On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs including the costs of the application for the adoption of interim measures.**

Touffait Pescatore Due

Delivered in open court in Luxembourg on 5 March 1980.

A. Van Houtte
Registrar

A. Touffait
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 31 JANUARY 1980 [1]

Mr President,
Members of the Court,

My opinion today is concerned with problems connected with the special import arrangements for frozen beef intended for the processing industry as they have been put into practice since the beginning of 1977. I do not now need to give particulars of these arrangements which are based on the common organization of the market in beef and veal (Regulation (EEC) No 805/68 of the Council of 29 June 1968: Official Journal, English Special Edition 1968 (I), p. 187) and the rules whereof have been laid down in a series of regulations. They were considered in detail in the judgment of 6 March 1979 in Case 92/78 (*Simmenthal S.p.A.* v *Commission of the European Communities* [1979] ECR 777), and I would refer the Court to the opinion and judgment in that case.

In the present case, which has also been brought by Simmenthal, the immediate matter at issue has been a Commission

1 — Translated from the German.

decision relating to the first quarter of 1978 fixing minimum selling prices for the sale of frozen beef by the intervention agencies and fixing quantities of frozen beef which could be imported in the first quarter of 1978 on special terms. The substantive issue, however, is the legal basis of that decision, namely the way in which the special import arrangements were devised. The Court has acknowledged that the criticism levelled against those arrangements is to a large extent justified. Thus it held in its judgment of 6 March 1979 in Case 92/78 that it is unjustifiable to allow undertakings which are not part of the processing industry to have access to the special import arrangements and that the absence of any condition that meat bought under the "linking" system is to be used for a specific purpose is also objectionable. Although there is no objection to the introduction of the system of invitations to tender for the sale of intervention meat, that system has been disrupted by allowing too many prospective purchasers to participate, which leads to minimum prices being set at a level considerably higher than that at which meat is normally sold from intervention stocks. In addition, the placing of an upper limit on the quantities of intervention meat which may be bought by one successful tenderer has led to excessive fragmentation of the import quota and has placed large processing undertakings at a disadvantage, and this would have been avoided if the upper limit had been fixed at a higher level. For those reasons the Court declared the Commission decision which had been challenged void in so far as it affected the applicant.

In accordance with the direction by the Court at the end of its judgment the Commission reconsidered the situation of the applicant. Because the Court also stated at the end of its judgment that care must be taken that the "linking" system does not have the effect of ensuring that the processing industry buys meat from intervention stocks at a price lower than the price which at the relevant time is usually charged for the sale of meat from intervention stocks, and having regard to the fact that the applicant's tender was for 1 091 units of account per tonne whereas the usual selling price was 1 290 units of account per tonne the Commission came to the conclusion after reconsideration that the applicant's tender should still be rejected. The applicant claims that it only heard of this decision, which was adopted on 19 April 1979, during the present proceedings. It was in any case not notified to the applicant by the Italian intervention agency until September 1979.

The Commission also accepted the consequences of the criticism which the said judgment made of the legal basis of the "linking" system. By means of Commission Regulation No 535/79 of 21 March 1979 (Official Journal L 71 of 22 March 1979, p. 15) it suspended the application of the "linking" system for the time being and modified the special import arrangements by means of Commission Regulations (EEC) Nos 1136/79, 1137/79 and 1138/79, all of 8 June 1979, (Official Journal L 141 of 9 June 1979, pages 10, 13 and 15) which entered into force on 1 July 1979.

In addition, during the proceedings in Case 92/78 — it is here that I come to the present case — an invitation to tender was published for the *fourth* quarter of 1978 based on the rules which had not at the time been amended. For that invitation the general notice of periodic invitations to tender for the sale of frozen beef held by the intervention agencies (Official Journal C 11 of 13

January 1978, p. 16), which had played a part in Case 92/78, was applicable and the "Notice of invitation to tender No It P 4 — Regulation (EEC) No 2900/77 — for the sale of certain frozen bone-in beef held in stock by the Italian intervention agency (Official Journal of 12 September 1978, C 225, p. 43) had to be observed. The applicant participated in that invitation to tender and submitted a tender, this time for 950 units of account per tonne. It was again unsuccessful, however, because by Commission Decision No 78/940/EEC of 27 October 1978 (Official Journal L 326 of 21 November 1978, p. 14) the minimum selling price for Italy was fixed at a considerably higher level (1 539 units of account per tonne or more). The applicant was informed of this by a letter from AIMA, the Italian intervention agency.

Thereupon it again sought redress of the Court, on 3 November 1978, on the same grounds as in Case 92/78. It claims that the Court should:

Declare the Commission's decision of 25 October 1978 to be void; and

If necessary, declare notice of invitation to tender No It P 4 (Regulation (EEC) No 2900/77), the general notice of periodic invitations to tender for the sale of frozen beef held by the intervention agencies, Commission Regulation (EEC) No 571/78, and in particular Articles 9, 11 and 12 thereof, and Regulation No 2900/77 to be inapplicable.

The Commission considers that that application is inadmissible because there is no interest requiring legal protection and for this reason contends that the Court should dismiss it. In support of its view it refers to the above-mentioned judgment given in Case 92/78, in connexion with a similar decision adopted for the first quarter of 1978. In that judgment an interest in bringing the application was acknowledged from two viewpoints: on the one hand, because after the annulment of the contested decision it was a matter of importance to the applicant to be "restored sufficiently by the Commission to its original position" (paragraphs 31 to 33 of the decision) and, on the other hand, because, if the system of invitations to tender were found to be incompatible with certain requirements, the Commission should be induced to modify the system for the future in an appropriate manner. In the instant case, however, it is contended that neither viewpoint is any longer relevant. The "linking" system has in the meantime been modified so that there is no interest in causing the Court to deliver a judgment once again on the earlier system which could only be the same as that given in Case 92/78. On the other hand, there is no point in the applicant's obtaining a declaration that the decision adopted by the Commission for the last quarter of 1978 is void, because it is already an established fact that a reconsideration of the applicant's tender can only lead to its rejection. This is said to follow, on the one hand, from the finding at the end of the judgment in Case 92/78 that the applicant's tender must be rejected if it is below price level at which meat from intervention stocks is usually sold at the relevant time, and, on the other hand, because the usual selling price at that time on the basis of Regulation No 2836/77 amounted to 1 291 units of account per tonne, whilst the applicant's tender was for 950 units of account per tonne.

In my view the following opinion on this dispute is appropriate.

1. If I may say so immediately, I do not consider that the Commission's view on the admissibility of the application is tenable.

In this connexion the applicant has submitted with good reason that when determining whether an application is admissible it is the general view that the date when proceedings commenced is decisive. But when the proceedings were instituted on 3 November 1978 the judgment in Case 92/78, upon which the Commission has concentrated for conclusive support of its view, had not yet been delivered. On the contrary, Case 92/78 came to an end with the Court's decision of 6 March 1979.

Consequently, the application must be held to be admissible, as it was in Case 92/78, because it is clear that the contested decision was of direct and individual concern to the applicant — as far as the details realating to this point are concerned I am able to refer your Lordships to my opinion and your judgment in Case 92/78 — and because at that time the applicant undoubtedly had an interest in obtaining the annulment of the decision, at all events having regard to the fact that according to that decision the applicant might be restored sufficiently by the Commission to its original position. The question whether in this connexion the desire to induce the Commission to change the system which was sought in Case 92/78 is to be regarded as relevant can remain undecided.

Subsequent events intervening during the court proceedings cannot alter this finding, cannot as it were remove at a later date the substratum of the action's admissibility. They may at best deprive the action of its purpose or bring about a situation where there are reasonable grounds for not proceeding with it.

In the present case, however, the former certainly did not happen. It cannot be denied that the judgment delivered in Case 92/78 held that the Commission had to modify the special import arrangements and that in consequence, especially as it may be assumed that the Commission implements a judgment of the Court, there was in this respect no longer any ground for obtaining once again from the Court a decision which — if the same statement of claim used — could only be identical to that in Case 92/78. However, the present case has not for that reason become devoid of purpose, if that word is given its proper meaning. That could only have been said to have come about if the contested decision were to have ceased to be valid which, however, was not the case and certainly not after Regulations Nos 1136 to 1138/79 were adopted, since the latter only modified the system for the future and therefore did not remove the legal foundation for the contested decision.

The question whether, after judgment was given in Case 92/78, there were reasonable grounds for discontinuing the application and whether pursuit of the proceedings afterwards might appear to be an abuse of process is relevant only to the decision as to costs. It is unnecessary therefore at this stage to examine this in greater detail in the context of the admissibility of the application and of the problems connected therewith.

2. If therefore the application is regarded as being admissible the subsequent consideration of its substance does not present the slightest difficulty. As I have already mentioned at the beginning of this opinion, the legal basis of the disputed Commission decision in the present case "fixing the minimum selling prices for frozen beef put up for

sale by the intervention agencies in accordance with Regulation (EEC) No 2900/77 and specifying the quantities of frozen beef for processing which may be imported under special terms in the fourth quarter of 1978" is the same as that of the decision contested in Case 92/78. I have therefore no other choice than to confirm, as I did in Case 92/78, that that legal basis, which has been challenged with the same arguments, is defective and accordingly — for the details I would refer to the judgment in Case 92/78 — it is also certain that the Commission's decision of 27 October 1978, which was founded on that legal basis, must likewise be declared void, though only in so far as it affects the applicant, so that its other legal effects remain in force.

3. I still have to consider the question mentioned above which is very relevant to the decision as to costs, namely whether there were not after the judgment of 6 March 1979 in Case 92/78 had been delivered compelling reasons for the applicant to discontinue the present action — it had reached the stage of the written procedure before the filing of the reply on 30 July 1979 — which might give grounds for the inference that the applicant has caused the Commission to incur costs "unreasonably or vexatiously" (Article 69 (3) of the Rules of Procedure) and for that reason is to be ordered to bear those costs despite the success of its application.

If I am correct that is the Commission's view, even though it has not specifically mentioned a decision as to costs within the meaning of Article 69 (3). It refers on this point to the direction at the end of the judgment in Case 92/78 that the Commission must reconsider the particular situation of the applicant and adopt another decision affecting it. In doing so it must however ensure that the processing industry is not allowed to buy meat from intervention agency stocks at a price lower than the price usually charged at the relevant time for reducing intervention agency stocks; therefore the applicant's tender is to be rejected if it becomes apparent that it was below that price level. However, this is exactly what happened in the case of the tender which the applicant submitted in response to the invitation to tender for the fourth quarter of 1978. At that time the usual selling price for beef held by the intervention agencies, that is for meat which does not have to be used for a specific purpose, was, pursuant to Commission Regulation (EEC) No 2836/77, 1 291 units of account per tonne, whereas the applicant's tender was for only 970 units of account per tonne. It is accordingly evident that a declaration that the Commission decision relating to the fourth quarter of 1978 is void and reconsideration of the applicant's tender could not produce a favourable result for the applicant and that it must therefore seem pointless to continue the proceedings for a declaration that the Commission's decision of October 1978 is void.

The applicant takes the view that the purport of the said judgment does not necessarily correspond to the Commission's interpretation. It was therefore perfectly reasonable to continue the present action after that judgment was delivered in order to obtain precise clarification of the question as to the examination which the Commission had to undertake after the annulment of its decision of October 1978. It must in particular not be overlooked that in the judgment in Case 92/78 the Commission was directed to reconsider the situation of the applicant *with due regard to the grounds of the*

judgment. In this connexion it is relevant that exception was taken in the grounds of the judgment to the absence of any condition that meat brought from the intervention agencies under the "linking" system is to be used for a specific purpose and to the quantitative restriction stipulated for each tender, that is the fact that the processing capacities of large undertakings were disregarded. It must accordingly be accepted that in reconsidering the applicant's situation the limitation of the amount of intervention meat to the 100 tonnes stipulated in the invitation to tender could not be retained. Furthermore, the lower price limit for the sale of intervention meat could only be fixed taking into account other sales to processing undertakings and not sales of meat the use whereof is unrestricted. Since, however, meat from intervention stocks was sold at that time to processing undertakings at a price corresponding to the price offered by the applicant in its tender (950 units of account per tonne), it was by no means impossible but in fact extremely likely that after the annulment of its decision and reconsideration of the applicant's tender the Commission might have reached a decision favourable to the latter.

As far as this dispute as to the interpretation of the judgment in Case 92/78 is concerned one might ask, as the Commission has done, whether the correct method of settling it was not the special procedure laid down for that purpose in Article 102 of the Rules of Procedure. It must however be conceded that this could scarcely have been a reason for discontinuing during the written procedure the action which now concerns us; at best a stay of proceedings until the delivery of a judgment interpreting the judgment in Case 92/78 might have been contemplated. The pursuit of the present proceedings could not then have been regarded as improper from the point of view of the legal costs.

If the above-mentioned dispute as to the interpretation of the judgment in Case 92/78 is to be settled in the present case the observation is surely of importance that, although the judgment in that case directs the Commission to reconsider the situation of the applicant with due regard to the grounds of that judgment, the decision was declared void only in so far as it affected the applicant, the remainder thereof remaining unaffected. In principle therefore there must be doubt as to whether a correct implementation of the judgment could have led to the subsequent creation of a situation which in the opinion of the Court would in fact have conformed wholly to the system.

It is in particular impossible to avoid the fact that at that time tenders were invited for the sale from intervention stocks not of meat intended for processing but of meat suitable for unrestricted use and that specific tenders were submitted *for that purpose.* However, a price level similar to that which usually applies to special purchases of intervention meat which has been stored for some time and is only suitable for processing could not of course be envisaged for such meat of relatively high value. Furthermore, it must not be forgotten that the Court at the end of its judgment in Case 92/78 only states that the applicant's *tender* is to be reconsidered. Consequently, the Commission must start by considering the amounts which are mentioned in the tender in conformity with the conditions of the invitation to tender. It cannot, on

the other hand, earmark for the award completely different quantities, as might happen after the system had been modified and taking into account solely the capacities of processing undertakings — that is, excluding dealers.

Furthermore, it is not to be overlooked that in the judgment in Case 92/78 the Court acknowledged, on the one hand, that there were no grounds for challenging the *invitation to tender*, that is, a kind of auction intended to achieve the best possible terms and also stressed, on the other hand, that it is right that the processing industry should participate, by means of the "linking" system, in the solution of the problems connected with the sale of surplus beef. It is accordingly clear that with the special arrangements prices may be sought for meat held by the intervention agencies which are above the price level for other sales. That also means — precisely because, as the Commission has shown, there were never any problems in the case of sales of intervention meat specifically intended for processing at a price fixed in advance, even when larger quantities were sold — that the processing industry has legitimately participated in the sale of other meat held by the intervention agencies, that is of meat for which naturally, having regard to the wide range of uses and the shorter period in store, higher prices have to be charged. If it was intended to proceed in any other way the processing industry would be afforded an unjustified dual advantage, namely imports free of levy and the purchase of intervention meat on particularly favourable terms.

Finally, it is also significant that the Court in its judgment mentions in connexion with its direction to the Commission to reconsider the applicant's situation — which if tenders submitted by dealers are disregarded might lead to a minimum price lower than that fixed in the decision — a lower limit which is determinative in each case. The selling price must not be below the price level which usually applies to sales from intervention agency stocks. According to the wording of the relevant paragraphs of the judgment (106 to 110) this certainly cannot mean — precisely because reference is made to a price charged during a specific period — that in this connexion an artificial price, which would still have to be established retroactively having regard to certain specific tenders, would be relevant. But having regard to those aspects of the "linking" system which the Court has approved it seems to be impossible to consider in this connexion prices which were from time to time charged for special sales from intervention stocks effected over a short period — whether for processing, for social purposes or for export. On the contrary, the Court clearly had in mind the price which was charged over a longer period for regular sales of meat from intervention stocks and which, as I have already said, having regard to the range of uses and period in store of that meat, must of necessity be above the price level ruling for special sales. Moreover, there is one piece of evidence in support of this taken from Case 92/78. In that case the Commission was asked about a number of prices (cf. the Registrar's letter of 9 October 1978) and in this connexion no-one doubted that it is precisely the selling price of 1 291 units of account per tonne which is to be regarded as the usual selling price for intervention meat.

In view of the foregoing there is no doubt that the rejection of the applicant's tender for the fourth quarter of 1978 was valid and that consequently reconsideration of the applicant's situation after the annulment of the Commission's decision of October 1978 would secure no advantage for it. Taking into consideration the differing views on

the interpretation of the judgment in Case 92/78 which have given rise to argument in the instant case I would however think that we are not confronted with an interpretation which is so obvious that the applicant's interest in pursuing the proceedings would have to be completely denied, so that the further prosecution of the action cannot therefore be regarded as improper. For that reason there should not be any order as to costs to the detriment of the applicant relating to the period subsequent to the lodging of the reply.

4. In view of the foregoing I can only submit that the application lodged by Simmenthal be declared to be admissible and well-founded. The contested decision must therefore be declared void, but without such declaration being linked to an obligation on the part of the Commission to adopt another decision accepting the applicant's tender. The decision as to costs should accordingly be based on Article 69 (2) of the Rules of Procedure.