreement given to these exceptions is one of encouraging the undertakings in whose favour they are made 'to adjust themselves to the new conditions of competition or of preventing them from regarding the measures as a permanent aid intended to offset the difficulties which they face'. This is why, in Case 28/66, the Court held that the time-limit which it had been necessary to attach to the authorization was an *essential* factor, although the fourth paragraph of Article 70 of the ECSC Treaty merely states that the High Authority *may* make its agreement temporary. In comparison with the system established by the ECSC Treaty it is undeniable that the provisions of Article 80 of the EEC Treaty are more far-reaching since it mentions, among the elements to be taken into account, the requirements of an appropriate regional economic policy and the needs of underdeveloped areas. It therefore follows from this text that considerations of *regional policy* may play a part in the Commission's decision, a possibility which, according to the case-law of the Court[1] is impossible as regards the application of the fourth paragraph of Article 70 of the ECSC Treaty. This means that under Article 80 the initiative of those undertakings in whose favour an authorization is granted and which must be encouraged to make certain efforts is neither the sole nor the principal factor which the Commission must consider. It also means that the nature and scope of the regional policy may prevent any precise prediction of the length of the period during which it will be necessary to maintain the exceptional measures in force. Consequently, the need to attach a specific time-limit to any authorization is not as imperative under Article 80 of the EEC Treaty as it is under Article 70 of the ECSC Treaty, even though it is probable that it will often be necessary to provide for a time-limit in the light of the requirements of appropriate planning, a matter which of course does not escape the legitimate influence of the Commission.

The decisive question is, therefore, whether it appears that in the *specific case* at present in question the Commission was justified in imposing a time-limit on its authorization. First, it is irrelevant to point out that no time-limit was imposed in the decision of 16 February 1962 by which the Commission authorized the application of Special Tariff No 201, the adaptation of which is now before us. As the Commission has told us, it is clear that this can be explained by the fact that the legal situation existing in 1962 was not the same, since at that time no common agricultural policy existed for fruit and vegetables. Moreover, I do not consider decisive the Italian Government's observation that the special tariff authorized by the contested decision represents an essential element in its development programme for the underdeveloped area of Southern Italy. As I have already indicated, the Member States must accept that their regional policies must be reviewed on the basis of the principles of the Treaty. In particular, it is unquestionable that the Commission has the right to exert its influence on the fixing of special tariffs in cases in which they form part of a *regional policy*. It would thus be mistaken to claim that a tariff measure must in all cases be allowed to continue in force as long as it serves a purpose in terms of the development programme which a Member State believes it necessary to implement. But once it is considered justifiable for Community institutions to exert an influence on national tariff measures, it may clearly be expedient to authorize them *for a limited period* only.

In adopting the contested decision the

1 — Rec. 1970, p. 527.

Commission let itself be guided mainly by the fact that the important modifications which had recently been introduced into the common agricultural policy, and more particularly into the common organization of the markets in fruit and vegetables, had resulted in a greater degree of efficiency in the operation of those mechanisms. This consideration cannot be declared a *priori* irrelevant and dismissed as immaterial, as the Italian Government now would wish (and it should be observed that no objections were put forward by the Government on previous occasions when the EEC drew its attention to this aspect of the matter), on the ground that it is not permissible to link the application of the rules relating to the transport sector to the development of the other sectors referred to by the Treaty. In fact, the two areas are closely connected, not only because the effect of the agricultural policy is to bring about changes in the economic situation which of course the Commission is bound to take into account in reaching decisions in matters of regional policy, but also and above all because there has been a marked change in the *legal* situation affecting products actually covered by the tariff measures in question as a result of the organization of the markets in fruit and vegetables. In this respect it seems useful to recall the stages of the development of this organization, which the Commission has set out so precisely in its pleadings. As we have heard, by its decision of 19 March 1964 the Commission authorized the application of Special Tariff No 251 — A for a limited period. This tariff, which applied to the export of agricultural products from the South of Italy, was therefore a measure which considerably facilitated the access of agricultural products from that region to foreign markets. On the occasion of the original decision and of each extension of the time-limit (decisions of 8 July 1964, 15 December 1965 and 22 December 1966) the Commission was concerned to point out the decisive influence of the progressive development of the common organization of the markets in fruit and vegetables and to emphasize that, when the organization was finally established it would inevitably render the tariffs in question superfluous. Then occurred a crucial event: the entry into force on 1 January 1967 of Regulation No 159/66 (of 25 October 1966). This Regulation brought about a substantial increase in and a significant structural improvement of the organization of the markets in fruit and vegetables. In particular it had the effect of strengthening the protection of producers in relation to third countries by means of the Common Customs Tariff and other Community measures and of making possible the unimpeded development of intra-Community trade (by providing for the abolition of customs duty and excluding any further recourse to Article 10 of Regulation No 23). This effect applied as from 1 January 1967 in respect of most of the goods benefiting from the special tariffs. In relation to the other products the Regulation came into force on 1 July 1968. In subsequently became clear that Special Tariff No 251 — A had to be abolished, since it was being replaced by Community measures serving the same purpose (improving the access to foreign markets of products which benefited from the measures).

As regards the tariff measure which was subsequently authorized and which is at issue in the present case, it in part replaced Tariff No 251 — A (although involving considerably smaller reductions). The Italian Government was itself forced to acknowledge the connexion between the two measures, as is shown by a letter dated 11 September 1967 from the Permanent Representative of the Italian Republic. This being so, it is clear that the new tariff measure could only apply during a short transitional period; its basic purpose was to mitigate the effects of the

sudden abolition of the previous system. Moreover, it must be observed that Regulation No 159/66 introduced new agricultural policy objectives and structures. It provided in particular for the formation of groups of producers' organizations entitled to fix minimum prices below which its members' products could not be sold. To encourage the formation of these organizations Member States may grant aids 50% of which is repayable out of the European Agricultural Guidance and Guarantee Fund. Member States may also grant loans on advantageous conditions in order to finance certain interventions carried out by these organizations, to compensate them in times of crisis and to intervene in other ways. All these mechanisms are explained in detail in the Commission's pleadings. It cannot be disputed that this system makes a more adequate contribution to the improvement of the agricultural structures than a system of special tariffs, a form of support which is certainly no more effective as its benefits are granted uniformly according to quantity and unit of product. The new measures are more in accordance with the development of the common market in agriculture than is the grant of special tariffs, because they are capable of eliminating any existing imbalances (to which the Commission has referred in its discussion of the situation of the producers' organizations in the various Member States). However, if such is the case, it must be conceded that the Commission is entitled to seek to put these new measures into effect and to pursue a 'policy' with that aim, even when it is led to consider appropriate special tariffs. Seen from the Commission's point of view, it would not be sensible to allow the special tariffs to continue in force, whatever the circumstances, until the economic situation adjusts itself one way or another to the organization of the market envisaged by Regulation No 159/66. This shows that the issue of authorizations valid for limited periods is a perfectly appropriate measure, first, because it gives the undertakings in whose favour it is adopted time to adjust themselves and in particular to create the type of commercial structures provided for by Regulation No 159/66, which clearly do not become effective overnight. Furthermore, the measure appears to be appropriate as regards the duration of the period allowed, because it is evidence of the Commission's understanding of the situation. It must not be forgotten that the only issue in the present case is the conversion of tariff measures of a fairly limited scope so as to approximate to the more rational measures provided for in Regulation No 159/66. And when to this end the Commission (after giving such clear and frequent warnings to the Italian Government between 1964 and 1966) provided for a period of two years in all in the decision contested in this case, it can scarcely be blamed for having risked making an impossible forecast. On the contrary, in my opinion, and in view of the explanations given by the Commission, it was for the Italian Government to show that the objectives laid down by the Commission cannot be achieved within the prescribed period. But this it has not atempted to do, as its arguments have been entirely in the abstract.

My conclusion is, therefore, that there can be no objection to the fact that the Commission imposed a time-limit on its authorization and, therefore, that as regards the substance of the case the complaints put forward by the Italian Government are unfounded.

For the sake of completeness I shall now consider the formal complaints that the statement of reasons for the decision was inadequate, although on this matter I can be brief.

As the Court is aware, the applicant does not claim that no statement of reasons was given for the decision. This

would be hard to maintain, since the Commission explained its actions in a preamble spread over more than two and a half pages in the Official Journal, referring to the objectives of the EEC Treaty, to the need to use the most rational means of improving the economic structures, to Regulation No 159/66 and its repercussions and to the need to modify agricultural structures. The main contention of the Italian Government is that the Commission did not give reasons for its argument that the conditions which allowed it to authorize the application of the special tariffs would no longer exist following the expiry of the period laid down. The Italian Government had also wished the Commission to indicate how the objectives of the agricultural policy could be achieved within a short period. It is true that the Commission did not give any specific explanation on these two points in its decision. This does not mean, however, that the reasons given for the decision are inadequate. It must be remembered that a close link exists between the contested decision and a series of earlier decisions which referred in their statements of reasons to the requirements of the common agricultural policy. Furthermore, I might observe that the text of Regulation No 159/66 to which the Commission refers provides abundant information, especially when it is considered that, as the Commission has pointed out, the special tariff authorized only involves slight reductions. In the light of these facts the Italian Government cannot reasonably expect the Commission to give any special explanations as regards its forecasts.

There are, therefore, no grounds for alleging that there is any procedural defect which would justify the annulment of the decision.

Summary

I am therefore of the opinion that the complaints put forward by the Italian Republic do not justify its application for annulment. The application must therefore be dismissed. As requested by the Commission the applicant must bear the costs of the action.