OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 22 JUNE 1972[1]

Mr President,
Members of the Court,

This is the third time that we are concerned in a court action with the Italian Law No 1089 of 1 June 1939 which was passed to protect the Italian cultural heritage. Article 37 of this Law provides, as you know, for the levying of a tax on the export to other States including Member States of the Community, of objects of artistic, historic, archaeological or ethnographic interest. The Commission expressed the view very early on (in January 1960) that the tax was incompatible with the principles of the EEC Treaty and that it was necessary under Article 16 of the Treaty to abolish it at the latest by the end of the first stage, that is by 31 December 1961.

Since the said provision was disregarded, the Commission, after carrying out the necessary preliminary procedure, brought an application on 7 March 1968 under Article 1969 of the EEC Treaty for a declaration that the Treaty had been infringed as the Commission had found. This application was concluded with a judgment of 10 December 1968 [1968] ECR 423 in which it was expressly declared that the Italian Republic, by continuing to levy after 1 January 1962 the progressive tax laid down by Article 37 of the Law of 1 June 1939 No 1089 on the export to other Member States of the Community of articles of an artistic, historic, archaeological or ethnographic interest, had failed to fulfil its obligations under Article 16 of the Treaty establishing the European Economic Community.

Accordingly the Italian Republic had an obligation under Article 171 of the EEC Treaty 'to take the necessary measures to comply with the judgment of the Court of Justice', that is to bring about a state of affairs which accorded with the Treaty. The Commission, charged under Article 155 of the EEC Treaty with ensuring 'that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied' accordingly pursued the matter further. Since after a lengthy interval of time it was not aware that anything had been done to abolish the said tax, its President sent a letter on 2 June 1969 to the permanent representative of Italy in which the obligation to comply with the judgment of 10 December 1968 and to abolish the tax was pointed out. Thereupon the permanent representative of Italy informed the President of the Commission on 15 July 1969 that the Italian administration had prepared a draft decree-law (decretto legge) to abolish the tax. Its adoption by the Italian Council of Ministers and thus its entry into force was being pursued with such urgency as the then political crisis permitted. Nothing however came of this. Instead the Italian Council of Ministers in September 1970 adopted a draft law (including *inter alia* the abolition of the tax) and transmitted it on 22 October 1970 to the Senate to deal with, admittedly without referring to the urgency of the matter. Not satisfied with this state of affairs, the Commission in a letter dated 1 October 1970 from its President to the President of the Italian Council of Ministers once again made the critical observation that the export tax was continuing to be levied. It referred to the infringement thereby of Article 171 of the EEC Treaty and observed that it was resolved to proceed under Article 169 of the EEC Treaty if the Italian Government did not suspend without delay the levying of the tax until it was abolished and it declared that the proceedings for infringement of the Treaty would be brought on 1 November 1970 if there was no suspension as requested. Since the Commission received no answer to this letter, it implemented its decision to bring the proceedings for infringement of the Treaty. To this end it sent a letter on 21 December 1970 to the Italian Foreign

1 — Translated from the German.

Minister. The letter stated that the failure to abolish and suspend the tax constituted contempt of the Court's judgment of 10 December 1968. It consequently invited the Italian Government to submit its observations on the matter. The Commission learnt from a telex from the permanent representative of Italy to the President of the Commission on 12 March 1971 that a Senate Committee had approved on 3 March 1971 the said draft law to abolish the tax. As this interim measure did not satisfy it, the Commission continued the proceedings for infringement of the Treaty and on 12 May 1971 delivered an opinion under Article 169 of the EEC Treaty. In this opinion it again observed that in spite of repeated approaches the Italian Government had not fulfilled its obligation to comply with the judgment of 10 December 1968. Further the Italian Government was called upon to take measures within a month to put an end to the infringement of the Treaty.
Since there was no reaction to this, on 29 July 1971 the present application was brought before the Court. As may be expected from what has been said the Commission claims that the Italian Republic has not fulfilled the obligations imposed on it by Article 171 of the EEC Treaty by failing to comply with the judgment of the Court on 10 December 1968 in Case 7/68.
Before I turn to consider this application it should be observed in addition that the Italian Senate on 15 November 1971 approved the said draft law and transmitted it to the Chamber of Deputies. However as a result of the premature dissolution of the Italian Parliament on 28 February 1972 it was not made law. Further it should be recalled that the application of the Italian law on the levying of an export tax was called in question in an action brought by an Italian undertaking against the Ministry of Education. This action led to a reference for a preliminary ruling to the Court (Case 18/71) and to the finding in the judgment of 26 October 1971 [1971] EC R811 that since 1 January 1962 Article 16 of the EEC Treaty had produced direct effects in the legal relations between the Member States and those persons subject to their jurisdiction and had conferred on the latter rights which the national courts must protect.

1. After these preliminary observations if we now come to the question of what is the right answer to give to the Commission's application, it should be said straight away that the Italian law in question on the levying of the export tax has still not yet been formally repealed. After the declarations made in the judgment of 26 October on the direct application of Article 16 of the EEC Treaty which are to be considered in connexion with the earlier findings of the Court on the supremacy of Community law, it could be said that the formal repeal of the law is plainly unimportant. In other words the view could be taken that because national law contrary to Community law is overridden by the rules of the Treaty which basically exclude the application of national law the declaration sought by the Commission is quite irrelevant.
However any such considerations may very quickly be shown to be quite wrong.

(a) First it is perfectly reasonable to attach importance to a formal regularization of the legal position. This may be said because the failure to repeal national law contrary to Community law and the fear of its being applied may have an inhibiting influence on trade within the meaning of the judgment in Case 7/68.

(b) Then it is in no way shown that the contested law is no longer applied. It is significant that the Italian Government in the present proceedings has expressly stressed that it did not seem possible to it to give the administration directions not to apply the law. On the contrary it seems clear that the law is still applied (even if perhaps only in a few cases). As we heard objection was raised to the judgment of the Tribunale di Torino following the preliminary ruling of 26 October 1971, a judgment which proceeds on the basis of the non-application of the Italian law, and this shows that the Italian administration is not ready to recognize the new legal

position. Thus it leads doubtless to trade being made more difficult even if it is assumed that the interpretation of the Tribunale di Torino is finally upheld in a higher court.

(c) Finally it must be borne in mind that the judgment of the Court of 10 December 1968 declared that the levying of the export tax in question was no longer permissible after 1 January 1962. The establishment of a state of affairs which accords with the Treaty accordingly means that the legal position should be regularized retroactively and that as far as possible repayment of the taxes levied after 1 January 1962 should be ordered. We have however heard in the proceedings that even the last Italian draft law contains no such provisions. The question is rather left to the courts without an attempt having been made to ascertain whether insuperable constitutional difficulties stand in the way of putting the legal position in order.

Thus it is clear that the preliminary ruling in Case 18/71 and the finding that since 1 January 1962 Article 16 of the EEC Treaty has produced direct effects in the legal relations between the Member States and those persons subject to their jurisdiction, has had no influence on the present proceedings.

2. A basic finding which the Court made in Case 8/70 [1970] ECR 961 at p. 966 must be borne in mind in the further consideration of the application made by the Commission. It is stated there: 'The obligations arising from the Treaty devolve upon States as such and the liability of a Member State under Article 169 arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution'. In relation to the present case therefore it is not sufficient to show that the Italian *Government* has done everything necessary to put the legal position in order and that events in the Parliamentary sphere are the cause of the legal position still existing at the present time.

If we nevertheless ask ourselves whether the Italian Government has done everything necessary to comply as quickly as possible with a judgment which, as was said in Case 20/59, Rec. 1960, p. 692, represented an *ultima ratio* of Community law and which moreover finds an infringement of Community law from 1 January 1962, then the following picture emerges.

In the proceedings it was explained that after the judgment in Case 7/68 of 10 December 1968 was given, steps were taken with the participation of several ministries whose interests had to be coordinated to take the necessary measures to change the legal position. It was not possible to consider a simple abolition of the export tax; it was necessary to restructure the Italian system protecting the national heritage having regard to the judgment. Thus a draft law was laid before Parliament in October 1970, albeit the adoption of the law was not noted as urgent.

In these circumstances several observations forcibly arise.

(a) First it seems scracely plausible that such a long period of preparation was necessary for a relatively simple law. In this connexion reference must be made to the fact that a draft law to abolish the export tax in question was approved as far back as 26 July 1967 by the Legal Committee of the Senate. Because of the untimely dissolution of Parliament on 11 March 1968 it could not be made law. It is not shown on the other hand that Parliament regarded the draft in the form it then took as unsatisfactory for the defendant in the present proceedings admits itself that the said draft was not even dealt with by Parliament then. The obvious course was therefore simply to take up this draft again and thereby to achieve some expedition of the legislative process. It does not seem plausible that this was impossible having regard to the necessity to restructure the Italian system protecting the national heritage because the law of 1939 without the export tax in question provided a sufficient range of instruments to protect the national heritage (namely in the form of obligatory export licences, strict examination procedure for their grant, the possibility of prohibitions on export and

the exercise of a right of pre-emption by the Italian administration). The argument that in accordance with Article 81 of the Italian Constitution it was necessary to consider an alternative source of income on the abolition of the export tax seems scarcely plausible. As was stated in the Government's last draft law only some Lit. 20 million per annum is at stake, an amount which certainly could not cause any special difficulties.
Accordingly justified criticism might be made of the Italian Government with regard to the preparation of the legislative procedure and not least having regard to the fact that it attached no importance to an urgent process in Parliament.

(b) Further it is claimed by the Commission that the Italian Government could have brought about an expeditious change in the law by a Decree-Law (as it already contemplated in 1969), that is, by means of rules which become immediately effective and have to be made into a law by Parliament within sixty days. Against this the Government objected that decree-laws could be adopted only in extreme emergency and in exceptional circumstances and from previous experience they were not liked by Parliament with the result that in the event of a decree-law not being confirmed there would have been a risk of further delay in the legislative process. This objection too seems scarcely convincing. At least there can be no doubt of the urgency of measures required in view of a judgment which finds an infringement of the Treaty extending over six years. Even if it is not for us to speculate on the political considerations affecting the choice of means to be adopted by a Member State to comply with a judgment, it is nevertheless certainly permissible to find the justification advanced by the Italian Government in the present connexion unsatisfactory and not convincing.

(c) In the third place according to the Commission it was possible for the Italian Government to give directions to its administration not to apply the law in question any longer. This comment is justified. The objection that such directions are ruled out so long as the law to the opposite effect is formally still in force overlooks the fact that Community law has precedence over contrary national law and this was stated very early in the case-law of the Court (Case 6/64 *Costa* v *ENEL* [1964] ECR 585). Moreover in 1968 there was already existing considerable case-law on the question of the direct application of Community law. Since the provision of Article 16 moreover offered no special problems, the Italian Government could indeed have followed the course indicated by the Commission.
If it were desirable to limit consideration to the behaviour of the Italian *Government*, it is still difficult for it to escape the criticism of infringing the Treaty.

3. Assuming that it was right and proper to use Parliamentary procedure to comply with the judgment in Case 7/68, that is to choose a necessarily time-consuming procedure, let me say at once that the defendant cannot however be exonerated.
As we have seen, a draft law to abolish the export tax in question was submitted to Parliament in October 1970; on 3 March 1971 it had the approval of the appropriate Committee of the Senate and on 15 November 1971 that of the Senate. Thereafter the draft was submitted to the Chamber of Deputies. It was not adopted however owing to the untimely dissolution of Parliament on 28 February 1972.
Having regard to this state of affairs and considering the urgency of the measures to be taken and the simplicity of the provisions at issue it may be said in my opinion that already there was no justification for the time that the consideration of the draft took in the Senate alone. In any event the very sparse statements of the Italian Government in this respect give no sufficient explanation.
As regards the fate of the draft in Parliament which at the end of 1971 was concerned with the election of a Head of State and which after the resignation of the Government and the formation of a new Government had to be dissolved, reference may be made to a finding in the judgment in Case 8/70 [1970] ECR 966 on a similar problem. Part of this judgment reads: 'In

any case a Member State cannot justify itself by relying upon obstacles which not only did not emerge until long after the coming into existence of the obligations which is alleged to have failed to fulfil, but only did so after the period laid down in the reasoned opinion had expired'. If this applied in that case then it can certainly not be seen how the defendant in the present proceedings can justify the delay in compliance with the judgment in Case 7/68 on the grounds of circumstances which are said to be *force majeure*.
Therefore, if all that the Italian Government has pleaded is weighed against what the Commission says, it is not capable of leading to dismissal of the application.

4. Finally we may ask ourselves whether a judgment against the Italian Government serves any purpose in view of the intention shown by its Government and Senate to abolish the rules on export tax, especially in view of the fact that now after the election of a new Parliament, it may be expected that the position will be speedily regularized.
This question too can scarcely be answered in the negative. It must simply be borne in mind that the procedure under Article 169 for an infringement of the Treaty, in any case a weak instrument, is the only means in the Community of bringing about a situation in accordance with the Treaty. Looked at in this light it is right to stress the need to use all national means to comply quickly with judgments which have been given in such proceedings if the authority of the Community legal order and thereby that of the Community itself is not to be diminished.

5. To summarize I would like therefore to propose that the application of the Commission be acceded to and that there be a declaration that the Italian Republic has disregarded Article 171 of the Treaty because it has not been able to show that it has done everything to comply with the judgment in Case 7/68. In this event in accordance with the application the costs must be borne by the defendant.