OPINION OF MR ADVOCATE GENERAL LENZ delivered on 14 December 1988 *

Mr President,
Members of the Court,

1. The case on which I am giving my opinion today concerns the admissibility of an action brought by a trader against a decision of the Commission authorizing a Member State to take protective measures of a commercial nature. The relevant facts are as follows.

A — Facts

2. As the Court has been told, the predominant sources of supply for the French banana market are the overseas departments of Guadeloupe and Martinique and the three ACP countries (Cameroon, the Ivory Coast and Madagascar) which are France's traditional suppliers. In view of those relationships France applies quantitative restrictions on imports of bananas from the so-called dollar area, pursuant to Council Regulation No 288/82 on common rules for imports. [1]

3. Because of production developments which took place in the overseas departments from 1984 to 1986 owing to increasing investments and in view of the impending situation for 1987 (which suggested that the expected imports from those overseas departments and ACP countries would clearly exceed French demand), the French Government feared difficulties for national production and a disruption of the French market if bananas released into free circulation in other Member States (for which different trade measures apply) were imported into France. Referring to the importance of banana production in the French overseas departments, to Article 227 of the EEC Treaty and to the Fourth Protocol to the Third ACP-EEC Convention of 8 December 1984 [2] the French Government applied on 30 April 1987, pursuant to Article 3 of Commission Decision 80/47/EEC of 20 December 1979, [3] for authorization to take protective measures under Article 115 of the EEC Treaty; more precisely, it sought authorization to exclude from Community treatment bananas originating in non-member countries (with the exception of products from Cameroon, the Ivory Coast and Madagascar) which were released into free circulation in the other Member States.

4. That authorization was granted by a decision of 8 May 1987 [4] but it was at variance with the French Government's application in so far as it was limited to bananas from the *dollar area* (since the Commission did not envisage any danger for the French market from products from other ACP countries on account of the

* Original language: German

1 — OJ L 35, 9.2.1982, p. 1

2 — OJ L 86, 31.3.1986, p. 160.

3 — OJ L 16, 22.1.1980, p. 14.

4 — OJ C 127, 13.5.1987, p. 4.

limited export capacity in those countries) and the validity of the measure was limited to one year, until 30 April 1988, with the reservation that the limitation should be reconsidered if imports from the dollar area came to exceed 15 000 tonnes.

5. The applicant in this case is a banana importer which has applied unsuccessfully on many occasions to import bananas into France, in particular from the Belgian market. It considers this decision to be illegal and has therefore brought an action to have it declared void.

6. The Commission, with the support of the French Government, consider that this view is erroneous. They take the view that the abovementioned decision cannot be the subject-matter of an action brought before the Court by an undertaking such as the applicant.

7. They claim that the application should be dismissed as inadmissible. Consequently, argument submitted at the hearing on 30 November was restricted to this issue. I therefore need only consider the question whether or not Lefebvre's application is admissible.

B — Analysis

8. Let me say at once that this question must be answered in the negative.

9. The question whether the decision challenged was of *direct* concern to the applicant need not detain us. I would merely observe that the decision was doubtless granting the French Government a discretionary power for the future. This power entitled, but in no way obliged, the French Government to keep certain bananas off the French market (apparently, as the Court was told, because of market developments, there were none the less considerable imports from the dollar area, which in the autumn of 1987 prompted the Commission to adopt a new decision with a considerable easing of the conditions).

10. The applicant's argument that the decision simply legalized an existing set of rules cannot be accepted. Whatever the position may have been in the past, the disputed decision's legal effects related only to the future, that is to say in the period after 8 May 1987, up to 30 April 1988 (Article 3 of the decision) unless it was amended earlier (Article 2 of the decision). Moreover, the wording of the disputed decision leaves no room for doubt that the defendant did not wish to adopt any measures itself, but only wished to authorize the intervener to do so. This is apparent from the title, the preamble and the wording of the disputed decision itself. Finally, the scope of the French rules was different from that of the decision which contained the abovementioned limitations.

11. Consequently, the applicant is undoubtedly wrong to base its argument on the judgment in Joined Cases 106 and

107/63,[5] which in fact only concerned a Commission decision retroactively validating a protective measure which had already been adopted by a Member State.

12. In any event, it is beyond any doubt that the decision was not of *individual* concern to the applicant within the meaning of the Court's case-law. On this point it is only necessary to make it clear that the decision allowed imports of bananas from the so-called dollar area which had been released into free circulation in another Member State to be turned back at the frontier for a period of one year. It was therefore clearly of general application and affected any person wishing to carry out such imports, in other words, besides the applicant, other French banana dealers (around 130 importers in France are said to do business with the dollar area) and traders in other Member States, in other words an abstractly drawn category of traders. Thus, it can be said without reservation that the decision challenged affects the applicant in the same way as it affects all other traders, as was found in the judgment in Case 231/82[6] regarding a decision taken under Article 115 of the EEC Treaty which in any event related to *future* imports and their prevention.

13. However, the circumstances mentioned by the applicant in order to show that the decision is of individual concern to it, namely the reference to previous applications for licences, previous attempts to import goods, proceedings brought before the French courts in respect of those events and the fact that the Commission has been informed of them in a complaint, clearly do not have any such significance.

14. In reply to its questions, the Court has been told that the applicant is referring in this context, on the one hand, to licence applications which were made between 1978 and 1980 and most recently in October 1986 and, on the other hand, to cases in which lorries were turned back at the frontier which occurred in the autumn of 1986 and in March 1987.

15. As regards the licence applications in question, it should in fact be noted that they were not pending at the time when the decision at issue was adopted; under French law they had already been dealt with. This can be deduced from a judgment of the tribunal de Lille of 19 June 1985, which was furnished to the Court, according to which after four months a licence application is to be regarded as having been impliedly rejected. This, therefore, excludes any possibility of referring to the judgment in Case 62/70[7] (in which an important factor was that a decision granting an authorization was to apply to applications for licences already pending) and it is also wrong to refer to the judgment in Case 100/74,[8] in which the Court accepted that measures were of individual concern since they affected certain traders owing to individual behaviour during a certain period.

5 — Judgment of 1 July 1965 in Joined Cases 106 and 107/63 *Töpfer KG und Getreideimportgesellschaft mbH v Commission* [1965] ECR 405

6 — Judgment of 14 July 1983 in Case 231/82 *Spijker Kwasten BV v Commission* [1983] ECR 2559.

7 — Judgment of 23 November 1971 in Case 62/70 *Bock v Commission* [1971] ECR 897

8 — Judgment of 18 November 1975 in Case 100/74 *CAM SA v Commission* [1975] ECR 1393

16. On the other hand, as regards the actual hindering of imports at the French frontier on the dates indicated, the only decisive point is that the disputed decision had no retroactive effect. Therefore, those events, which took place well before the decision entered into force, can have no bearing on the question of admissibility.

C — Conclusion

17. Thus, the only conclusion that may be drawn is that the application must be dismissed as being inadmissible, as the Commission has maintained. Since costs have been applied for, the applicant must also be ordered to pay the costs of the proceedings with the exception of the intervener's costs, since the French Government has not asked for them.