Costs

26 Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

27 The applicants have failed in their submissions and must therefore be ordered to pay the costs.

On those grounds,

THE COURT,

hereby:

1. **Dismisses the application;**
2. **Orders the applicants to pay the costs.**

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 5 December 1978.

A. Van Houtte — Registrar

H. Kutscher — President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 8 NOVEMBER 1978 [1]

Mr President,
Members of the Court,

I — The Italian company Denkavit, the first applicant in this case, sells feeding-stuffs which it buys from a Netherlands supplier forming part of the same group. It undertook once again on 9 November 1977 to import a consignment of these feeding-stuffs of which the potassium nitrate content was higher than the limit fixed by the Italian authorities on 7 September 1976. By that measure those authorities unilaterally introduced a

1 — Translated from the French.

maximum permitted level for that substance which they considered was dangerous and which in their opinion had been *added* to the feeding-stuffs and they applied marketing restrictions calculated to give effect thereto. The Court has already had to deal with this point in the proceedings which culminated in its judgment of 5 October 1977 in Case 5/77 *Carlo Tedeschi* v *Denkavit Commerciale s.r.l.* ([1977] ECR 1555) delivered in answer to questions referred to if for a preliminary ruling by the Pretura di Lodi. I do not know what benefit that court derived from the Court's judgment but the fact remains that, as happened in September 1976, the consignment was refused by the Italian Customs and had to be sent back to the Netherlands.

The company, by a letter of 23 November 1977, gave formal notice to the Commission to adopt, within a period of two months, the measures provided for by Article 10 of Council Directive No 74/63/EEC of 17 December 1973 on the fixing of maximum permitted levels for undesirable substances and products in feeding-stuffs and in the meantime to call upon the Italian Government to revoke the measure adopted on 7 September 1976, otherwise, if all these steps were not taken, it would claim damages.

On 11 December 1977 the Secretary General of the Commission acknowledged receipt of that letter, informing the applicant that he had passed it on to the departments responsible.

On 19 January 1978, that is to say before the expiry of the period allowed by the applicant company, the Commission, in a letter signed by the Director General for Agriculture, informed the applicant company that it had just delivered to Italy a reasoned opinion as provided for in the first paragraph of Article 169 of the Treaty, though apparently without sending the applicant company a copy. That reasoned opinion, to which I shall have occasion to return, was not delivered to the Italian Government until 25 January 1978. The Government had a period of one month within which to comply with it.

At the same time, on the "legislative" level, the Director General pointed out that, as soon as the *Scientific* Committee for Feeding-stuffs had formally adopted its opinion in this matter, the Commission planned to take forthwith the necessary steps as provided for in Article 5 of Directive No 74/63/EEC.

On 24 January 1978 the European Federation of Compound Animal Feeding-stuffs Manufacturers, to which the two applicants are affiliated, raised with the Director General the question of "the enforcement of the judgment of the Court of Justice in Case 5/77".

This Federation, pointing out "that the problem of substance relating to the above-mentioned judgment, which has been in abeyance since the month of September 1976", has not yet been solved, requested the Commission "to adopt in the shortest possible time the appropriate decisions so as to avoid the difficulties attendant upon exports of feeding-stuffs to Italy, against which formal complaint has been laid on several occasions, and at the same time to prevent an aggravation of the damage suffered by Italian importers of the same products coming from the Member States".

In their application the Italian company and its Netherlands supplier request the Court to order the Community to make good the damage which is alleged to have been caused to them by the Commission, whose liability in the case in point arises directly out of the fact that that institution failed to challenge with the requisite dispatch the Italian measures which in their view constitute a means of arbitrary discrimination and a

disguised restriction on trade between Member States.

Therefore, the aim of the application is not and moreover cannot be to make the Court decide that the measure adopted on 7 September 1976 by the Italian authorities was contrary to the Treaty. The applicants in fact complain of the delay, which in their view was wrongful, with which the Commission adopted its Decision of 30 May 1978 relating to the measures of the Italian Government limiting the nitrate content of certain feeding-stuffs and of its failure to react to the stopping of their lorries at the Italian frontier.

Even if it is assumed that there was a semblance of justification for the national measure from the scientific point of view, it has been obvious from the beginning, as the Commission finally confirmed in the reasoned opinion which it delivered to the Italian Government on 25 January 1978, that in order to carry out an adequate check of the nitrate content, it was quite unnecessary for the lorries to remain halted for a long period at the frontier awaiting the results of the chemical analysis; the objective pursued could be attained by other means, which impede trade to a lesser extent, such as the verification of a certificate issued in the country of origin or sealing the lorries after sample taking at the frontier. The checking procedure employed by the Italian authorities, because it was disproportionate to the objective pursued, rendered importation from other Member States of the Community more burdensome and consequently more difficult.

II — Formally, the applicants claim the Court should declare that the Commission has acted *unlawfully* in that it failed to adopt, with reference to the Italian State, a measure designed to require the urgent note of 7 September 1976 to be revoked. The Commission in fact acquiesced for nearly two years in this failure to respect the principle of the free movement of the products in question, which is nevertheless enshrined in Article 30 of the Treaty and in the directive; the proper functioning of the common organization of the market in milk products established by Regulation No 804/68 has for this reason not been ensured.

It is claimed that the declaration should date back to 7 October 1976, which is one month after the procedure referred to in Article 10 of the directive was initiated, or in any event to 5 November 1977, which is one month after the Court's preliminary ruling.

They claim in the second place that the Court should order the Commission to take measures urgently on the basis of the combined provisions of Articles 5 and 10 of the directive, in order to re-establish the free movement of feeding-stuffs for calves.

Finally, they claim that the Court should order the Community to refund to them by way of compensation such sum as the Court shall determine.

I should like to make the following *preliminary observations* in connexion with these claims:

As far as the first head of claim is concerned, it seems to me that the applicants' computation of the dates from which the behaviour of the Commission should be found to have been unlawful is somewhat arbitrary: in fact it only became apparent after 5 October 1977 that the problem of the presence of nitrates in feeding-stuffs had to be examined in the light of Directive No 74/63 on "undesirable substances" and not that of Directive No 70/524 on "additives". Furthermore, Article 10 of the directive on "undesirable substances" does not subject decisions to be taken by the Commission to any specific time-limit; the only time-limits mentioned in that article for which figures are given are, on the one hand, that of *two days* within which the Standing Committee, *if it votes*, must express an opinion on the

draft submitted to it by the Commission and, on the other hand, that of 15 days available to the Council for the purpose of adopting, if it deems advisable, by a qualified majority, the measures *proposed* by the Commission.

As far as the second head of claim is concerned, it seems to me to have no purpose since the result it seeks to obtain has been achieved for the future by the Commission's decision of 30 May 1978 relating to the Italian Republic's measures limiting the nitrate content of certain feeding-stuffs. That decision was adopted after the application had been filed but it has already resulted at least in the Commission's formally confirming that the substance in question, which is not an additive within the meaning of Directive No 70/524, is not an undesirable substance either. The Italian measure has been abolished by an "urgent note" of 13 July 1978 and the applicants will be spared any future damage arising from its maintenance in force.

I shall not dwell on this point and will confine myself to considering whether, in this case, the Commission is in principle liable.

I shall concede, for the purposes of this application, that there has been damage and that the immediate cause was, at least in part, the Commission's failure to act in the manner desired by the applicants. Quite obviously I shall take care not to express an opinion, in the context of these proceedings, on the degree of the Italian authorities' potential liability, in the first place because the Court has held that by virtue of Article 5 (2) of Directive No 74/63 the measure complained of could be maintained in force *so long as* no decision had been taken either by the Council or the Commission; but also because the Italian Government has not been made a party to these proceedings.

It will nevertheless be advisable to elucidate the wording of the applicant's claims, because an unlawful act does not necessarily, in itself, render the Community liable. There must have been "a sufficiently serious breach of a superior rule of law" within the meaning which the Court has given to that expression.

I will endeavour to ascertain whether, as the applicants maintain, the Commission has rendered the Community liable under two heads:

— from the legislative point of view, by taking its final decision only on 30 May 1978;

— from the administrative standpoint, by neither commencing nor prosecuting with the requisite vigour proceedings against the Italian Government for failure to fulfil an obligation.

III — At the "legislative" level the applicants maintain that the Commission has exceeded or misused the powers conferred upon it by Articles 5 and 10 of the directive. The nature of the powers which the Commission derives from those articles must therefore be ascertained.

We must bear in mind that Article 5 enables Member States, if a product not listed in the Annex presents a danger to *animal or human health,* to forbid, by means of a directly applicable measure, the presence of that product in feeding-stuffs or to fix a maximum permitted level. When the Member State concerned makes use of this power it must advise the other Member States and the Commission of the level fixed and of the reasons upon which the measure that it has adopted is based. Paragraph (2) of that Article provides that in accordance with the procedure laid down in Article 10, an *immediate* decision shall be made as to whether the Annex should be modified, but that *so long as* no decision has been made by either the Council or the Commission the Member State may maintain the measures it has

implemented. It is therefore clear that the procedure laid down by Article 10 is itself dependent upon the work rate of the Standing Committee and that the adjective "immediate", even if it is not intended to mean "at some future date", admits of a rather flexible meaning in accordance with the use made of the procedure laid down by Article 10.

That procedure involves the adoption of a decision by the Commission after consulting the Standing Committee for Feeding-stuffs. However, if that Committee does not deliver an opinion or where the Commission intends to enact measures which are not in accordance with the opinion given, it *shall* bring the matter before the Council which shall act by a qualified majority. If the Council has not adopted any measures within 15 days the Commission itself shall adopt appropriate measures and implement them forthwith, except where the Council has voted by a simple majority against such measures.

The extracts of the minutes of meetings held by that committee between 15 October 1978 and the month of April 1978, which were produced at the request of the Court by the Commission, make it possible to reconstruct the proceedings of that committee as far as potassium nitrates are concerned.

The "draft of the measures to be adopted" submitted by the Commission's representative to the Standing Committee (Article 10 (3)) was apparently designed to fix limits for the levels of potassium nitrates. According to that provision the committee had two days within which to deliver its opinion on those measures.

On 7 September 1976, the other delegations, according to the minutes quoted by the applicants and produced by the Commission, while expressing surprise and regret concerning the measures adopted by Italy "consider that the question whether or not it is necessary to limit the level of nitrates in feeding-stuffs *can only be determined* on the strength of an examination of *scientific* data compiled for that purpose" and the chairman decided that the scientific data which the Italian delegation was requested to submit as soon as possible "shall be laid before the *Scientific* Committee for Feeding-stuffs as soon as it meets ... The Opinion of the Scientific Committee shall be taken into consideration by the Commission's departments for the purpose of drawing up the appropriate proposals which will be submitted to the Standing Committee for Feeding-stuffs".

A committee of consultant experts, qualified to furnish the Commission with scientific information, had already begun working unofficially from the date when the first measures for implementing the Community programme for the harmonization of food laws were adopted. That committee was assigned a permanent rôle in the preparation of Community food legislation after it was officially established on 16 April 1974 (Official Journal of 25 May 1974, L 136, p. 1) as the Scientific Committee for Food [for *human consumption*].

On the other hand the Scientific Committee for *Feeding-stuffs* was not in existence on 7 September 1976; the setting-up of that committee may be traced to a Commission decision of 24 September 1976 (Official Journal of 9 October 1976, L 279, p. 35). Consequently its opinion had to be taken into consideration for the purpose of drawing up the appropriate proposals for submission to the *Standing* Committee and the latter had on several occasions recorded that this procedure met with its approval.

Again, on 7 June 1977 "at the request of the delegations the chairman decides to postpone formulation of the opinion of the Standing Committee so that the observations submitted by the German delegation may be placed before the Scientific Committee and the latter may

consider whether it is necessary to modify its opinion".

On 1 February 1978 the Standing Committee had still not formally defined its position on the draft of the measures submitted to it by the Commission with a view to amending the Annex to Council Directive No 74/63 on the fixing of maximum permitted levels for undesirable substances and products in feeding-stuffs.

The chairman, to whom the draft which became the Commission decision on the measures adopted by the Italian Republic had been referred, pointed out on 3 May 1978 that "according to Article 5 of Directive No 74/63 the Commission was under an obligation to decide *immediately* whether an amendment to the Annex was necessary; that from the outset the medical data supplied by Italy have proved to be inadequate; that the Commission, however, *being anxious to take the necessary health precautions,* has asked for the opinion of the Scientific Committee which has been *obliged* to wait for the expert evidence; that when the Scientific Committee has delivered its opinion, it is for the Commission to take the necessary measures *forthwith*". This led him once again to postpone for a week the formulation of the *opinion* of the Standing Committee.

Finally, the Committee delivered a concurring opinion; the Commission was then able to adopt its decision of 30 May 1978.

Thus the Standing Committee had never, before the month of May 1978, formally voted on that draft. Accordingly there could be neither a concurring opinion nor an unfavourable opinion nor even a case where "no opinion was delivered", that is to say an opinion for which there could not be shown to have been the requisite majority (41 votes) for a concurring or unfavourable opinion. Of the Standing Committee's delay in voting it cannot be said that this was a case where "no opinion was delivered".

Furthermore, the only measures which the Commission intended to adopt before the month of May 1978 consisted, as I have already mentioned, in an amendment to the Annex to the directive: even if the Standing Committee had voted and the Commission had disregarded that opinion, the only effect of those measures would have been to fix a new maximum permitted level for nitrates in complete feeding-stuffs for piglets up to the age of four weeks, which would not have amounted to an express decision on the measure adopted by the Italian authorities.

The applicants suggest that the Commission, instead of adopting the procedure laid down in Articles 5 and 10, which they regard as the "urgent" procedure, should have availed itself of the "scientific" procedure provided for in Articles 6 and 9. It is in fact very likely that at the outset the wrong course was taken, but, once having embarked upon the procedure laid down in Article 10, the latter had to be carried through to completion. Even if the Commission had elected to follow the Article 9 procedure it should have followed at the same time the procedure laid down by Article 10 since Italy had adopted unilateral measures. I do not, moreover, quite see how the Commission could have applied the procedure laid down in Articles 6 and 9 without at the same time initiating the procedure laid down in Articles 5 and 10, and in my view it is very difficult to distinguish between those two procedures.

On the other hand, the applicants are perfectly justified in pointing out that the directive on undesirable substances originates in the idea of securing a higher degree of Community integration. The Court itself held (paragraph 35 of its judgment of 5 October 1977, [1977] ECR 1576) that "where, in application of Article 100 of the Treaty, Community directives provide for the harmonization of the measures necessary to ensure the

protection of animal and human health and establish Community procedures to check that they are observed, *recourse to Article 36 is no longer justified* and the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonizing directive"; but that simply means that the reasons which might justify the measures adopted by Member States under Article 36 must continue to guide the action of the *Commission* when it makes use of Article 10. Consequently, the Commission finds that the duties which it has to perform conflict with each other: on the one hand, it must ensure the free movement of goods, which in fact seems to me to be a superior rule or principle of Community law, but, on the other hand, it must take proper account of the essential requirements for the protection of human or animal life and health, a task which it has so to speak inherited from the Member States in the specific field of feeding-stuffs.

The applicants maintain that a mere glance at the scientific file forwarded to the Commission by the Italian authorities on 7 October 1976 is sufficient proof that the application made by these authorities for amendment is wholly without foundation; in fact all the scientific data which that file contains were already known when the directive was adopted.

Similarly, no doubt in answer to the observation in my opinion of 6 July 1977 ([1977] ECR 1583), they point out appropriately that, according to Commission Regulation No 804/76, as from 15 April 1976 feeding-stuffs had to contain not less than 60% skimmed-milk powder in order to qualify for the Community aid provided for in Article 10 (3) of Regulation No 804/68. In other words, it was in the *interest* of producers, as from April 1976, to reduce the amounts of powdered whey used for the manufacture of their compound feeding-stuffs and the nitrate content was henceforth *of necessity* lower than it had been previously. I do not know whether this producers' interest necessarily resulted in the reduction which the applicants mention.

In any case, the question of the harmlessness of the nitrates might be raised again in the light of developments in scientific knowledge.

If their harmlessness had been proved beyond doubt before the directive on "undesirable substances" was adopted, such a fact ought not have escaped the notice of the distinguished members of the Standing Committee and the Scientific Committee. For my part I can only with difficulty accept that those persons met merely for the pleasure of meeting or that the supplementary research which they carried out was unnecessary from the outset.

I said in my opinion in the above-mentioned *Tedeschi* Case, that it did not seem to me that there was anything illegal in the system organized by Article 5 of the directive; nevertheless, I did not rule out the possibility that the Member States or the Commission might abuse that system. Can one complain because the Commission endeavoured to obtain, and in the end did obtain, a *concurring* opinion from the Standing Committee, instead of risking a decision without that committee's having formally expressed an opinion? Taking into account its responsibilities in this field I do not think so. Otherwise it would have to be supposed that, when the Commission set up the Scientific Committee on 25 September 1976, its actual aim was to bring to a halt the work of the Standing Committee on the maximum permitted levels for nitrates. The applicants themselves do not claim that it was unlawful for the Commission to set up the Scientific Committee or for the Commission or the Standing Committee to consult it. Thus the use which the Commission made at the "legislative" level of Articles 5 and 10 of the directive do not seem to amount to a sufficiently

serious abuse of the concept of "protection of public health" such as to render it liable.

IV — It remains for me to consider the complaints which the applicants make against the Commission on the "administrative" level.

According to paragraph 56 of the Court's judgment of 5 October 1977: "The final paragraph of Article 10 therefore does not have the effect of paralysing the Commission or of enabling the national measure adopted provisionally to be prolonged *indefinitely*", and according to paragraph 55: "However, the Commission still has *jurisdiction* to issue, in accordance with the procedure laid down in the first subparagraph of Article 10 (4), *any other* measure which it considers appropriate". For my part I do not find it very easy to imagine the kind of measure which might be adopted by the Commission within the powers conferred upon it by Article 10, unless the Court had in mind the measures which the Commission can take within the much wider framework of Articles 155 and 169 of the Treaty.

The aim of the Treaty is to achieve the elimination of failures to fulfil obligations and the consequences thereof, both *past* and future, as the Court held in its judgment of 12 July 1973 in Case 70/72, *Commission of the European Communities* v *Federal Republic of Germany* ([1973] ECR 829). The Court has also held that in the face of both a delay in the performance of an obligation and a definite refusal, a judgment by the Court under Articles 169 and 171 of the Treaty may be of substantive interest as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member States, the Community or private parties (judgment of 7 February 1973 in Case 39/72, *Commission of the European Communities* v *Italian Republic* [1973] ECR 112). The Court accordingly emphasized the significance of its judgments on matters arising under Article 169, and, at one and the same time, the prime importance of the steps to be taken by the Commission.

However, it is also necessary for the Court to find that there has been a failure to fulfil an obligation and, assuming that the Court has so found in relation to a Member State, since it is the duty of the latter to take the measures called for in execution of that judgment, it is that Member State which, in the final analysis, according to the case-law of the Court, may "incur responsibility as a result of its default as regards private parties".

No doubt the applicants or the European Federation of Compound Animal Feeding-stuffs Manufacturers, to which they are affiliated, invited the Commission on several occasions and as a matter of urgency to take action. But, in view of the discretion which the Court has hitherto acknowledged the Commission to have in this field, it does not seem to me to be possible to go any further. In order to arrive at a different result it would be necessary to consider that the Commission, by failing to initiate at the right moment the procedure laid down in Article 169 and by failing to file an application at the Court pursuant to that article of the Treaty, could render the Community liable.

The Court stated in its judgment of 3 April 1968 in Case 28/67, *Molkerei-Zentrale Westfalen-Lippe GmbH* v *Hauptzollamt Paderborn* ([1968] ECR 153) that "the guarantees given to individuals under the Treaty to safeguard their individual rights and the powers granted to the Community institutions with regard to the observance by the States of their obligations have different objects, aims and effects and a parallel may not be drawn between them". In the Court's judgment of 1 March 1966 in Case 48/65, *Alfons Lütticke GmbH and Others*

v *Commission of the European Community* ([1966] ECR 28), the Court had already held that an individual is not entitled to challenge the validity of a decision by which the Commission refuses to take action against a Member State pursuant to Article 169. The position must be the same whether there is an express decision or no decision.

In the Court's judgment of 22 October in Case 1/75, *Martin Meyer-Burckhardt* v *Commission of the European Communities* ([1975] ECR 1171), Mr Advocate General Warner stated in is opinion *(ibid,* 1190) that "Much of Mr Advocate General Gand's reasoning [in the above-mentioned *Lütticke* case] seems to me to lead also to the conclusion that such a person cannot sue the Commission for damages in respect of such a decision. In particular, for the Court to entertain such an action would involve that it should, in the absence of that Member State as a party, and without affording it any of the safeguards afforded to a Member State under Article 169, decide whether or not it was in breach of the Treaty". He says later in his opinion *(ibid.* p. 1191): "... the duty of the Commission to the applicant was, at the very most, conscientiously to consider his request. It cannot have owed him a duty, *of such a kind that a breach of it would be actionable,* to exercise its discretion under Article 169 in a particular way".

The applicants cannot therefore inculpate the Commission either for not having adopted its opinion earlier or for not having brought the matter before the Court of Justice after the period of one month which it had itself fixed in that opinion. To satisfy their requirements it would have been necessary for the Commission to bring itself to take action before 23 January 1978 (the date when the time-limit fixed by the first applicant in its letter of 23 November 1977 expired), whereas, according to the reasoned opinion, the Italian Government had been given a time-limit which was to expire on 25 February 1978 at the earliest and which in fact ran until 30 June 1978 according to Article 2 of the decision of 30 May of the previous year.

To bring the matter before the Court and ask for interim measures to be adopted would have been incompatible with the time-limit which the Commission had itself allowed the Italian Government. It seems to me that individuals cannot be permitted to interfere with time-limits laid down by the Commission pursuant to Article 169.

In all these circumstances it is my view that neither at the "legislative" nor at the "administrative" level has the Commission acted in such a way as to render the Community liable and I submit that the application should be dismissed and that the applicants should bear the costs.