the expression "payment in advance" referring not only to payments for speculative purposes but also to normal and current payments in intra-Community transactions, constitute a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

In Case 95/81

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Rolf Wägenbaur, its Legal Adviser, acting as Agent, assisted by Giuliano Marenco, a member of its Legal Department, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

ITALIAN REPUBLIC, in the person of its Agent, Arnaldo Squillante, represented and assisted by Ennio Viola, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

defendant,

supported by

GOVERNMENT OF THE FRENCH REPUBLIC, represented by G. Guillaume, Director of Legal Affaires at the Ministry of Foreign Affairs, acting as Agent, assisted by A. Carnelutti, Secretary for Foreign Affairs, acting as Deputy Agent, with an address for service in Luxembourg at the French Embassy,

intervener,

APPLICATION for a declaration that by retaining the provisions requiring importers to lodge a security for advance payments relating to the importation of goods, the Italian Republic has failed to fulfil its obligations under the Treaty,

THE COURT,

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. The Italian provisions in question

Article 1 of Law No 1126 of 20 July 1952 laying down supplementary provisions concerning currency matters and foreign trade (Gazzetta Ufficiale [Italian Official Journal] No 206 of 5 September 1952), as amended by Law No 162 of 2 April 1962 (Gazzetta Ufficiale No 111 of 30 April 1962) provides that:

"Advance payments for goods intended to be imported shall be subject to the lodging by the importer of a security in favour of the Ufficio Italiano dei Cambi [Italian Foreign Exchange Office]."

According to Circular No V/206600/104 published on 25 June 1976 by the Ministry of Foreign Trade the bank dealing with the operation must place the amount of the security lodged by the trader to a current account, which does not bear interest, opened in the name of the importer; the account is blocked and payments may be made only with the consent of the Ufficio dei Cambi. A bank guarantee may be substituted for the security.

Article 3 of the Decreto Ministeriale (Ministerial Order) of 7 August 1978 (Gazzetta Ufficiale No 220 of 8 August 1978) shows that the security (or the substitute bank guarantee) amounts to 5% of the exchange value in lire of the advance payment to be made and is at present required for imports having a value in excess of LIT 10 000 000.

In addition Article 4 of the above-mentioned Law of 20 July 1952 lays down the following provisions concerning forfeiture of the security:

"If proof that the importation has been effected within the period prescribed by the provisions in force is not furnished the security shall be forfeit in its entirety to the Treasury.

When proof is provided in respect of the importation of only part of the goods the security shall be forfeit only to the extent of the exchange value in lire of the quantity of goods not imported.

The total or partial forfeiture shall be effected by means of an order of the Minister for Foreign Trade."

By "importation" the Italian authorities understand not the physical arrival of the goods on Italian territory but "the release for consumption of products in free circulation in another Member State". Consequently all payments made before the completion of the formalities for release for consumption are subject to the provision of a security or of a bank guarantee.

Article 1 of the Ministerial Order of 28 September 1980 (Gazzetta Ufficiale No 267 of 29 September 1980) shows that the period within which the importation must be effected on pain of forfeiture of the security or of the bank guarantee is fixed at 120 days (or four solar months) from the date on which the advance payment was made.

2. *The procedure prior to court proceedings*

As a result of complaints lodged by private persons regarding the rules described above the Commission concluded that the said rules constituted an infringement of the EEC Treaty in two respects:

Infringement of Article 30,

Infringement of the directives adopted by the Council in implementation of Article 67 concerning the free movement of capital.

In accordance with the provisions of Article 169 the Commission accordingly addressed to the Italian authorities first of all a letter of 17 July 1980, giving them the opportunity to submit their observations, and subsequently the reasoned opinion of 28 January 1981.

The Italian authorities did not reply either to the letter or to the reasoned opinion.

Nevertheless, the Commission knows the views of these authorities in particular through the observations submitted by the Government of the Italian Republic in the references for preliminary rulings pending before the Court in Cases 206, 207, 208 and 210/80 in which the Tribunale Civile [Civil District Court], Rome, requested the Court to deliver a preliminary ruling on the compatibility with Community law of rules such as the Italian provisions in question.

This application, dated 23 April 1981, was received at the Court Registry on 24 April 1981. At the request of the Court the Commission refrained from submitting a reply.

By application lodged on 19 August 1981 the French Government requested permission to intervene in partial support of the conclusions of the defendant in the case. The intervention was allowed by an order of 16 September 1981.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

Nevertheless it requested the Commission to reply in writing before 15 January 1981 to the following question:

"What other methods are available to Italy to counter speculation in this particular case of advance payment for goods?"

II — Conclusions of the parties

The *Commission* claims that the Court should:

"Declare that by making the advance payment for goods intended for import subject to the provision of a security or of a bank guarantee, the Italian Republic has failed to fulfil its obligations under the Treaty."

The *Italian Republic* "hopes that the Court in its judgment will dismiss the Commission's claims".

The *Government of the French Republic* contends that the Court should:

"Declare that Italy has failed to fulfil its obligations under the Treaty to the extent — and only to the extent — to which the legislation in question makes subject to the provision of security or of a bank guarantee advance payments for goods which are not of a speculative nature and which correspond to payments which are normal in intra-Community trade."

III — Submissions and arguments of the parties

A — Infringement of Article 30

1. The *Commission* maintains that the Italian provisions must on analysis be considered as a measure having an effect equivalent to a quantitative restriction. In fact since advance payments are normal in international trade the Commission considers that the system, established by the said rules, of providing security through the bank, imposes upon traders resident in Italy special burdens, both as to administrative formalities and finance; the financial burdens are furthermore very considerable in the case of forfeiture of the security for failure to comply with the prescribed time-limit. Consequently such provisions have the effect of encouraging traders to prefer domestic transactions which are not liable to such charges.

The Commission recalls in this connection that Directive No 70/50/EEC of 22 December 1969 (Official Journal, English Special Edition 1970 (1), p. 17) classifies as measures having an effect equivalent to quantitative restrictions those which hinder imports which might otherwise take place, including measures which make importation more difficult or more costly than the disposal of domestic production, and in particular those which "require, for imports only, the giving of guarantees or making of payment on account" (Article 2 (3) (i)).

The Italian Government indeed maintains in the observations which it submitted in Joined Cases 206, 207, 209 and 210/80 that the rules in question form part of monetary policy and as such, through Article 104 of the Treaty in accordance with which "each Member State shall pursue the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency . . .", fall outside the prohibition laid down in Article 30.

The Commission does not dispute the monetary nature of the Italian rules but nevertheless remarks that Article 104 does not authorize any derogation from Article 30 since only the grounds laid down in Article 36 or protective measures within the meaning of Article 108 (3) permit derogations from Article 30.

With regard to Article 108 (3) the fact that it makes provision for taking protective measures in the case of difficulties or the threat of serious difficulties as regards the balance of payments confirms that Article 104 does

not by itself authorize derogations from Article 30: such derogations must be decided within the framework of Article 108. Since the Commission has not authorized the Italian rules in question under Article 108 (3) that possibility of derogating from the prohibition laid down in Article 30 must be ruled out.

With regard to Article 36 the Commission emphasizes that the need to ensure the equilibrium of the balance of payments does not feature amongst the possible justifications. According to the Italian Government the rules in question are indeed justified under Article 36 of the Treaty in so far as that article provides that public policy may be a justification. However, the Commission recalls in this connection that in accordance with the case-law of the Court Article 36 constitutes an exceptional provision which must be interpreted restrictively. Furthermore the Court has emphasized that Article 36 is directed to eventualities of a non-economic kind (judgment of 19 December 1961, *Commission* v *Italy*, Case 7/61 [1961] ECR 317).

In the observations which it lodged in the four references for a preliminary ruling made by the Tribunale Civile, Rome, the Italian Government also invoked in its defence the judgment of 23 November 1978 *(Regina* v *Thompson*, Case 7/78 [1978] ECR 2247) in which the Court ruled that the concept of public policy mentioned in Article 36 justified a prohibition of exports intended to protect "the right to mint coinage which is traditionally regarded as involving the fundamental interests of the State". Nevertheless, the Commission maintains that there is no analogy between the circumstances considered in Case 7/78 and this case.

2. The *Italian Government* disputes the argument put forward by the Commission both with regard to Articles 104 and 108 and Article 36 of the Treaty.

First of all, with regard to Article 104 the reason for establishing the limits laid down in that article comes under the objectives set out in Article 2 of the EEC Treaty in so far as an economic policy which is not intended to attain the objectives set out in Article 104 or which has the effect of lowering the level of employment or disturbing the level of prices hinders the attainment of the aims of the European Economic Community.

According to the Italian Government, since Article 104 is included in Chapter 2, entitled "Balance of Payments", of Title II of Part Three of the Treaty it appears to constitute a relatively exceptional provision. According to it the provision in question represents a general rule with regard to the specific subject-matter which it governs whilst constituting an exceptional rule in relation to the rules prohibiting quantitative restrictions and measures having equivalent effect. Furthermore the provisions of Article 108 (3) do not prevent Article 104 from constituting by itself sufficient ground for derogating from Article 30. In fact since the implementation of Article 104 appears to be an instrument for controlling and ensuring the equilibrium of the total balance of payments and for maintaining confidence in the currency of each of the Member States it is not arbitrary.

With regard to Article 108 (3) whilst that provision is in the nature of "a relatively exceptional rule" it also constitutes "an alternative subsidiary rule". That article, which governs matters other than those

covered by Article 104, inserts into the system an extreme procedure for the application of instruments for countering disequilibria in the balance of payments. Consequently Article 108 is of a subordinate nature in relation to Article 104 and applies as a rule in derogation from Article 30 justifying the adoption of measures in direct restriction of the free movement of goods.

Accordingly the heterogeneous nature of the abstract situations governed by Article 104 and those governed by Article 108 (and indeed by Article 109) points to the conclusion that Article 104 authorizes by itself derogations from Article 30, as does Article 108 in so far as it constitutes another provision derogating from Article 30 in situations which differ as to quality or quantity or both from those in Article 104.

In conclusion, although the Italian Government concedes that all monetary measures produce an effect on the free movement of goods it maintains that such measures are contrary to Community law only in a situation where the relation between the means and the end (inappropriate inasmuch as the measures are excessive) is disproportionate. The protective measure in question cannot be considered as disproportionate in relation to the objective laid down.

With regard to Article 36 the Italian Government disputes the submissions of the Commission and claims that even in that context the contested provisions are justified from the Community point of view.

In fact, according to the Italian Government, the exceptional nature of Article 36 does not preclude a wide interpretation in so far as that interpretation is limited to bringing within the scope of the rule under interpretation cases whose exclusion is merely apparent. According to the Commission the grounds for the application of Article 36 refer only to the protection of non-economic interests. According to the Italian Government not only is the argument of the protection of non-economic interests capable of taking on an economic aspect but furthermore the last sentence of Article 36 — which is neutral and means that the requirements of safeguarding the situations envisaged which justify the prohibitions or restrictions must be genuine — does not preclude the justification for the application of Article 36 from concerning protection of an economic nature.

Thus the Italian rules in question are justified under Article 36 on the ground of public policy. The Court has in fact emphasized in a judgment of 27 October 1977 *(Regina* v *Bouchereau,* Case 30/77 [1977] ECR 1999) that recourse to the concept of public policy presupposes the existence "of a genuine and sufficiently serious threat affecting one of the fundamental interests of society". These were the concepts forming the background to the reference by the Italian Government to the judgment in the *Regina* v *Thompson* case (cited above) in the course of its observations in the cases referred to the Court for a preliminary ruling concerning the same subject-matter. The Italian rules in question — concerning the protection of the monopoly of the Italian State in dealing in foreign currencies, the balance of payments and the maintenance of confidence in its own currency — appear to constitute a measure intended to protect the fundamental interest of the State. Since that fundamental interest would be jeopardized by the absence of

rules like those at issue and rendering the grant of currency to the importer subject to the lodging of security is not disproportionate in relation to the objective pursued, these rules are justified on the basis of Article 36 of the Treaty.

The *French Government*, intervening in support of certain of the arguments of the Italian Government, considers that the latter has failed in its obligations only in so far as the legislation complained of renders subject to the lodging of security advance payment for goods which is not of a speculative nature and which constitutes a normal payment in intra-Community trade.

According to the French Government the views of the Commission appear partially justified but, in the way in which they have been set out in the application, they appear excessive as a Member State must be able to ensure the equilibrium of its balance of payments, the stability of its currency and that its public policy in the economic field is upheld, apart from the situations of crisis referred to in Article 108.

The Italian rules do indeed constitute a hindrance to the free movement of goods but are contrary to Article 30 only in so far as the payments in question constitute "normal" payments or payments "connected to the normal conduct of business" and their characteristics are in accordance with usage in the economic field in which they occur — in this connection the French Government considers it essential not to adopt an abstract and uniform definition applicable to all the Member States and all products as usage is variable, and contrary to what is stated by the Commission, even the practice of advance payments is not the rule in the field of international trade.

On the other hand, the rules in question are not contrary to Article 30 in so far as the advance payments are merely alleged to be such and in fact constitute unlawful exports of currency for speculative purposes.

The French Government concurs in the opinion of the Italian Government to the effect that a Member State must be able to combat the practices mentioned above not only by means of Article 108 — which corresponds only to a manifest and present crisis and which thus does not apply in the present case — but also by means of Articles 104 and 36. According to the French Government in so far as the rules in question were conceived in such a way as to remain strictly in accordance with the lawful objective which they pursued, that is to say in so far as their objective is to prohibit export of funds in the guise of advance payments for goods, they cannot be judged to be contrary to the Treaty for three basic reasons:

First because they contribute to the harmonious pursuit of the objectives set out in Article 2 of the Treaty;

Further because Italy was justified under Article 104 of the Treaty in setting up the system of securities criticized by the Commission;

Finally, because the objectives pursued by the Italian Government are covered by the protection of its public policy and constitute a general interest of such a nature as to take precedence over the free movement of goods within the Community.

With regard to Articles 104 and 36 of the EEC Treaty the French Government concurs in the approach adopted by the Italian Republic but, with regard to Article 36, it nevertheless adds that the

Italian rules in question are permissible in Community law only if they are strictly appropriate to the objective which they are intended to pursue. It does not appear that they meet this requirement because of the fact that they apply to all kinds of advance payments for goods and that they extend the concept of "advance payment" to customs clearance. The French Government indicates furthermore that the last aspect of the Italian rules appears to constitute the essential point of the four preliminary questions which are related by their subject-matter to this case and considers that such a definition of advance payment appears excessive with regard to the requirements of control.

B — Infringement of the directives on the free movement of capital

1. The *Commission* recalls that for the purposes of the implementation of Article 67 of the Treaty on the free movement of capital the Council adopted on 11 May 1960 a First Directive (Official Journal, English Special Edition 1959-62, p. 49), as subsequently amended by a Second Directive, dated 18 December 1962 (Official Journal, English Special Edition 1963-64, p. 5). Article 1 of the First Directive liberalized the capital movements referred to in List A of Annex I in which it is stated in particular:

"The granting and repaying of short-term and medium-term credits in respect of commercial transactions or provision of services in which a resident is participating."

Since payments effected prior to delivery of goods form part of such transactions the Italian rules which render them more difficult are incompatible with the requirement of liberalization.

Under Article 5 of the First Directive of 11 May 1960 the provisions of that directive "shall not restrict the right of Member States to verify the nature and genuineness of transactions or transfers, or to take all requisite measures to prevent infringements of their laws and regulations."

Nevertheless that right does not imply that the Member States may maintain or create obligations in relation to trade, especially since they have at their disposal other means for supervising and countering the improper exportation of capital.

2. The *Italian Government* challenges the Commission's statement that payments effected prior to delivery of goods form part of the transactions referred to in Article 1 of the First Directive on the free movement of capital.

In fact, according to the Italian Government, the advance payment of the sale or purchase price of goods in the currency of the Member State in which the creditor resides does not come within the scope of Article 1 of the directive in question because, first of all, payment of the price before delivery of the goods does not constitute the grant of credit in the technical sense, and, secondly, the fact that commercial transactions alone are not provided for in List A of Annex I implies that payments relating to such transactions already form the subject-matter of a directly-applicable Community provision, Article 106 (1) of the EEC Treaty.

However, even if it were necessary to consider that the advance payment of the purchase or selling price of goods fell within the scope of Article 1 of the directive in question the Italian Government maintains nevertheless that there would be no contradiction between the rules challenged by the Commission and Article 1 of the directive. The measures provided for by the contested rules are in fact indispensable for preventing an infringement of the national rules requiring that the

commercial transaction for which the grant of currency was obtained should be effected. It is true that the Commission in fact disputes that this is indispensable, maintaining that the Member States have at their disposal other means of supervising and preventing the improper exportation of capital but the Commission does not indicate what such "other means" are.

Furthermore, the directive in question itself provides in Article 5 an exception to the widest possible liberalization of the movement of capital, namely the adoption of measures necessary to prevent infringements of the laws and regulations of the State and, according to the Italian Government, the national rules in question come within the framework of that exception. The legality under Community law of the measure adopted — since it must be classified in the abstract as indispensable — is verified not only because it is impossible to adopt other measures but also because any other possible measures, whether of a criminal, civil or administrative nature, are ineffective.

Consequently the Italian Government considers that a measure indispensable for preventing infringements of laws and regulations is capable of attaining its objectives in so far as it can be put into effect and the only means of obtaining a general guarantee that such a measure will be put into effect necessarily coincides with a supplementary means of providing a material or personal guarantee for the general liability of the possible debtor.

3. According to the *French Government* international purchases of goods are settled by means of payments either before delivery, in which case they are always on account, or in cash or on delivery, which are simply payments, or due after delivery, which are payments linked to commercial credits.

It is important to distinguish from these three categories cases in which the payments are made at a time other than the due dates specified in the contract. In that case either the payment is made before the term laid down and it may constitute either an advance refund or a speculative transaction if the debtor anticipates that the rate of exchange of his currency will fall or the payment takes place after it is due and this may amount either to an extension of the commercial credit provided for or to a speculative transaction consisting in the retention for the supplier of a credit with his customer which is not realized. According to the French Government neither of these two cases appears to be concerned in this action.

According to the French Government where payment takes place before delivery and outside the usual practices relating to payment on account it constitutes an abnormal transaction. It cannot be considered either as an advance refund of credit or as a commercial credit. A credit can only be financial and in that sense it does not come within Annex I to the First Directive of the Council for the implementation of the Treaty. In fact the connection with the commercial transaction provided for by that provision must consist in permitting payment for

the goods purchased. The making of such a payment on account will in no case permit the supplier to settle for the goods which form the subject-matter of the transaction giving rise to the advance payment. Accordingly it cannot be classified either as a grant of credit or as a refund of credit in view of the fact that there can be no credit before delivery since the claim arises with the transfer of ownership and of possession of the goods.

When it is established that an advance payment is not related to a purchase of goods or that it is not in accordance with trade practices it cannot, according to the French Government, be governed by Article 106 of the EEC Treaty and thus claim to qualify for the liberalization of payments concerning current commercial transactions brought about by the two directives in question. Such a payment must be classified as a movement of capital coming under the list annexed to the above-mentioned directives in accordance with Article 67 of the Treaty. Since these latter movements have not been liberalized it is accordingly still possible for the Member States to impose restrictions on them.

Finally, the French Government points out to the Court that it is necessary to refer to the national legal systems of the Member States in order to distinguish "current" or "normal" payments from payments which are not in accordance with practice, and thus of a speculative nature, as the speculative nature of payment to account cannot be completely defined in advance; it may be presumed on the basis of the circumstances in which a Member State is placed. Since these circumstances are variable it is scarcely possible to establish absolute criteria as to the interval of time or the size of the amount whereby a normal payment may invariably be distinguished from another type of payment on account. Consequently it is thus necessary to refer in each case to the commercial practices prevailing in the trade in the product in question in the country, to the circumstances and particular rules of the importing Member State.

IV — Oral procedure

At the sitting on 27 January 1982 replies were given to the questions put and oral argument was presented by the following: Mr Marenco, acting as Agent, for the Commission of the European Communities; Mr Ferri, acting as Agent, for the Government of the Italian Republic and Mr Carnelutti, acting as Agent, for the Government of the French Republic.

The Advocate General delivered his opinion at the sitting on 17 March 1982.

Decision

1 By application lodged at the Court Registry on 24 April 1981 the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that, by making

advance payment for goods intended for import subject to the provision of a security or of a bank guarantee, the Italian Republic has failed to fulfil its obligations under the EEC Treaty.

2 The Commission considers that the Italian rules concerning advance payments for imported goods constitute an infringement of Article 30 of the Treaty and of the two directives adopted by the Council for the implementation of Article 67 of the Treaty: the First Directive of 11 May 1960 (Official Journal, English Special Edition, 1959-62, p. 49) as supplemented and amended by the Second Directive of 19 December 1962 (Official Journal, English Special Edition 1963-64, p. 5).

3 The rules at issue are based on Article 1 of Italian Law No 1126 of 20 July 1952 on supplementary provisions concerning currency matters and foreign trade (Gazzetta Ufficiale [Italian Official Journal] No 206 of 5 September 1952) which provides that:

"Advance payments for goods intended to be imported shall be subject to the lodging by the importer of a security in favour of the Ufficio Italiano dei Cambi [Italian Foreign Exchange Office].

If a security has not been provided in accordance with the foregoing paragraph a security must also be provided in cases in which the Bank of Italy, or a bank authorized to act as its agent, transmits to the importer documents of such a nature as to allow him to dispose of the goods to be imported.

The amount of the security shall be fixed by Order of the Minister for Foreign Trade.

A bank guarantee may be substituted for the security."

4 These provisions were supplemented by the sole article of Law No 162 of 2 April 1962 (Gazzetta Ufficiale No 111 of 30 April 1962) which provides that:

"The Minister for Foreign Trade may by order determine the maximum limit of the value of the goods to be imported below which the security or guarantee referred to in the foregoing paragraphs is unnecessary."

5 Circular No V/206600/104 of the Minister for Foreign Trade of 25 June 1976 states that the bank entrusted with the transaction is required to pay the amount of the security into an interest-free account in the name of the importer. That account is blocked and may only be released by the Ufficio Italiano dei Cambi.

6 According to Article 3 of the Ministerial Order of 7 August 1978 (Gazzetta Ufficiale No 220 of 8 August 1978) on the rules concerning settlement of foreign exchange transactions and financial relations with foreign countries that security or bank guarantee is fixed at 5% of the exchange value in lire of the advance payment to be made and is required for imports having a value in excess of LIT 10 000 000.

7 Finally, in accordance with Article 4 of the above-mentioned Law of 20 July 1952 where proof has not been provided that the importation has been effected within the period prescribed — fixed at 30 days after the advance payment by the Ministerial Order of 20 January 1973 (Gazzetta Ufficiale No 19 of 23 January 1973) and extended to 120 days by the Ministerial Order of 28 September 1980 (Gazzetta Ufficiale No 267 of 29 September 1980) — the Minister for Foreign Trade declares the security to be wholly or partially forfeit or enforces the bank guarantee in favour of the Treasury.

8 By the expression "importation" the Italian authorities understand not the physical arrival of the goods on Italian territory but the release for consumption of the products imported after the completion of the customs formalities necessary for that transaction and any payment is considered as "advance" for the purposes of the Italian exchange rules if it is made before the purchaser has the goods at his disposal and is able to put them to their intended use in Italy.

9 The Commission took the view that the rules as a whole constituted an infringement of Article 30 of the Treaty and of the directives adopted by the Council for the implementation of Article 67 on the free movement of capital and consequently addressed a letter to the Italian Government on 17 July 1980 initiating the procedure laid down in the first paragraph of Article 169 of the EEC Treaty. The Italian Government failed to reply to the letter and the Commission then addressed to it on 28 January 1981 a reasoned opinion.

That opinion requested the Italian Republic to take the measures needed to comply with it within a period of one month. The Italian Government failed to comply and the Commission brought this action on 23 April 1981. By an order of 16 September 1981 the French Government was allowed to intervene in partial support of the Italian Government.

10 The Commission takes the view that the Italian rules constitute a measure having an effect equivalent to a quantitative restriction, which is prohibited by Article 30 of the Treaty. According to it having regard to the fact that advance payments are the rule in international trade the requirement of lodging a security in an account which does not bear interest or of furnishing a bank guarantee where the price of the goods imported into Italy is paid before their release for consumption, in conjunction with the requirement that the goods be imported within a period fixed by ministerial order and the forfeiture of that security if the period is exceeded impose upon the importer special burdens which do not affect domestic transactions and which thus constitute a disincentive and encourage traders to engage in domestic trade.

11 The Commission furthermore recalls that its Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7) on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (English Special Edition 1970 (I), p. 17) classifies as measures having an effect equivalent to quantitative restrictions those which make importation more difficult or costly than the disposal of domestic production and in particular those which "require, for imports only, the giving of guarantees or making of payments on account" (Article 2 (3) (i)).

12 With regard to the complaint of infringement of the directives on the free movement of capital the Commission claims that Article 1 of the First Directive has liberalized the movements referred to in List A of Annex I. In that list, as amended by the Second Directive, appears:

"The granting and repayment of short-term and medium-term credits in respect of commercial transactions or provision of services in which a resident is participating."

13 Payments effected before delivery of the goods are included in such transactions and are unconditionally liberalized; the Italian rules which make them more difficult are thus incompatible with the requirement of liberalization.

14 The Italian Government puts forward a number of arguments against these complaints. It contends first of all that the rules in question do not come under Article 30 but under the provisions of Article 104 and Article 106 (2). It then claims that, even if it were necessary to consider that these rules came under Article 30, they would nevertheless be justified on the basis of Article 36.

15 First, according to the Italian Government, the rules in question come exclusively within the monetary field. The period laid down and the security or bank guarantee prescribed by these rules have no aim other than that of avoiding speculative transactions against the national currency and the disequilibrium of the balance of payments. These measures thus do not come within the prohibition of Article 30 and are covered by Article 104 of the Treaty in accordance with which "each Member State shall pursue the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency . . .".

16 The scope of the provision relied upon by the Italian Government must be appraised in the light of the system as a whole of the chapter on the balance of payments. Within the framework of that chapter Article 104 merely sets out the general objectives of the economic policy which the Member States must pursue, regard being had to their membership of the Community. It accordingly may not be invoked in order to derogate from the other provisions of the Treaty.

17 It should be remarked in addition that Articles 108 and 109 of the Treaty provide specific procedures for cooperation, mutual assistance, and if necessary, protective measures to counter difficulties in the balance of payments. In that case however they constitute Community procedures which rule out unilateral measures by the Member States otherwise than as

precautionary measures and on conditions which are not alleged to have been fulfilled in this case. Nevertheless the Member States remain free to employ all means of ensuring that payments made abroad relate exclusively to genuine transactions, subject always to the condition that such means do not hinder the freedom of intra-Community trade as defined in the Treaty.

18 It is clear from the foregoing that the Italian Government's argument to the effect that Article 104 of itself permits derogations from the provisions of Article 30 of the Treaty must be rejected.

19 During the oral procedure the Italian Government put forward a second argument, contending that the Italian measures in question could only come under Articles 30 and 36 "by analogy" on the ground that, according to it, the measures constitute detailed rules for the implementation of an economic transaction related to imports and do not constitute quantitative restrictions but restrictions on payments coming under Article 106 (2) which provides:

"In so far as movements of goods, services, and capital are limited only by restrictions on payments connected therewith, these restrictions shall be progressively abolished by applying, *mutatis mutandis*, the provisions of the chapters relating to the abolition of quantitative restrictions, to the liberalization of services and to the free movement of capital."

20 The Italian Government deduces from the wording of that article and in particular from the words "applying *mutatis mutandis*" that the interpretation of Article 36 must not be restrictive, in accordance with the normal case-law of the Court in this field, but should be taken beyond the wording, regard being had to the specific interest of the State in the protection of its currency and the equilibrium of its balance of payments — objectives which remain within the powers of the Member States pursuant to Article 104 of the Treaty.

21 The arguments of the Italian Government do not correspond to the purpose of Article 106 within the system of the Treaty. According to the first two paragraphs of that article the Member States undertake to authorize, at the

latest by the expiry of the transitional period, any payments connected with the movement of goods; the provisions are thus intended to ensure that all necessary transfers of money are authorized so that goods may in fact move freely. The second paragraph, which is chiefly concerned with the transitional period, provides that the liberalization of payments must proceed in the same stages as the liberalization of movements of goods and subject to parallel conditions. Since that provision has no objective other than to transpose into the field of payments, *inter alia*, the principles concerning the elimination of quantitative restrictions in so far as movements of goods are limited only by restrictions on payments connected therewith it does not permit the imposition of restrictive conditions on payments liberalized on the basis of the first paragraph.

22 It is clear from the foregoing that the Italian rules at issue in this case do not come under the provisions of Article 106 (2).

23 In those circumstances it is necessary to consider whether the measures brought into force by the rules in dispute are contrary to Article 30.

24 As the Court has held on many occasions, it is sufficient for the purposes of the prohibition of all measures having an effect equivalent to quantitative restrictions on imports laid down by Article 30 that the measures in question should be likely to hinder, directly or indirectly, actually or potentially, imports between Member States.

25 It must be stated that, although the measures in question were enacted for the purpose of preventing currency speculation, they do not constitute specific rules for the attainment of that objective but general rules dealing with intra-Community transactions as a whole where payment is made in advance. In fact, in so far as the Italian Government extends its rules to cover payments made by letters of credit and similar documents, the financial method usually employed for imports of goods in certain commercial sectors, it is dealing with a means of payment normally employed in international trade. The measures in question thus affect not only speculative operations but normal commercial transactions and, since their effect is to render imports more difficult or burdensome than internal transactions, they produce restrictive effects on the free movement of goods. For these reasons, and in so far as they produce these effects, the measures at issue are contrary to Article 30.

26 The Italian Government further contends that, even if the rules in question were contrary to Article 30, they would nevertheless be justified under Article 36 on grounds of public policy. In fact, they claim, the measures adopted have as their objective the safeguarding of a fundamental interest of the State, the defence of its currency, which would be jeopardized but for the rules at issue.

27 It must be recalled that in accordance with the settled case-law of the Court, Article 36 must be strictly interpreted and the exceptions which it lists may not be extended to cases other than those which have been exhaustively laid down and, furthermore, that Article 36 refers to matters of a non-economic nature.

28 The Italian rules in question thus constitute a measure having equivalent effect within the meaning of Article 30 of the Treaty inasmuch as they require all importers of goods coming from other Member States to provide a security or a bank guarantee amounting to 5% of the value of the goods when payment is in advance, the expression "payment in advance", referring not only to payments for speculative purposes but also to normal and current payments in intra-Community transactions.

29 The Italian Republic has consequently failed to fulfil its obligations under the said article.

30 Since the Italian rules at issue are contrary to Article 30 of the Treaty it does not appear necessary to consider whether they may be in accordance with the two directives adopted by the Council for the implementation of Article 67 of the Treaty on the free movement of capital.

Costs

31 Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading.

32 In this case since the Italian Government has failed in its principal submissions it must be ordered to pay the costs with the exception of those arising from the intervention, which must be borne by the French Government.

On those grounds,

THE COURT

hereby:

1. **Declares that, by requiring all importers of goods coming from other Member States to provide a security or a bank guarantee amounting to 5% of the value of the goods when payment is in advance, the words "payment in advance" referring not only to payments for speculative purposes but also to normal and current payments in intra-Community transactions, the Italian Republic has failed to fulfil its obligations under Articles 30 and 36 of the Treaty;**

2. **Orders the Italian Government to pay the costs with the exception of those arising from the intervention;**

3. **Orders the French Government to pay its own costs.**

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 9 June 1982.

J. A. Pompe
Deputy Registrar

J. Mertens de Wilmars
President