OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 28 MAY 1963[1]

Summary

Mr President,
Members of the Court,

The applicant, a German commercial partnership engaged in importing southern fruits, submitted to the Court on 27 July 1962 for examination a Decision of the Commission of the European Economic Community relating to customs duties.

1 — Translated from the German.

We know that the Government of the Federal Republic made a written request to the Commission on 16 June 1961 for authorization to suspend in part the general external tariff for fresh clementines. The application was amended orally with a view to establishing an ex-tariff heading clementines (rate of duty 10%).

The Commission however refused the request in writing on 22 May 1962. This Decision gives rise to the present proceedings.

The purpose of the action is twofold:

— On the one hand the applicant seeks annulment of the above-mentioned Decision.

The applicant, with the consent of the Commission, declared in its second pleading that supplementary conclusions in connection with this request were irrelevant; these conclusions sought:

— a declaration that the defendant is obliged to authorize the Federal Republic of Germany to suspend the application of the customs duty in force for clementines for the period from 1 January to 31 December 1962; or

— an immediate new ruling on the request of the German Federal Republic of 16 June 1961 for partial suspension of the external customs tariff for clementines having regard to the view of the law taken by the Court as to the interpretation of the Treaty on the question of suspension of customs duties; and

— as a subsidiary point, a declaration that the defendant is obliged to grant the Federal Republic of Germany a customs quota of up to 11 000 metric tons at a rate of 10% for imports of clementines from third countries.

— On the other hand the applicant asks that the Commission be ordered to pay compensation amounting to 39 414.01 DM. This claim is in substitution for the original claim in the application for a declaration of liability for compensation. It was first submitted in the memorandum of 18 January 1963 in which the loss was calculated at 43 265.30 DM. In the oral proceedings of 2 May 1963 the applicant reduced the amount of the loss and at the same time, as a subsidiary point, maintains its original application for such a declaration

The Commission asks that the application be dismissed in its entirety as inadmissible and in any event as unfounded.

Moreover as regards the proceedings it must be said that the applicant, with the consent of the Commission, has withdrawn a request for the appearance of the Federal Republic of Germany. Apart from two applications for the adoption of an interim measure (of 8 August and 4 December 1962) both of which were dismissed by Orders of the President of the Court (of 31 August and 21 December 1962) the proceedings have this special feature that the Commission has asked the Court to give a preliminary ruling on the admissibility of the application under Article 91 of its Rules of Procedure. After the observations of the applicant had been lodged asking for dismissal of this application and alternatively for the decision on admissibility to be reserved until the final judgment, the Court decided on 24 October 1962 to reserve its decision on the preliminary objection until the final judgment.

If it falls to me today to give my opinion in this case, then naturally, as is to be expected from the course of the procedure, questions of admissibility are to be found in the forefront as regards both the application for annulment and the claim for compensation. In every system of judicial protection, and consequently too in that of the European Treaties, these questions are of such importance that

the Court must examine them of its own motion independently of whether they are argued by the parties. Their clarification will make an essential contribution to determining the scope of the judicial protection open to private individuals under the Treaty.

I — Admissibility

1. *Application for Annulment*

The application is based on the second paragraph of Article 173 of the EEC Treaty. It is there provided that:

'Any natural or legal person may, under the same conditions'—that is, as set out in the first paragraph— 'institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

The Commission has examined in detail the various requirements of this provision in writing and orally and has concluded that the applicant has no right of action.

(a) The Commission first raises the question whether 'other persons' within the meaning of the second paragraph of Article 173 are the Member States or only private individuals to whom a decision is addressed.

In my opinion there is no occasion to construe the words quoted in a narrow sense.

Member States too are persons, that is to say legal persons governed by public law and as such fall within the definition of the second paragraph of Article 173 which is in very general terms. In this connection I would recall to mind the provisions of Article 34 of the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community governing the right to intervene. There all interested parties including the Member States are included under the description of 'natural or legal persons'. In the same way the Member States, institutions of the Community and 'any *other* legal person' are mentioned in Article 39 of the Protocol on the Statute of the Court of Justice of the European Economic Community as being entitled to institute third party proceedings. I would also point out that in other provisions of the Treaties the Member States are *expressly* made the subject of special rules if there is an intention to except them from the general provisions as, for example, in Article 41 of the ECSC Statute of the Court of Justice or Article 37 of the EEC Statute of the Court of Justice. In this connection I would finally mention that for directives, that is to say measures which prescribe in a binding manner a given objective for a Member State but leave the choice of the *modus operandi* to its domestic bodies, the right of action of private individuals is expressly excluded.

From the omission of any differentiation in the second paragraph of Article 173 the first conclusion to be drawn is therefore that the right of private applicants to contest decisions addressed to Member States is not excluded in principle. Moreover there appears to be no basic reason for any such limitation of the right of action. The fact that in the case of a decision addressed to Member States interests not within the category of private interests may be at stake is the least convincing. Apart from the fact that in a concrete case, say for example, where it is left to a Member State to regulate a given matter, the private interests of individuals may well be paramount, a concurrence of private and public administrative interests frequently appears in administrative procedure and constitutional jurisdiction. Little would be left of the right of action of private individuals if it were confined to cases in which

sovereign interests played a subordinate rôle.

It might be asked moreover why only the sovereign interest of *Member States* should require special treatment but not the sovereign interests of other legal persons governed by public law, for example, the constituent states in a federal state, or municipalities. Under the second paragraph of Article 173 these too may be persons to whom a decision is addressed. For the purpose of such decisions however, the Commission does not apparently consider that a limitation of the right of action is required.

Finally, consideration of judicial protection possibly obtained through the initiative of the Member States can lead to no different conclusion because the present case shows us just how inadequate this method is if private individuals have no means of compelling their own State to take legal proceedings. Just as under the ECSC Treaty which contains no special features in its legal system and on which there exist clear decisions (cf. the judgments on special rates for national transport[1]), so too under the EEC Treaty the right of action of private persons cannot be limited in principle when decisions addressed to Member States are before the Court.

(b) In the second place the Commission raises the question whether the phrase 'a decision addressed to another person' should not be read in exactly the same sense as the phrase 'a decision, which although in the form of a regulation'; the consequence would be that a right of action would lie only if the contested Decision were only *ostensibly* addressed to the Federal Republic.

I consider that this reasoning too is misconceived. If the Rome Treaties, so far as the right of action of private persons is concerned, primarily turn on the difference between decisions and regulations and exclude regulations in principle from a right of action, then there is good reason to permit an examination of the true legal nature of a measure and to allow a right of action so far as that measure has only the outward form of a regulation and not the material content. To apply the same thinking to the *addressing of decisions,* that is to a group of legal measures comprising unequivocal individual measures, would involve attributing to the authors of the Treaty an intention to narrow down the right of action to an excessive degree. On this basis only the person to whom an administrative measure is addressed would have a right of action and every person not addressed would need to show that the measure in fact applied to him whilst the actual addressee could only be regarded as a nominal addressee.

If this argument be applied to administrative measures which benefit one person while burdening another, or to the authorization of associations, that is to cases in which in current administrative practice the measure is frequently not addressed to all persons to whom on general principles it must admittedly be of concern, then it is at once shown to be untenable. I am satisfied that no such limitation could have been intended and shall therefore exclude it from consideration.

(c) The Commission makes the further point that the contested Decision really belongs to the sphere of legislation. The question at issue is the grant or refusal of an authorization to amend national laws since under German law customs duties may be suspended only by way of amendment of tariff headings already established by legislation. Accordingly the right of action of private persons must, it is claimed, be excluded as in the case of regulations.

This line of argument, I must confess,

1 — Joined Cases 3 to 18, 25 and 26/58 (Rec. 1960, p. 367); 27 to 29/58 (Rec. 1960, p. 503).

seems attractive but takes me back to the view I took in Case 18/57 where the authorization of a commercial arrangement under the law relating to associations was under consideration. At that time I thought it proper in determining the nature of the legal measure to take account of the repercussions upon purchasers affected by the commercial arrangement and so came to accept that it was a general decision. The Court did not follow my suggestion. The fact that the decision of the High Authority related to concrete decisions on certain undertakings was conclusive for the Court[1]. Therefore as regards the undertakings making the application the decision must be said to be an individual one. Such a decision cannot however at the same time apply as a general one relating to third parties.

The attitude of the Court has appeared still more clearly in other cases. I have in mind the proceedings about the German miner's bonus ('Bergmannsprämie') which was introduced by an association of undertakings. Although the Court emphasized that in a case under Article 35 of the ECSC Treaty the High Authority's decision of refusal must be classed in the same way as the decision sought from the High Authority[2] and although the High Authority was called upon to issue a decision under Article 88 of the Treaty in relation to a Member State and so to bring about the alteration of a national law, the Court acted on the basis that the subject matter of the action was an individual decision because a special measure taken by a particular Member State was to be considered. The application was therefore declared to be admissible.

I am of the opinion that this decision of the Court will be of importance as regards the Rome Treaties because I see no difference in this respect in the systems of the Treaties. Whereas in the ECSC Treaty the issue is one of the difference between general and individual decisions, under the Rome Treaties the all-important factor in determining the right of action is the difference between regulations and decisions, both of which are defined in Article 189 of the Treaty. If however the legal nature of a measure is paramount in the investigation (that is, its legal validity and its binding nature in law and not its further legal effects, though these admittedly may be material in the question of legal interest) the Court will find itself unable in the light of its previous decisions to regard the Decision of the Commission as an individual measure addressed to a particular natural or legal person (in this case a Member State) containing rules governing an individual legal relationship, a clear and particular question. In this assessment the Court may be fortified by the fact that in German administrative law similar acts—for example the authorization of municipal bye-laws by the supervisory authority—are likewise treated as individual measures which may be contested.

In the present case, however, it cannot be denied that there is a right of action on the basis of the legislative nature of the contested Decision.

(d) A further requirement of the Treaty for the admissibility of an action for annulment is a direct interest. The applicant considers this condition satisfied because the Decision is of 'some importance' for it. The applicant regards the criterion of directness as no more than a measure of the strength of the interest. In my view however this is to miss the point of its significance. It must be understood in a particular way from the system of the Treaty and the structure

1 — Rec. 1958–1959, p. 112.
2 — Rec. 1961, p. 34.

of the Community order. An essential feature of the Community is—if you like—its federal structure, that is to say, a situation in which the Community institutions are raised above national courts with powers which in part have direct effects in the sphere of the Member States but in part are limited and in realizing specific aims require the co-operation of Member States. The criterion of direct effect must take account of this structure in the organization of legal protection. It thus indicates a clear and positive expression in concrete form of the requirement of legal protection laid down in general form for many legal systems as a pre-condition for bringing an action.

In this respect the Commission is right in its observation that directness is lacking where a decision of the Community Executive lays down an authorization or obligation. Here the measure taken by the Commission is followed by action on the part of the Member State concerned and only this action produces direct effects for individual natural or legal person. This relationship comes out most clearly in the case of authorizations. Only when the Member State avails itself of the authorization, which is left to its discretion, are legal effects created for the individual. The decision of the Member State is therefore an essential link inserted in the chain of various legal measures betwen the decision of the Commission and the concrete legal effect falling on the individual.

It is true that the question does arise whether the facts are to be judged in a different way when an authorization is *refused* because here an existing set of rules whose amendment was sought remains intact without the need for any further measure.

In my view this factor can lead to no other result. It must not be overlooked that we have here a sphere of national discretion because it depends upon the decision of the Member State concerned whether it pursues its original aim by legal process or submits to the Commission's decision the statement of reasons which it may find convincing. It must be borne in mind too that even if a person succeeds in having the decision of the Commission set aside and instead obtains a positive decision, its implementation depends upon the exercise by the state of its discretionary power which, however, in view of altered circumstances or of a change in political attitudes after a certain time has elapsed, is not necessarily to be exercised in the same way as when the quota procedure was set in train. This fact of itself precludes any direct connection in the relations between the Community institutions and private persons concerned when customs matters under Article 25 are at issue.

Therefore the application for annulment by the firm Plaumann & Co. appears to be inadmissible.

(e) We must however also examine the question whether the contested Decision is of *direct concern* to the applicant, a matter which equally constitutes a condition of admissibility.

The Commission takes the view that only such persons are individually concerned as are affected by a decision by reason of their individual nature or of special circumstances attaching to them.

The applicant observes in this connection that it is affected in its own legal sphere by the refusal of its application for a quota but that the Treaty does not require that it *alone* should be affected.

If an attempt is made to define the concept of individual interest it must first be remembered that the Rome Treaties exhibit a special feature which is foreign to the ECSC Treaty. In the latter it is the *legal nature* of a contested measure which is paramount in fixing the limit of the right of action.

So an individual decision affecting the applicant is sufficient.

Since in the Rome Treaties account is already taken of the legal nature of the measures in the definition of the right of action by contrasting regulations and decisions, there must have been an intention, as the Commission rightly infers, to limit further by the criterion of 'individual concern' the right of action by reference to *legal effects*.

From a consideration of these effects in the present case it is clear that, so far as individual interest is concerned, the Commission's decision of refusal exhibits the same character as an authorization for suspension of customs duties involving an amendment of the national customs laws.

From the viewpoint of legal effects, which must be left out of account in determining the *legal nature* of the contested measure but are all important as regards the question of individual interest, it cannot be denied that there is conformity with legislative measures. All those wishing to import clementines in the course of the year 1962 are concerned. It may be that at the end of this period the number of those concerned was relatively small and easily ascertainable. That cannot however be decisive. The important thing is that the concern does not arise from the individuality of particular persons but from membership of the abstractly defined group of all those who wished to import clementines during the period in question. Their class is not ascertainable at the time of *issue of the decision* because, of its nature, it is constantly changing, though in practice only to a limited degree.

If however the legal effects of the decision are the same as in the case of a legislative measure against which individuals cannot bring an action, it cannot be admitted that there is any need for legal protection from the point of view of individual concern.

(f) To sum up then, I must advise that the application for annulment be dismissed as inadmissible.

2. *Claim for compensation*

The claim for compensation is based on the second paragraph of Article 215 of the EEC Treaty, that is on that provision whereby 'in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'.

If the present proceedings lead us for the first time to study this provision, our first task is to bring to light the basic concept of the second paragraph of Article 215 which sets forth the duty laid upon the Court. This is the concept as I understand it:

A series of conditions for bringing actions founded upon administrative liability is set out in the second paragraph of Article 215 itself. If it is left to the Court to develop by its decisions other essential conditions, namely the question of illegality—infringement of a right, breach of a protective law—and the question of blame, then reference to the national law of a Member State, which clearly does not appear self-evident from statements in legal works, can only mean a reference to the national *law on administrative liability* and not to the general law on compensation, and it cannot be taken in the sense of a close attachment to the details of the dogmatic elaboration of law on the administrative liability in the various States but only in the sense of an orientation on the underlying principles whereby the *measure* of the responsibility of the administration is assessed in the national sphere. In comparative law it is generally found that even closely related legal

orders frequently go their separate ways in their legal mechanisms for solving a problem, yet on the whole the results are the same. The same applies to administrative liability.

I am therefore of the opinion that the Court is relatively free under the second paragraph of Article 215 in the dogmatic assessment of individual problems but that in the results of its investigation into the law concerning the legal liability of the Community it must remain within a framework common to the laws of the Member States.

Viewed in this way the second paragraph of Article 215 loses much of the danger and novelty which at first sight seem to attach to it. It requires, so far as the law on administrative liability is concerned, basically no more than that activity in the creation and comparison of laws which the Court, faced with the many loopholes in Community law, has constantly to use in resolving many legal questions both of procedure and substance. Above all however in the understanding of the rule relating to administrative liability in the Rome Treaties it is clear that the Court is not confronted with wholly uncharted territory. The general provisions regarding administrative liability contained in the ECSC Treaty (Article 40), looked at closely, do not provide a more precise system than the wording of the second paragraph of Article 215. Indeed the concept of wrongful act or omission ('faute de service') arises there. But in the cases with which it has had to deal hitherto the Court has, rightly I think, avoided a close reliance on French law and, taking into account the legal systems of other Member States, so formulated the essential features of the law on administrative liability as if there were a guideline for ECSC law similar to the second paragraph of Article 215. So we shall be able to obtain useful indications from the previous decisions of the Court on the ECSC Treaty for dealing with applications concerning the liability of the administration under the Rome Treaties.

As in the case of the application for annulment the Commission has put forward a number of considerations in connection with the claim for compensation which are clearly intended to establish its inadmissibility.

(a) The first objection relates to the formulation of the conclusions, the content of which, I said at the outset, has been amended on several occasions in the course of the proceedings.

It is a matter for consideration how these amendments are to be viewed and in particular whether they constitute inadmissible amendments of the application.

The written Rules of Procedure of the Community tell us nothing with regard to the possibility of amending an application or of the limitations on so doing. So far as I can see the Court has hitherto ruled only once on the admissibility of amendments to an application when in Case 17/57 it was argued that the application should be considered as made under Article 35 if it could not succeed under Article 33 of the ECSC Treaty. The Court then ruled that the nature of the application could not be altered in the rejoinder[1]. The special feature of the case however lay in the fact that Article 35 of the ECSC Treaty provides for a preliminary procedure which had not been observed in the actual case. This decision cannot therefore help us today.

Without going into the question what is the proper course in proceedings for annulment in which, unlike a claim for compensation, observance of a time limit for bringing the application

1 — Rec. 1958–1959, p. 26.

has a part to play, I should like to assume that in cases of official liability of the administration not too rigid criteria should be applied with regard to the amendment of conclusions. A glance at national law will fortify us in this view. In German administrative legal procedure, for example, an amendment of the conclusions may readily be made if the purpose of the application and the basic facts remain unchanged and only an extension or limitation is involved[1]. Moreover a switch from an action for a declaratory judgment to an action for performance is not considered to be an amendment requiring authorization. Finally an amendment of an application involving an amendment of the subject matter, that is to say either of the purpose or of the ground of the application, can be made without the consent of the opposite party if the Court deems it of assistance in the case.

If we allow ourselves to be guided by these concepts in the present case, and I believe they exist in similar form in French administrative law[2], then we come to the following conclusion.

In the process of changing from a request for a declaratory judgment to a request for performance, connected with the fact that, contrary to what is stated in the application, the compensation was calculated for the whole of the year 1962, the amendment of the subject matter of the case, the claim for compensation being in substance already at issue, consisted only in quantifying the damage and extending the factual part of the grounds of the application to cover a wider period of time.

Thus the only new feature was a complementary statement as to the facts which, if a parallel be drawn with the application for annulment, could be equated with the additional admissible arguments within the framework of the submissions already made. There can be no objection to such an extension, and this applies *a fortiori* as regards the reduction of the amount of damages in the oral proceedings and the request to retain as a subsidiary point the submission for a declaration. The latter is logically something less than the application for performance.

The only fundamental objection of the defendant to this procedure lies in the reference to a limitation of its rights of defence which it could only exercise in a single pleading if the conclusions were extended in the reply. It can be settled essentially by saying that the Commission has no absolute right to make its observations in two pleadings, as is the case, for example, where the applicant itself renounces its right to lodge a reply. In any event we cannot say that the defendant in the present case has been restricted in its defence.

I am inclined to accept therefore that the alterations in the conclusions relating to the claim for compensation do not run into any procedural objections but in so saying I am not implying any definite judgment on the *admissibility* of the various conclusions.

(b) A second objection by the Commission relates to the fact that the claim for compensation was presented simultaneously with and parallel to the application for annulment. The Commission expressly states that, in raising this objection, it does not wish to go into the general problem of the relationship between the application for annulment and the claim for compensation which both relate to the same legal measure but to raise the particular point that in the present case both are directed to the same end.

1 — Koehler: Kommentar zur Verwaltungsgerichtsordnung, 1960, Notes II and III to §91.
2 — Gabolde: Traité pratique de la procédure administrative contentieuse, 1960, No 310.

By the annulment of the contested Decision the applicant seeks to replace the refusal of the request made by the German government with a positive decision the final result of which would be a refund by the German government of the customs duties paid consequent upon the refusal to suspend them. The applicant is claiming the same amount by way of compensation from the Commission, and yet is not proceeding on the basis that this is a subsidiary claim; thus the applicant, if successful in both applications, would receive more than its due. It follows that the claim for compensation must be considered as inadmissible.

I am of opinion that the Court too has no occasion in the present case to deal generally with the problem whether an applicant can at one and the same time ask for the annulment of a measure with all its legal consequences and compensation for the damage allegedly caused by the measure. I will only point out that I do not consider the joining of two conclusions in a single action as inadmissible in principle if, for example, it were clear that the measures to be taken by the administration after the annulment would not lead to a complete restoration of the *status quo*.

As regards the particular difficulties in our case it is of course not feasible to seek to attain the same end twice. It must be asked however whether the conclusions in the present case are in fact formulated in this way.

The procedural relationship concerns only the applicant and the Commission. Even if we assume that the proceedings end in the applicant's favour in the annulment of the contested Decision, leaving the Commission no choice but to give a wholly positive decision on the request for a quota, this of itself sheds no light on the attitude of the German government after it had received the authorization. It could decline to apply the authorization retroactively after the end of 1962. As the applicant has pointed out, it certainly declines to refund customs duties already paid. In other words the refund of the duties paid by the applicant is not the inevitable consequence of an affirmative judgment in the annulment proceedings. But this fact prevents our regarding as *inadmissible* a claim for compensation raised simultaneously against the Commission and seeking similar financial compensation. Whether for the reasons mentioned above such a claim might possibly not be ready for adjudication at the same time as the application for annulment because the effects of the decision for annulment must first be awaited, or whether for this reason it should be regarded as unfounded, is another question with which we need not concern ourselves in the present context.

(c) A third objection by the Commission concerns the particulars given of the claim for compensation, that is the full statement of the factual and legal requirements of the claim put forward. This must be done in the application as provided by Article 19 of the Statute and Article 38(1) of the Rules of Procedure of the Court.

In its pleadings the applicant in essence relies on the fact that the Decision of the Commission is contrary to the Treaty and abuses its own discretionary power and states that the compensation is calculated on the extra customs charge including turnover tax which it was unable to pass on to its customers. In the oral proceedings the further point was made that the Commission was in breach of its duty of care, had committed a patent infringement of the Treaty and was guilty of a serious misuse of powers.

The Court procedure requires only a

brief statement of the grounds on which the application is based and not an exhaustive treatment of all the questions. However I do not see how the few observations made by the applicant could meet the requirements in force. I am particularly doubtful about those conditions of its claim which relate to the existence of a *wrongful act or omission.* My doubts are not removed by the objection that the evolution of EEC law on administrative liability is only in its infancy. The applicant must have known that the mere illegality of an administrative measure cannot suffice for the purpose of administrative liability, since otherwise an application for annulment and an application alleging administrative liability could be formulated on the same grounds despite differing legal consequences, something never contemplated by the Treaty in view of the different limitations on rights of action. Even if a detailed examination of comparative law for the purpose of ascertaining the general principles of law on administrative liability could not be expected of the applicant, knowledge of German law and perhaps also of French law should have led the applicant to conclude that a claim founded upon administrative liability can lie only if a *fault* or wrongful conduct in the sense of 'faute de service' is proved. In its summary statement however there is no reference whatsoever to this necessary element in an application founded upon administrative liability.

Furthermore the plaintiff should have shown at least in broad outline how its calculation of the damages is made up, including an explanation of how its business would have fared if the duties had been reduced, for it is not self-evident that in this event it would have retained as profit the whole increase in the customs charges.

The applicant should therefore have set out the composition of its profit margin in past years and the state of the market in 1962 which allegedly did not allow it to pass on the increase in the customs charges. The ascertainment of such essential facts cannot be left over for a possible preparatory inquiry the useful effect of which cannot be assessed because the offers of proof made do not make clear what light the evidence tendered may shed.

To sum up, the written and oral observations of the applicant do not meet the requirements in force for a properly substantiated application and this obliges the Court to dismiss the claim for compensation as inadmissible.

II — Substance

In a few words I will however go into the substance of the case and show that the claim for compensation cannot be considered as well founded.

1. First there arises the question what part the attitude of the Federal Republic plays in the assessment of the claim founded upon administrative liability.

In the examination of the questions of admissibility I have already emphasized that in decisions on customs duties under Article 25 (3) of the Treaty, whether concerning an authorization or refusal to suspend customs duties, private persons cannot be directly affected, because there lies between them and the Commission an area of discretion in economic policy reserved to the national government which has the legal power to influence fundamentally the course of the events which are alleged to be causing damage.

If the Commission refuses a request for a quota or for the suspension of customs duties, the Member State alone and not its subjects has a right of action. Whether it avails itself of that right or not is equally a matter within its political discretion. We must not overlook this fact within the framework of admini-

strative liability. In relation to the subjects it seems that not only the Commission but the State making the application bears the responsibility for customs duties not being amended. But then the question arises whether the responsibility of this Member State does not outweigh that of the Commission. I incline to the view that this is so and that consequently a claim for compensation by a private individual is precluded, because the position submitted to us differs only insignificantly from that in which a Member State contrary to the wishes of its subjects, fails to make a request for a quota or does not avail itself for specific reasons of an authorization issued to it. No one would however suggest that a claim for compensation exists against the State in question by reason of such an attitude.

2. There is a second consideration in the same vein. As I have shown, the application for annulment must be dismissed as inadmissible *inter alia* because no *individual interest* is affected. The decision of the Commission, even if it is not as such to be treated as falling within the ambit of legislation, must by reason of its *legal effects* be equated with a legislative measure. This inevitably leads us to the question whether actions founded on administrative liability are permissible in such cases or whether they fail for want of some *special* damage. My view is that the Court should here apply the principles applicable for example in French administrative law in respect of 'actes-règles'. According to the consistent decisions of the Conseil d'Etat an action based on a wrongful act or omission cannot in principle be founded on legislative measures which give rise to a general and impersonal legal position to be decided on abstract criteria[1]. A breach of this rule can only be contemplated under very stringent conditions, namely when abnormal specific and direct damage is caused, that is to say, when a special loss, affecting only individuals, is established.

In our case the position is that the refusal to suspend the customs duties affects equally all importers of clementines carrying on import business in the Federal Republic. Moreover it affects the consumer too if the additional charge for customs duty is, in whole or in part, passed on to him; this possibility cannot be excluded. So there cannot be any question of the applicant's suffering special damage and for this reason the applicant's claim for compensation ought to be dismissed.

3. Finally we must investigate whether under Community law a claim for damages is well founded only if Community institutions have infringed rules laid down for the protection of the applicant.

The Commission has pointed out that under German law a claim for compensation by reason of a wrongful act or omission is recognized only if a law exists which serves to protect the interests of the applicant. It has shown that similar views exist in Belgian law. As regards French and Luxembourg law it must be remembered that a claim in respect of a wrongful act or omission requires the infringement of a right vested in the individual, that is to say, of a special legal situation ('situation juridique particulière'). Above all however reference must be made to the decisions of the Court on Article 40 of the ECSC Treaty, that is to say, to that general rule of administrative liability which corresponds to the rule in the second paragraph of Article 215.

In Cases 9 and 12/60[2] the Court brought out the point that a breach of law alone is insufficient ground for a claim for damages: it must be shown

1 — Duez–Debeyre, Droit Administratif, 1952, pp. 458 et seq.
2 — Rec. 1961.

that a rule which has been infringed is intended to protect precisely the interests of the applicant or those of the group to which the applicant belongs. Without going more closely into the facts of this case, I should like to emphasize that I consider the legal principle then applied extraordinarily useful for sensible definition of the scope of the law on compensation. That principle should thus be accepted for the purpose of EEC law as well. An examination of the rules for its legal protection invoked by the applicant in support of the application is therefore appropriate.

No indications can be obtained from Article 25(3), that is from the rule forming the immediate basis for the contested Decision. If on the other hand we look at the considerations set out in Article 29 by which the Commission must be guided when taking decisions under Article 25(3), the following picture emerges.

Under Article 29(a) account must be taken of the need to promote trade between Member States and third countries. This requirement repeats a theme set out several times in the Treaty on the need for a policy of world-wide trade by the Community and Member States. Further it must take account of the special needs of individual States in regard to trading policies. It cannot be said however that this provision is intended to promote the commercial interests and advantages of importers; an indirect reflex action in their favour is the most that can be said.

Subparagraph (b) provides for the developments in the competitive capacity of undertakings established in the Community. It is not for us to consider this because it was never submitted in the proceedings that the Commission had wrongly left this aspect out of account and was thus guilty of a wrongful omission.

Subparagraph (c) of Article 29 deals with the requirements of the Community as regards raw materials and semi-finished goods. It is intended therefore, as is part of subparagraph (b), to protect the interests of consumers and those engaged in processing but not those of traders which in the nature of things are not necessarily the same.

Finally subparagraph (d) of Article 29, which deals with the need to avoid serious disturbances in the economies of Member States and to ensure rational development of production, does not come into the picture because the applicant is not concerned with production and has not claimed that serious disturbances have been caused as a result of the refusal of the quota.

Moreover it must not be forgotten that the individual criteria of Article 29, as has been repeatedly stressed in other proceedings, cannot all he considered in the same way having regard to their diverse objectives; rather must a balance of the various interests put forward be sought. Even if the protection of traders' interests could be read into one subparagraph, this is not to say that these interests must take precedence in a given case.

Article 25(3), read in conjunction with Article 29, can therefore in no way be advanced as a proper rule for legal protection in an action founded on administrative liability in order to found a claim for damages by the applicant importer.

On this ground also the claim for compensation must be dismissed.

III—Summary and Conclusion

So we come to the conclusion that this application cannot succeed. It is admissible in so far as it seeks the annulment of the contested Decision; it is likewise inadmissible, or at least unfounded, in so far as it seeks compensation.

I am therefore of opinion that the application should be dismissed. Under the provisions of our Rules of Procedure the costs of the proceedings must be borne by the applicant.

ORDER OF THE PRESIDENT OF THE COURT
31 AUGUST 1962[1]

In Case 25/62 R1

PLAUMANN & Co., Hamburg 1, Fruchthof, assisted by Harald Ditges, Marienburg, Von-Groote-Strasse 7, with an address for service in Luxembourg at the offices of Mr Audry, Fédération des commerçants, 8 Avenue de l'Arsenal,

applicant,

v

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, represented by Hubert Ehring, Legal Adviser to the European Executives, acting as Agent, assisted by Professor Ernst Steindorff of the University of Tübingen, with an address for service in Luxembourg at the offices of Henri Manzanarès, Secretary of the Legal Department of the European Executives, 2 Place de Metz,

defendant,

Application for the adoption of an interim measure in Case 25/62 (refusal to authorize the Federal Republic of Germany to suspend in part customs duties on 'clementines, fresh' as regards third countries).

Issues of fact and of law

On 20 July 1962 the applicant lodged at the Court Registry an application for the annulment of the Decision SIII 03079 of 22 May 1962 addressed to the Government of the Federal Republic of Germany whereby the Commission of the EEC rejected the request of the Federal Republic of Germany for authorization to make an 'ex tariff heading clementines' (customs duty at 10%).

On 16 August 1962 the applicant lodged at the Court Registry an application for the adoption of the following interim measure:

'a declaration that the defendant is required to authorize the Federal Republic of Germany to suspend provisionally, to the extent of 3%, subject to security being given, the application of the customs duty in force

— Language of the Case: German.