41 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Tribunal d'Instance, Bourg-en-Bresse, by judgments of 30 June 1977, hereby rules:

Article 31 (2) of Regulation No 816/70 in so far as it authorizes producer Member States to prescribe and levy, in intra-Community trade in the products covered by the organization of the market which that regulation sets up, charges having an effect equivalent to customs duties, is incompatible with Article 13, in particular paragraph (2) thereof, and with Articles 38 to 46 of the Treaty and is consequently invalid.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 20 April 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 15 MARCH 1978

My Lords,

In 1975 there was an exceptional influx of Italian wine onto the French market. It is common ground that that influx was due, at all events in the main, first to the fact that in 1973 and 1974 the weather had been such that yields had

been high both in France and in Italy and secondly to successive devaluations of the Italian lira. The French Government has alleged that it was due also to a failure on the part of the Italian authorities to establish and operate satisfactorily the administrative mechanisms necessary for the management of the market in wine as envisaged by Council Regulation (EEC) No 816/70 of 28 April 1970 (Official Journal L 99 of 5 March 1970) "laying down additional provisions for the common organization of the market in wine".

With a view to limiting that influx, the French Government, on 11 September 1975, instituted by decree (Decree No 75/846) a charge on table wines and wines suitable for yielding table wines, coming from Italy, imported in containers of more than two litres. The charge was calculated on the volume and the alcoholic strength of the wines. Its amount was fixed at FF 1.13 per degree/hectolitre. It is common ground that the charge was one having equivalent effect to a customs duty.

As the decree itself recited, the French Government relied, in introducing the charge, on Article 31 of Regulation No 816/70. Paragraph 1 of that Article was, so far as relevant, expressed to prohibit the levying, in the internal trade of the Community, of any charge having equivalent effect to a customs duty. In fact of course that provision was otiose. The Regulation having been adopted after the end of the transitional period, the prohibition already existed by the direct effect of Articles 9 and 12 of the Treaty. Article 31 (2) was in these terms:

"By way of derogation from the provisions of paragraph 1, so long as all the administrative mechanisms necessary for the management of the market in wine are not in application — with the exception, until 31 December 1971, of the viticultural land register — producer Member States shall be authorized in order to avoid disturbances on their markets to take measures that may limit imports from another Member State.

These measures shall be communicated to the Commission, which shall decide without delay whether to maintain, amend or abolish such measures."

On the same day as it adopted the decree the French Government informed the Commission of it by telex.

On 15 September 1975, the Commission wrote to the French Government expressing the opinion that it was not entitled to rely on Article 31 (2), because that provision had, by then, ceased to be operative, the administrative mechanisms necessary for the management of the market in wine being in application in all Member States. That being so, the Commission said, it would not be appropriate for it to take a decision of the kind envisaged by the second subparagraph of Article 31 (2) and it asked the French Government to revoke its decree.

The French Government having declined so to do, the Commission initiated proceedings against the French Republic under Article 169 of the Treaty and eventually brought an action in this Court against it under that Article, Case 117/75. Before that action came to a hearing, however, the French Government (by Decree No 76/287 of 31 March 1976) repealed the decree of 11 September 1975 as from 1 April 1976. Thereupon the action was discontinued.

By Council Regulation (EEC) No 1160/76 of 17 May 1976, a Regulation which made numerous amendments of greater and lesser importance to Regulation No 816/70, Article 31 (2) was expressly repealed.

There are now, so we were told, some 40 actions pending in various French Courts in which importers of Italian wines into France who were, during the

period when the decree of 11 September 1975 was in force, required to pay the charge thereby imposed, are seeking from the French Customs restitution of the sums paid by them in respect of it. The present cases come before this Court by way of references for preliminary rulings made by the Tribunal d'Instance of Bourg-en-Bresse in two of those actions. They are therefore in the nature of test cases.

The questions referred to the Court by the Tribunal d'Instance are these:

"(1) Did Article 31 (2) of Council Regulation No 816/70 accord with the EEC Treaty, having regard to the fact that that provision authorized measures contrary to the rules of the Treaty on the free movement of goods applicable *after the end of the transitional period?*

(2) If the answer to the foregoing question is in the affirmative, were the provisions of Article 31 (2) of the said Regulation still applicable on 11 September 1975, having regard to the possibility that all the administrative mechanisms necessary for the management of the market in wine had been set up?"

As regards the first question, there are four rival contentions.

The Plaintiffs contend that, under the Treaty, the Council had no power, after the end of the transitional period, to legislate in such a way as to authorize Member States to impose charges having equivalent effect to customs duties in internal Community trade.

At the other extreme, the French Government contends that the way in which agriculture is dealt with in the Treaty, and in particular the unique provisions relating to it contained in Title II of Part Two of the Treaty, must be taken to indicate (having regard to those obvious characteristics of agriculture that distinguish it from other economic activities, such as its vulnerability to the vagaries of the weather) that the authors of the Treaty intended it to be treated as an exceptional sector, and that the Council should, in its case, have a general power to derogate from the rules that would otherwise be applicable under the Treaty. The French Government draws particular attention to Article 38 (2) of the Treaty, under which "the rules laid down for the establishment of the common market" are to apply to agricultural products "save as otherwise provided in Articles 39 to 46", and to Article 39 (2), which provides that "In working out the common agricultural policy and the special methods for its application, account shall be taken of" among other things "the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions".

The Council and the Commission advance intermediate contentions, though not the same one.

The Council contends that it has, when instituting a common organization of the market in any agricultural product or group of agricultural products, a limited power to derogate from the general rules of the Treaty, limited in that the power does not permit the Council to go beyond the adoption of measures that are both ancillary and temporary ("mesures temporaires d'accompagnement" was the expression used).

The Commission's contention is more restrictive. It is that the Council had power, when instituting the common organization of a market at or about the end of the transitional period, to prescribe transitional provisions applicable until the end of the then current marketing year. Thus, the Commission contends, Article 31 (2) could only have been valid if it had been limited to operate until 1

September 1970, which was the date of the beginning of the next "wine-growing year" after the adoption of Regulation No 816/70.

In argument, a number of Judgments of this Court were cited as supporting this or that contention. I think it will be convenient if, subject to one exception, I discuss those Judgments in their chronological order.

Case 17/67 Neumann v *HZA Hof* [1967] ECR 441 (Rec. 1967, p. 571) which was cited on behalf of the French Government and of the Council, does not, in my opinion, lend support to the contention of either of them. The question there was whether levies on imports from third countries instituted by Council Regulations establishing the common organization of a market (that in poultry meat) were lawful. It was argued for an importer that they were not because they were incompatible with the Articles of the Treaty setting up the Common Customs Tariff. The Court rejected that argument. It held that such levies came within Article 40 (3) of the Treaty as being "measures required to attain the ... regulation of prices ... and common machinery for stabilising imports or exports". They were therefore within the saving clause of Article 38 (2). Thus, for the principle of that decision to be held to apply here, it would be necessary to be able to point to a provision in Articles 39 to 46 which, either expressly or by necessary implication, authorized the institution, as part of a common organization of a market, of charges having an effect equivalent to customs duties in trade between Member States. I can see none, nor did either the French Government or the Council attempt to point to any. Certainly Article 40 (3) cannot be held to constitute such a provision, since it goes on to provide that a common organization "shall exclude any discrimination between producers or consumers within the Community".

Case 82/71 the *SAIL* case [1972] 1 ECR 119 was much relied upon, not least by the Commission, which saw in that case the authority for its contention that the Council had a power of derogation that was limited to "overstepping" the end of the transitional period for the rest of the then current marketing year ("un dépassement technique"). A close reading of the Judgment reveals, however, that the Court confined itself there to holding, as a matter of interpretation of the Council Regulations authorizing Italy temporarily to retain its "milk centre" system, that that authorization had expired at the relevant time. The Court did not deal with the question of its validity. The case is therefore, in my opinion, of no relevance here.

To the three cases on monetary compensatory amounts decided by the Court on 24 October 1973, namely Case 5/73, the first *Balkan* case [1973] 2 ECR 1091, Case 9/73 *Schlüter* v *HZA Lörrach*, ibid. p. 1135 and Case 10/73 *Rewe-Zentral* v *HZA Kehl*, ibid. p. 1175, I had occasion to refer recently in Case 29/77, the third *Roquette* case [1977] ECR 1835. I there pointed out that those cases, and others, were authority for saying that the fundamental purpose of the system of m.c.a.'s was to prevent changes in exchange rates from immediately affecting agricultural prices in terms of national currencies in such a way as to disturb the functioning of the common organizations of markets. Such disturbances of trade could be of two kinds. The first kind was direct disturbance of intervention arrangements, such as had occurred in consequence of the devaluation of the French franc in 1969, when German traders bought cereals in France for re-sale to the German intervention agency at a profit, and did so in such quantities as to threaten to exhaust that agency's storage capacity. The second kind of disturbance

consisted in the diversion of trade between the Community and third countries, in particular the diversion of imports through Member States with devalued currencies in search of lower levies and the diversion of exports through Member States with revalued currencies in search of higher refunds.

One can therefore say that, in those cases, the Court recognized the existence in the Council of a power to institute as between Member States charges having an effect equivalent to customs duties in so far as that was essential to ensure the proper functioning of common organizations of markets.

Case 153/73 *Holtz & Willemsen* v *Council and Commission* [1974] 1 ECR 675 is in my opinion the most pertinent of the cases that were cited. It was an action for damages under the second paragraph of Article 215 of the Treaty, in which a German oil-miller, relying on Article 7 thereof and on the prohibition of discrimination in Article 40 (3), challenged the validity of a special temporary subsidy instituted by the Council in favour of Italian oil-millers as part of the common organization of the market in oils and fats. The Court upheld the validity of that subsidy on the narrow ground that, at its initiation, the common organization of a market might contain gaps the difficulties caused by which the Council could lessen by means of provisional measures. It is to be observed, first, that the case went to the verge of the law, inasmuch as the Court recorded that it had not found the explanation given by the Defendants "altogether satisfactory" and, secondly, that the Court considered that the "provisional nature" of the measure had been "respected" because the Council put an end to it after the 1973/74 marketing year.

The reason why I think that case particularly pertinent is this. At the time of the adoption of Regulation No 816/70, the administrative mechanisms necessary for the management of the market in wine existed in certain Member States, notably in France (which had had until then a national organization of that market) but they did not exist in other Member States, notably Italy. The Council was therefore faced with a choice. It could either wait to bring the common organization of the market into force until those administrative mechanisms had been established in all Member States; or it could bring that organization into force at once, with a provision affording a safeguard against its undue malfunction so long as those mechanisms were not operative in all Member States. It chose the latter course. That that was the genesis of Article 31 (2) may be inferred in part from paragraph 2 of the reasoned opinion of 29 October 1975 delivered by the Commission to the French Government in the Article 169 proceedings and in part from the observations of the Council in the present case. (It appeared perhaps even more clearly from the Commission's application in Case 117/75, but I would hesitate to refer Your Lordships to that document as it does not, strictly speaking, form part of the papers in the present case). That having been the position, it seems to me that the validity of Article 31 (2) at its inception can be upheld on the principle of the decision in the *Holtz & Willemsen* case: at the outset, the organization established by Regulation No 816/70 contained a gap, inasmuch as the necessary mechanisms for its functioning did not exist in some Member States, so that it was open to the Council to lessen the difficulties that that gap might cause by provisional measures. That comes fairly close to accepting the Council's contention in the present case, but it does not go all the way to doing so.

There was much discussion of Case 48/74, the *Charmasson* case [1974] 2 ECR 1383. In my opinion the main

relevance of that case is that the Court there considered, not for the first time, the interpretation that ought to be given to Article 38 (2) of the Treaty. The Court held that it appeared from that provision, "particularly if considered in conjunction with Article 42", that agricultural products were, in the absence of any contrary provision, "subject to the rules relating to the establishment of the common market". Article 42, Your Lordships remember, is concerned with the application "to production of and trade in agricultural products" of the provisions of the Treaty "relating to rules on competition". It provides that those rules shall apply to such production and trade "only to the extent determined by the Council". The inference from that Judgment is, therefore, again, that, before the Council can be held to have a discretion to exclude those rules in any particular respect, there has to be shown to be, somewhere in Articles 39 to 46 of the Treaty, a provision conferring that discretion on it. So the case is authority against the French Government's contention.

But it was relied upon by the Plaintiffs and by the Commission as authority for the view that, after the end of the transitional period, there was no power at all, even for a Community Institution, to derogate in any way from the general rules of the Treaty except those relating to competition and except (per the Commission) to the extent of the "dépassement technique" to which I have referred. That, in my opinion, goes too far. As I ventured to point out in Case 29/75 *Kaufhof* v *Commission* [1976] ECR at p. 450, it must be borne in mind that the events giving rise to the *Charmasson* case had occurred during the transitional period and that the actual question with which the Court was there concerned (so far as relevent here) was as to the extent to which the existence in a Member State, during that period, of a national organization of the market for a particular product precluded the application in that State of Article 33 of the Treaty, which provided for the progressive abolition during that period of import quotas as between Member States. In dealing with that question the Court adverted to what was to be the position after the end of the transitional period. But, as to that, apart from making the general observations on the interpretation of Article 38 (2) that I have mentioned, the Court said no more than that a Member State would not then be entitled to rely on the *de facto* absence of a common organization of the market in a particular product as justifying it in maintaining restrictions on imports from other Member States under its own market organization.

I now depart slightly from the chronological order of the authorities so as to deal together with Case 46/76 *Bauhuis* v *Netherlands* [1977] ECR 5 and Case 89/76 *Commission* v *Netherlands* [1977] ECR 1355. With all respect to those who cited them it seems to me manifest that those cases are not in point. They were concerned with charges imposed to meet the cost of inspections provided for, in the first case, by Council Directive No 64/432/EEC (Official Journal L 121 of 29. July 1964) "on animal health problems affecting intra-Community trade in bovine animals and swine" and, in the second case, by the International Plant Protection Convention. As I had occasion to mention recently in Case 70/77 *Simmenthal* v *Amministrazione delle Finanze* (in which the Court has not yet delivered judgment) what underlay the decision of the Court in each of those cases was that, in each of them, the system of inspections in question had as its object and effect to facilitate trade between the States to which it applied. That being so, it could not be held that charges imposed to meet the cost of such inspections had an effect equivalent to customs duties.

Here, on the other hand, it is, and always has been, common ground that the charge imposed by the French Government purportedly in pursuance of Article 31 (2) of Regulation No 816/70 was one having an effect equivalent to a customs duty. Indeed Article 31 (2) related only to such charges.

Lastly we were referred to Case 68/76 *Commission* v *France* [1977] ECR 515, in paragraph 21 of the Judgment in which the Court, after referring to the terms of Article 38 (1) and (2) of the Treaty, said:

"Accordingly, following the end of the transitional period, the provisions of Articles 39 to 46 cannot be relied upon in justification of a unilateral derogation from the requirements of Article 34 of the Treaty, even in respect of an agricultural product for which no common organization of the market has yet been established."

It was submitted on behalf of the French Government and of the Council that it could be inferred, from the use there of the word "unilateral", that the Court would not have regarded as unlawful a similar derogation made in pursuance of a measure adopted by the Community. In my opinion, however, the only inference that it is safe to draw is that the Court was not there concerned to pronounce on anything other than unilateral derogations. Of greater moment, to my mind, in that case, is the conclusion of Mr Advocate General Capotorti that "While ... it is true that the common organizations of the market give rise to intervention on the agricultural market by public authorities to an extent which would not be permissible in the industrial field, those organizations still have to abide by the fundamental principle of the freedom of trade throughout the Community" (see [1977] ECR at p. 539).

Before I sum up what appears to me to be the effect of those authorities, I should I think mention that the French Government referred to four instances where, it said, the Council had enacted provisions derogating from the general rule of the free movement of goods within the Community, the suggestion being, so I understood, that, since the Council had enacted those provisions, it must have had power to do so. The first instance was that of the subsidy that was in question in the *Holtz & Willemsen* case. The other three (in relation to which no decision of the Court was cited) were drawn respectively from the common organization of the market in fruit and vegetables, from that of the sugar market, and from the legislation on fisheries. The Commission submitted that, in fact, in none of those three instances was there truly a derogation from the rule as to the free movement of goods. I do not propose to enter into the question whether there was or was not. To my mind it cannot assist the Court in determining what is, on the true interpretation of the Treaty, the scope of the Council's powers, to know what in fact the Council regarded as being within its powers in particular instances.

In my opinion the effect of the authorities may be summarized as follows.

There is no authority that supports the French Governement's contention, and some authority against it. This is not surprising since it is a contention that flies in the face of Article 38 (2) of the Treaty. The saving clause is for that which is "provided in Articles 39 to 46", not for whatever may be provided by the Council. I would therefore reject that contention.

There is authority inconsistent with the other extreme contention, that of the Plaintiffs, notably in the m.c.a. cases and in the *Holz & Willemsen* case. I would acordingly reject that contention too.

There is no authority that supports the contention of the Commission; and the m.c.a. and *Holz & Willemsen* cases are inconsistent with it too. Moreover that contention, which rests neither on any express provision of the Treaty nor on any known rule of interpretation, whould produce an arbitrary result. So I would reject it also.

There is authority to support the contention of the Council, but not in the wide terms in which it was formulated. In order to justify the inclusion by the Council, in any legislation relating to the common organization of agricultural markets, of a provision derogating from the general rules of the Treaty, in circumstances not expressly provided for anywhere in Articles 39 to 46, it must be shown not only that that provision is auxillary and temporaly, but also that, in view of a particular factual situation, the provision is necessary, and goes no further than is necessary, to afford a safeguard against the malfunctioning of such organization. That is the effect of the m.c.a. and *Holtz & Willemsen* cases, and it must be right because the power for the Council to derogate from the rules of the Treaty in such circumstances being an implied power, implied in Article 43 of the Treaty, it cannot be wider than is necessary for the attainment of the objectives for which the express powers contained in that Article are conferred (consider para. I (3) of the reasoning of the Court in its Opinion given on 26 April 1977 under Article 228 (1) of the Treaty in the matter of the *draft 'Agreement establishing a European laying-up fund for inland waterway vessels'* [1977] ECR, at p. 755).

I should add — although perhaps this goes without saying — that, even where it is shown that a provision derogating from the general rules of the Treaty is necessary as a temporary safeguard against the malfunctioning of the common organization of a market, the power of the Council to enact such a provision does not, in my opinion, include power to delegate any wide discretion to Member States. The operation of the provision must remain under the control of the Community itself.

For the reasons I have already stated, I am of the opinion that, at the time when Regulation No 816/70 was adopted, a situation existed which warranted the inclusion in that Regulation of Article 31 (2). Moreover the second subparagraph of that provision was designed to ensure that its operation remained under the control of the Commission. I am accordingly of the opinion that, at its inception, Article 31 (2) was valid, and that Your Lordships should so rule in answer to the first question referred to the Court by the Tribunal d'Instance of Bourg-en-Bresse.

I turn to the second question.

As to that the French Government submits first that Article 31 (2) must have remained in force in September 1975 because it was not repealed until May 1976. The French Government argues that, since that provision was contained in a Council Regulation, its applicability could be brought to an end only by an act of the Council. In support of that view the French Government refers to the fact that the minutes of the Meeting of the Council held on 27 and 28 April 1970, when Regulation No 816/70 was adopted, contained a declaration to the effect that "the Commission would consider, at the beginning of the next wine-growing year, whether, in each Member State, all the mechanisms necessary for the management of the market in wine, within the framework of the common organization of that market, had been established in such a way that their due functioning could be ensured; and would report its findings to the Council". The French Government also

relies on the views expressed by certain members of the Council at subsequent meetings of it.

In my opinion that submission should be rejected. By its own terms Article 31 (2) was limited to operate only "so long as all the administrative mechanisms necessary for the management of the market in wine are not in application". Indeed, had it not been for that limitation, Article 31 (2) would, I think, having regard to the reasons that warranted its inclusion in Regulation No 816/70, have been void as being in excess of what it lay within the power of the Council to enact. The difficulty arises from the fact that the Regulation did not specify by whom and in what manner it should be ascertained when the condition subsequent expressed in the limitation was satisfied. It cannot, however, be deduced from that that such ascertainment should be a matter for the Council. Having regard to the terms of, respectively, Articles 145 an 155 of the Treaty, it is not to the Council, but to the Commission, that pertains the function of ensuring that measures taken by the Institutions pursuant to the Treaty are applied.

There are a number of reasons why the declaration contained in the Council's Minutes cannot have had the effect suggested by the French Government. First, and most obviously, such a declaration is not an act having legislative force and, even if it were, it could not alter the provisions of the Treaty as to the respective functions of the Council and of the Commission. It was submitted on behalf of the French Government that the declaration might be invoked, under the heading of "travaux préparatoires", as an aid to the interpretation of Regulation No 816/70. But no amount of such aid would enable one to interpret the Regulation in a way inconsistent with the Treaty. Moreover, whatever may be the value in general of "travaux préparatoires" in the interpretation of Council Regulations — and, as Your Lordships know, I doubt if they can have any — they certainly cannot be invoked when unpublished. (I would refer in that connexion to what I said in Case 28/76 *Milac* v *HZA Freiburg* [1976] ECR at p. 1664 and in Case 109/76 *Blottner* v Nieuwe Algemene Bedrijfsvereniging [1977] ECR, at p. 1154). It was also submitted on behalf of the French Government (at the hearing) that the declaration might be held to have had legal effect by virtue of the principle in Case 81/72 *Commission* v *Council* [1973] 1 ECR, 575. But that principle is only that a declaration of the Council may, in certain circumstances, give rise to legitimate expectations which the law will protect. It is difficult to see that the declaration here in question can have given rise to any legitimate expectation on anyone's part. At all event the French Government did not mention any. Lastly, the terms of the declaration were narrow in scope. They called upon the Commission to give consideration to a matter that it would have been its duty to consider anyway and to "report its findings to the Council". Nothing was said about the purpose of that report. It could well have been envisaged as being for information only. Furthermore, the declaration called upon the Commission to give consideration to that matter only once, i.e. at the beginning of the next wine-growing year. Nothing was said as to what was to happen if the Commission found (as indeed, in the events, it did) that, at that time, the administrative mechanisms in question had not been fully established in all Member States.

Thus the question remains when, in fact, all the administrative mechanisms necessary for the management of the market in wine came to be "in application". If they were in application before May 1976, the repeal then of Article 31 (2) was merely the elimination of statutory dead wood — a familiar enough process.

It was submitted on behalf of the French Government that that question was not of a kind that it was within the jurisdiction of this Court to resolve in proceedings under Article 177 of the Treaty. We were referred to two Judgments one, dated 29 April 1977, of the Tribunal d'Instance of Marseille and the other, dated 29 June 1977, of the Tribunal d'Instance of Sète, in two others of the 40 or so cases that I have mentioned, in which those Courts (unlike the Tribunal d'Instance of Bourg-en-Bresse) took that view, and ordered experts' reports on the question whether those administrative mechanisms had been set up in Italy by 11 September 1975.

There again I have come to the conclusion that the submission of the French Government must be rejected, with the consequence that the Judgment of the Tribunal d'Instance of Marseille and that of the Tribunal d'Instance of Sète were mistaken.

If I am right in thinking that, by virtue of Article 155 of the Treaty, it lay, in the first instance, with the Commission, and with the Commission alone, to determine when those administrative mechanisms had been set up and were functioning, it could not alter anyone's rights whether or not in fact the Commission took any formal decision on the matter. If the Commission issued such a decision, it would be open to challenge by the Council or by any Member State under Article 173 of the Treaty. Alternatively its validity would be open to review under Article 177, on a reference from any Court or Tribunal in any Member State. In either case it would be for this Court to decide, according to the evidence, whether the decision of the Commission was sustainable. As I pointed out in Cases 51, 86 & 96/75 *EMI* v *CBS* [1976] ECR at p. 854, it is open to this Court, on a reference under Article 177 as to the validity of any act of a Community Institution, to admit evidence on any issue of fact affecting such validity.

The omission of the Commission to issue any such decision (at all events before 15 September 1975) could, in theory, be attributed to any one of three reasons. (I say "at all events before 15 September 1975", because the Commission's letter of that date to the French Government might be regarded as embodying such a decision). The first possible reason would be that the Commission overlooked its obligations under the Treaty. The second would be that the Commission did not consider itself obliged to take any formal decision until a practical situation arose in which it became necessary to do so. The third would be that the Commission was not satisfied until May 1976 that the requisite administrative mechanisms were in application. We know, from what we have been told on behalf of the Commission itself, that the last was not the case. Therefore the reason must have been one of the first two. Neither of them could operate so as to result in a transfer of the ultimate jurisdiction on the essential question from this Court to the national Courts of Member States. As it was put on behalf of the Commission in the course of argument, although we are here concerned with the duration of the validity of a provision of Community legislation, rather than with the question of its validity from the outset, the question is still one about its validity. It is not a question as to the application of Community law to the circumstances of a particular case, which, in the context of Article 177, would be a matter exclusively for the national Courts. In saying that I do not, of course, overlook that an inferior Court in a Member State has a discretion to decide itself, without reference to this Court, a question concerning the validity of a provision of Community Regulation. But, on any appeal against its decision to a Court against whose decisions there is no judicial remedy under national law, a reference to this Court there

must be. Ultimate jurisdiction on such a question thus lies with this Court.

So I turn to the evidence.

In the Article 169 proceedings (Case 117/75) the French Government made a number of allegations to the effect that, by September 1975, the mechanisms necessary for the management of the market in wine had still not been fully set up in Italy, or at all events were not functioning there properly. The Court asked the French Government whether it proposed to put in any evidence to substantiate those allegations. In response to that invitation the French Government put in a bundle of documents consisting in part of dispatches from the French Embassy in Rome, in part of cuttings from Italian newspapers and in part of extracts from the "Gazzetta Ufficiale della Republica Italiana". In its written observations in the present cases the French Government repeated much the same allegations, again without proferring any evidence. The Court invited it to say whether it would agree to that bundle of documents being transferred from the file in Case 117/75 to the file in the present cases. To that course the French Government assented. It did not however rely on those documents in argument. Having perused them, I have come to the conclusion that they are of negligible evidentiary value.

The rest of the evidence consists of documents put in by the Commission and by the Council

Of those the first that is relevant is the report made by the Commission to the Council pursuant to the declaration contained in the minutes of the meeting of the Council of 27 and 28 April 1970. That report was dated 27 July 1971. Its conclusions were expressed in the following terms:

"— Les instruments nécessaires à la gestion du marché viti-vinicole semblent, pour la plus grande partie, être mis en place par les États membres.

— Les dates à partir desquelles les instruments nécessaires ont été mis en place diffèrent d'un État membre à l'autre. Pour des raisons d'ordre administratif, il a été relativement plus facile de procéder à une mise en place rapide de ces instruments dans certain États membres qui, avant l'entrée en vigueur de l'organisation commune du marché viti-vinicole possédaient déjà, dans le cadre national, les instruments correspondants."

In other words the Commission could not find, at that date, that the mechanisms in question had been fully established in all Member States, and in particular could not find that they had been so established in Italy.

The Commission's report was successively considered by the Council's Working Party on Wine and by its Special Committee on Agriculture. The former's report is dated 14 February 1972, the latter's 23 February 1972. Both concluded, in the light of further information that had been received since the date of the Commission's report, that the mechanisms necessary for the management of the market in wine had been established in the Member States by 31 December 1971.

It was argued on behalf of the French Government that those reports should be ignored because the Working Party on Wine and the Special Committee on Agriculture were simply non-statutory bodies set up by the Council to assist it in its tasks, so that they had no power to bind their master, the Council itself. If, however, I am right in thinking that the competence of the Council did not extend to adjudicating upon the question whether the condition subsequent contained in Article 31 (2) of Regulation No 816/70 had been satisfied at any particular time, that argument is beside the point. The relevance of those reports is that, having been made by specialized bodies (I

hesitate to use the word "expert") on which all the Member States and the Commission were represented, they constitute evidence and, I would think, strong evidence, that in fact that condition was satisfied when they said it was. There is no suggestion that the reports were other than unanimous.

The French Government also refers to what happened at two subsequent meetings of the Council.

Of those meetings the first was that held on 29 and 30 May 1972, when the reports of the Commission and of the Special Committee on Agriculture were considered. The minutes of that meeting are before the Court. Formally, the Council confined itself to taking note of the report of the Commission. During the course of the discussion, however, the French Minister of Agriculture had said that he could not believe that all the mechanisms in question were in application, because daily experience showed that difficulties were still being encountered on the wine market. It was "politically" impossible for him to accept that the Council should declare Article 31 (2) spent. In answer to a question from the President, he confirmed that what he meant was that, whilst those mechanisms had been established, they were not functioning adequately. The Member of the Commission present stated that the provisions of Regulation No 816/70 had been applied. Whether those provisions needed modification or improvement was another matter.

The second meeting of the Council referred to by the French Government was that held on 9 September 1975, that is just before the adoption by that Government of the decree here in question. The minutes of that meeting too are before the Court. At the start of the meeting the French Minister of Agriculture drew attention to the disturbance caused in the French wine market by the depreciation of the Italian lira. He suggested the re-introduction of m.c.a.'s. That suggestion was however rejected. The French delegation then put forward the suggestion that Article 31 (2) should be invoked on the footing that the Council had so far failed to agree on the measures necessary to improve the common organization of the market in wine, although it had, by a Resolution of 21 April 1975 (Official Journal C 90 of 23 April 1975) committed itself to doing so by 1 August 1975. The French Government relies strongly on the fact that, not only a number of other Members of the Council but also the responsible Member of the Commission (Mr Lardinois), who was present, accepted that such a solution might be possible. It is fair to say however that they accepted it only reluctantly and as one element in a possible "political package", the feasibility of which would need to be examined by the Commission, there being doubts about its practicability and about its legality. In the events the solution was rejected, because other Members of the Council were opposed to it on both political and legal grounds. It is, incidentally, noteworthy that a number of them expressed, as I have done, the view that it was for the Commission to say when the condition subsequent in Article 31 (2) had been satisfied.

In my opinion one cannot deduce from the proceedings at those two meetings of the Council that, in September 1975, the condition subsequent in Article 31 (2) had still not been satisfied. One may deduce from them, and from much else in the documents placed before the Court by the Commission and by the Council, that the common organization of the market as established by Regulation No 816/70 was in need of improvement. It was indeed improved, later, by Regulation No 1160/76. But Article 31 (2) cannot, in my opinion, be interpreted as meaning that the right of a Member State to take measures there-

under was to remain exerciseable, not only so long as the mechanisms necessary to give effect to Regulation No 816/70 itself were not in application, but also so long as it might appear that the provisions of that Regulation were imperfect.

There is one other piece of evidence to which I should refer.

On 15 September 1975, Mr Lardinois held a press conference in Brussels at which he expounded the considered view of the Commission. In the course of doing so, he outlined the measures that the Commission itself had taken to alleviate the situation on the wine market. One of them was the dispatch to the Italian Government of a letter asking it to accelerate the payment of sums due to producers and traders under the common organization of that market (e.g. refunds, storage aids, distillation premia, etc.). He said that such payments, though normally effected in Member States within two months, took closer to a year to effect in Italy, and that that had an adverse effect on the market. This, in some measure, supports the view of the French Government that some of the relevant administrative mechanisms were not functioning properly in Italy.

Administrative inefficiency is however, I apprehend, albeit regrettable, more or less endemic in all our countries. Often it causes hardship, sometimes grave hardship. The remedies against it vary from country to country. There are ombudsmen, there are courts, there is the press and there are parliamentary questions. At the Community level we rely particularly on Article 169 of the Treaty. But one cannot, I think, hold that a temporary provision in a Council Regulation establishing a common organization of the market in an agricultural product, derogating, in order to meet a particular factual situation, from the general rules of the Treaty, such as was, if I am right, Article 31 (2) of Regulation No 816/70, may be regarded as still capable of being invoked, five years after the entry into force of that Regulation, simply in order to afford a remedy against administrative inefficiency.

I am therefore of the opinion that Your Lordships should, in answer to the second question referred to the Court by the Tribunal d'Instance of Bourg-en-Bresse, rule that the provisions of Article 31 (2) of Regulation No 816/70 had ceased to be applicable before 11 September 1975.