able damage, which is an essential precondition for the grant of a suspension. That such damage is inevitable has not been proved, and if it were to occur the suspension of imports, authorized by the Commission, would be a suitable method of counteracting it. Moreover, the Federal Republic is not bound to undertake a long-term suspension of all imports.

(d) Finally, suspension of operation can be granted only when there is a strong presumption that the application originating the main action is well-founded. This is not so in the present proceedings:

— The contested decision does not infringe Article 226(3), since the Commission did not exceed its discretion under that provision in judging that a temporary suspension of imports which could be limited to specific products might be considered the lesser evil.

— Protective measures have not been refused.

— The fact that the statement of reasons for the decision mentions, in justification of the application of Article 226 of the EEC Treaty, the difficulties arising in the agricultural sector from the floating rate of exchange does not lead to the conclusion that the Commission used its powers for a purpose other than that for which they were conferred.

## OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 5 OCTOBER 1969[1]

*Mr President,*
*Members of the Court,*

1. The comprehensiveness of the written observations submitted by the parties, which have been supplemented before the Court, makes it possible for me to be fairly brief in the opinion which I shall deliver on the application before the Court today. Needless to say, I shall take pains to comment not only objectively but with the calmness required of a judge. On the other hand, at the risk of appearing rather unimaginative I shall restrict myself entirely to the question with which we are concerned today. At the present stage in the proceedings the Court has not in fact to give a ruling on the legality of the decision taken on 1 October 1969 by the Commission of the European Communities; the annulment of this decision forms the subject of a separate action brought by the Federal Republic of Germany, the investigation of which is only in its initial stages and in the course of which the parties will be required to give further explanations. The Court is simply asked to order suspension of the operation of this decision to an extent which I shall define.

This application accompanying the action is based on the rule set out in Article 185 of the EEC Treaty, which reads as follows:

> 'Actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended.'

In accordance with the normal view of public law and administrative law this provision treats suspension as a derogation. The continuity of administrative activity in fact requires that decisions of the public authorities shall be imple-

1 — Translated from the French.

mented unless the court having jurisdiction has pronounced them illegal. By suspending, even temporarily, the activity of those authorities such a court itself becomes involved in their activity; the court takes on executive responsibility and thus departs from its role of legal arbiter. Normally this review is effected by a declaration of nullity *erga omnes* with retroactive effect and the author of the contested measure is bound to take the steps necessary to nullify the effects produced by the annulled decision.

But it may be that this retroactive nullification is impossible or extremely difficult, since the damage occasioned may have been irreparable or at least very serious. It was for cases of this nature that suspension was provided and consideration of the case-law of the Court shows that the Court makes a strict appraisal of this damage.

Finally, in making that appraisal, the chances of success of the main action must not be entirely ignored. If the main action clearly appears well-founded or if there is at least a strong presumption that it is well-founded the Court tends to grant suspension. In other cases the rule that the decision must be implemented until it is annulled continues to prevail.

Certain observations made at the hearing by the Agent of the German Government appear to indicate that the application may have the alternative object of obtaining the grant by the Court of 'interim measures', which would therefore be ordered on the basis of Article 186 not Article 185, of the EEC Treaty. I doubt whether this is possible as Article 186 in my opinion essentially refers to protective measures which may be taken in financial disputes and it is difficult to conceive how the system established by it could be applied to an action concerning the annulment of a decision taken pursuant to Article 226.

2. Having made these general remarks I shall begin my consideration of the application brought before you by the Government of the Federal Republic of Germany.

The applicant asks you to order the suspension, until a ruling is given in the main action, of the operation of the decision of the Commission of 1 October 1969 authorizing it to take protective measures in the agricultural sector, 'to the extent to which that decision prohibits all other measures derogating from Community rules in force'.

What does this signify? It is better understood by juxtaposing this application with the applicant's conclusions in the main action, to which the former is merely subsidiary. The main action seeks annulment of the Commission's decision authorizing the Federal Republic of Germany to take protective measures in the agricultural sector 'to the extent to which it authorizes more extensive interventions in the Common Market than were indicated in Germany's application of 30 September and prohibits the implementation of the measures requested in that application'.

The application thus referred to is contained in the telex message of 30 September from the Federal Minister for Food, Agriculture and Forestry to the President of the Commission of the European Communities.

This states, first, that the temporary suspension of intervention by the Federal Bank on the money market involves widening the margin of fluctuation for the exchange rate of the Deutsche Mark; the greater variations which result may involve important deflections of international trade in agricultural products. Two consequences follow from this: first, a direct risk that German agriculture will be considerably and probably permanently affected by it. Secondly, an appreciable deterioration in the economic situation in the agricultural regions of the Federal Republic. And it will be immediately noted that these two types of difficulty (difficulties pertaining to sectors and to regions) are the two

eventualities in respect of which provision was made for the adoption of protective measures by Article 226 of the Treaty.

That is why the Federal Republic, having explained the situation, requests authorization under the said Article 226 with effect from 30 September 1969 to charge compensatory amounts on imports and to grant compensatory amounts on exports of the goods listed in a schedule to its letter. It finally explains that the level of compensatory amounts should be fixed in terms of the degree of fluctuation of the rate of exchange.

We know the Commission's reply to this application. As it pointed out in the recitals of its decision, the Commission considered that for the reasons expounded in its written observations a system of charges and subsidies is an ineffective method of rectifying the situation. The method which would least disturb the functioning of the Common Market would be the suspension of imports of products for which the intervention price or purchase price has to be paid in the Federal Republic, together with products derived therefrom. The Commission's decision therefore authorizes the Federal Republic, subject to adherence to Community rules in force, to suspend imports of those products coming from Member States and third countries.

3. Consequently, two points appear to me clear:

The Government of the Federal Republic requested authorization to establish a system of charges and refunds; the Commission's decision refused this authorization and it is to this extent that the decision forms the subject of the action for annulment. The object of the suspension of its operation is thus to obtain temporary suspension of the effects of this refusal.

Secondly, the application was made and the decision taken under Article 226 of the Treaty. The legality of that decision will therefore have to be reviewed in the light of that article; at all events it is within the framework of Article 226 that the scope of the decision must be reviewed today to decide whether the suspension should be granted.

It is true that, following its application and the contested decision, the Government of the Federal Republic adopted other grounds, that is to say, Articles 109 and 115 of the Treaty, to maintain that the charging of compensatory amounts (if not the grant of the export subsidies) was justified and that it came within its exclusive competence—which is why it chose to charge such amounts by virtue of its order of 29 September 1969. By the contested decision the Commission thus endeavoured to obtain the repeal of this order or at any rate to deprive it of its basis in Community law.

I do not wish to concern myself with this dispute and indeed I have difficulty in understanding the applicant's train of thought. If indeed Articles 109 and 115 could by themselves provide a basis for the decision taken by the German Government within the framework of its competence, why should it request authorization under Article 226? This is indeed the object of the application submitted to the Commission on 30 September, which does not even mention the order of the previous day, although it had already entered into force. It is scarcely necessary to recall that in the system set up by Article 226 although a Member State may apply for protective measures, it is for the Commission alone to determine the measures which it considers necessary. This decision falls within the exclusive competence of the Commission.

As they have been submitted to you, the conclusions request a suspension to the extent to which the contested decision 'prohibits all other measures derogating from Community rules in force'. From this point of view, the conclusions seem to me irrelevant; since protective measures taken pursuant to Article 226 are

possible only under the conditions set out by the Commission in exercise of its power of decision, the disputed provision is merely declaratory. If the question is scrutinized more closely it will be found that the application for suspension really concerns that part of the decision which—by implication—*refuses* the authorizations requested. Such an application can only be rejected. In fact it has already been stated in Eyerman and Fröhler's commentary on the former law concerning administrative disputes in various Länder (Verwaltungsgerichtsgesetz 1950, p. 183), that 'suspension of operation is, by definition, applicable only to a measure which it is possible to implement; it cannot therefore apply to a measure rejecting an application for the grant of a power. In such a case suspension could only signify that the application was provisionally granted; the courts are prohibited from taking such a measure unless it is otherwise provided by the law'.

This was in fact the Court's line of reasoning in proceedings which bear a fairly close resemblance to the present case from a legal point of view: Case 19/59 R, *Geitling and Others* v *High Authority*—Order of 12 May 1959—Recueil 1960, p. 91. The Ruhr coal marketing companies requested the Court to order suspension of the operation of an article in one of the High Authority's decisions pertaining to the renewal of authorizations concerning the selling-agencies of the Ruhr Basin. The Court held that this article was to be construed as refusing authorization and deduced therefrom that the request for suspension was irrelevant. In fact the Court said that suspension of the operation of a decision of rejection does not amount to granting the authorization refused; in any event such authorization may be granted only by the administration and in this the Court has no power of injunction.

In the present case, by the expedient of the suspension provided for in Article 185 of the Treaty, the Government of the Federal Republic is endeavouring to obtain an authorization which the Commission has refused. The grant of this authorization might at some future date become binding on the Commission if in giving a ruling on the substance of the case the Court were to annul its decision; however, this depends on the grounds of your judgment. But at the present stage in the proceedings and within the framework of Article 185 suspension can neither be the equivalent of the grant of an authorization nor involve an obligation to grant one; the application, to repeat the terms of Order 19/59 R, 'is irrelevant' and it seems to me that it must be rejected.

4. I shall therefore quickly review the conditions required by the case-law of the Court for a suspension of operation of a contested decision.

In fact this may only be granted when the operation of that decision is of such a nature as to cause serious or irreparable damage. It does not appear to have been established that this is in fact true in the present case. Indeed, although the Commission refused the authorizations requested, it authorized the Government of the Federal Republic to suspend imports of the agricultural products listed in its decision and, contrary to what the applicant appears to believe, this decision allows it to take selective measures. Furthermore, although the period for which the authorization was granted was not expressly fixed, it is not impossible, for reasons which may readily be conceived, that other decisions may be taken as a result of inquiries in another sphere which would render the contested decision irrelevant.

5. Finally, for the suspension to be granted it is also necessary that there should be a 'strong presumption that the application in the main action is well-founded', or that it should 'clearly' be well-founded, as it is stated in the order in Case 43/59 of 20 October 1959, Rec. 1960, p. 988.

In order to decide this, reference must be made to the Federal Government's arguments in its action, to which the Commission reserves the right to give a fuller reply. In essence the applicant relies on two submissions. The first is based on the Commission's infringement of Article 226(3), in that it is alleged not to have given priority to such measures as would least disturb the functioning of the Common Market. Although the Commission cannot exercise discretion in this respect it possesses a power of appraisal subject to review by the Court and on the information now available it is not clear that this power has been exceeded. There is a difference not only of degree but in kind between suspending imports and levying a charge. The measure which appears at first sight to be the most radical is not necessarily the measure which would most disturb the functioning of the Common Market, above all if it is applied selectively. At any rate the question is debatable.

The other submission is based on misuse of powers: it is alleged that the Commission was prompted in its decision by its desire to modify the applicant Government's monetary policy. I shall simply note that misuse of powers must be proved and cannot be presumed. The fact that the recitals in the decision refer to the difficulties created in the agricultural sector by the floating of rates of exchange certainly does not allow the conclusion to be drawn that the contested measure was taken in pursuance of a monetary policy. It is by no means clear to me that the remarks made in public by a Vice-President of the Commission, to which the Agent of the Government of the Federal Republic referred at the hearing, provide proof of misuse of powers.

However, and here I depart from the strict terms of the application, there can be no question of failing to recognize the intimate connexion between monetary and agricultural problems. Debates will shortly be initiated in another sphere, relating to these problems as a whole, and from them decisions may emerge which will render irrelevant the proceedings presently before you.

Within the framework of Article 185, I cannot, for the reasons which I have expounded, arrive at any conclusion other than in favour of dismissal of the application of the Government of the Federal Republic of Germany.