THE COURT

composed of: A. M. Donner, President, Ch. L. Hammes (Rapporteur) and A. Trabucchi, Presidents of Chambers, L. Delvaux, R. Rossi, R. Lecourt and W. Strauß, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

hereby orders:

1. **The decision on the objection raised by the defendant is reserved the final judgment;**
2. **The costs are reserved.**

Luxembourg 25 June 1964.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 16 JUNE 1964[1]

Mr President,
Members of the Court,

The applicants are commercial partnerships under German law. They buy and sell cereals and fodder in Germany and abroad. On 1 October 1963, in order to make forward imports of maize from France for January 1964, they lodged duly completed applications for import licences with the body for the importation and storage of cereals and fodder (Einfuhr- und Vorratsstelle für Getreide und Futtermittel) at Frankfurt am Main (the German intervention agency within the meaning of the Law of 26 July 1962, passed in order to implement Regulation No 19, BGB1 I, page 455). These licences were to be granted at a zero rate of levy, which was the rate

1 — Translated from the German.

calculated on 30 September 1963 for 1 October 1963 by the Einfuhr- und Vorratsstelle, on the basis of the free-at-frontier price fixed by the Commission in its decision of 27 September 1963 for the period from 1 to 6 October 1963. A notice to this effect had been posted in the offices of the Einfuhr- und Vorratsstelle to bring this to the attention of interested parties at the time when the applicants in the present cases applied for licences.

After the licences had been applied for, that is to say, during the afternoon of 1 October, the notice was taken down before closing time at the Einfuhr- und Vorratsstelle and replaced by the following communication:

'The notices on the rates of levy for France/Saar are temporarily withdrawn by reason of the amendment of the free-at-frontier prices by the Commission of the EEC at Brussels.'

As has been learned during the course of the proceedings, on 1 October 1963 the Commission fixed a new free-at-frontier price for imports of maize from France; it was applicable as from 2 October.

Although the applicants had fulfilled all the required conditions for the grant of the import licences at the time when their requests were put in, the licences were not issued. The applicants received letters dated 3 October 1963 from the Einfuhr- und Vorratsstelle, which informed them that their requests could not be accepted; no import licence could be granted.

The letters referred to an announcement which had appeared in Bundesanzeiger No 185 of 3 October 1963, according to which until further notice requests for import licences for maize lodged as from 1 October 1963 with the Einfuhr- und Vorratsstelle would not be granted because on 1 October 1963 the Federal Government had taken protective measures under paragraph 9 of the German Law implementing Regulation No 19 of the Council of Ministers of the EEC, and also under Article 22 of the Regulation. This announcement does not say at what time exactly the Federal Government took the protective measures, nor does the announcement state by which Ministry or Federal Government Office it is made. According to what the Commission has said during the course of the proceedings, the protective measures were notified to it by the Federal Government on 1 October 1963 during the course of that day.

On 11 October 1963 the Official Journal of the Communities published, at page 2479, a decision of the Commission addressed to the Federal Republic authorizing the Federal Government, by virtue of Article 22 of Regulation No 19, to maintain until 4 October 1963 inclusive the protective measures notified to the Commission. The decision states that these measures consisted in suspending as from 1 October 1963 the issue of import licences for maize etc. coming from Member States and third countries. The decision is dated 3 October 1963.

Such are the facts relevant to the external course of the events which are important in this dispute. As regards the other elements of fact, I shall be referring to the detailed report of the Judge-Rapporteur and also to the legal texts, regulations and administrative notices to which the parties have drawn attention during their arguments. Furthermore I shall have occasion, when I examine the case from the legal point of view, to bring other facts in this complicated matter.

The commercial undertakings mentioned above have brought an action against the decision of the Commission of 3 October 1963. They request the Court to annul the decision or, alternatively, to annul it in so far as it authorizes the Federal Republic to maintain certain protective measures consisting in the rejection of the requests of the applicants for the grant of import licences.

Without taking up a position as to the substance of the case the Commission replied with a pleading under Article 91 of the Rules of Procedure of the Court of Justice. In it the Commission set out its views on the rights of the applicants to bring these actions and requested the Court to give a preliminary ruling that the applications are inadmissible.

The applicants replied with a pleading which is also limited to the question of admissibility. They seek a declaration that the applications are admissible or that the objection of inadmissibility should be reserved for the final judgment.

It was on this limited subject-matter that the parties presented their oral arguments at length during the hearing on 28 May 1964. The Commission attempted to defend generally its point of view that decisions authorizing Member States to maintain protective measures may not be called in question by actions brought by individuals. Similarly the applicants set out to defend their opinion to the contrary. Furthermore they laid particular stress on the particular features of this case the subject-matter of which is difficult to grasp both from the legal point of view and from the point of view of the facts. They did so in order to carry the discussion to the question of the substance of the case, by which I mean the matter as a whole, because it was only then that it would be possible to give a sound judgment on the way in which the applicants were concerned and on the admissibility of the applications.

My opinion will in the main follow the arguments of the applicants and of the defendant.

Legal consideration

The decisive problems of interpretation derive from the second paragraph of Article 173 of the Treaty. Since the other criteria do not present any difficulties, the problems are mainly concerned with the question whether the decision of the Commission is of direct and individual concern to the applicants.

I have had occasion to discuss these two conditions in detail in Case 1/64 (*Glucoseries réunies* v *Commission of the EEC*). But the exposition of the facts in the present case makes it clear that we are dealing with a special legal situation, for which a mere reference to the explanations given in the Glucose case will not be sufficient. Let us therefore now consider what are the individual problems which now arise.

I — Are the applicants directly affected?

Here, briefly summarized, is their line of argument on this point. The most important thing for the purposes of the second paragraph of Article 173 as in the case of the German law of administrative procedure is whether the *rights* of an applicant have been infringed, and whether a relationship of cause and effect can be proved between the contested administrative measure and the alleged infringement of the right. It may be said that there has been a direct infringement if the harm which has occurred was intentional and 'directed'. This was the case as regards the decision of the Commission to grant an authorization, because its intention was to give definitive approval to the refusal to grant import licences. No further action to that end was necessary on the part of the Federal Republic.

From this point of view the reference to certain principles of German administrative procedure seems to me to be open to criticism at the start. In my opinion it should be rejected just as the attempt to proceed to an interpretation of the Treaty with the help of concepts from French law ('intérêt direct') was rejected in Case 1/64, even though it is understandable that national parties

might wish to invoke concepts which are familiar to them.

In rejecting the said reference it is not even the difference in wording used which is decisive (Article 173: 'of direct and individual concern'; paragraph 42 of the Code of Procedure before the Administrative Court 'to suffer injury to his rights'), even though naturally one cannot simply disregard the text of a provision when one interprets it. Two other considerations, which result from the legal context of the Treaty and from the Community order, are much more important. First it is certain that the Treaties of Rome have restricted the right of individuals to bring actions to a greater degree than has the Treaty of Paris. Under the latter, at least according to the first proposition of the second paragraph of Article 33, it is enough for an individual decision to concern the applicant, whereas the Treaties of Rome require the decision to be of direct and individual concern to him. Although the ECSC Treaty, in view of the wording which I have just mentioned on the right to bring an action, makes it possible to conceive of an interpretation with the aid of principles such as those which have been evolved for German administrative procedure, this does not seem possible as regards the intentionally more restricted wording of Article 173.

Secondly, and I have made this point several times previously, the adjective 'direct' in its qualifying capacity on 'concern' should be given a sense which corresponds to the structural elements characteristic of the Community. These elements are far from having the same importance in national law. In saying this I have in mind the multi-tier system of legal action which characterizes the Community, and which becomes apparent in the fact that a Community institution can bring about legal effects at national level, not directly, but only with the help of government action, in other words in the fact that the institutions of the Community are not allowed to control national matters directly, as the Commission has made very clear. In my opinion the meaning of the criterion of 'direct concern' is most clearly seen when this concept is interpreted by reference to this fundamental characteristic of the Community.

That, contrary to the applicants' opinion, it cannot be the function of this criterion to refer to causality seems to me to go without saying. A causal relationship can equally be direct and indirect. The question what was the cause, which naturally is also an important element when an action is brought against an administrative measure, should rather be taken up when the primary question as to the infringement of an interest is examined.

This is why I adhere in principle to the view that at least when a Community measure, intended to bring about legal effects with regard to the citizens of the Community, requires the intervention of *discretionary acts* at national level to produce those effects, the existence of a margin of discretion at national level and the freedom of national authorities to follow or not to follow the route opened up by the Community institutions do not allow it to be said that the measures taken by the Community are of direct concern to the citizen of the Community.

When the applicants on the other hand refer to German administrative procedure where the practice is to allow the citizen who is ultimately affected to bring an action against internal instructions addressed to subordinate authorities before an implementing measure is taken, this does not add up to much when set against the argument which I have just developed. Internal instructions create legal obligations, and directly alter the legal situation because they must be carried out. This is why they cannot be compared with a situation

where Community authorities give *authorizations* to act and leave it to the national authorities to decide whether to make use of them or not. The applicants' reference could at the most be of some interest when treating a question which does not require examination here, namely whether private individuals have the right to bring an action when some Community authority addresses *mandatory decisions* to Member States.

For the same reason I do not see how the arguments of the applicants, according to which the adjective 'direct' simply means that there must be an intentional 'directed' legal effect, whether adverse or not, could override my opinion. They say that it is also possible to talk of an intentional and 'directed' result when several authorities collaborate to bring it about by successive actions emanating from different tiers. In my opinion this attempt at interpretation fails when faced with a situation where national authorities have full discretion to decide whether or not to bring about a consequence which the Community authorities have simply rendered possible by giving an authorization beforehand.

However it is true that in this case, as has been carefully pointed out during the course of the proceedings, the decision of the Commission *came after* the legal measure adopted at national level, and thus had not preceded it as in Case 1/64. In the latter case it was only after permission had been given by the Commission that the national protective measure was taken. Furthermore the applicants take the view that it is not possible to speak of an *authorization* in the present case. What in fact has to be considered is the Commission's definitive confirmation of a national measure, and this is comparable to a decisive definitive act issued after the close of proceedings for interim relief.

Must we therefore ask whether all this requires us to judge the present case differently?

This does not seem to me to be necessary when the principle of the matter is looked at. First of all, contrary to what the applicants say, it seems to me certain that Article 22 of Regulation No 19, while it does not speak expressly of an authorization, could not have meant anything else when the Commission does not raise an objection against a protective measure taken by a State on its own initiative, that is to say, when the Commission allows that measure to remain in force. The procedure under Article 22 is in fact clearly modelled on certain protective procedures which are known to the Treaty itself. This is proved by comparing it with Articles 73, 109 and 115 if the general rule under which previous authorization is necessary be disregarded. In a procedure where speed is essential, the Member State which is threatened takes the necessary measures in its own discretion and takes its decision independently (according to Article 22 of Regulation No 19, when the carrying out of measures for setting up the common organization of the market in cereals exposes the national market to serious troubles by reason of imports). The measures are notified to the Commission and the Commission forthwith decides 'whether they shall be retained, amended or abolished'. The word 'shall' in Article 22 could admittedly lead to the view that an order of the Commission is always involved, even for the maintenance of protective measures, and that this order, for its part, excludes any discretionary power on the part of the State. However such an interpretation would not be reasonable and would therefore be inaccurate. In the first place the word 'shall' obviously refers to 'amended' and 'abolished', and thus to cases where there in fact exists an order of the Commission, whereas for 'retained' the word 'may' must logically be written in. An examination of the

protective clauses mentioned in the Treaty supports this. For examples it can be concluded from Article 73 of the Treaty that nothing else can logically be meant than an authorization when the Commission, after being informed of the protective measures, does require their amendment or abolition. Otherwise the power of intervention given to the Council of Ministers by the first paragraph of Article 73 as regards *authorizations* given by the Commission would disappear, which would not be logical. (Cf. commentary by Wohlfarth-Everling-Glaesner-Sprung, note 5 on Article 73).

Thus it may safely be said that if the Commission acts in a positive way under Article 22 of Regulation No 19 it does so by way of an authorization, and so cannot exercise ultimate control over the legal fate of the measure taken, and make them its own. Government measures are always involved, and the responsibility for them, according to national law, can only belong to the Government authorities.

Looking at the matter in another way, I think that there is no reason for giving an affirmative answer to the question whether the direct nature of the interest must be recognized in such a case because the authorization granted by the Commission is not followed by an implementing act on the part of the Government. The manner in which various measures concern a person must be determined according to the substance of their content and not according to the order in which these acts take place in time. The decisive factor is that between the individual and the Community measure the autonomous exercise of governmental powers are subject to the State's discretion. The citizens of the Community are in a direct relationship with the governmental measure but not with the confirmatory measure taken by the Community institution, which can at any time lose its importance for the individual if the competent national institutions decide to abolish the protective measures authorized or even to revoke them. When the position is properly understood, the measure resulting from the will of the State is therefore the true origin of the measure adopted, and its continuance constitutes the direct basis of the injury to the interests of the applicants.

This becomes particularly clear if one disregards the aspect peculiar to this case which consists in the fact that the authorization given by the Commission was only intended to remain valid for a few hours at the time when notice of it was given, and that therefore it was almost exclusively directed at something which had already occurred. If one takes the case of an authorization applying not only to protective measures already taken but which is intended to be valid for a certain amount of time in the future, there should be no doubt that the act of authorization, as regards that part of it which is directed towards the future, is equivalent to a prior authorization such as, for example, the one mentioned in Article 226 of the Treaty.

The decisive part played by the measure resulting from the will of the state appears clearly here, for it is easy to imagine that for some reason the state to which an authorization has been given might decide of its own volition to stop applying the protective measures authorized even earlier than the expiry of the time limit on the validity of the authorization (this is what also happened here, for the German authorities gave orders for import licences to be issued again starting on 4 October, although the authorization given by the Commission covered 4 October).

But to my mind it would be artificial, when considering the question of interest, to split a protective measure whose legal content is always the same in relation to the acting Member State into a part relating to the past and another valid for the future.

Thus it seems to me to be certain that the decision of the Commission is not of direct concern to the applicants, if one only takes into consideration the external course of events and rules governing jurisdiction to which reference has been expressly made.

However it is true that in their application and in their written reply to the objection of inadmissibility as well as in the oral proceedings the applicants have made further comments, as regards both the facts and the law on the admissibility of the application, which we cannot ignore. If these explanations were to be confirmed, the legal assessment as it has appeared until now would have to be altered. They refer to the motives and the objectives which led the German and European authorities concerned to act between 1 and 3 October. According to the applicants, mistakes had manifestly been made in running the organization of the market in cereals. These mistakes led the Commission to fix incorrect prices, and from this there resulted an incorrect calculation of the rates of levy by the Government or by the administrative authorities of the Federal Republic of Germany. To rectify these administrative mistakes, say the applicants, the safeguard procedure in Article 22 of Regulation No 19 was brought into action, and with a degree of retroactive effect. This leaves room for the supposition that the national and supranational authorities which took part in issuing the rules governing the situation were in agreement amongst themselves on the measures to take, and possibly also on the need to make changes in the legal situation as it existed on the morning of 1 October by choosing a legal basis and a legal form which were not appropriate to the situation with which they were faced.

The second applicant uses the following words:

'The defendant, by its decision of 3 October 1963, thus used its discretionary power for a purpose other than that laid down by Article 22 (1) and (2) of Regulation No 19 (a case of misuse of powers).'

If this was what really happened, if in fact, and the pleadings contain offers of proof on this point, the impression were confirmed that we are faced with an intentional collaboration between national and supranational authorities in the nature of binding agreements having an effect on the applicants, the question of direct interest would thus have to be examined again, because the examination which I have just given is based essentially on the proposition that the Government action was free and autonomous and that the Commission did no more than give its consent to that action after an objective and conscientious scrutiny of it.

At the present stage of the proceedings, when in principle all arguments about the substance of the matter are excluded, it is not possible to go into these problems in any depth. But there is reason to expect that a comprehensive written and oral discussion of the whole of the subject matter of the case, after the proceedure took its normal course, would bring more light to bear on these problems. In other words we are faced here with a factual situation in which it may well be that a discussion of the substance could bring with it decisive information bearing on the question of admissibility.

The necessary consequences should be drawn from this observation. Thus, taking into account the special facts of the case, and in the interests of legal certainty, no judgment should be given, even on the question of admissibility, until the case has completely run its course in accordance with the normal procedure.

II — At all events, I shall not at this point break off my examination of the questions at issue because of the doubts whch I have just demonstrated. Instead

I shall go on to consider the question how the procedural requirement of individual interest should be assessed.

To reply to this question I shall start with the wording adopted by the Court in Case 25/62. It says this: 'Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed'.

In the opinion of the Commission the requirements quoted above are not fulfilled in this case because what counts when considering this question is the legal nature of the national measure which has been authorized. Its legislative character cannot be denied because the halt on imports which was ordered applied to all those who contemplated importing maize during the relevant period.

On the other hand the applicants assert that they were singled out from many persons who might possibly be affected and distinguished individually within the meaning of the judgment in the Plaumann case because on 1 October they lodged duly completed applications for import licences in compliance with the decision of the Commission of 27 September 1963, and with the notice of the Einfuhr- und Vorratsstelle of 1 October 1963 and because they had entered into contract of purchase with French exporters.

If one chooses to examine the events at issue from a formal point of view, nothing can be said against the attitude adopted by the Commission. In fact the Commission stated its view on the justification of a national measure which applied not only to the past but also to the future at the moment when it was taken. Thus in this sense it could cover an indeterminate and incalculable number of situations, just as a legislative measure. To be added to this is the fact that the Commission's decision was not limited to ratifying things which had already happened, but also covered the future, even though for a very short time. So it matters little whether one puts the national measure at the centre of the examination, which might be warranted by the fact that the interest results directly from this measure and only indirectly from the Community measure, or whether one only starts with the Community act. In both cases it seems that the only effects on individuals are those of general application which, looked at from the point of view of the right to bring annulment proceedings, constitute the opposite of individual legal effects.

However it would be wrong to proceed no further than this consideration. If a proper view is taken, the essential factor for the purpose of assessing the kind of interest involved, be it individual or general, is the moment when the decision to authorize was taken, because its legal effect are predominant in annulment proceedings, and not the moment when the governmental measure was adopted because this only acquired its own binding legal force when it was authorized by the Commission. If one considers the Community measure in this way, that is to say, the measure which, although taken on 3 October 1963, only became effective when it was communicated to the Member State concerned during the course of 4 October, it must be admitted that it produced effects of general application in appearance only. Between the moment when it came into force and the moment when its validity expired, the amount of time was in fact so short that in reality it should only be considered as a measure exclusively relating to the past: the Commission's measure is essentially limited to declaring past conduct to be unobjectionable. Looked at from this angle, the decision of the

Commission, so far as its legal effects are concerned, is obviously akin to collective decisions as understood in German administrative law. These are classed as administrative measures, because it is ultimately possible to ascertain which persons they concern.

To the above I must add this: during the course of the proceedings we have heard it said that the national measure itself had retroactive effect. It was taken during the course of the afternoon of 1 October, but it was to apply to all requests lodged since the beginning of that day. There are circumstances in which this fact need not have any legal importance if a measure of general application were involved which, apart from its effect as regards the future, was also intended to cover matters which lay in the past. However a special aspect of this case lies in the fact that, shortly after the very moment when the protective measure with retroactive effect was taken, the Community legal situation altered. Although in effect, until the evening of 1 October a zero rating applied in Germany for imports of maize from France by virtue of the free-at-frontier price fixed by the Commission, on the evening of 1 October the Commission fixed a new free-at-frontier price with effect from 2 October, by amending its decision of 27 September 1963, and this price had repercussions on the rate of levy applicable as from 2 October. In other words all those who may have lodged requests for import licences after 1 October would have had their requests examined in the light of a legal situation different from the one which applied to importers who had already lodged their requests on 1 October and who were subject to the rate of levy in force on that day. Thus the national protective measure takes on an entirely special aspect: it seems to have been adopted mainly in order to prevent the requests lodged on 1 October from being granted.

Therefore in order to judge the right to bring an action the decisive question emerges as follows: are the applicants sufficiently distinguished individually in that on 1 October 1963 they lodged requests for import licences which ought to have been granted in accordance with legally valid and well-determined conditions concerning the levy, but which later ceased to be valid? In my view the fact that other importers could also have lodged requests on 1 October does not justify giving a negative answer to this question. We know from these proceedings that the request was tied to certain and even burdensome legal effects (the obligation to import and payment of a bond). As a general rule the making of contracts of purchase with exporters followed directly. From this point of view it does not seem to me arbitrary to make a distinction between importers who fulfilled all the conditions for the issue of import licences on 1 October, as follows from their requests, and those who only come into consideration as potentially concerned. This is why I think that the applicants can be credited with an individual interest. This may be because of 'attributes peculiar to them' or, if not, it is at least because of the 'special circumstances' (as the Plaumann judgment says), for these circumstances obviously constituted the main reason for the protective measure taken. I urge this conclusion even though a total of more than twenty requests reached the Einfuhr-und Vorratsstelle and although, therefore, a lot of undertakings were in the same situation as the applicants. In fact the number of persons concerned should only, if ever, be a factor if it starts at a considerably higher figure.

III — In all, however, taking into account the considerations on the question of direct interest, I would have to suggest that the application be dismissed if the Court did not see fit to decide to obtain a clearer view of the facts. I cannot definitely say whether this

would result in an unacceptable limitation on the right of the applicants to legal protection. At all events some of their objections on the procedure under Article 177, which the Commission has relied upon so heavily, do not seem to me to be completely unfounded.

As regards the possibility of bringing an action for damages against the Community, the fears of the applicants are certainly understandable. This is because it seems from the judgment in the Plaumann case that an action for damages only lies when the Community measure which has been criticized has been annulled. I feel, however, that the last word has not yet been said on this question. It seems to me that such a requirement does not exist under the law of all the Member States. But, looking at this matter properly, the question of the relationship between actions for damages and applications for annulment, just like all other features of the law governing administrative liability, must be decided 'in accordance with the general principles common to the laws of the Member States' (the second paragraph of Article 215 of the Treaty).

IV — My conclusion is as follows:

In the first place I suggest that by virtue of Article 91 (4) of the Rules of Procedure the Court should not now adjudicate upon the Commission's request for a preliminary ruling, but shoulld only do so after the whole case is pleaded, because I expect that this would yield additional and clearer information on the question of direct interest.

If the Court chooses not to follow this course, the applications should be dismissed as inadmissible in their entirety, including the alternative conclusions, and the applicants should be ordered to bear the costs.