JUDGMENT OF THE COURT
16 MARCH 1977 [1]

Commission of the European Communities v French Republic

'Potatoes'

Case 68/76

1. *Quantitative restrictions — Elimination — Measures having equivalent effect — Concept*
   was Treaty, Article 30)

2. *Agriculture — Transitional period — Expiration — Quantitative restrictions on exports — Measures having equivalent effect — Elimination — Product not subject to a common organization of the market — Derogation — Not permissible*
   (EEC Treaty, Article 34)

1. The imposition of any special formality on intra-Community trade constitutes an obstacle to the free movement of goods by the delay which it involves and the dissuasive effect which it has upon exporters.
2. Following the end of the transitional period, the provisions of Articles 39 to 46 cannot be relied upon in justification of a unilateral derogation from the requirements of Article 34 of the Treaty, even in respect of an agricultural product for which no common organization of the market has yet been established.

In Case 68/76

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Advisers, Sven Ziegler and Jean Amphoux, acting as Agents, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Bâtiment Jean Monnet, Kirchberg,

applicant,

v

FRENCH REPUBLIC, represented by Noël Museux, acting as Agent, and by P. Coste, acting as Assistant Agent, with an address for service in Luxembourg at the office of Georges Sidre at the French Embassy, 2 rue Bertholet,

defendant,

1 — Language of the Case: French.

Application for a declaration that the French Republic has failed to fulfil its obligations under the EEC Treaty, and in particular Article 34 thereof, in that, since 25 October 1975, it has rendered exports to the other Member States of potatoes under subheading 07.01 A III (b) of the Common Customs Tariff conditional upon submission of an export declaration endorsed by the Fonds d'Orientation et de Régularisation des Marchés Agricoles (Fund for the Guidance and Stabilization of Agricultural Markets, hereinafter referred to as 'FORMA'), the issue of such endorsements being subject to delays,

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe and G. Bosco, Judges,

Advocate-General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments put forward by the parties in the course of the written procedure may be summarized as follows:

I — Facts and procedure

The decree issued on 30 January 1967 by the Director-General of French Customs (*Journal Officiel de la République française*, 31 January 1967, p. 1127), as last amended by the decree of 20 October 1975 (*loc. cit.*, 30 October 1975, p. 11212), lays down various procedures in respect of imports and exports. Under Title 2, Chapter 1, Section 2, it contains rules regarding the procedure for the export of goods subject to submission of 'a previously endorsed declaration'. That provision does not provide for the possibility of refusal of that endorsement.

During 1975 a considerable shortage of potatoes occurred throughout the Community, resulting in substantial price increases.

On 22 October 1975, the French Republic informed the Commission that it intended to monitor exports of potatoes, indicating that the relevant formalities would be automatic.

On 25 October 1975, the French Republic published in the *Journal Officiel de la République française* a

Notice to Exporters to all countries of certain categories of potatoes, stating that exports of potatoes under subheading 07.01 A III (b) of the Common Customs Tariff were to be conditional upon submission of an export declaration endorsed by the Fonds d'Orientation et de Régularisation des Marchés Agricoles. The declaration declaration to remain valid for two months.

The notice did not state whether the FORMA might refuse to endorse the declaration in question. In two Information Bulletins issued by the French Ministry for Agriculture, Nos 702 and 703 dated 8 and 15 November 1975 respectively, the notice was stated, on the one hand, to be an attempt to restrain exports and, on the other hand, to be an attempt to 'stabilize' those exports.

Bulletin No 703 provides as follows:

'Following the recent adoption by the Minister for Economic Affairs and Finance of measures for the stabilization of exports of potatoes, representatives of producers and potato merchants had a meeting on 4 November with the director of the FORMA in order to elaborate the new export procedures.

- Each week a quota is to be fixed by the Ministry for Economic Affairs and Finance in respect of the granting of export applications (validity: one month); the size of the quota is to be proportional to the state of the market;
- An interdepartmental committee is to meet every Thursday to apportion this quota amongst the various applicants;
- Priority will be given to exports to countries which are traditional purchasers (Federal Republic of Germany, and in particular the Saarland, Italy, the French-speaking countries of Africa); priority will also be given to traditional exporters and to exporters who have signed storage contracts with the Société Nationale Interprofessionnelle de la Pomme de Terre.'

By telex message of 3 December 1975, the Commission informed the French Republic that it considered the said export procedure to be in the nature of a measure having an effect equivalent to a quantitative restriction. By telex message of 19 December 1975, the French Republic furnished the Commission with information on the export procedure for potatoes, according to which the latter was a mere procedure for ascertaining the intentions of exporters regarding sale.

By letter of 26 December 1975 to the French Government the Commission reiterated the point of view expressed in its previous telex message and requested the French Republic, pursuant to the provisions of Article 169 of the EEC Treaty, to submit its observations to the Commission within a period of twenty days.

By letter of 12 January 1976 the Commission invited the French Government to submit its observations within a period of ten days from the receipt of the said letter.

The French Permanent Representative informed the Commission by letter of 27 January 1976 that

'The Notice to Exporters published on 25 October last is not intended to impose quantitative restrictions on trade within the Community. The export statistics ... show, on the contrary, that sales by France in this sector increased in 1975 in relation to preceding years.

The procedure implemented in France, as in other Member States, is even capable, pending the application of suitable Community provisions, of helping to alleviate the serious shortage at present being experienced within the Community ...'

By letter of 24 March 1976 the Commission delivered a reasoned opinion to the French Republic pursuant to Article 169 of the EEC Treaty, stating that:

'By rendering exports to the other Member States of potatoes coming under subheading 07.01 A III (b) of the Common Customs Tariff conditional since 25 October 1975 upon submission of an export declaration endorsed by the FORMA, and moreover, by not issuing such endorsements without delay, the French Republic has failed to fulfil its obligations under Article 34 (1) of the EEC Treaty.'

The Commission invited the French Republic to take the measures necessary to comply with the said reasoned opinion within a period of fifteen days.

By letter of 22 June 1976 the French Permanent Representative wrote to the Commission as follows:

'The disturbances which became apparent on the market in 1975 as a result of shortages of that product prompted my Government to undertake a statistical check on exports in that field and to maintain traditional patterns of trade.

This exceptional measure, adopted in the absence of appropriate Community provisions, cannot be considered as leading to quantitative restrictions on trade.

It should be noted in this connexion that quantities exported from France in 1975 were greater than those exported in 1974 and that the very substantial diminution in the volume of exports during the first months of 1976 is to be explained not by the effect of the measures implemented on 25 October 1975 but solely by the lack of supplies.

Finally, my Government wishes to point out that traders may at present export without formality ...'

By telex message addressed to the French Permanent Representative on 29 June 1976 the Commission requested the following information:

'Would you kindly indicate to the Commission within a period of three days whether ... the French Government has revoked or taken the necessary steps to revoke (by publication in the *Journal Officiel de la République française* of a subsequent notice) the Notice to Exporters to all countries of certain categories of potatoes, published in the *Journal Officiel de la République française* of 25 June 1975, and state the date upon which that revocation took effect.'

That communication remained unanswered.

On 20 January 1976, by means of Regulation (EEC) No 128/76 (OJ 1976, L 14, p. 6), the Council suspended the Common Customs Tariff duty for potatoes.

On 17 February 1976 by Regulation No 348/76 (OJ L 43, p. 14) on measures to be taken owing to the difficulties affecting potato supplies, the Council stated that the shortage and the consequent risk of an increase in the cost of living

'is aggravated by the export of potatoes to non-member countries, encouraged, in some non-member countries, by import subsidies; whereas it is necessary, in order to ensure that the Community is supplied, that a tax should be imposed temporarily on exports of that product to non-member countries',

provided for the levy of a tax of 25 u. a. per hundred kilogrammes on exports of that product.

By application submitted on 17 July 1976 the Commission brought an action before the Court of Justice pursuant to the second paragraph of Article 169 of the EEC Treaty in respect of the alleged failure of the French Republic to fulfil its obligations.

Having heard 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.

II — Conclusions of the parties

The *Commission* claims that the Court should:

— Declare that by rendering exports to the other Member States of potatoes covered by subheading 07.01 A III (b) of the Common Customs Tariff conditional, since 25 October 1975, upon submission of an export declaration previously endorsed by the FORMA, the French Republic has failed to fulfil its obligations under Article 34 of the EEC Treaty;

— Order the French Republic to pay the costs.

The *French Republic* contends that the Court should:

— Declare that by rendering exports to the other Member States of potatoes covered by subheading 07.01 A III (b) of the Common Customs Tariff conditional, since 25 October 1975, upon submission of an export declaration previously endorsed by the FORMA, the French Republic has not failed to fulfil its obligations under Article 34 of the EEC Treaty;

— Order the Commission to pay the costs.

III — Submissions and arguments of the parties

(1) Whether the French provision is a measure having an effect equivalent to a quantitative restriction on exports

The *Commission* maintains that the French measure constitutes a clear infringement of Article 34 (1) of the EEC Treaty. In this respect it relies principally on the case-law of the Court in *International Fruit Company* v *Produktschap voor Groenten en Fruit* ([1971] ECR 1107), according to which the application to intra-Community trade of a provision which requires, 'even purely as a formality, import or export licences or any other similar procedure' is to be regarded as a measure having an effect equivalent to a quantitative restriction.

The French measure and the measure condemned by the Court in that case differ only in name. A licence and a previously endorsed declaration are in practice the same thing. By their very existence such formalities entail extra administrative work and delays for exporters.

Although it is true that a Member State may legally compile statistics concerning trade in potatoes, it may not do so by means of measures equivalent to quantitative restrictions. The requirement of a previously endorsed export declaration is tantamount to a negation of the right to the free movement of goods, since failure to observe the requirement results in the inability to export.

In fact, the French measure was not a mere formality. The true scope of the procedure is revealed by the information bulletins, which are published weekly under the auspices of the assistant directorate for information, public relations and documentation of the Ministry for Agriculture. The description given in those weekly publications has been confirmed by information which the Commission has been able to obtain from the trade circles concerned.

The statistics showing that exports of potatoes to other Member States increased after the introduction of the measure are to be explained by the shortage and by a sharp increase in demand in certain countries. There is nothing to show that in the absence of the French measure exports would not have been even higher. In fact, those statistics are not relevant (cf. Case 12/74,

Commission v *Federal Republic of Germany* [1975] ECR 181).

Regarding proof of this, the requirements are minimal in the case of rules which are substantially identical to rules already held to be contrary to Article 30 *et seq.* of the Treaty. But the Commission believes that it has shown that the object and effect of the French measure were to restrict exports. If it is true that the monitoring system had a stabilizing effect on exports by restricting the proportion of exports to third countries that surely proves that the system, which is applicable without distinction and in the same conditions with respect both to third countries and to Member States, is capable of having the same restrictive effect on exports to the said Member States or at least to certain of them, in view of the system of priorities according to which export declarations are issued.

The *French Republic* replies that the Notice to Exporters was merely a statistical check which had no effect on trade and, therefore, was perfectly compatible with Article 34. It maintains that the data contained in the information bulletins can quite clearly not take precedence over the official attitude of the French Government as expressed on two occasions to the Commission. In fact the formalities were automatic, their sole purpose being to gain information as to the intention of exporters regarding sale.

The Notice to Exporters was a means of alleviating the effects of the shortage in question and, further, it fell very much within the range of powers granted to the Member States by Regulation No 348/76 of the Council, which in fact enables the Member States to prohibit exports of potatoes to third countries. The very implementation of such a provision presupposes the existence of appropriate measures to control currents of trade. The characteristic features of supply (a large number of producers who are widely dispersed and lack organization) do not allow it to be ascertained *a priori* whether exports are intended for the Member States or for third countries. To contest the validity of the statistical check in question amounts in fact to depriving the said provision of Regulation No 348/76 of its useful effect and therefore to prohibiting any positive action to safeguard intra-Community trade.

The Court of Justice has never considered, and with good reason, that the existence of measures to ascertain economic realities is contrary to Community law. The *International Fruit* cases were concerned solely with import or export licences and other similar procedures. It is quite clear that a system of statistical checks has nothing to do with a procedure akin to an export licence.

The contested Notice to Exporters, as a mere statistical check, therefore in no way contravenes Article 34 of the EEC Treaty. It is sufficient to consider the statistics regarding France's foreign trade in potatoes to realize immediately that the contested measure, far from having actual restrictive effects — whether direct or indirect — on intra-Community trade, permitted the volume of that trade to increase substantially. Indeed, during the period for which the system in dispute was in operation, France supplied its partners with 34 % more potatoes than it had done before the system came into existence and the proportion of exports to the Member States rose from 64 % to 83 %.

In Case 12/74, *Commission* v *Federal Republic of Germany,* the Court stated that 'it is not necessary to show that such measures actually restrict imports of the products concerned but ... that they may merely hinder 'imports [or exports] which could otherwise take place'. According to that judgment it is at least necessary to establish that they *may* constitute an obstacle. In the case under consideration positive proof must

therefore be produced that the notice in question had a potentially restrictive effect on trade in potatoes.

The Commission has not discharged its obligation concerning the burden of proof.

In the opinion of the French Government the Court should rule that since it does not have an effect equivalent to a quantitative restriction the measure at issue is in no way incompatible with Article 34 of the EEC Treaty.

(2) *Justification for the French measure in relation to Articles 38 to 44 of the Treaty*

The French Republic adds a number of comments on this subject and, for this purpose, it accepts, purely for the sake of argument, that the Notice to Exporters in question did indeed have an effect equivalent to a quantitative restriction.

In that case the legal problem is intricate, since it must be determined precisely what law is applicable to an agricultural product which is not yet covered by a common organization of the market.

By proposing the straightforward application of Article 34 to potatoes, the Commission is treating them as an industrial product pure and simple, notwithstanding the provisions of Article 38 (3) of the Treaty.

One difficulty remains, since the application of Articles 39 to 46 of the Treaty presupposes in principle that the Council has adopted the necessary measures of secondary legislation. The difficulty provoked by the Council's delay in adopting the measures provided for by the Treaty has been examined by the Court in Cases 2/74 *(Reyners)*, 33/74 *(Van Binsbergen)* and 48/74 *(Charmasson)*.

It emerges from this case-law that the Council's failure to act does not represent an obstacle to the application of the relevant provisions of the Treaty. This means that not only must the principles concerning the free movement of goods be applied, but also those exceptions to the said principles which are also laid down by the Treaty.

The French Republic notes that in connexion with freedom to provide services, the Court has stated that 'specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good' *(Van Binsbergen,* ground of judgment No 12).

Although the judgment in *Charmasson* merely stated that a product, in that case bananas, which was not covered by a common organization of the market, was subject to the provisions of Article 33, this was not because the Court considered that Title II did not apply to it, but because Article 38 (2) makes reference by implication to the said Article 33.

The legal rules applicable to those agricultural products in respect of which the Council has not adopted any particular measure consist of all those relevant provisions of the Treaty, whether statements of principle or exceptions, as they have been interpreted by the Court of Justice.

The said relevant provisions of the Treaty provide for two sorts of exception to the principle of the free movement of goods.

The first are of the structural kind, that is to say permanent exceptions which are justified by the special nature of the products in question. The French Republic cites:

— The system of producers' organizations instituted by Regulation No 159/66 on the common organization of the market in fruit and vegetables: although it applies to

a stage well in advance of intra-Community trade, this system nevertheless — even if only indirectly or potentially — has effects equivalent to quantitative restrictions;

— The system of production and trade quotas for sugar (Regulation No 3330/74) or of catch quotas (judgment of the Court in Joined Cases 3, 4 and 6/76) which also have an undeniably restrictive effect on trade, as the Court also held in Case 190/73 in relation to quota restrictions on the production of hyacinth bulbs.

Other exceptions to the principle of the free movement of goods recognized by Community law are measures of a conjunctural nature:

— Generally speaking, all intervention arrangements which have the incidental effect of influencing intra-Community trade, if only indirectly;

— Specific action intended to counter a temporary imbalance on the market, as, for example, the supplementary aid granted in respect of colza and rape seed processed in Italy (Regulation No 876/67 of the Council of 20 November 1967) in order to lessen disturbances in one Member State resulting from the institution of the common organization of the market in oils and fats, the legality of which was recognized by the Court in Case 153/73.

Community law has indeed provided, in the case of agricultural products, for the possibility of giving precedence in the event of economic stress to one or other of the objectives of Article 39 over the objective of the free movement of goods: Case 5/73, *Balkan Import-Export* v *Hauptzollamt Berlin Packhof* ([1973] ECR 1091, ground of judgment No 24).

In the case of potatoes, the Court could readily concede that the French Government confined itself to giving preference, temporarily, to two of the objectives of Article 39 — ensuring availability of supplies and ensuring that supplies reach consumers at reasonable prices — over the objective of free movement laid down elsewhere.

No argument may be adduced from the fact that the measures at issue were adopted by France and not by an institution of the Community. The legal criterion applicable to the restriction cannot be deduced from the national or Community origin of the supposedly restrictive measure. Where secondary Community legislation has already been adopted in relation to a given field the Member States may not intervene. It may be said that the precise purpose of secondary legislation is to explain and define in relation to individual cases the very general exceptions laid down by the Treaty. In consequence, if the Member States themselves were to add to those exceptions it might well be thought that they were going beyond what was reasonably laid down by the Council.

The very existence of such secondary legislation also has the effect of bringing about a transfer of powers. If such secondary legislation has established a Community policy the Member States are no longer entitled to adopt concurrent or supplementary measures of intervention: Case 31/74, *Galli* ([1975] ECR 47).

In accordance with the contrary hypothesis, according to which secondary legislation, although envisaged, does not yet exist, the criterion of the national or Community origin of the measure is totally devoid of meaning. Where a certain field is not yet governed by common rules, the Community authorities have no power to take, for example, the necessary measures for conjunctural intervention. No choice of means is possible. Any intervention must of necessity be national.

The Commission's argument leads to an absurd conclusion — treating the potato

as an agricultural or as an industrial product according to whether the measure of intervention is Community or national.

The only valid solution is to accept the legality of national intervention in application of the provisions of Title II.

The judgment in *Van Binsbergen,* which acknowledges that the Member States are entitled to restrict freedom of movement for persons in the case of a 'special condition', clearly demonstrates that the Court itself intended to rule to that effect: the present case forms part of a body of case-law which is already well-defined.

From the point of view of expediency, since the problem concerns those few agricultural products which are not yet covered by a common organization of the market, the practical scope of such a solution is very restricted. It does not therefore represent any real danger to the common market.

On the other hand, from the legal point of view, it involves restrictions on free movement laid down by the Member States in respect of particular cases corresponding to those laid down by the Council in a general way: both remain subject to review by the Court of Justice, whose task it is, as a final court of appeal, to declare whether they are compatible with Title II of Part Two of the Treaty.

In the *Commission's* view it is inherent in the Community legal order that a Member State may not rely upon the absence of Community measures or a failure by the institutions to exercise their powers in order to justify the adoption of internal rules which are contrary to the rules contained in the Treaty.

In particular, a failure to act on the part of the Community institutions cannot be relied upon in support of the introduction and retention of the measure adopted by the French Government since Community provisions were indeed adopted in order to counteract the shortage of potatoes found to exist within the Community and the supply difficulties resulting therefrom.

Following the end of the transitional period, if it appears that special rules for agricultural products are appropriate, they may be adopted only within the framework of the common agricultural policy which was to have been established by the end of the said period at the latest.

But the special rules for agriculture cannot, in principle, affect the rules of the Treaty concerning free movement of goods. Those rules are binding upon the Community legislature itself in relation to the setting-up of the common agricultural policy. They are binding *a fortiori* in relation to national measures which the Member States may be prompted to adopt with regard to agricultural products.

Apart from the case of quite exceptional circumstances, such as the repercussions of monetary upheavals, the agricultural provisions of the Treaty do not allow the Community institutions the possibility of drawing up measures which do not conform to those rules.

The free movement of goods is the basis and the very essence of the single market, which the common agricultural policy is intended to achieve in relation to agricultural products. Intervention arrangements are amongst those measures listed expressly in Article 40 (3) of the Treaty which may be adopted in the framework of common organizations of the market in pursuit of the objectives set out in Article 39. Such measures, which are adopted for the purpose of organizing production and regulating the markets in order to attain the said objectives, can in no way be said adversely to affect the unity of the Community market since, as is expressly

laid down in the second subparagraph of Article 40 (3) of the Treaty, they must adhere to the requirement of non-discrimination as embodied in the principle of free movement within the sphere of the common agricultural policy.

None of the measures of intervention adopted by the Community may be said adversely to affect the free movement of goods within the Community or to constitute a measure having an effect equivalent to a quantitative restriction.

Account should be taken of the stage in the economic cycle at which the Community provisions take effect. Those measures apply at a stage considerably in advance of Community trade. They concern the production stage of the goods concerned, not that of marketing.

Although Community agricultural measures may indirectly influence trade they cannot affect the freedom of that trade within the Community: they do not disturb the unity of the common market, nor do they constitute barriers to intra-Community trade.

Such measures therefore have nothing in common with those whose purpose is to isolate a national market within the common market, which may be said to be the case of the application of a national system involving import or export licences in trade between Member States.

The rules relating to the free movement of goods are automatically and wholly applicable to the actions of the Member States in the sphere of agricultural products both in the case of products which are already covered by a common organization of the market and in the case of those which are not yet so covered. Regarding customs duties and charges having equivalent effect between Member States, Articles 39 to 46 do not derogate in any way from Article 16 of the Treaty and the prohibition on customs duties on exports and charges having equivalent effect has therefore applied to all products with direct effect as from 1 January 1962: Case 63/74, *Cadsky* v *Istituto Nazionale per il Commercio Estero* ([1975] ECR 281).

The same is true of the provisions prohibiting measures having an effect equivalent to quantitative restrictions: Joined Cases 3, 4 and 6/76, *Kramer* ([1976] ECR 1279).

The Commission also cites Case 91/75, *Hauptzollamt Landau* v *Miritz,* concerning Article 37 (4).

The Commission emphasizes the essential difference between national measures and those which the Community is prompted to take in the context of the common agricultural policy. This difference arises not so much from the origin of the measures: it arises from their nature, in view of the objectives to which they may tend and the extent of their field of application. On the supposition that action must be taken to face the risks of disturbance on the market in a product, such as those arising from a shortage or from supply difficulties, it is one thing to take Community measures which are applicable in all the Member States and are intended to tackle the situation as a whole, taking account of the Community markets in the product in question; it is quite another thing to accept that a Member State may adopt national measures which, since they may apply *ex hypothesi* only within the territory of that State, can only solve the difficulties within the context of that national market alone.

The general rules contained in the Treaty on the free movement of goods apply in their entirety with respect to agricultural products, even in the case of products, such as potatoes, which are not yet covered by a common organization of the market: judgment in Case 48/74

Charmasson v *Ministre de l'Économie et des Finances.*

What the Court said in relation to Article 33 in that case also applies to Article 34.

Even in the absence of a common organization of the market in potatoes the Treaty makes available to Member States the means of alleviating existing difficulties: in the present state of Community law on foreign trade, potatoes are amongst those products in respect of which the Member States have retained, pursuant to Article 10 of Regulation (EEC) No 2603/69 (OJ L 324, English Special Edition 1969 (II), p. 590), the power to adopt independently measures restricting exports to third countries. It may be that the application of such national measures of commercial policy could be obstructed by deflexions of trade. There is nothing to prevent the Member States' having recourse to the provisions of Article 115 of the EEC Treaty where the conditions for the application of that article are fulfilled.

IV — Oral procedure

During the oral procedure on 2 February 1977, Noël Museux for the French Republic and Mr Amphoux for the Commission of the European Communities submitted oral observations. Mr Museux summarized the attitude of the French Republic in the form of three questions:

1. Are the Member States empowered to intervene on the market in an agricultural product which is not yet covered by Community rules?
2. Does the Community law applicable to agriculture authorize, at least in certain circumstances, exceptions in relation to Community law?
3. May intervention by a Member State on the market in a product which is not yet covered by a common organization take the form of an exposition or implementation of any law creating such exceptions?

First question: Powers of the Member States

The powers exercised by the Community depend on the existence of common rules in the field in question: Case 22/70, *Commission* v *Council* ([1971] ECR 263). If the Member States themselves were required to refrain from taking action in fields which the Community institutions have not yet tackled, the result would be a complete legal void. Since the existence of an organization of the market does not prohibit the Member States from intervening in areas not covered by that organization it must follow, *a fortiori,* that those national powers remain intact in the event of a total absence of such organization.

Second question: The possibility of exceptions on conjunctural grounds to the normal rules in relation to the movement of agricultural products

The provisions of Title II as a whole may constitute an exception to any rule contained in Title I (cf. Case 17/67, *Neumann* v *Hauptzollamt Hof/Saale* [1967] ECR 441; cf. also the judgment in Case 92/71, *Interfood* v *Hauptzollamt Hamburg* [1972] ECR 242, ground of judgment No 5).

As a general rule, Community law recognizes that it may sometimes be possible to relax rules which it has laid down in other fields where, by reason of exceptional circumstances of a temporary nature, too strict an application of such rules would be detrimental to the common market: see Articles 108 and 109 of the EEC Treaty, as well as the protective clauses contained, *inter alia,* in the major basic agricultural regulations.

This is also the import of the case-law concerning compensatory amounts. Such measures are valid even if they obstruct the unity of the market since, in the circumstances in question, they alone are capable of safeguarding the objectives of Article 39.

The argument of the French Government will be seen in a favourable light if the traditional case-law of the Court, as regards the derogative nature of Title II of Part Two of the EEC Treaty, is applied to the case. It is not contested that the drought which affected Europe in 1975 and 1976 was of an exceptional nature and that its consequences were extremely severe. Here, then, was one of the circumstances recognized by Community law as authorizing the implementation of the derogation contained in Articles 38 (2) and 33 of the Treaty.

It follows from these considerations that the Member States are empowered to intervene in spheres which have not been the subject of Community rules and that the Community law applicable to agriculture authorizes derogations from the normal rules, in particular in circumstances such as those of the present case.

Third question: Can national intervention consist in the implementation of such derogative law?

To a new-comer to Community law such a question must appear paradoxical.

The Member States are empowered to take action in those spheres left untouched by Community rules. In the sphere of agriculture, Community law is specific in that it authorizes exceptions to the principle of free movement, in particular in the case of serious, short-term economic difficulties. Where they are competent to intervene, therefore, the Member States must apply this specific law.

The judgment in the *Charmasson* case was not intended to prohibit all exceptions to the principle of free movement but only such exceptions as are based on the existence of a national organization of the market.

The French Government cites Joined Cases 3, 4 and 6/76, *Kramer,* in support of its argument. In those cases the Court accepted the lawfulness of production quotas where they were justified by very specific circumstances, notwithstanding the fact that those restrictive measures had been adopted not according to a common procedure but by the Member States.

The Court did not adopt the extreme view of the Commission that the Community or national origin of the restrictive measure should be taken as the criterion for its validity. Other arguments and considerations militate in favour of a much more subtle use of such a criterion.

According to the Commission's argument it is only when the Community institutions have drawn up implementing rules that the specific provisions of Title II can come into force; in spheres where those institutions have not yet adopted secondary legislation the basic law applicable is not, paradoxically, that relating to agriculture contained in Title II but that relating to industrial products contained in Title I. Thus according to whether secondary legislation has or has not been adopted the agricultural product in question is treated either, in fact, as an agricultural product or strangely, as an industrial product.

Such a conclusion is not merely intellectually and legally incoherent but is also dangerous in practice. The Treaty laid down specific provisions in the sphere of agriculture precisely because its authors were aware that that sector is particularly sensitive and that the rules of *laissez-faire* and *laissez-passer* must be introduced with caution precisely in order to avoid the serious disturbance which may be caused in particular by short-term economic situations such as, for example, that arising from the exceptional climatic conditions of last year.

The Treaty is an indivisible entity, and the necessarily partial nature of the

case-law of the Court on direct effect has the result in individual cases that some parts of that entity enjoy a particularly well-entrenched implementation, whereas other parts remain in the background, their implementation being, for practical purposes, indefinitely suspended. Furthermore since, by their very nature, the criteria for direct effect are purely formal, the provisions which are most readily enforced are those which are couched in the simplest, briefest, and perhaps most forthright terms, whereas provisions whose wording is more complex, that is to say those regulating more difficult matters, are less readily enforced.

The result of widening the scope of certain rules while allowing others to become curtailed is the emergence of a difference in treatment, as championed by the Commission, and this, like the technique of caricature, provokes fundamental changes of balance between certain basic principles of the Treaty.

The answer to this third question is: 'Yes, but . . .'. It is a positive reply on the principle, since only such a reply is in accordance with the Treaty, in that it alone enables account to be taken of the latter as a whole.

As well as the 'Yes', there is the 'But', since this is not an attempt to cast doubt on the principle of the free movement of goods, but simply to effect a fine adjustment in its application to agriculture and, in this connexion, since in the present case the Council has not adopted measures to this end, it is for the Court to indicate how far and by what means the Member States may exercise the opportunities for derogation offered by Title II.

The area in which the Member States may exercise these exceptional powers might well be that habitually provided for in the case-law of the Court:

— A review of the conclusions drawn from the facts, in the present case a decision as to whether the climatic conditions which led the French Government to take the measure at issue were indeed exceptional;
— A check on whether the measure taken was proportional to the objective in view.

If it concurs with this line of argument the Court should rule that:

— The Member States are empowered to intervene in areas which have not been the subject of Community rules;
— Community law applicable to agriculture authorizes, in certain circumstances, and in particular in the event of short-term economic crises, derogations from the normal rules;
— National intervention may consist in particular in the implementation of such derogative law.

In reply to certain questions put by the Court, Mr Museux, for the *French Republic*, explained that the measure at issue was intended to ascertain the *intentions* of exporters in order to make it possible to encourage Community trade.

The objective of the measure was obviously to enable exports to third countries to be discouraged pursuant to Article 1 (3) of the Community regulation, which invited the Member States to act in that manner (Regulation (EEC) No 348/76 (OJ 1976, L 43, p. 14)) and, for that reason, it was clearly necessary to be able to gain information first of all on the flow of exports and to be able to prohibit them, and it was precisely for this purpose that meetings were organized.

It is true that the information bulletins make no distinction between exports to third countries and exports to Member States, but the reason is that these were internal bulletins, that is to say documents in which the French Government presents measures in such a way as to satisfy certain categories of public opinion and, therefore, the

comments appearing in those bulletins are not to be taken to reflect the official attitude of the French Government.

The statistical objective of the measure was accompanied by the possibility, pursuant to the invitation contained in the Community regulation, of restricting, that is to say, prohibiting, exports to third countries. Prohibitions on export had been issued on various occasions, in a certain number of cases, but it was only exports to third countries which were prohibited.

It was part of the intention of the authors of the measure to be able to prohibit exports to Member States which would finally be sold in third countries. The French Republic is not able to say whether a deflexion of trade in fact took place. If there had been a very appreciable increase in the flow of trade towards a certain Member State and if, at the same time, the French authorities had been able to ascertain, by way of customs statistics, that exports of potatoes to that State had increased to the same extent, the French authorities would have been in a position to draw their conclusions therefrom.

The Advocate-General delivered his opinion at the hearing on 3 March 1977.

Law

1 By application dated 16 July 1976 submitted pursuant to the second paragraph of Article 169 of the EEC Treaty, the Commission has requested the Court to declare that by rendering exports to the other Member States of potatoes covered by subheading 07.01 A III (b) of the Common Customs Tariff conditional since 25 October 1975 upon submission of an export declaration endorsed by the Fonds d'Orientation et de Régularisation des Marchés Agricoles (Fund for the Guidance and Stabilization of Agricultural Markets, hereinafter referred to as 'the FORMA'), the French Republic has failed to fulfil its obligations under the Treaty and in particular Article 34 thereof.

2 As a result of the sharp decrease in the production of potatoes which occurred in northern Europe in 1975 the French Government, by a notice published in the *Journal Officiel de la République française* on 25 October 1975, made exports of potatoes, that is to say, potatoes other than new potatoes and those intended for the manufacture of potato starch, conditional upon submission of the said declaration.

3 In Information Bulletins Nos 702 and 703 of 8 and 15 November 1975, the French Ministry for Agriculture stated that that measure was intended to 'restrain' and to 'stabilize' exports of potatoes and that a quota would be fixed

each week by the Ministry for Economic Affairs and Finance 'in respect of the granting of export applications'.

4 Information Bulletin No 703 outlined, more particularly, a system of quotas, the size of which was to be determined in relation to market developments, priority being given to the needs of several States, including two Member States of the Community.

5 Before adopting the measure at issue the French Republic informed the Commission , by telex message, that it intended to subject exports of potatoes to a 'monitoring' procedure, stating that the action to be taken on completion of the formalities would be automatic.

6 The Commission considered that the French measure was intended not only to monitor sales at the Community frontier but also to monitor intra-Community trade and that, furthermore, the French Republic was in fact introducing the measure as a procedure for authorization and the imposition of quota restrictions, and the Commission therefore commenced proceedings under Article 169 of the Treaty.

7 In its reply to the Commission's reasoned opinion, sent to the French Government on 24 March 1976, the latter stated that, as regards exports to Member States, the measure was no more than a mere statistical one.

8 In its defence before the Court the French Republic has claimed that, since it amounted to a statistical check, the measure in question cannot be said to be a measure having an effect equivalent to a quantitative restriction on exports between Member States within the meaning of Article 34.

9 It is claimed that the content of the information bulletins, which were intended for 'internal use', that is to say to 'satisfy certain categories of public opinion', cannot take precedence over the official attitude of the French Government which was that, as regards intra-Community trade, the action to be taken on completion of the formalities was to be automatic.

10 However, these comments in no way answer the question of the objective scope of the measure adopted by the French authorities.

11 There is nothing in the Notice to Exporters and the bulletins to indicate that exports to Member States were to be treated differently from exports to third countries.

12 As regards the latter, the French Government does not contest that the measure at issue had the object and effect of restraining exports.

13 On the contrary, the title of the measure at issue: 'Notice to Exporters to all countries of certain categories of potatoes' could not enable those concerned to conclude that only exports to third countries would be affected.

14 As the Court stated in its judgment of 15 December 1971, in Joined Cases 51 to 54/71 *(International Fruit Company NV and Others* v *Produktschap voor Groenten en Fruit* [1971] ECR 1107), apart from the exceptions for which provision is made by Community law itself Articles 30 and 34 preclude the application to intra-Community trade of a national provision which requires, even purely as a formality, import or export licences or any other similar procedure.

15 Accordingly, even if in connexion with intra-Community trade the FORMA granted its endorsement without delay and for all quantities requested, and even if the object of the measure was merely to ascertain the intentions of exporters , it must be held to be a measure having an effect equivalent to a quantitative restriction on exports.

16 Indeed the imposition of any special export formality constitutes an obstacle to trade by the delay which it involves and the dissuasive effect that it has upon exporters.

17 In the alternative, the French Republic claims that, in the absence of any appropriate Community measures and in respect of an agricultural product which is not yet covered by a common organization of the market, the Member States may adopt measures in derogation from the common rules, that is to say, the rules on the free movement of goods pursuant to Article 39 *et seq.* of the Treaty, provided that such derogative measures are of a conjunc-

tural nature, are proportional to the legitimate objective pursued and are subject to review by the courts.

18 The French Government states that although Article 34 prohibits all measures having an effect equivalent to quantitative restrictions on exports the measure which it has adopted should not be considered solely in the light of Article 34.

19 Since potatoes are agricultural products, as referred to in Articles 38 to 46 of the Treaty, it is claimed that the measure at issue is justified pursuant to the exceptions which may be made on the basis of those articles to the rules concerning the free movement of goods.

20 Article 38 (1) provides that the common market shall extend to agriculture and trade in agricultural products, while paragraph (2) states that, save as otherwise provided in Articles 39 to 46, the rules laid down for the establishment of the common market shall apply to agricultural products.

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

22 Therefore the absence of such an organization does not amount to a legal vacuum which the Member States are entitled to fill, since Articles 39 to 46 of the Treaty remain applicable.

23 It is precisely because of the transfer of powers to a Community and the fundamental purpose of that transfer that, following the end of the transitional period, problems such as that with which this case is concerned may be solved solely by Community measures drawn up in the interests of all producers and consumers within the Community.

24 It must, therefore, be recognized that by rendering exports to the other Member States of potatoes covered by subheading 07.01 A III (b) of the

Common Customs Tariff conditional since 25 October 1975 upon submission of an export declaration previously endorsed by the FORMA, the French Republic has failed to fulfil its obligations under Article 34 of the EEC Treaty.

Costs

25 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

26 The defendant has failed in its submissions.

On those grounds,

THE COURT

hereby:

1. **Declares that by rendering exports to the other Member States of potatoes covered by subheading 07.01 A III (b) of the Common Customs Tariff conditional since 25 October 1975 upon submission of an export declaration previously endorsed by the Fonds d'Orientation et de Régularisation des Marchés Agricoles the French Republic has failed to fulfil its obligations under Article 34 of the EEC Treaty;**

2. **Orders the defendant to pay the costs.**

Kutscher Donner Pescatore

Sørensen Mackenzie Stuart O'Keeffe Bosco

Delivered in open court in Luxembourg on 16 March 1977.

A. Van Houtte — Registrar

H. Kutscher — President