JUDGMENT OF THE COURT
1 JULY 1965[1]

Alfred Toepfer and Getreide-Import Gesellschaft v Commission of the European Economic Community[2]

Joined Cases 106 and 107/63

Summary

1. *Measures adopted by an institution—Applications by individuals against a decision addressed to another person—Decision of direct concern to them—Concept*

   (EEC Treaty, Article 173)

2. *Measures adopted by an institution—Applications by individuals against a decision addressed to another person—Decision of individual concern to them—Concept*

   (EEC Treaty, Article 173)

3. *Agriculture—Common organization of markets—Cereals—Protective measures taken by Member States—Powers of the Commission—Character—Exercise by way of decisions directly concerning the interested parties*

   (EEC Treaty, Article 173, Regulation No 19 of the Council of the EEC of 4 April 1962, Article 22 (2), Official Journal of the European Communities of 20 April 1962, p. 942/62)

1. A decision which comes into force immediately is of direct concern to an interested party within the meaning of the second paragraph of Article 173 of the EEC Treaty.
2. Cf. para. 1 of summary in Case 40/64.
3. Since they come into force immediately decisions of the Commission amending or abolishing protective measures taken by Member States for the protection of the market in cereals are directly applicable and concern interested parties subject to them as directly as the measures which they replace. Decisions retaining protective measures have the same effect because they do not constitute a mere approval of these measures but render them valid.

In Joined Cases
106/63

ALFRED TOEPFER, a limited partnership, whose registered office is at Hamburg, represented by Mr Auguste Schultz, its agent

and 107/63

1 — Language of the Case: German.
2 — CMLR.

GETREIDE-IMPORT GESELLSCHAFT, a limited company whose registered office is at Duisburg, represented by its managers Wilhelm Specht and Wilhelm Breder, assisted by Walter Hempel of the Hamburg Bar (for both cases) and K. Redeker of the Bonn Bar (for Case 107/63 only), both with an address for service in Luxembourg at the Chambers of Georges Reuter, Advocate, 7 avenue de l'Arsenal,

applicants,

v

COMMISSION OF THE ECONOMIC COMMUNITY, assisted by Claus-Dieter Ehlermann, member of the Legal Department of the European Executives, with an address for service in Luxembourg at the offices of Mr Henri Manzanarès, secretary of the Legal Department of the European Executives, 2 place de Metz,

defendant,

Application for annulment of the decision of the Commission of 3 October 1963 authorizing the Federal Republic of Germany to retain in force the protective measures concerning the importation of maize, millet and sorghum (63/553/EEC);

THE COURT

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

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

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows:

The business of the two applicant firms is to import and conduct wholesale dealings in cereals of all sorts, including maize, and they count amongst the

larger undertakings in this area of trade in the Federal Republic.

The maize imported into the Federal Republic comes partly from France. The trade between these two countries comes under the provisions of Regulation No 19 of the Council of the EEC on the progressive establishment of a common organization of the market in cereals (Official Journal, 1962, p. 933/62).

The Regulation makes the import of maize subject to the payment under certain circumstances of a levy resulting from the difference between the threshold price and the free-at-frontier price fixed by the Commission for the exporting country.

The levy is calculated and collected by the national customs authorities, in this case by the 'Einfuhr- und Vorratsstelle für Getreide und Futtermittel' (hereinafter referred to as 'the E.V.G.'), a body governed by German public law which publishes the rates of levy by posting notices in the building of its headquarters at Frankfurt and which issues import licences on demand. These licences amount to an 'authority to import'.

The E.V.G., in application of the abovementioned Regulation, posted a notice fixing a zero levy for 1 October 1963, and on the same day the applicants asked for import licences for the month of January with advance fixing of the levy at zero.

The applicant in Case 106/63 asked for licences for a total of 24 000 metric tons, and the applicant in Case 107/63 for a total of 21 200 metric tons. It emerges from the file that the total of requests for import licences lodged on 1 October for the month of January came to 126 000 metric tons.

The E.V.G. did not issue the licences requested, basing its decision on certain protective measures taken by the Federal Government as provided for in Article 22 of Regulation No 19.

By a decision taken on 1 October, the Commission of the EEC fixed a new free-at-frontier price for maize imported into the Federal Republic as from 2 October.

Furthermore the Official Journal of the European Communities of 11 October 1963 (p. 2479/63) published the Commission's decision of 3 October by which it retroactively authorized the Federal Republic to maintain the protective measure taken by the Federal Government until 4 October inclusive.

On 20 December 1963 the two undertakings initiated proceedings for the annulment of the said decision of the Commission.

II — Conclusions of the parties

The applicants present the following conclusions in which they claim that the Court should:

1. declare the application admissible;
2. annul the decision of the Commission of 3 October 1963 authorizing the Federal Republic of Germany to maintain the protective measures concerning the importation of maize, millet and sorghum (65/553/EEC) published in the Official Journal of the European Communities, 6th year, No 146, of 11 October 1963, p. 2479/63;
   alternatively
   annul the abovementioned decision in so far as it authorizes the Federal Republic of Germany to maintain in force the protective measure which consists in refusing to grant the requests lodged by the applicants on 1 October 1963 with the Einfuhrstelle at Frankfurt-am-Main for the delivery of import licences for 21 200 metric tons (24 000 metric tons respectively) of maize to be imported into the Federal Republic from France;
3. order the defendant to bear the costs.

The defendant contends that the Court should:

— dismiss the application as inadmissible or alternatively as unfounded,

— order the applicants to bear the costs.

III — Submissions of the parties

A — *Admissibility*

Since the contested decision is addressed to the Governments and in particular to the Government of the Federal Republic of Germany, the *defendant* points out that under the second paragraph of Article 173 of the EEC Treaty the applications are only admissible in so far as the said decision, although addressed to another person, is of direct and individual concern to the applicants. Relying on the case-law of the Court and the opinions of the Advocates-General, it asserts that the decision does not so concern the applicants in this case. It further asserts that the contested decision only concerns the applicants through the effect of the protective measure authorized, and thus indirectly. The initiative and the responsibility for this measure fall on the Federal Government. The Commission only gave authority under Article 22 for the measures which the Federal Government considered necessary.

The defendant further argues that since the protective measure is conceived in general terms, it concerns all the importers in a position to apply for import licences for the period from 1 to 4 October. Thus neither this measure nor the decision which authorized it concerned the applicants individually. Even if the class of persons concerned be limited to importers who asked for an import licence on 1 October, which means no less than 27 companies, it must be admitted that the applicants are only concerned as members of a definable group, and that they are not concerned individually (Judgment in Case 25/62).

The *applicants* argue against the submissions of the defendant, first with the help of arguments founded on legal theory, but more particularly with arguments as to the facts and circumstances of the case. They claim that the free-at-frontier price fixed by the Commission for 1 October was erroneous, and that as soon as the E.V.G. and the Commission became aware of the consequences of the mistake which had been made (the rapid increase in requests for import licences for the month of January 1964) they held consultations together on the means of rectifying it. After rejecting the possibility of amending the free-at-frontier price retroactively, the Federal and Community authorities agreed to fall back on Article 22 of Regulation No 19 so far as 1 October was concerned, and that the Commission would fix a higher free-at-frontier price for 2 October and the following days.

In the light of these circumstances, the applicants maintain that the contested decision affected their requests for a licence in a direct and individual way.

B — *Substance*

The applications are based on (a) infringement of an essential procedural requirement, (b) infringement of the EEC Treaty and any rule of law relating to its application and (c) misuse of powers.

(a) Infringement of an essential procedural requirement

It is argued that insufficient reasons are given for the contested decision. First it fails to state at what time on 1 October the Federal Government decided to take protective measures and at what time on that same date it is supposed to have informed the Commission in accordance with Article 22 of Regula-

tion No 19. It is further argued that in recopying Article 22 (5) word for word the decision failed to show why the facts stated would create serious disturbances. Finally it is said that moreover the mere statement that the measure adopted 'appears the most appropriate for rectifying' the situation which had arisen, did not comply with the requirement that sufficient reasons be given, since the Commission may only entertain the least restrictive measures. As regards this the applicants assert that a quota system for the various requests would have been more appropriate and less burdensome for the parties concerned.

The *defendant* is of the opinion that sufficient reasons were given for the decision. It was not required to state the time on 1 October when the events took place, and the reasons given for the authorization are clear and unequivocal. The Commission had to consider whether the protective measures were of an appropriate character. It was not required to explain why it did not prefer other solutions, and anyhow the solution suggested by the applicants is an arbitrary one and difficult to put into practice.

(b) Infringement of the Treaty

1. In putting forward the submission of infringement of the Treaty or 'of any rule of law relating to its application', the *applicants* use the words quoted in order to complain that the contested decision disregards Federal public law relating to the application of Regulation No 19. The protective measures are, so they say, contrary to the requirements of Federal legislation; therefore the Commission could not authorize them.

The *defendant* considers this submission to be unfounded, because the Commission only had to examine the protective measures submitted to it from the point of view of Community law and the interests of the Community. The question whether the protective measures comply with national law is a matter exclusively for national authorities and national courts.

2. The *applicants* deny that the grant of the licences requested on 1 October 1963 would have 'had as its result, in January 1964, the importing of considerable quantities of maize into the Federal Republic, at a price which would have been considerably below the threshold price'. They further argue that the quantities concerned would have been sold on the German market at a normal price. Furthermore if prices had fallen, purchases at the intervention prices would have been enough to maintain a suitable level of prices. In any event there could be no question of a catastrophe, which is a prerequisite for applying Article 22.

The *defendant* denies the argument that in speaking of 'serious disturbances' Article 22 requires the existence of an emergency situation. This expression is made more clear by the additional words 'the resulting imports' and by the qualifying words 'which might endanger the objectives laid down in Article 39 of the Treaty'. It is asserted that this case particularly involved subparagraph (1) (b) of this Article, namely ensuring a fair standard of living for the agricultural community.

The *defendant* adds that since maize and barley-meal are products which are interchangeable, an excess of maize on the market would have influenced the price and the sales of barley-meal, and there had already been an unusually big harvest of the latter in Germany in 1963. Furthermore intervention prices exist for maintaining the price levels of national products. Intervention buying because of imports would be illogical.

The *applicants* deny that maize and barley-meal can be substituted for each other to a limitless extent, and offer proof of this by means of an expert's report.

In its rejoinder the *defendant* requests the Court to obtain an expert's report if it is not convinced of the force of the arguments and submissions of the Commission.

3. The *applicants* allege that the refusal, the effect of which was retroactive, to grant the requests which they had made constitutes an infringement of the law applicable to the case.

In so far as this complaint presupposes an infringement of the customs legislation the *defendant* is of the opinion that it is unfounded under Community law. Regulation No 19 itself says that protective measures must leave a period of three days' grace in favour of goods in transit. From this it draws the conclusion that protective measures with retroactive effect are not contrary to Community law, and it thinks that this conclusion is reinforced by experience concerning serious disturbances. The defendant also says that the undeniable interests of importers must come after considerations of the common good.

(c) Misuse of powers

It is said by the *applicant* that in confirming the total suspension of import licences the Commission disregarded the interests of the companies concerned, and that its action exceeded the limits on its powers imposed by Article 22 of Regulation No 19, because a suspension of this sort is only permissible when there is a catastrophic situation.

Secondly the Commission, so it is said, acted for a purpose other than the one for which the protective measures are intended. Its purpose was to avoid the possible consequences of its own ill-considered decision fixing the free-at-frontier price for 1 October. The applicants point out that amongst these possible consequences was the loss of several million DM by way of levies imposed by the Federal Republic.

The *defendant* argues that it did not go beyond the limits laid down in Article 22, and that it cannot have acted for purposes other than that of the provision in question, which simply requires the Commission to consider whether the conditions laid down in it are fulfilled. Since this power does not include any discretionary element, a misuse of powers is *ipso facto* excluded.

IV — Procedure

The procedure followed the normal course.

By order dated 18 February 1964 the Court joined the two cases for procedural purposes.

On 25 June 1964 the Court decided, having heard the written and oral observations of the parties and the opinion of the Advocate-General, to reserve its decision on the objection of inadmissibility raised by the defendant for the final judgment.

The parties were heard at the hearing of 9 March 1965. At the hearing on 20 May 1965 the Advocate-General gave his opinion to the effect that the applications should be dismissed as inadmissible.

Grounds of judgment

Admissibility of the applications

As the contested decision was not addressed to the applicants the defendant argues that it was not of direct and individual concern to them within the meaning of Article 173 of the Treaty; it only concerns the applicants through the effect of the protective measure in question, and thus indirectly.

The defendant further argues that, since the protective measure was drawn up in general terms applicable to all importers in a position to ask for an import licence during the period between 1 and 4 October 1963, neither this measure nor the decision which upheld it is of individual concern to the applicants.

The expression 'of direct . . . concern'

According to the terms of Article 22 of Regulation No 19, when a Member State has given notice of the protective measures provided for in paragraph (1) of the said Article, the Commission shall decide within four working days of the notification whether the measures are to be retained, amended or abolished.

The last sentence of the second paragraph of Article 22 provides that the Commission's decision shall come into force immediately.
Therefore a decision of the Commission amending or abolishing protective measures is directly applicable and concerns interested parties subject to it as directly as the measures which it replaces.

It would be illogical to say that a decision to retain protective measures had a different effect, as the latter type of decision does not merely give approval to such measures, but renders them valid.

Therefore decisions made under the third and fourth subparagraphs of Article 22 (2) are of direct concern to the interested parties.

The expression 'of . . . individual concern'

It is clear from the fact that on 1 October 1963 the Commission took a decision fixing new free-at-frontier prices for maize imported into the Federal Republic as from 2 October, that the danger which the protective measures retained by the Commission were to guard against no longer existed as from this latter date.

Therefore the only persons concerned by the said measures were importers who had applied for an import licence during the course of the day of 1 October 1963. The number and identity of these importers had already become fixed and ascertainable before 4 October, when the contested decision was made. The Commission was in a position to know that its decision affected the interests and the position of the said importers alone.

The factual situation thus created differentiates the said importers, including the applicants, from all other persons and distinguishes them individually just as in the case of the person addressed.

Therefore the objection of inadmissibility which has been raised is unfounded and the applications are admissible.

On the substance of the case

Apart from various submissions of infringement of essential procedural requirements and misuse of powers, the applicants base their cases upon the submission of infringement of the Treaty or of any rule of law relating to its application.

With regard to this the applicants allege in particular that in this case the conditions required by Article 22 of Regulation No 19 were not fulfilled.

The contested decision is based on the considerations 'that applications for import licences with advance fixing of the levy in respect of very large quantities were made on 1 October 1963 to the appropriate departments in the Federal Republic of Germany; acceptance of these requests would have led to large quantities of maize being imported into that Member State in January at prices much below the threshold price. Therefore the German cereals market was threatened with serious disturbances likely to endanger the objectives defined in Article 39 of the Treaty'.

During the course of the procedure, both written and oral, the Commission explained its reasoning by arguing that a collapse of prices on the market in maize would have been caused by the offer of a quantity of maize such as would result from the application made on 1 October 1963 at prices—according to its calculations—below DM 70 per ton, that is to say, 16 or 17 per cent below the threshold price. The Commission also argued that although maize is not widely produced in Germany, such a disturbance of the market in it might have jeopardized in particular the objectives of Article 39 of the Treaty which includes stabilizing markets and ensuring a fair standard of living for the agricultural community by means of reasonable prices for the producer.

The Commission further argued that in fact such a collapse of prices would have caused dangerous repercussions on the German market in barley, a national product, and, according to the Commission, easily interchangeable

with maize. In addition the defendant offered to prove by means of an expert's report that the danger of grave disturbances which might jeopardize the objectives laid down in Article 39 was a real one.

Information given by the Commission during the oral procedure makes it clear that at this moment there is no need to proceed to the measure of inquiry asked for. Applications for import licences lodged on 1 October with a view to importation during the month of January 1964 amounted to a total of about 125 000 metric tons. According to the statistics produced by the Commission, this quantity scarcely exceeds the monthly average of normal imports. Furthermore, given the accurate knowledge which existed of the state of the German market in maize, there was a reduced danger of other substantial imports' being added to the abovementioned quantity in respect of the same period. In fact since the news that import licences subject to such a favourable rate of levy had been issued would spread rapidly to all the importers interested, it was unlikely that an appreciable number of them would compete with the holders of the licences.

Therefore it does not seem that the quantity of imported maize which was in fact concerned could itself have been enough to bring about serious disturbances of the market.

On the other hand the importing of a quantity of 125 000 metric tons at the reduced prices mentioned was not enough to bring about a collapse in prices of maize. In fact, while it cannot be ruled out that the offer of a quantity of 8 to 10 per cent of the annual needs of a certain product might bring about an excessive decline from normal prices, nevertheless such a consequence need only be feared when the amount offered is in the nature of a surplus and when it is not known how much is being offered at low prices. Such a possibility could not occur in this case because the quantities of imported maize in question were not in the nature of a surplus, and they were fixed and known as from 2 October 1963, which was three months before the critical period. Thus it was improbable that the German market could not have absorbed the said quantity without much disturbance, even if it were offered at low prices, which was certainly not the intention of the importers concerned.

In so far as it already appears extremely doubtful that acceptance of the applications in question would have threatened the German market in maize with disturbances of the seriousness required by Article 22 of Regulation No 19, it follows logically that no such disturbances could have had dangerous

repercussions on the German market in barley. According to the defendant's own statements the two markets are interdependent mainly because of the respective amounts of maize and barley used for feeding stuffs. These amounts may vary in relation to the cost of these basic products.

Although it is true that an increased supply of maize at low prices might alter the said amounts used in the Federal Republic to the detriment of barley, such a change of practice presupposes that producers of feeding-stuffs would have confidence in the stability of prices and supply of the imported product. In the present case, however, even supposing that there were a transitory fall in prices of maize, such a situation would scarcely lead producers to change their practice.

It must be concluded from the foregoing that even if the disturbances contemplated by the Commission did take place against all probability, they would have been of too temporary a nature to be capable of jeopardizing the stability of the market in maize and barley and thus of jeopardizing 'the fair standard of living for the agricultural community' mentioned in Article 39 of the Treaty.

Therefore, since the conditions laid down in Article 22 of Regulation No 19 were not fulfilled in this case, the contested decision must be annulled.

Costs

By Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. The defendant has failed in its submissions. Therefore it must be ordered to pay the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 39 and 173 of the Treaty establishing the European Economic Community;
Having regard to Regulation No 19 of the Council of the European Economic Community, especially Article 22;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69

THE COURT

hereby:

1. **Annuls the decision of the Commission of the European Economic Community of 3 October 1963, authorizing the Federal Republic of Germany to retain protective measures concerning the importation of maize, millet and sorghum.**

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

Hammes Donner Lecourt

Delvaux Trabucchi Strauß Monaco

Delivered in open court in Luxembourg on 1 July 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 20 MAY 1965[1]

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1 — Translated from the German.