manufactured and marketed in other Member States. With regard to such products, the imperative need to protect consumers cannot justify the prohibition of imports in so far as such protection may be ensured by other measures, such as requiring the provision of appropriate information, which restrict trade between Member States to a lesser extent.

In Case 51/83

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Alberto Prozzillo, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

applicant,

v

ITALIAN REPUBLIC, represented by Ivo Braguglia, Avvocato dello Stato, acting as Agent for the purposes of this action, with an address for service in Luxembourg at the Italian Embassy,

defendant,

APPLICATION by the Commission of the European Communities for a declaration under Article 169 of the EEC Treaty that, by restricting the importation of foodstuffs which contain animal gelatin and which are lawfully manufactured and marketed in another Member State, the Italian Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, Y. Galmot (President of Chamber), P. Pescatore, A. O'Keeffe, G. Bosco, U. Everling and C. Kakouris, Judges,

Advocate General: C. O. Lenz
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

1. On 20 October 1978 the Italian Ministry of Health issued a ministerial order (General supplement to the Gazzetta Ufficiale [Official Gazette] No 337 of 2. 12. 1978) concerning permissible chemical additives in the manufacture and conservation of foodstuffs; under that order the use of animal gelatin in the manufacture and marketing of foodstuffs is limited as follows:

for preserved meat products *(carni cotte)*: maximum level of 0.4 %;

for ice-cream: maximum level of 1%;

for confectionery products *(prodotti dolciari)*: maximum level of 1%.

The Commission took the view that that legislation constitutes a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the EEC Treaty since it prevents the importation of foodstuffs containing a higher percentage of animal gelatin which have been lawfully manufactured and marketed in another Member State.

Having already drawn the attention of the Italian Government to this matter, the Commission, by a letter of 24 March 1982, requested the Italian Government, in accordance with Article 169 of the EEC Treaty, to submit its observations. In that letter the Commission relied on the Court's judgments concerning the free movement of goods, in particular the judgment of 20 February 1979 in Case 120/78 *(Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649), and stated that a Member State may not prevent the importation of products which have been lawfully manufactured and marketed in another Member State and that obstacles to movement within the Community resulting from disparities between national laws must be accepted in so far as they may be recognized as being necessary in order to satisfy imperative requirements relating in particular to the protection of public health and the protection of the consumer.

In addition the Commission observed that Article 9 (d) of Council Directive 74/329/EEC of 18 June 1974 on the approximation of the laws of the Member States relating to emulsifiers, stabilizers, thickeners and gelling agents for use in foodstuffs (Official Journal 1974, L 189, p. 1) provides that Article 2 thereof is not to apply to edible gelatin so that, since the field in question has not been harmonized, the aforementioned case-law applies in this case.

Finally, the Commission maintained that the Italian authorities could not argue that the provision of Italian law is justified because its purpose is to prevent confusion on the part of the consumer and to ensure that the market is not distorted by price differences between products containing a high proportion of

ingredients of little value and those which cost more and contain a higher level of nutritive ingredients; although, according to the aforementioned judgment, the requirements of consumer protection may justify a provision restricting the free movement of goods, the national provision in question does not seem to be capable of being justified on those grounds. Moreover, according to the Commission, even if there were such justification it must be emphasized that the Court of Justice has stated in a recent judgment concerning consumer protection that "the provision of suitable information for consumers may easily be ensured by appropriate means, such as requiring labelling showing, for example, the weight and specific composition of an imported product" (judgment of 19. 2. 1981 in Case 130/80, *Kelderman*, [1981] ECR 527).

The Commission therefore regarded the aforementioned provisions of Italian law as being "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" in the product in question so that the provisions of the Decreto Ministeriale of 20 October 1978 limiting the use of edible gelatin in confectionery products to a maximum level of 1% must be regarded as an infringement of Article 30 of the EEC Treaty.

In its reply of 21 April 1982 the Italian Government disputed the Commission's view and contended in particular that animal gelatin fell within the scope of Directive 74/329 by virtue, above all, of its title and of Article 2 thereof.

With regard to the Commission's argument concerning Article 9 of the directive, the Italian Government replied that the effect of that article's providing that Article 2 is not to apply to gelatin is that the prohibition laid down in Article 2 is no longer applicable so that gelatin should be equated with the subtances listed in Annex I to the directive. Consequently, Article 4 of the directive, which provides that the Council is to determine as soon as possible the foodstuffs to which the substances listed in Annex I may be added and the conditions under which they may be added, is applicable to gelatin and therefore in the absence of the harmonizing measures provided for by Article 4 the differences between the national laws in force have to be accepted.

Those observations did not cause the Commission to alter its stance. Whilst it accepted that in principle gelatin fell within the scope of the directive, it contended nevertheless that that substance was excluded, by virtue of Article 9, together with other products, from the restrictions laid down in Article 2, and concluded that the Member States remained free to apply their own rules concerning the use of gelatin in foodstuffs provided they complied with Community law and in particular with Article 30 of the Treaty.

In accordance with the second paragraph of Article 169 of the Treaty, the Commission therefore issued a reasoned opinion on 24 November 1982 and requested the Italian Republic to adopt the measures necessary within one month of notification.

In a letter of 7 February 1983 the Italian Government took note of the reasoned opinion but stated that the observations which it had previously submitted remained valid, that is to say that the question of admitting for consumption in one Member State foodstuffs which did not comply with the law in force in that Member State but which did comply with the law in force in another Member State ought to be discussed and resolved at a political level. The Italian Government also referred to the confusion which might arise as a result of the Commission's request to it, according to which it would have to admit into free circulation products which, in the absence of Community harmonization in the field in question, complied with the rules in force in another Member State but did not comply with the provisions of Italian law. It observed that the Ministry of Health would thereby be forced to adopt the provisions of national law of other States without being able to exercise its own will and its own discretion in the adoption of equivalent measures.

The Italian Government also made it known that with regard to the confectionery products referred to in the Commission's letter of 24 March 1982 the Ministry of Health had itself decided to abolish the restrictions in question independently of the request addressed to it in the reasoned opinion of 24 November 1982; that did not however indicate recognition on its part that it was under an obligation to do so.

2. The Commission did not regard that position as a satisfactory reply to its request addressed to the Italian Government to adopt the measures necessary to terminate the default with which it was charged; it therefore lodged an application at the Court Registry on 29 March 1983. The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, the Court requested the Commission to produce a list of the different rules of national law in Italy and the other Member States concerning the amount of gelatin which the products in question could contain. In response to that request the Commission produced the information concerning the provisions in force in Belgium within the period laid down and concerning the provisions in force in other Member States after that period had expired.

II — Conclusions of the parties

1. The *Commission* claims that the Court should declare that the Italian Republic has, by restricting the importation of foodstuffs which contain animal gelatin and which are lawfully manufactured and marketed in another Member State, failed to fulfil its obligations under Article 30 of the EEC Treaty.

2. The *Italian Republic* contends that the Court should:

Declare that it has removed the restriction on the use of animal gelatin in sweets;

For the rest, dismiss the application;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

1. In its application the *Commission* maintains that Council Directive 74/329/EEC, on the approximation of the laws of the Member States relating to emulsifiers, stabilizers, thickeners and gelling agents for use in foodstuffs, is not applicable in this case because Article 9 (d) thereof provides that Article 2, which limits the use of certain substances, is not to apply to edible gelatin. It therefore follows that the Member States remain free to apply their own rules with regard to the use of gelatin in foodstuffs, provided they comply with Community law and in particular with Article 30 of the Treaty.

With regard to the requirements of consumer protection and fair trading as possible justification for the application of the Italian provisions of law to imported products, the Commission is of the opinion that those objectives may be attained by other means which affect trade to a lesser extent, such as requiring labelling showing, for example, the composition of the product in question (cf. the Court's judgment of 19. 2. 1981 in Case 130/80, *Kelderman*, [1981] ECR 527).

2. In its statement of defence the *Italian Government* observes that according to the Commission's letter of 24 March 1982 the question before the Court relates solely to confectionery products, that is to say to "the importation of sweets containing animal gelatin".

In that respect it states that, as the Commission was notified in a letter of 7 February 1983, the restriction on the use of animal gelatin to a maximum level of 1% has been abolished, that at the present time the use of animal gelatin is permitted "in accordance with normal manufacturing processes" (Article 4 (2) of Title II of the Decreto Ministeriale of 14. 4. 1983, Gazzetta Ufficiale No 120 of 4. 5. 1983, p. 3409) and that therefore, with regard to sweets, the Commission no longer has an interest in bringing an action.

The Italian Government also observes that it nevertheless appears from the reasoned opinion of 24 November 1982 and from the application to the Court that the Commission is challenging all the restrictions on the use of animal gelatin laid down in the aforementioned Decreto Ministeriale of 20 October 1978: that is to say, the restrictions relating to preserved meat products (maximum of 0.4%), ice-cream (maximum of 1%) and other confectionery products (maximum of 1%).

In that respect the Italian Government states that restrictions on the use of animal gelatin do not prevent the importation into Italy of products of the aforementioned type.

It also observes that the Commision has failed to show, either in the course of the preliminary procedure or in its application to the Court, in which other Member States and on the basis of which legislative provisions the products in question (that is to say preserved meat products, ice cream and confectionery products other than sweets) are lawfully marketed even though they contain a higher amount of animal gelatin additive than is permitted by the Decreto Ministeriale of 20 October 1978

The Italian Government maintains that in any event animal gelatin must certainly be regarded as falling within the definition of "thickeners" and "gelling agents" set out in Article 1 of

Directive 74/329 and that therefore it is one of the agents in relation to which, according to the third recital in the preamble to the directive, the protection of public health, the protection of the consumer against falsification and, so far as health protection allows, economic and technological needs are important considerations.

It observes that, in that respect, it is of little importance that Article 9 of the directive provides that Article 2 is not to apply to edible gelatin and that that exclusion explains why edible gelatin is not referred to in Annex I to the directive, which lists the agents whose use in the treatment of foodstuffs must be authorized by the Member States.

The decisive factor, according to the Italian Government, is that edible gelatin is also regarded by the directive as a substance in relation to which the protection of public health and the protection of the consumer against adulteration are important considerations and whilst it is true that the provisions governing the use of edible gelatin, like the provisions relating to the substances listed in Annex I, have not been harmonized yet, nevertheless the absence of harmonization in respect of substances such as edible gelatin cannot lead to the conclusions drawn by the Commission.

On the contrary, according to the Italian Government, the justification for the different national legislation on the use of such substances resides in the fact that they are regarded by Directive 74/329 as substances which require harmonized legislation, in accordance with the third and fourth recitals in the preamble thereto.

It therefore takes the view that the Member States retain their freedom to regulate the matter and that even if, in connection with this case, the national authorities have concluded that recognized requirements concerning the protection of public health do not exist in relation to sweets and have therefore abolished the restriction on the use of animal gelatin in sweets, such reasoning should not be extended, and should not in any case be applied in the abstract, to the other products referred to in the Decreto Ministeriale of 20 October 1978, whether in relation to the protection of public health or in relation to the protection of consumers.

According to the Italian Government, it is therefore necessary to compare the relevant Italian rules with any rules in force in other Member States in order to determine in respect of each product whether the Italian rules are more restrictive and to establish the reasons justifying such greater severity, if there are any.

For the same reason, and still in relation to the products other than sweets referred to in the Decreto Ministeriale of 20 October 1978, the Italian Government considers it premature to examine the proportionality of the national measure and the question whether it might be possible to attain the same objectives by means of, for example, information on the labels.

The Italian Government therefore takes the view that the applicant must give precise information with regard to the existence in other Member States of products which lawfully contain a greater quantity of animal gelatin than that permitted by the Decreto Ministeriale of 20 October 1978.

3. In its reply the *Commission* observes that the Italian Government refers to the partial repeal of the measures impugned;

in other words, it claims to have repealed them only in relation to one confectionery product and not in relation to all the products in which animal gelatin may be used.

With regard to the request made by the Italian Government concerning information relating to the legislative provisions of other Member States which permit the marketing of the products in question notwithstanding the addition of a higher quantity of animal gelatin than that permitted by the Italian rules, the Commission replies that, according to a report published by an association of producers:

All Member States, with the exception of Italy, consider gelatin to be a foodstuff and not an additive and therefore the use of gelatin in foodstuffs is permitted without restriction; and

Many foodstuffs marketed in the Community at the present time contain a higher proportion of gelatin than is permitted by the Italian legislation.

With regard to the Italian Government's view that edible gelatin must be regarded as a "sensitive" substance from the point of view of the protection of public health and the protection of the consumer, the Commission reiterates that such objectives may lawfully be pursued by the Italian Government, provided that no breach of Community law, in particular Article 30 of the EEC Treaty, is committed.

In conclusion the Commission states that the Italian Government amended its legislation in order to take account of the position in the other Member States; that that amendment relates to jellied sweets, which fall within the category of "confectionery products", that the use of gelatin in such products is limited to 1%; that the proportion of 1% is the maximum permitted by the Italian legislation; that at the present time the use of animal gelatin in jellied sweets is no longer restricted; that the health of consumers of jellied sweets is as worthy of protection as that of consumers of other confectionery products, ice-cream and preserved meat products; that, consequently, the amendment of the legislation shows that such rules are not necessary in order to protect public health; that the products whose marketing is prohibited in Italy are lawfully marketed in other Member States; that the prohibition on the importation of sweets containing gelatin shows that the Italian Government intends to apply the rules in question to products lawfully marketed in other Member States and that that is sufficient to create a potential obstacle to intra-Community trade and that therefore the Italian rules in question are illegal.

4. In its rejoinder the *Italian Government* reiterates that the restriction on the use of animal gelatin laid down in the Decreto Ministeriale of 20 October 1978 does not in fact mean that imports into Italy of preserved meat products, ice cream and other confectionery products (other than jellied sweets) are prohibited and that the Commission has not produced any evidence to the contrary in its reply.

With regard to the Commission's response concerning the production of information on those Member States where the products in question are lawfully marketed even if a higher quantity of animal gelatin has been

added than is permitted in Italy and on the relevant legislation of those States, the Italian Government makes the following observations:

(i) The second reply does not provide the evidence and information requested because it merely contains a general statement which is insufficient and which cannot be regarded as a precise point of reference for the application of the Court's case-law relating to Article 30 of the EEC Treaty to the contested Italian measures.

(ii) The first reply is also unsatisfactory on account of its general character since if animal gelatin is regarded as a foodstuff and not as an additive it does not necessarily follow that the use of such gelatin in foodstuffs may be unrestricted.

Moreover, according to the Italian Government, to regard animal gelatin as a foodstuff does not appear to correspond to the relevant provisions contained in Directive 74/329.

In that respect, it observes that animal gelatin is certainly a "thickener" or "gelling agent" within the meaning of Article 1 of the directive and since that article defines "thickeners" and "gelling agents" as those substances which are "added to a foodstuff" for certain purposes referred to therein, it follows that in Article 1 of the directive animal gelatin is not regarded as a foodstuff to which gelatin may be added as a "thickener" or "gelling agent".

It maintains that the same conclusion follows from Article 9 of Directive 74/329, which refers separately to foodstuffs possessing specific properties (paragraph (a)) and to edible gelatine (paragraph (d)). That shows that, for the purpose of the directive, animal gelatin is not a foodstuff and that, furthermore, even if gelatin is regarded as a foodstuff that does not necessarily mean that its use "in foodstuffs" is permitted without restriction.

The Italian Government reiterates its argument that in Directive 74/329 edible gelatin is regarded as a substance in relation to which the requirements of the protection of public health and the protection of the consumer against fraud and adulteration are of particular importance and emphasizes that national measures which regulate or limit the use of animal gelatin in foodstuffs are therefore justified, in the absence of complete harmonization.

It concludes that it is not necessary for the Member State concerned to provide proof of the imperative requirements in relation to the protection of public health or the protection of the consumer because those requirements have already been confirmed and recognized under Community law in such a way until total harmonization has been achieved the Member States remain free to restrict the use of animal gelatin in foodstuffs.

Moreover, according to the Italian Government, the imperative need to protect the consumer with regard to the use of animal gelatin in foodstuffs is obvious.

It states that animal gelatin (which may be manufactured from primary products or from secondary products resulting from the tanning of animal skins) is capable of thickening a quantity of water between 10 and 15 or even 20 times its own volume and that it is therefore necessary to prevent the sale to the consumer as, for example, preserved meats, of products which in fact contain

a very large quantity of thickened water as a result of the unrestricted use of animal gelatin.

It therefore maintains that the only effective remedy against such frauds is to restrict the use of animal gelatin, thereby automatically bringing about a proportionate restriction on the addition of water.

Whilst that certainly applies to preserved meat products, it also applies, albeit to a lesser degree, to ice-cream and confectionery products.

In that connection, the Italian Government maintains that the same result could not be achieved by means of the provision of appropriate information for the consumer. It cites Article 6 (5) (a) of Directive 79/112/EEC of 18 December 1978 (Official Journal 1979, L 33, p. 1) and emphasizes that that provision does not require the labelling of foodstuffs to show the percentages of the various ingredients, but only requires the ingredients to be listed "in descending order of weight, as recorded at the time of their use"; furthermore, in the case of added water that provision provides that the amount of water is to be listed if it exceeds 5% by weight of the finished product but it does not provide that the proportion of added water actually present in the product is to be listed.

In those circumstances the Italian Government considers that the consumer might be confronted with two products which are apparently identical, one of which consists as to 51% of preserved meat and as to 49% of water and animal gelatin and the other of which consists as to 94.4% of preserved meat, as to 5.1% of water and as to 0.5% of animal gelatin.

It adds that, under Article 6 (5) (a) of Directive 79/112/EEC, the labelling of the two products would be required to contain the same information and therefore the consumer would not be informed of the fact that, in the example given, the first product contains only 51% of preserved meat, whereas the second product contains more than 90%. In fact, according to the directive, it is not possible to distinguish between the two products because in both cases the preserved meat is to be indicated as the principal ingredient (whether it amounts to 94.4% of the product or only 51%) and the added water as the secondary ingredient (provided it exceeds 5% of the product, whether it amounts to 49% 5.1% or only thereof).

It follows from the foregoing that, with regard to the protection of the consumer, the national measure restricting the use of animal gelatin was justified and necessary and, with regard to the protection of public health, in particular in connection with preserved meat, the restriction on the use of animal gelatin was also intended to prevent the risk of unlimited use in foodstuffs, to the detriment of public health, of gelatin manufactured for purposes other than as a food product.

In conclusion the Italian Government reiterates that the requirements of consumer protection and of public health must be determined in relation to each individual food product and that even if those requirements were not considered to be imperative in relation to jellied sweets, with the result that the restriction of the use of animal gelatin in such sweets was abolished, it does not follow that the requirements in question do not exist in relation to the other products referred to in the Decreto Ministeriale of 20 October 1978, in particular preserved meat products.

IV — Oral procedure

At the sitting on 3 April 1984 oral argument was presented for the Italian Government, by Ivo Braguglia, Avvocato dello Stato, and for the Commission of the European Communities, by A. Prozzillo, acting as Agent.

The Advocate General delivered his opinion at the sitting on 23 May 1984.

Decison

1 By an application lodged at the Court Registry on 29 March 1983, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that the Italian Republic, by restricting the importation of confectionery products, preserved meat products and ice-cream which contain animal gelatin and which are lawfully manufactured and marketed in another Member State, has failed to fulfil its obligations under the EEC Treaty.

Admissibility

2 The Italian Government points out that the letter of 24 March 1982, by which the Commission invited it to submit its observations with regard to the alleged failure to fulfil its obligations, referred solely to the restriction on the use of gelatin in sweets, whilst the Commission's reasoned opinion of 24 November 1982 and the application to the Court also relate to confectionery products, preserved meat products and ice-cream.

3 It should be recalled that under Article 169 of the Treaty the Commission may bring before the Court an action for a declaration that a State has failed to fulfil its obligations only if that State does not comply with the reasoned opinion within the period laid down therein by the Commission. The Commission does not deliver its reasoned opinion until the Member State has been given an opportunity to submit its observations.

4 It follows from the purpose assigned to the preliminary stage of the procedure under Article 169 that the initial letter is intended to define the subject-matter of the dispute and to indicate to the Member State which is invited to submit its observations the factors enabling it to prepare its defence.

5 As the Court held in its judgments of 17 February 1970 (Case 31/69, *Commission* v *Italy*, [1970] ECR 25) and of 15 December 1982 (Case 211/81, *Commission* v *Denmark* [1982] ECR 4547), the opportunity for the Member State concerned to submit its observations constitutes an essential guarantee required by the Treaty and, even if the Member State does not consider it necessary to avail itself thereof, observance of that guarantee is an essential formal requirement of the procedure under Article 169.

6 It is clear from the documents before the Court that the Commission specified in the letter of 24 March 1982 that the default with which the Italian Republic was charged consisted in the restriction on the use of edible gelatin in the manufacture and marketing of confectionery products. After the Italian Government had submitted its observations on that point the Commission, in its reasoned opinion of 24 November 1982 and subsequently in the application to the Court, enlarged the scope of the complaint made against the Italian Republic by including preserved meat products and ice-cream and thereby acted in breach of its duty to give the Italian Government a fair hearing.

7 That irregularity cannot be regarded as having been cured by the fact that the Italian Republic subsequently submitted observations on the reasoned opinion of 24 November 1982.

8 It follows that the application is only admissible to the extent to which it relates to the use of animal gelatin in confectionery products and for the rest must be dismissed as inadmissible.

9 The Italian Government goes on to contend that the restriction on the use of animal gelatin in sweets was abolished by the Decreto Ministeriale of 14 April 1983 (Gazzetta Ufficiale of 4. 5. 1983). It maintains that accordingly "the Commission no longer has an interest in securing a judgment in this action."

10 In that respect it must be noted that the aforementioned Decreto Ministeriale relates only to sweets, so that other confectionery products are not affected. The Commission therefore retains an interest in proceeding with its action.

Substance

11 It must be recalled that Article 30 of the Treaty prohibits measures having an effect equivalent to quantitative restrictions on the importation of products lawfully manufactured and marketed in other Member States.

12 The Italian Government maintains first that the use of edible gelatin is governed by Council Directive 74/329 of 18 June 1974 on the approximation of the laws of the Member States relating to emulsifiers, stabilizers, thickeners and gelling agents for use in foodstuffs (Official Journal 1974, L 189, p. 1), which, it is argued, allows the Member States complete freedom to adopt the measures they consider necessary without their having therefore to comply with the prohibition laid down in Article 30 of the Treaty.

13 That argument must be rejected. Although edible gelatin is referred to in Council Directive 74/329, it does not follow from any provision of the directive that the Member States are vested with such freedom as to be able to deviate from the prohibition laid down in Article 30 of the Treaty when adopting measures relating to the use of animal gelatin.

14 The Italian Government goes on to contend that the national provisions in question are intended to satisfy imperative requirements relating to the protection of consumers, who might be confused as to the composition of

preserved products if gelatin could be used without restriction in their manufacture.

15 However, as the Court has held on numerous occasions, Member States may satisfy such a requirement by adopting an appropriate measure which impedes trade between Member States as little as possible, for example by providing the consumer with suitable information.

16 The Italian Government also maintains that the national provisions in question are necessary for the protection of public health in view of the danger presented by the unrestricted use of animal gelatin in foodstuffs.

17 In that respect it must be stated that the Italian Government has not produced, in support of its contention, any evidence or information showing that public health was actually threatened by the use of animal gelatin at a rate in excess of the 1% laid down by the contested provisions.

18 It is therefore necessary to declare that the Italian Republic, by restricting the importation of confectionery products which contain more than 1% of animal gelatin and which are lawfully manufactured and marketed in another Member State, has failed to fulfil its obligations under the EEC Treaty.

Costs

19 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs. Where there are several unsuccessful parties the Court is to decide how the costs are to be shared.

20 In this case both parties have been partially unsuccessful. However, it must be noted that the Commission did not formally claim costs in its application.

Furthermore, it is clear from the rejoinder that the Commission proceeded on the assumption that all the Member States apart from Italy permitted the use of gelatin in foodstuffs without restriction, a point which it has not been able to establish in the course of the proceedings; it thus appears that the Commission failed to make a full study of the case before instituting proceedings. Accordingly, the Commission must be ordered, under the second subparagraph of Article 69 (3), to pay the whole of the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that the Italian Republic, by restricting the importation of confectionery products which contain more than 1% of animal gelatin and which are lawfully manufactured and marketed in other Member States, has failed to fulfil its obligations under Article 30 of the EEC Treaty;**

2. **Dismisses the remainder of the application;**

3. **Orders the Commission of the European Communities to pay the costs.**

Mackenzie Stuart Galmot Pescatore

O'Keeffe Bosco Everling Kakouris

Delivered in open court in Luxembourg on 11 July 1984.

P. Heim
Registrar

A. J. Mackenzie Stuart
President