This is an exceptional circumstance justifying application of the first subparagraph of Article 69 (3) of the Rules of Procedure. Therefore, the parties should be ordered to bear their own costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 95, 169 and 171;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Lecourt Monaco Pescatore

Donner Trabucchi Strauß Mertens de Wilmars

Delivered in open court in Luxembourg on 10 March 1970.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 20 JANUARY 1970[1]

Mr President,
Members of the Court,

On examining the Italian system of turnover tax, the Commission of the European Economic Community came to be convinced that some of the rules concerning the import of wool and wool products from other Member States infringed Articles 95 and 96 of the EEC Treaty. It therefore considered it necessary to initiate proceedings to establish these infringements of the

1 — Translated from the German.

Treaty which it had uncovered. It did this in a letter dated 12 July 1966 in which it listed a series of infringements under six headings. The Italian Government's first reply was made in the form of a letter from its Permanent Representative, dated 13 September 1966, announcing in particular the adoption of new provisions which were intended to put an end to four of the infringements complained of. On one point it made no comment; with regard to another complaint it put forward a different view from and disputed the justification of that of the Commission. In fact, Italian Law No 370 of 16 May 1967 (of which the Commission was informed whilst it was in its preparatory stage) has eliminated most of the infringements listed. However, in the Commission's opinion, there still remained a breach of Article 95 of the Treaty in so far as skin wool and carded or combed wool imported from other Member States was subject to a tax heavier than that levied on the corresponding domestic products. The Commission brought this to the attention of the Italian Foreign Minister in a letter dated 2 March 1967. Subsequently, the competent departments of the Commission had a meeting with experts from Member States: according to the Commission, the arguments contained in its letter of 12 July 1966 were recognized as valid at this meeting. As a result the procedure laid down by Article 169 of the EEC Treaty in respect of infringements of the Treaty which remained in existence was continued after the formation of the single Commission; that is to say, the latter issued a formal opinion on 16 July 1968 requesting the Italian Government to put an end to these alleged infringements within 30 days.

As the Italian Republic did not comply with this opinion the Commission referred the matter to the Court of Justice on 4 February 1969. In its application, it asked for a declaration 'that the Italian Republic, by applying a general system of turnover tax which places a heavier burden on skin wool and carded or combed wool imported from other Member States than on similar domestic products, has infringed Article 95 of the Treaty establishing the EEC'.

In its statement of defence the Italian Government questioned the existence of any breach of the Treaty and requested that the application be dismissed as unfounded.

During the written procedure, or to be more exact, after the reply was lodged, the Italian Government announced in a letter of 15 July 1969 the adoption by it on 2 July 1969 of Decree No 319, Articles 7 and 8 of which amended in various respects the existing system of turnover tax. Without going into the Commission's arguments, the Italian Government considered that as a result the application should be withdrawn. But the Commission could not see its way to agreeing to this request. As it stated in a written statement dated 4 August 1969, it was unable to find that the aforementioned Italian Decree had eliminated every infringement of Article 95 of the Treaty. The Italian Government then submitted on 15 September 1969 another written statement in which it explained the new legal position. As a result of this and on the initiative of the Commission, a multilateral discussion took place on the information supplied by the Italian Government regarding the taxation of Italian wool. However, the Commission was still not convinced by the Italian arguments and so eventually the case continued on 26 November 1969 with the oral procedure. During this procedure the Italian Government produced a great many documents to justify its point of view. Finally, after discussing the case and considering the new legal position in Italy, the two parties repeated their earlier requests.

Let us now examine how the facts should be evaluated from the legal point of view.

1. The first question concerns the effect on these proceedings of the modification, subsequent to the filing of the application, of the Italian legal position criticized by the Commission.

On this point I can confidently assert that the possibility of giving judgment on the previous legal position and, if such be the case, of establishing a breach of the Treaty, is not thereby excluded. Contrary to the Italian Government's opinion, a change in the legal position does not destroy the grounds for this action. It would not be so even if the infringement of the Treaty had been ended. In reality, such an adaptation

of the legal position would be important only if it were brought about *within* the period laid down by the Commission in its opinion. If it takes place later, the Commission does not lose the interest it had in obtaining a declaration when it made the application. This is so especially when, as in the present case, the possibility exists of the original legal position being restored, that is to say, when there is a danger, however slight, of repetititon. This is clear, it seems to me, from previous decisions of the Court of Justice, especially in Case 7/61 (Rec. 1961 p. 653) so no more need be said on this preliminary question.

As for the question whether the Court of Justice can consider the legal position existing in Italy at the time when the application was made or whether it is entitled to extend its inquiries to the subsequent changes in that position, the Italian Government, as you know, is of the opinion that this last course of action is not possible. It considers it necessary that the Commission should on that point initiate new proceedings, beginning with a specific opinion framed in the light of the new legal position. The Commission on the other hand, refers to Case 45/64 [1965] E.C.R. 864, in which the subject-matter of the proceedings before the Court was similarly a national law different from that in the previous administrative proceedings. I do not think however that I need spend much time on this problem. In fact, Case 45/64 must now be disregarded because in that case a legal situation had been decisively changed before the application was lodged, so that the problem of altering the subject-matter of the dispute did not arise. Furthermore, in my view, not only the text of the Treaty, but also your judgment in Case 7/61 support the Italian Government's view. It was then clearly established that the Court had only to decide 'whether there has been any failure to fulfil an obligation, without having to ascertain whether, *after* the submission of the application, the State involved had taken the necessary action to end the infringement.' If we observe this principle here too, there will be no need to consider the legal position created by the Decree of 2 July 1969 and the Court should limit itself to an appraisal of the national legal position existing at the time when the application was lodged.

2. Having made these preliminary comments I can now broach the question whether the Commission is justified in complaining that the Italian system of turnover tax infringes Article 95 of the EEC Treaty. In this respect, two facts should be made clear: on the one hand the fiscal burden on skin wool imported from other Member States; on the other hand, the tax on carded and combed wool of the same origins.

(a) *Skin wool*

Let me begin with the problem of skin wool, that is to say wool removed from raw skins. Under Article 2 (b) of Law No 757 of 12 August 1967, a 7.2% turnover tax and an additional duty of 4% must be paid on this wool when imported from other Member States. Under Article 3 of Law No 1309 of 4 December 1965, the additional duty is also levied on domestic skin wool, either when it is sold by the fellmongers or when it moves on to other stages in the manufacturing process within the same undertaking. But, according to the legal position existing at the time the judicial proceedings were initiated, that is to say under Article 2 (b) of Law No 757, the 7.2% turnover tax was only levied when the domestic skin wool was *sold* by the fellmonger to other processers. But as such sales almost never took place because of the high degree of integration of the Italian wool industry, the Commission considered that in spite of the existence of the same tax rates on imports and on sales within the country and of the same basis of taxation (namely, the wholesale price of wool), it was not possible to assert that there was no discrimination against imported goods. This situation, the Commission went on to say, had not been greatly changed even after the coming into force of Decree No 319 of 2 July 1969. Admittedly as regards domestic skin wool Article 7 of this Decree provided for the payment of a turnover tax even when it was merely transferred from the dewoolling section to the processing works, that is to say even when no change in ownership was involved. But the

rate in this case was only 2.5%; consequently even under this new legislation, domestic products were subject to a 6.5% tax only as against an 11.2% tax on imports. Therefore there was not complete equality of taxation. At first sight all this in fact supports the complaint made by the Commission since, under Article 95 of the EEC Treaty, Member States undertook not to impose directly or indirectly on the products of other Member States any internal taxation in excess of that levied either directly or indirectly on similar domestic products. It is however not possible to come to a definite conclusion until we have studied the arguments advanced by the Italian Government to justify the situation I have just described. In its statement of defence, that is, *before* the Italian tax system was changed, the defendant submitted in the first place that the charge of infringement of Article 95 was unfounded because the Treaty did not require the sale of a product to be at any particular processing stage, 'nor did it require the national legislature to levy a tax on goods when they moved from one stage to another of the manufacturing process within as integrated undertaking. On this line of argument it is certainly true that in principle the Treaty allows Member States great freedom in devising their tax systems. It is, however, easy to show that the complaint cannot be dismissed in this way. First of all, as we have seen the turnover tax tax is, in some cases, payable even *independently* of any transfer of ownership. I need only mention the additional duty under Law No 1309 and the 2.5% turnover tax imposed by the Decree of 2 July 1969. If, however, domestic products at any particular stage of manufacture are subject to tax rates lower than for imported products, this fact strengthens the proposition that it was the legislature's intention to favour domestic production, or in other words to discriminate against imported goods. Furthermore, the Italian Government would seem to be proceeding on the basis of a misconception when it ascribes to the Commission the view that the Treaty prescribes the manner in which *domestic* products should be taxed, that is to say independently of sales, even when a product moves from one stage to another in the manufacturing process. In reality the Commission has only referred to the principle of Article 95, that is, to the obligation to subject all similar products to the same treatment for taxation purposes irrespective of whether they originate from within the country or are imported from other Member States. In this respect, any change in the position as to ownership is of no importance. But if an examination of a national tax system shows that, taking into account the legal structure of the economic sector to which it applies, a particular rate is practically never applied, this fiscal charge is in fact non-existent for the national sector. As the only thing that matters, when comparing tax burdens under Article 95, is the *normal* situation in the country, it must also be concluded from this that imported goods should be treated in accordance with the same normal situation, that is to say, they should be exempted from tax. In this context the facts which have been placed before you bear some similarity to those in Case 10/61 [1962] E.C.R. 1, in which the Court stressed that the decisive factor is not what duties are legally applicable but what duties *are in fact applied*. I would repeat that in my opinion the Italian Government cannot justify levying a tax on imports at the rate of 7.2% on the ground that this rate is also applicable to similar domestic products when there is no doubt that in practice the rate is not applied to domestic products. The first argument in the statement of defence cannot therefore invalidate the charge of infringement of the Treaty.

The same conclusion holds good for a second argument. If I have understood this argument correctly, it is an attempt by the Italian Government to justify the fact that as a rule this rate of 7.2% is not applied to domestic skin wool on the ground that the processing undertaking must shoulder extra costs throughout the entire production cycle (for instance, losses suffered during processing and depreciation on machinery used in processing). It is obvious, however, that this argument misses the point, for the simple reason that although it is possible to assert that the costs incurred in the subsequent processing of this skin wool were a charge on the *end* product, it is quite impossible to say as much in respect of the *basic* material. However, in order to com-

pare the charges which concern us here, of course only the taxes and the costs which must be borne by the skin wool itself can be taken into account. At the very most these can only be, apart from direct taxes, charges imposed on *preliminary* products and taxes which become due in the course of their processing. The precise position with regard to this *indirect* taxation will be examined presently. For the moment it only remains to be said that the second argument of the Italian Government as set forth in the statement of defence is similarly incapable of invalidating the complaint of an infringement of Article 95.

In fact, it was only in its rejoinder that the Italian Government tried to prove that the tax on imported skin wool was fair, by pointing to the *indirect* charges borne by domestic skin wool, that is, by making a comparison as laid down in the Treaty. In this respect it had the following to say: the raw skins from which the wool is pulled are subject, under Article 5 of Law No 1153 of 26 November 1957 to a tax of 2.4% of the wholesale price whether the skins are imported or obtained at home. Further costs are incurred in removing the wool from the skins, which is also subject to a tax. These two elements, taken toghether, result in a sum which, in terms of the value of the skin wool thus pulled, represents an indirect tax of 5.74%. Adding to this the additional tax of 4% which is in any case payable on domestic skin wool and a 2.5% turnover tax introduced by the Decree of 2 July 1969, the total taxation levied on Italian skin wool is 12.24%, a tax level higher than the 11.2% tax borne by imported skin wool. When the matter is seen thus, there can be no question of any infringement of Article 95 of the Treaty. It is, however, obvious that even this calculation does not dispose of the complaint of an infringement of the Treaty. And this can be said without examining the accuracy of the figures put forward by the Italian Government, some of which are challenged by the Commission. In fact, it must not be forgotten that the Court of Justice has for the moment to pass judgment only on the legal position which eixsted in Italy at the time when the application was made and that consequently it should leave out of consideration the new element brought in by the Decree of 2 July 1969. Consequently the figure of 2.5%, that is to say, the rate of a tax which did not exist before 2 July 1969, must be eliminated from the figures produced by the Italian Government. If we do so, if we subtract 2.5% from the total tax levied on domestic skin wool by the Italian Government, there remains in fact a total tax burden of 9.74% in normal cases, that is to say, where processing is carried out within integrated undertakings. It has thus been established, however, that, even taking as a basis the figures given by the Italian Government, skin wool imported from Member States was subject, before 2 July 1969, to heavier taxation than domestic skin wool and that the Commission was right to raise this complaint of infringement of Article 95 of the EEC Treaty in its application.

In any case, the Italian standpoint would not be justified even if, contrary to my view, the consideration were to be extended to the *new* Italian legal position and therefore took into account the above-mentioned rate of 2.5%. I will demonstrate this very briefly for the sake of completeness. Once again I shall refrain from examining the disputed figures, although their modification, that is to say, the acceptance of other prices for wool and other dewoolling costs, would naturally affect any comparision of tax burdens. As the Commission has shown, a serious mistake is apparent in the Italian Government's calculations. The result set out in the written statement of 12 September 1969 was decisively influenced by the fact that the Italian Government relate the tax on untreated skins and the taxes based on dewoolling costs wholly and exclusively to the *skin wool* derived from dewoolling. Objection may legitimately be taken to this method. Contrary to the Italian Government's opinion it is necessary to apportion between the *two* products resulting from dwoolling the tax levied on untreated skins and that which falls due in the course of their processing, that is to say to assess only a part of it on the skin wool and to consider the other part as an indirect charge on the resulting *leather*. On the basis of the figures for wool and leather supplied by the Italian Government, it would appear from this method that the skin wool is subject at most

to an indirect tax of 3.02%. Together with the additional tax of 4% and the 2.5% turnover tax just introduced, it would appear that the total tax levied on domestic skin wool is only 9.52%; it has thus been proved that the Decree of 2 July 1969 has not entirely eliminated the tax discrimination against imported skin wool.

We can conclude, therefore, without any further examination of the disputed figures, that as far as skin wool is concerned the Commission is justified in complaining that the Italian Government has infringed Article 95 of the EEC Treaty.

(b) *Carded and combed wool*

As regards carded and combed wool the Commission has criticized the fact—and this is the second complaint that I have to examine—that on imports tax is assessed on the *market value* whereas Article 2 of Law No 757 which is applicable to domestic wool and under which the taxation of the basic product, that is to say, the tax assessed on the basis of the wholesale price of *raw wool*, includes the tax incurred at the time the manufactured product is passed on. As the processed wool is worth 20% more, the result is that in spite of the application of the same rate of 11.2% (up to 2 July 1969) imported wool is subject to heavier taxation and that Article 95 of the Treaty is infringed. In the Commission's opinion the Decree of 2 July 1969, by reducing the additional tax on imported wool from 4% to 3.6% has not entirely eliminated this infringement of the Treaty.

On this point, the Italian Government argues in the first place that objection cannot be taken to the fact that domestic wool is sold mainly in the form of raw wool and that tax liability is linked to this. For tax purposes it is necessary to take as a starting point the value of the product at the time the tax liability is incurred. Consequently, the different values of domestic wool on the one hand and that of imported wool on the other can also give rise to differences in tax liability. However it is clear to me that this argument cannot invalidate the present ground of complaint any more than the corresponding argument which was brought against the first complaint. In comparing tax liabilities under Article 95 it is essential to make sure that *similar* goods are involved. It is therefore impossible to justify a rate of tax levied on imported processed goods by reference to a tax levied at the same rate on domestic products which is applied only to the *raw* product. Furthermore if, given the structure of the Italian economy, it is known that raw wool and not processed wool is the only kind normally sold in the country, the only conclusion to be drawn for the purposes of compliance with Article 95 is that the imported *processed* wool should be taxed at a lower rate than the domestic one. Such was not the case until 2 July 1969 and therefore the Commission appears to be justified in complaining of an infringement of Article 95.

However, this conclusion, reached only on the basis of the consideration set forth above, cannot be regarded as final. This is because, principally in its rejoinder but also in the oral procedure, the Italian Government pointed out that to produce a given quantity of processed wool a greater quantity of raw wool was needed owing to losses in the course of processing and that the sums paid for processing also attract a 2.8% tax. If, says the Italian Government, these factors are taken into account, then one arrives at the conclusion, in spite of the non-recurring tax payable on raw wool, that carded and combed wool produced in Italy is subject to a tax burden heavier than that recognized by the Commission and that in the final analysis Article 95 has not been infringed. It is thus impossible—and this the Commission has admitted also—to deny that the Italian Government was justified in pointing out these factors. The necessary comparison of tax burdens would not therefore be valid unless we take into account the factors put forward and thus cover the *indirect* taxation of Italian carded and combed wool. When, however, we try to ascertain the details of the incidence of indirect taxation in our calculations, we find that there is also disagreement in the present context about certain figures, and this does not make it any easier to arrive at a conclusion. In the opinion of the Italian Government, as outlined in a document produced during the oral procedure, any

calculation should take as a basis a value of Lit. 1740 per kg for raw wool and a tax of Lit. 16.2 per kg on processing, whereas the Commission considers the true values to be Lit.1300 for the wool and Lit.10.2 in respect of processing. According to whether one or the other of these two sets of figures is adopted, one arrives at a tax burden of 10.7% (on the Italian Government's figures) or 10.16% (on the Commission's figures). At the present stage of this case it is not possible to choose with any degree of certainty the right set of figures. This point and the need to clarify it need not, however, delay a settlement of the case. It seems that the Court may deliver judgment if it limits its consideration of the case to the legal situation existing in Italy at the time when the proceedings were instituted. It can do so on the basis of the figures supplied by the Italian Government itself, that is to say, even if we assume them to be correct. On the basis of the comparative calculations produced by the Italian Government during the oral proceedings, we find that equality in tax liability as between imported and domestic carded and combed wool cannot be proved unless an additional tax is imposed on imported wool at the rate of 3.6%. This is the rate in force since 2 July 1969. On the other hand, if we employ in these calculations of the Italian Government the rate of 4% formerly in force it is clear that even on the basis of the figures supplied by the Italian Government itself one cannot accept that there is equal treatment for tax pruposes of imported goods.

I can therefore summarize my investigation with reference to the second ground of complaint as follows: the treatment for tax purposes of carded and combed wool imported into Italy from other Member States also constitutes an infringement of Article 95 of the EEC Treaty. In contrast to the observations applicable to the first ground of complaint, this statement of the position holds good only for the period before 2 July 1969. If, contrary to my view on the limits of this action, the Court should consider it appropriate to deliver judgment on the situation recently created by the Decree of 2 July 1969, I am convinced that it would be essential to clarify further the facts concerning the second ground of complaint.

3. Summary

To sum up it can be stated, following the Commission's submissions and referring to the legal position as it was in Italy at the time when the application was lodged, that the Italian Republic, by adopting a general turnover tax system which results in a heavier burden being placed on skin wool and on carded and combed wool imported from other Member States than on similar domestic products, has infringed Article 95 of the Treaty establishing the EEC. Since the application is well-founded, the defendant Italian Republic must bear the costs.