seeks a declaration that by not complying with the decision of 17 February the United Kingdom has failed to fulfil an obligation imposed on it by the Treaty, and Case 53/77 in which that very decision is assailed by the United Kingdom. In this situation the Commission is not entitled to request interim measures.

(b) There is no need for the adoption of interim measures. When the United Kingdom stated its intention to end the aid as soon as possible it did so in the expectation of a rapid reduction in the monetary compensatory amounts on pigmeat.

(c) Nor is there any urgency. The fact that the United Kingdom has not complied with the decision of 17 February may, under Article 93 (2) of the Treaty, supply grounds for a reference to the Court but cannot by itself justify the adoption of interim measures.

(d) The Commission has not substantiated its allegation that the aid measure in question is causing irreparable damage to the production of exporting Member States.

(e) Accordingly the questions at issue between the Commission and the United Kingdom cannot be resolved by interim measures but rather by an acceleration of the procedure in the two main actions.

A. M. Donner

Judge-Rapporteur

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 20 MAY 1977 [1]

Mr President,
Members of the Court,

On 20 January 1977 the Commission received a notification of a decision taken on the previous day by the Government of the United Kingdom to grant, as from 31 January, temporary aid to United Kingdom pig producers in the form of a subsidy of 5 1/2 pence per kilogramme dead weight.

On 25 January the Commission, considering that this aid was not compatible with the essential requirements of the Common Market within the meaning of Article 92 of the Treaty, initiated the procedure laid down by the first subparagraph of Article 93 (2). It immediately notified the Government of the United Kingdom, giving it notice to submit its comments within one week.

As the Commission pointed out in that communication, the provisions of Article 93 (3) had the effect of prohibiting the United Kingdom from putting the aid into effect until the procedure which had been initiated had resulted in a final decision.

However, the Government of the United Kingdom ignored this notice and did in fact bring the disputed aid measure into force on the date originally provided, namely 31 January.

At the same time the government, availing itself of the procedure offered by

1 – Translated from the French.

Article 93 (2), applied to the Council for a decision that the aid in question was compatible with the Common Market in derogation from the provisions of Article 92.

That application, which had the effect of suspending the procedure initiated by the Commission, was rejected by the Council after deliberations terminating on 15 February 1977.

It was thus possible for the procedure to be legally resumed. This was rapidly done since, after examining the comments of the other Member States and the trade organizations concerned, which had previously been invited, the Commission on 17 February adopted a decision requiring the United Kingdom Government to terminate forthwith the provision of the aid in question. Although the decision was notified to the Government on 18 February it paid no attention to it. It continued to grant national producers the aid previously decided upon.

Thus the conflict between the Commission and the British Government could not fail to give rise to proceedings before the Court.

However, the Commission waited until 11 March before referring the matter to the Court in pursuance of the second subparagraph of Article 93 (2) for a declaration that by not complying with its decision of 17 February the United Kingdom had failed to fulfil an obligation imposed upon it both by Article 93 of the Treaty and by the said decision.

It is relevant to point out, as the Commission does, that by negotiations undertaken directly with the United Kingdom Minister of Agriculture the Commission attempted to persuade the Government to comply with its decision of 17 February.

The Government had then informed the Commission that the subsidy to pig producers would cease 'as soon as practicable'.

Whatever may be the value of that undertaking I am compelled to note that it was only on 12 May that the Commission thought it appropriate to apply to you in pursuance of Article 186 of the Treaty and the provisions of Article 83 and the following articles of the Rules of Procedure for the adoption of an interim measure requiring the United Kingdom to cease infringing the Commission decision of 17 February 1977 pending the trial of the main action both in the Commission's application, 31/77, relating to the failure of the United Kingdom to fulfil its obligations and Case 53/77 brought by the United Kingdom for the annulment of the abovementioned decision of the Commission.

Before setting out the reasons for which I think that it will be necessary for the Court to dismiss this application for the adoption of an interim measure it seems essential for me to discuss the substance of the dispute, without of course arriving at any decision upon it.

As far as the Commission is concerned it is not merely a question of stating that the United Kingdom, which was bound by the provisions of Article 93 of the Treaty, and in particular by paragraph (3) thereof, could not legally bring into force the aid measure which it had notified to the Commission on 20 January 1977, but also of proving that the system of aid which the Government is granting to its producers of pigmeat is incompatible with the Common Market.

The Government of the United Kingdom on the other hand wishes to prove that the national aid is compatible with the Common Market under the provisions of Article 92 (3) (b) as being appropriate to remedy a serious disturbance in the economy of the Member State in question.

It seems advisable to mention the essential facts of the substance of the dispute in the two Cases 31/77 and 53/77. In this respect it is appropriate to recall that according to the Government of the United Kingdom it felt bound to grant the aid in question so as to remedy the extremely serious situation of pig producers and manufacturers of pigmeat in the United Kingdom — a situation brought about by the large quantity of imports into the United Kingdom of pigmeat or derived products from certain other Member States, in particular the Netherlands and Denmark.

In the opinion of the United Kingdom this situation originates in the fact that the monetary compensatory amounts received by the exporters of those States have been fixed at too high a level; these compensatory amounts, which were originally intended, according to the provisions of Regulation No 974/71 of the Council, solely to meet the difficulties arising from the variation in the margins of fluctuation of the currencies of certain Member States beyond the limits accepted by the International Monetary Fund have now, as regards the pigmeat sector, reached rates that are manifestly excessive in relation to the original objective.

They are in fact calculated on the basis of an intervention price which in this common organization of the market is purely notional since in practice recourse to the intervention machinery is altogether exceptional.

Hence the monetary compensatory amounts applicable to pigmeat are distinctly higher than they ought to be since they are based on an artificial intervention price. Contrary to the intention of Regulation No 974/71 of the Council, they are not limited to a level strictly necessary to compensate the incidence of monetary fluctuations on the prices of basic products actually covered by intervention measures.

What are, in the view of the Government of the United Kingdom, the foreseeable consequences, which indeed have even been visible since 1976, of this system of monetary compensatory amounts?

One of the first results, arising from the depreciation of sterling in relation to the currencies of countries exporting pigmeat or derived products to the United Kingdom and the accompanying increase in compensatory amounts is stated to have been the existence of an actual system of Community subsidies for exporters. These were enabled, in spite of an increase in their own costs of production, to supply the United Kingdom market at falling wholesale prices in such a way that British producers who at that time were unsubsidized have seen their profit margins diminish and even disappear completely from January 1977 although the output and efficiency of British producers were not to blame.

The United Kingdom Government has calculated that but for the aid which it granted to its national producers the loss suffered by them would have risen to more than £8 per pig.

The consequences of this situation on the national production potential for pigmeat were even more serious as the slaughter rate had continued to increase and the reproduction rate to decrease so that the breeding stock had diminished at the beginning of 1977 by some 12½ % below the level of 1973, the year of the accession of the United Kingdom to the Communities, in which a considerable fall in production had already been recorded.

In support of these statements, which are of course contested by the Commission, the Government of the United Kingdom attempts to produce evidence on which it is impossible for us to arrive at a decision at the present time.

However, what finally emerges from its line of argument is that the national aid

which it decided to bring into force from 31 January this year had no other purpose than partially to offset the distortions of competition due to the 'subsidies' granted to exporters from other Member States.

I shall not attempt to go into the extent to which this line of argument is well founded as the Court will only be able to consider it when the substance of Cases 31 and 53/77 is examined, but it has seemed to me necessary to show the consequences which the British Government draws for its part from the analysis which it presents of the economic situation created as a result of the monetary compensatory amounts.

These factors are indeed essential having regard to the criteria required by the case-law of the Court for the adoption of 'interim measures' within the meaning of Article 186 of the Treaty, and furthermore these criteria are also applicable to requests for a stay of execution of a Commission decision in pursuance of Article 185.

It is therefore in the light of these requirements that I shall examine the application submitted by the Commission having regard to the following considerations:

1. Can its Application 31/77 be regarded as not being manifestly unfounded?
2. Is it proved that there is an urgent need for the 'interim measure' in question?
3. Are the interests of the applicant threatened with irreparable damage? Moreover this is not a one-way question. It is also appropriate to enquire whether on the contrary an order of the Court adopting the said interim measure, that is to say, requiring the Government of the United Kingdom to put an end forthwith to the grant of the aid put into effect on 31 January 1977 would not risk causing definitive damage to the sector of the economy concerned, that is to say to British pigmeat producers.
4. Finally, we must enquire whether, independently of the criteria mentioned above, the interim measure which the Commission is asking the Court to adopt does not exceed the powers conferred on the Court by the provisions of Article 93 of the Treaty.

I — In its application lodged on 11 March the Commission claims in its conclusions that the Court should declare that by not complying with the Commission decision of 17 February 1977, that is to say, by not terminating the grant of the aid in dispute, the United Kingdom has failed to fulfil an obligation imposed on it by the EEC Treaty.

In fact the actual provisions of the first subparagraph of Article 93 (2) state that 'if, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the Common Market having regard to Article 92, ... it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission'.

The Commission decision of 17 February 1977 does in fact come within these provisions of the Treaty and *prima facie* it seems clear that the conclusions of the applicant in the main action are well founded to the extent to which they request a declaration that by maintaining in force the system of aid in dispute the Government of the United Kingdom has failed to fulfil an obligation imposed upon it on the basis of the said Article 93.

I feel bound to admit therefore not only that the Commission's application is not manifestly unfounded but that, according to the expression which it uses, it exudes an air of *fumus boni juris.*

The application for an interim measure therefore answers the first criterion

which I have mentioned. However, in this respect we cannot proceed without embarking on an examination of the substance, not only of the application for a declaration of failure to fulfil an obligation within the meaning of Article 93 of the Treaty, but also of the application for annulment presented under No 53/77 by the United Kingdom against the Commission decision. For the basis of the problem presented under different aspects by both these applications is in the last resort whether the national aid granted by the British Government to national producers of pigmeat is or is not compatible with the Common Market within the meaning of Article 92.

This is a question which it will only be possible to settle when the direct actions which have been brought before the Court have been finally determined.

II – Must we acknowledge the urgency of the need for the adoption by the Court of the 'interim measure' claimed by the Commission, namely an order addressed to the Government of the United Kingdom to terminate the aid in dispute forthwith?

The mere time-scale of the procedures embarked upon, first by the Commission on the basis of the second subparagraph of Article 93 (2) against the State concerned and subsequently in proceedings before the Court leads me to give a negative answer to this second question.

First of all it is true that the Commission embarked upon the abovementioned procedure laid down in Article 93 (2) on 25 January, that is to say, five days after the notification made to it by the British Government. This procedure was suspended, in accordance with the third subparagraph of that provision, by the application made by the British Government to the Council for a decision that the national aid in question be considered compatible with the Common Market in derogation from the provisions of Article 92 ... if such a decision is justified by exceptional circumstances.

It is true too that the Council finally rejected that application at its meeting on 8, 14 and 15 February 1977 and accordingly, as the procedure under Article 93 (2) was resumed, the Commission was not long in adopting its decision that the United Kingdom should bring to an end *without delay* the grant of the aid in the form of a subsidy to pig producers, since that decision was adopted on 17 February.

However, it was then that the Commission showed less diligence in its actions. Although its decision was immediately enforceable, the applicant in fact waited until 11 March to refer to the Court in pursuance of the second subparagraph of Article 93 (2) the specific application for a declaration of failure to fulfil an obligation as authorized by that provision of the Treaty. I am well aware that, in doing this, the Commission referred the matter to the Court within the prescribed period since the time-limit for taking action had not yet been exceeded and above all because it wished to reserve the possibility of negotiating with the British Government as is shown by the contacts made at this period between the Member of the Commission in charge of agricultural problems and the Minister of Agriculture of the United Kingdom.

Moreover, I attach no importance to the date of the lodging of the application for a declaration of failure to fulfil an obligation in Case 31/77 but rather to the fact that, in order to ask for the adoption, in the form of an 'interim measure', of an order to the British Government, the Commission waited until 12 May to put before the Court its application for the adoption of that measure.

Even accepting the fact that the 'negotiations' between the parties were

pursued beyond the date of the lodging of that application, I can only note that a delay of two months had elapsed before the Commission decided to ask the Court to order the United Kingdom, as an 'interim measure', to put an end forthwith to the grant of the aid in dispute — an obligation which already arose from its decision of the previous 17 February.

The Court will understand therefore that in these circumstances it does not seem to me that the degree of urgency claimed by the Commission can be accepted, all the more so as the Commission, once it had decided to bring the dispute before the Court, could have accompanied its main action by an application for the adoption of an interim measure drawn up in accordance with Article 186 of the Treaty, as soon as the main application was lodged.

This first consideration seems to me to be decisive by itself but there are other factors which can only reinforce my opinion with regard to the Commission's application for the adoption of an interim measure.

III — I now come to the concept of irreparable damage. On this point the applicant maintains that the continued delay of the United Kingdom in observing its decision of 17 February 'is increasingly harming a variety of Community interests'.

It states that this damage arises at two levels:

— First, the Commission states that with regard to the application of the Treaty itself and in particular its reponsibility for the control of State aids, which is laid upon it by Article 93, it cannot be unmindful of the effect which a wilful refusal on the part of a Member State to observe a decision 'properly taken' may have upon the general system for the prior review of so-called 'new' State aids which, in principle, cannot be put into effect until after it has approved them.

I agree that this is one of the most important questions of principle but we must recall that it is intimately bound up with the question put forward both by the Commission's main application and the 'counter-action' brought by the British Government for annulment, namely an assessment of the conformity of the national aid in question with the provisions of Article 92 and more particularly with subparagraph (3) (b) thereof.

In other words, if you were to follow the Commission on this legal territory you would end up by examining the substance of the dispute.

I shall content myself with saying that the concept of damage referred to here is of a political nature and I am almost ready to believe that in truth the application for the adoption of an interim measure by the Commission is bound up with the action which it has taken to induce the United Kingdom to arrive at a negotiated solution.

— Secondly, the Commission claims that irreparable damage would be caused to competing pig producers of other Member States, in particular those of Denmark and the Netherlands, whose exports of pigmeat to the United Kingdom fell by some 9 % during the first three weeks of April. I need not point out that this period includes the Easter holidays, during which intra-Community trade, in this sector as in others, has normally been slowed down owing to the holidays, since it is in any case difficult to admit that this could amount to irreparable damage.

Not only was it possible for the rate of importation of pigmeat into the United Kingdom from other Member States to be re-established after the end of that period but in my view we must weigh against that the damage which British producers might suffer if the national aid which had been granted to them were to be eliminated immediately. I am not

referring to the financial damage which certain of those producers, considered individually, might suffer and I shall not even enquire whether, as the British Government states in its reply to Application 31/77, the temporary aid paid to them represents only a little more than half of the amount resulting from the monetary compensatory amounts. I am referring to the general damage which might be suffered by a not inconsiderable sector of British agriculture, that of pig breeding, in which 30 000 producers are engaged.

What seems important to me is the considerable reduction recorded from the end of 1976 in the breeding stock. Without the aid which was granted it might be expected, the British Government says, that this reduction might reach the rate of 10 % in six months, that is to say in June next.

Without adopting these calculations myself — and it will be necessary no doubt for the Court to consider them when it examines the substance of the case, that is to say, in reality the compatibility of the aid granted by the British Government with the Common Market — I cannot exclude the possibility that in accordance with the actual terms used by the government, 'unless some action is taken serious erosion of the production potential of the United Kingdom was in prospect' in the pigmeat sector.

It seems to me therefore that if the Court required the Government of this Member State, even by way of an interim measure, to put an end forthwith to the system of aid which it has been operating for a little more than three months the Court would be risking truly irreparable damage not to the exporters of other Member States but to the whole of an important sector of the British economy.

IV — Finally, as I have mentioned, there is the question whether the Court even has jurisdiction to *require* the Government of the United Kingdom to put an end forthwith to the aid which it has granted its producers.

For my part I doubt it. It is true that the prohibition on bringing into force a national aid incompatible with the Common Market — the prohibition referred to in the last sentence of Article 93 (3) — has direct effect as is clear from the Court's judgment of 15 July 1964 (Case 6/64 [1964] ECR 596), confirmed by the judgments of 11 December 1973 in Cases 120 to 122 and 141/73 [1973] ECR 1483, 1507, 1523 and 1540.

But we still have to determine the legal process which, in the Community legal order, is capable of giving full effect to the prohibition in question.

Unfortunately, the Court's declaration, often repeated, that the rules of national law, whatever they may be, cannot be set up against the application of a Community prohibition having direct effect cannot be transposed into the Community legal order.

The Court can only address an order to a Community institution or to a natural or legal person, not to a State. As this would be an order addressed to a Member State and one which, furthermore, did not impose any pecuniary obligation, it would not be enforceable and would be incapable of founding proceedings for enforcement (Article 192).

The Court cannot transform into a positive measure capable of enforcement — the only interim measure capable of having any effect — an order to abstain from doing something, which is nevertheless the only thing which the Court can do in this matter, but would simply amount to repeating a rule which is already clear from the actual provisions of the Treaty.

Neither the wording nor the structure of Article 186 permits the Commission to avail itself of the provisions of that article

in order to cause the Court to apply a supplementary jurisdiction parallel to the jurisdiction in ordinary law which is conferred by the Treaty on the Commission and which must be exercised on the lines available to it under Article 93.

The final decision to which Article 93 (3) refers can only have as its object *the mere finding* that the national aid is contrary to the Treaty: if the Commission has not seen fit to accompany its decision with a time-limit or with conditions it cannot have the detailed rules for the execution of that decision laid down by the Court.

The actual scope of Article 93 (3) makes it impossible for the application directed against the Commission's decision containing the prohibition to have suspensory effect. The decision taken by the Commission (or, moreover, by the Council, within the context of the procedure laid down in the third subparagraph of Article 93 (2)) is a declaratory measure so that an order in the sense applied for by the Commission would be equivalent to casting doubt not only upon the enforceable nature of that decision but on the mandatory effects of the very provisions of the Treaty. To grant the Commission's request would be tantamount to acknowledging that it is necessary to confirm that a provision of the Treaty is directly binding — although that is obvious and has been repeatedly confirmed by the case-law of the Court.

The only purpose of the present proceedings is therefore to substitute for enforcement, which can be imposed upon undertakings, but which does not exist in the relationship between the Commission and the States, the *political* effects of a finding that the attitude of a Member State is contrary to the Treaty.

In any event, the Court cannot address an order to the Member State. The most it could do is, by an accelerated procedure for a finding of failure to fulfil an obligation, to *recognize,* without waiting for the judgment on the substance of the case and even before pronouncing on the substance of these two main actions, that in bringing into force and in continuing to apply its aid measure after the Council had discussed the matter and in any case after the notification of the Commission decision, the United Kingdom has failed and is failing to comply with the Treaty; in this case, Article 171 would apply *mutatis mutandis.*

However, in view of the 'immunity' of the States and having regard to the system laid down by Article 93, which does not confer on the Court any wider jurisdiction than Article 169, it is not possible to make the leap consisting in directly *ordering* a Member State to put an end to the grant of a national aid; at the most the Court could only *declare* the existence of a failure to fulfil an obligation arising from the Treaty, but, even in this case, it would only be for the Member State concerned to draw the consequences of the Court's decision.

Consequently, the Court has not, in my view, jurisdiction to adopt the 'interim measure' requested by the Commission.

On these grounds my opinion is that:

— The application for the adoption of an interim measure put forward by the defendant should be dismissed;

— The costs relating to the said application should be reserved.