In Case 62/70

WERNER A. BOCK, a limited partnership having its registered office in Hamburg, in the person of Werner A. Bock, the partner bearing personal liability, represented by Rechtsanwälte Modest, Heeman, Gündisch, Brändel, Rauschning, Landry and Röll, of the Hamburg Bar, with an address for service in Luxembourg at the Chambers of Félicien Jansen, Huissier, 21 rue Aldringen,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Claus-Dieter Ehlermann, acting as Agent, with an address for service in Luxembourg at the Chambers of Émile Reuter, Legal Adviser to the Commission, 4 boulevard Royal,

defendant,

Application for the partial annulment of Commission Decision No 70/446/EEC of 15 September 1970 authorizing the Federal Republic of Germany to exclude from Community treatment prepared and preserved mushrooms under heading No 20.02 of the Common Customs Tariff originating in the People's Republic of China and in free circulation in the Benelux countries (OJ L 213 of 26 September 1970, p. 25 *et seq.*),

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and H. Kutscher Rapporteur, Presidents of Chambers, A. M. Donner and R. Monaco, Judges,

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

(1) The applicant undertaking imports foodstuffs, and in particular preserved products. At the beginning of September 1970 a Netherlands undertaking offered to sell to it a consignment of some 65.5 metric tons of preserved

mushrooms originating in the People's Republic of China at a price of DM 150 000. On 4 September 1970 the applicant submitted to the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry) (hereinafter referred to as 'the Bundesamt') an application for an import licence, at the same time pointing out that the goods were already in free circulation in the Netherlands. On 9 September 1970 it repeated its application, stressing that the offer made by the vendor remained open for a matter of days only. By letter dated 8 September the Bundesamt informed the applicant that its application was being considered. By telex message of 11 September 1970 the applicant again requested the Bundesamt to deal immediately with its application. By telex message of the same day the Bundesamt replied, in particular, as follows: 'It is intended to reject your application of 4 September 1970 for an import licence as soon as the Commission has given its authorization in accordance with Article 115 of the EEC Treaty'.

(2) On the same day the Federal Government informed the defendant by telex that it had received an application for an import licence for preserved mushrooms of a value of DM 125 000 originating in the People's Republic of China and in free circulation in the Netherlands. The Federal Government requested the Commission to grant:

> 'authorization, as a matter of urgency, to exclude from Community treatment the import of preserved products of tariff heading 20.02, originating in the People's Republic of China and in free circulation in any Member State (in view of the fact that there is reason to anticipate that the applicant in question will effect the imports by other indirect means) including the import contemplated by the application already lodged'.

By the contested decision of 15 September 1970 the defendant, relying on the first paragraph of Article 115 of the EEC Treaty, granted the application by the Federal Government. The first article of this decision is worded as follows:

> 'The Federal Republic of Germany is authorized to exclude from Community treatment the following products:

Common Customs Tariff heading No	Description of goods
20.02	Vegetables prepared or preserved otherwise than by vinegar or acetic acid: — mushrooms

> originating in the People's Republic of China and in free circulation in the Benelux countries. The present authorization likewise covers imports of these products in respect of which applications for licences are currently and duly pending before the German authorities.'

(3) By letter dated 21 September 1970 the Bundesamt rejected the application by the applicant, citing the aforementioned decision of the Commission. In the action brought by the applicant against this decision before the Verwaltungsgericht Frankfurt that court, by judgment dated 8 December 1970, ruled as follows:

> 'The rejection of the application made by the plaintiff on 4 September 1970 to obtain an import licence was unlawful.'

That judgment is based on the provisions of German law. It states that a 'legitimate necessity to protect the economy', which alone could have justified the rejection of the application, did not exist in the present case in view of the fact that the quantity which the applicant proposed to import was relatively small.

The Bundesamt appealed against this judgment to the Hessischer Verwal-

tungsgerichtshof (Higher Administrative Court), which has not yet given judgment.

(4) The application was filed at the Court on 12 November 1970. In its statement of 14 December 1970 the defendant requested that an initial ruling should be given on the admissibility of the application in accordance with Article 91 of the Rules of Procedure and that the application be declared inadmissible. After the applicant, in its statement of 18 January 1971, had requested principally that the objection of inadmissibility be rejected and that the Court deal with the substance of the case, the Court decided on 3 February 1971 to reserve its decision on the preliminary objection for the final judgment.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without prescribing any measures of inquiry.

The parties presented their oral observations at the hearing on 13 July 1971.

The Advocate-General delivered his opinion at the hearing on 12 October 1971.

II — Conclusions of the parties

The *applicant* claims that the Court should:

(1) Annul Article 1 of the Commission's Decision of 15 September 1970 in so far as the said decision covers imports of products in respect of which applications for licences were duly pending before the German authorities when it came into force;

(2) Order the defendant to pay the costs.

The *defendant* contends that the Court should:

declare the application inadmissible or alternatively dismiss it as unfounded;

— order the applicant to bear the costs.

III — Submissions of the parties

1. *Admissibility*

The submissions and arguments of the parties may be summarized as follows:

A — The question whether the applicant is affected by the contested decision

The *defendant* maintains that the applicant is not affected by the contested decision in view of the fact that that decision did not empower the Bundesamt to refuse the import licence requested by the applicant.

According to the defendant, the word 'duly' in the second sentence of Article 1 of the decision relates neither to the form in which applications for import licences must be made nor to the time-limit prescribed for this purpose. Rather does it appear from the words 'imports . . . in respect of which applications . . . *are* . . . duly pending' that the Community legislature wished to refer not to the rules for lodging applications but to those which apply to applications already pending.

Taken in isolation the first sentence of Article 1 of the decision authorizes the prohibition of all imports which had not yet been effected at the time when the decision took effect and thus also the prohibition of imports in respect of which applications for licences had already been pending for some time.

The defendant maintains that it certainly did not seek to legalize unlawful delays in the issue of import licences. According to the defendant the second sentence of Article 1 of the decision did not therefore extend but restrict the scope of the first sentence of the said article. Preserved mushrooms come under the provisions of Regulation (EEC) No 865/68 of the Council of 28 June 1968 on the common organization of the market in products processed from fruit and vegetables (OJ 1968, L 153, p. 8), Article 10 (1) of which

prohibits the application of quantitative restrictions or measures having equivalent effect in intra-Community Trade. Article 2 (3) (q) of the Commission Directive of 22 December 1969 based on the provisions of Article 33 (7) of the EEC Treaty (OJ 1970, L 13, p. 29) requires Member States to abolish measures which 'specify time-limits for imported products which are insufficient or *excessive* in relation to the normal course of the various transactions to which these time-limits apply'. The defendant adds that it is true that it is not possible to indicate in a general way the period within which a request for an import licence must be granted so that there is no infringement of the prohibition of 'measures having an effect equivalent to quantitative restrictions'. In the present case, however, it continues, a whole working week expired between the lodging of the application by the applicant (7 September) and the request made by the Federal Government to the defendant (6.30 p.m. on 11 September). In the defendant's view this lapse of time patently exceeds the period required for the operations necessary for the issue of the authorization, especially as the applicant had several times drawn the attention of the Bundesamt to the urgent nature of its request. This being so, the defendant concludes, the application for the licence lodged by the applicant was no longer 'duly' pending on 11 September 1970 and it is not therefore affected by the second sentence of Article 1 of the decision.

The *applicant* stresses first of all that the Bundesamt has not so far adopted this interpretation in respect of the applicant, but has rather expressed the opinion in its ground of appeal that the contested decision took effect retroactively and gave it the power to dismiss the application in question. As a result, continues the applicant, in the present case it must be assumed that the objective interpretation of the decision in question is that it applies to the application. It follows, according to the applicant, that the first sentence of Article 1 of this decision refers only to cases in which the licence was applied for *after* the decision had come into effect, while the second sentence of the same article extends the scope of the authorization to applications on which decisions had not yet been taken, although they were lodged before the decision came into effect. According to the applicant, this is clear from the following considerations.

Where the second sentence of Article 1 of the decision begins with the words: 'The present authorization likewise covers...', this means that the authorization covers not only the factual situation in the first sentence, but also other situations. This widening of the scope of the authorization was moreover necessary if the defendant wanted it to apply also to applications which had been lodged before the date when the decision took effect. Indeed, it is in no way obvious that decisions of the kind in question in the present case extend to all imports subsequent to the decision's taking effect. If the first sentence of Article 1 also covered imports in respect of which valid import licences had already been issued, the defendant would have violated fundamental principles of the rule of law; in this case the provision would have entailed 'complete retroactivity', which is regarded on principle as unlawful by the Bundesverfassungsgericht. It is inconceivable that the defendant should have intended to provide for such retroactivity. It would moreover be incomprehensible for the second sentence of Article 1 merely to have intended to exclude from the retroactive effect those cases in which an application for a licence was then still pending but not cases in which the importer had already obtained an import licence. It is right then to assume that in any event the first sentence of Article 1 of the decision ought not to apply to cases in which a licence had already been issued.

According to the applicant, the defendant therefore wrongly maintains that in the absence of the second sentence of Article 1 the decision would have covered all imports effected after the decision took effect.

This does not mean, in the applicants' view, however, that the first sentence of Article 1 likewise extends to cases in which the importer had not yet obtained a licence, although he had already applied for one. Rules which apply to facts which have not yet materialized, but which are in the process of so doing, also give rise—by providing for a so called 'incomplete' retroactivity—to objections based on the rule of law. Express provision is required for the application of an 'incomplete' retroactive effect, and this is not contained in the first sentence of Article 1 but in the second. As a result this provision must be interpreted as meaning that its first sentence does not cover applications still pending while its second sentence extends the scope of the decision to applications of that nature.

B — The question whether the applicant is 'directly' affected by the contested decision

The *defendant* maintains that even if the contested decision was of concern to the applicant, it would not however be of 'direct concern' within the meaning of the second paragraph of Article 173 of the EEC Treaty. This would be so only if the decision affected the applicant 'immediately'; it is not sufficient for the applicant to be 'potentially' affected by the decision.

In the defendant's view it is not its decision which is the direct cause of the applicant's having been prevented from effecting the import which it contemplated, but the action of the Bundesamt. According to the defendant the contrary opinion would involve the illogical consequence that it would be of 'direct concern' to the individual, who would therefore have a right of action, even though the Member State had not used the authority which had been given it, that is, if it had authorized the import.

The judgment of the Court of 1 July 1965 (*Töpfer* v *Commission*, protective measures, Joined Cases 106 and 107/63, [1965] ECR 405) in no way supports the applicant's view. That judgment, the defendant maintains, is based expressly on the fact that the decisions taken by the Commission under Article 22 (2) of Regulation No 19, which were in dispute in those cases:

— 'did not merely give approval' to national protective measures 'but rendered them valid';
— could have had as their subject-matter not only the authorization but also the amendment or abolition of measures taken by the Member State concerned:
— came into force immediately.

The defendant observes that these conditions are not fulfilled by the decisions in the present case, which were adopted under the first paragraph of Article 115 of the EEC Treaty.

The applicant is likewise in error, according to the defendant, in citing the judgment of the Court of 6 October 1970 (*Franz Grad* v *Finanzamt Traunstein*, competition in transport, Case 9/70, Recueil 1970, p. 825 *et seq.*). Although a decision which is binding on a Member State may confer rights directly on individuals, it does not follow as a corollary that a decision granting an authorization to a Member State likewise places the individual under an obligation and can therefore directly affect his legal situation. Otherwise decisions and regulations would be equivalent in effect, which would be incompatible with Article 189 of the EEC Treaty.

The *applicant* considers, on the other hand, that the contested decision is of direct concern to it.

It claims that if the decision in question had not been taken it would have been able to confront the German authorities under Article 10 of Regulation No 865/68 with an unconditional right to

obtain the authorization requested. The decision has weakened this right in the sense that the applicant could only require the Bundesamt to exercise its discretion correctly in considering and deciding on the application, since the Bundesamt had been authorized to base its action not only on judicial criteria but also on expediency. Annulment of the contested decision by the Court would restore to the applicant the right which it has under Article 10 of Regulation No 865/68.

In the applicant's view the present case is fundamentally different from cases in which the Member States possessed a discretion antedating the taking of a decision by the Commission. It maintains that since the Court decided that the matter in question was of direct concern to the applicant in the *Töpfer* Case, then *a fortiori* the present case should be decided in a similar manner. The applicant observes further that it is not possible to see how an authorizatoin given by the Commission *ex post facto* could have different legal status from an agreement given in advance. Further, the applicant continues, in the *Töpfer* Case the Commission only endorsed a measure adopted by the national authorities. If such endorsement is of direct concern to the importer, although his rights have already been affected by the prior measure of the national authorities, it is even more certain that a decision which gives the national authorities the power to exercise a discretion is of direct concern to the citizens of the Community.

The applicant considers that the judgment of the Court in Case 9/70 also confirms its view.

The difference between the fact of being 'immediately' affected by a decision and that of 'potentially' being so affected finds no support, in the applicant's view, in the second paragraph of Article 173 of the EEC Treaty, since that provision makes a distinction only between direct and indirect concern.

C — The question whether the contested decision is of 'individual' concern to the applicant

The defendant maintains that the contested decision is not in any case of 'individual' concern to the applicant within the meaning of the second paragraph of Article 173 of the EEC Treaty.

Assuming that the decision applies to the applicant's case it would be the second sentence and not the first of Article 1 which would be of concern to the applicant. The defendant observes that the first sentence covers a class of persons defined in general terms, that is, all those who wish to import preserved mushrooms into the Federal Republic of Germany while the decision is in force. Furthermore, the defendant feels it must stress the following facts:

— The applicant was not the only company to lodge, before the date of the contested decision, an application for an import licence for preserved mushrooms originating in the People's Republic of China which were in free circulation in the Netherlands. On 25 August 1970 the company Lütjens of Bookholzberg lodged a similar application for goods to the value of DM 125 000. In its telex message of 11 September 1970 the Federal Government was referring to this application and not to that of the applicant.

— The defendant made no investigations before the date of the contested decision as to whether other applications had been lodged apart from the application referred to in the telex message from the Federal Government and therefore it was not aware of the application submitted by the applicant.

In the defendant's view the applicant wrongly—that is to say on the basis of principles borrowed from German law which do not hold good in Community law—assumes that the scope of decisions of the kind at issue in the present

case cannot extend to imports which have already been authorized and that such decisions cannot cover imports in respect of which an application for a licence has already been lodged unless they contain an express provision to that effect. It considers that the 'necessary protective measures' referred to in Article 115 of the EEC Treaty may equally relate to imports in respect of which the necessary licences have already been granted or applied for; it maintains that such imports, too, may involve deflections of trade. A restrictive interpretation of the first sentence of Article 1 of the contested decision is therefore not justified in the defendant's view.

In reply to these arguments the *applicant* maintains that the second sentence of Article 1 relates only to applications which had already been lodged at the time the decision came into force. The applicants were known or at least ascertainable at that date.

In the applicant's view it was not only the application by the Lütjens company which led the Federal Government to approach the defendant but also the application by the applicant which was already under consideration by the Bundesamt.

2. *Substance*

A — The question whether Article 115 of the EEC Treaty has been infringed

The *applicant* maintains that apart from the 65.5 metric tons which it wished to import into the Federal Republic— which represents less than 0.15% of the annual consumption of preserved mushrooms of that country (45 000 metric tons)—there were in the Netherlands no other goods of this nature originating in the People's Republic of China. In its view, such a small quantity is not capable of causing deflections of trade or of involving economic difficulties within the meaning of the first paragraph of Article 115 of the Treaty and it concludes that the conditions for applying this provision were not fulfilled.

In the applicant's view the dispute arises from the fact that the Netherlands authorize a far greater volume of imports of products originating in the People's Republic of China than does the Federal Republic of Germany. The applicant observes that it would have been possible effectively to remedy this situation and its undesirable consequences by harmonizing the provisions governing importation of the goods in question in the two Member States. In this respect, the applicant continues, it would have been sufficient for the defendant to make a recommendation to those States under the first paragraph of Article 115 of the EC Treaty. In the applicant's view the principle of the proportionality of administrative measures required the defendant to choose first of all this less extreme expedient and to apply the more radical means constituted by the protective measure only after a recommendation had proved fruitless.

The applicant maintains that the difficulties which the Federal Republic feared did not require the adoption of a retroactive protective measure covering the import which the applicant intended to effect. It cites in this respect the judgment of the Court of 13 December 1967 in Case 17/67 (*Neumann* v *Hauptzollamt Hof*, levy, [1967] ECR 441) and alleges that the statement of reasons for the contested decision indicates only by way of allusion that deflections of trade might arise in the future. It observes that retroactive authorization was justified only if it could be shown that similar deflections of trade had already taken place. This was not the case. Even taking its application and that of the Lütjens company together, the quantities of goods intended for import represented only a small fraction of the monthly imports required to satisfy consumption in the Federal Republic of Germany.

The applicant further notes the defendant's statement that only 1 303 metric tons of preserved mushrooms were imported into the Netherlands during the first nine months of 1970; it may be assumed that this quantity was largely employed to cover the domestic requirements of that country. It thus appears from what the defendant says that there were no deflections of trade to be feared, at least up to September 1970.

The applicant considers that the defendant should have ascertained the quantities of preserved mushrooms originating in third countries which had already been imported into Germany in the past by way of the Netherlands. This would have shown, according to the applicant, that considerable quantities had been imported in that way before 1970. The applicant observes that it is not possible to speak of 'deflections of trade' except where trade patterns are altered, that is to say when appreciable quantities of a certain type of goods follow a different route from that which they followed previously.

The goods which the applicant wished to import were at the time in free circulation in the Netherlands. If there was a 'deflection of trade' this took place at the time of importation into the Netherlands. The applicant concludes that the contested decision could not attain the objective sought and that therefore it was not 'necessary' within the meaning of the first sentence of Article 115 of the EEC Treaty.

In reply the *defendant* maintains that the decision was taken above all to avoid the danger, which in fact existed, of deflections of trade; in its view the second criterion in the first paragraph if Article 115 of the EEC Treaty, that of the danger of 'economic difficulties' may therefore be left aside.

The defendant observes that the importation of preserved mushrooms originating in the People's Republic of China is prohibited in the Federal Republic of Germany, free from any quantitative restrictions in the Benelux countries and Italy and subject to quotas in France. The Federal Republic of Germany imports these goods in large quantities; it imported a total of 46 122 metric tons in 1969, of which 16 918 metric tons originated in Formosa. The defendant considers it natural that imports originating in Formosa should be replaced by less expensive imports originating in the People's Republic of China and that the prohibition on imports originating in that country should be evaded. According to the defendant, differences existing between the import arrangements of Member States, on the one hand, and the prohibition of all quantitative restrictions and measures having equivalent effect in intra-Community trade, on the other hand, make it possible to effect such imports at any time by devious ways.

In the defendant's view the applicant overlooks the fact that future deflections of trade might likewise arise from import applications still pending. It observes that no deflection took place in the present case when the goods were imported into the Netherlands but that it would have taken place if they had reached the Federal Republic by way of the Netherlands.

The defendant denies that large quantities of preserved mushrooms were imported into the Federal Republic by this route before 1970. Furthermore, it declares that this is unimportant in view of the fact that imports effected by devious ways do not lose their character of 'deflections of trade' simply because there have already been imports of the same kind.

The defendant challenges the applicant's claim that apart from the 65.5 metric tons of preserved mushrooms which it wished to import, there were no other goods of the same kind and of the same origin in free circulation in the Netherlands. However this may be, in the defendant's opinion it is not very relevant. What is decisive is that, at that time, the possibility of buying in the Benelux countries preserved mushrooms

originating in the People's Republic of China was not limited to quantities which were in free circulation in those countries; the import arrangements of those countries allow further quantities of these products to be put into free circulation at any time. During the first nine months of 1970 the Netherlands imported not less than 1 303 metric tons of preserved mushrooms, whereas during the previous years goods of this kind had not been imported, or at least only in insignificant amounts. It must be concluded that the 1 303 metric tons in question were not intended exclusively to meet the domestic needs of the Netherlands.

In the defendant's view a recommendation addressed to the Member States would not have led to harmonization of import arrangements. Several times the defendant submitted proposals to the Council urging a unification of the import arrangements of the Member States in relation to third countries (cf. for example OJ 1968, C 45, p. 12; 1969, C 108, p. 61). The Member States however did not agree either on the system proposed by the defendant or on any other system. In the defendant's view deflections of trade would have ceased if the Federal Republic had abolished the prohibition on import or if the Benelux countries had issued a similar prohibition. The fact that the Benelux countries were not disposed to adopt such measures is due, in the defendant's view, on the one hand to the application by the Federal Government for authorization to take protective measures, and on the other hand to the fact that the Benelux countries have advocated in the Council the utmost freedom in import arrangements. If the Benelux countries limited the import of preserved mushrooms to conform to a recommendation from the Commission they would weaken their position in discussions in the Council. Moreover, since the end of the transitional period the Member States are no longer applying the second paragraph of Article 115 of the EEC Treaty and they can therefore no longer ensure their own protection; this fact also reduces the chances of success of a recommendation. Finally, the Commission on the whole has not had much success with the recommendations which it has previously made.

The defendant observes further that a measure prohibiting imports would not have been compatible with Article 110 of the EEC Treaty. Deflections of trade could have been limited if the Benelux countries had imposed a quota on imports of preserved mushrooms originating in the People's Republic of China and fixed the amount of the quota in relation to their own needs. Apart from the fact that the Benelux countries were not disposed to lay down such a quota, this solution would have been difficult to implement in practice in view of the fact that a sufficiently precise assessment of domestic needs does not appear possible in respect of a product such as preserved mushrooms.

The defendant maintains that the contested decision does not have retroactive effect. It considers that the first sentence of Article 1 simply authorizes the Federal Republic of Germany to prohibit future imports; imports effected previously are not affected, in the defendant's view, by this authorization. The second sentence of the said article does not imply an extension but a limitation of the authorization granted in the previous sentence. The defendant concludes by claiming that the applicant's objection that the import which it contemplated could not have disturbed the market is irrelevant. The contested decision was taken above all because of the risk of deflections of trade. It is not necessary to inquire whether the market was disturbed or whether there was simply a risk of disturbance.

B — Lack of precision in the second sentence of Article 1 of the decision

The *applicant* considers that this pro-

vision must likewise be annulled because it lacks the requisite precision. In the applicant's view what the defendant has stated on the subject of admissibility shows that the latter has left it to the German authorities to implement the phrase 'duly pending', in other words it has allowed those authorities to make a discretionary assessment. The applicant maintains that the defendant has an obligation to word its decision sufficiently clearly to leave no doubt either in the mind of the German authorities or of interested citizens of the common market as to the scope of the decision.

The *defendant* maintains that it has not allowed the German authorities a discretion. In its view the phrase 'duly pending' is a 'precise legal concept' the implementation of which is fully open to judicial review.

Grounds of judgment

[1] The purpose of the application is to obtain the annulment of Article 1 of Decision No 70/446 of the Commission of 15 September 1970 (OJ L 213, p. 70), whereby the Federal Republic of Germany was authorized to exclude from Community treatment certain products originating in the People's Republic of China which were in free circulation in the Benelux countries, in so far as this authorization 'likewise covers imports of these products in respect of which applications for licences are currently and duly pending before the German authorities'.

[2] I — Admissibility

(1) The Commission first contends that the application is inadmissible because the contested provision is not of concern to the applicant. It maintains that the words 'currently and duly pending' exclude applications for import licences which the German authorities ought already to have granted before the entry into force of the contested decision, at the risk of infringing the prohibition of measures having an effect equivalent to quantitative restrictions. This is said to be the case with the plaintiff's application since the German authorities had permitted an excessively long period to elapse before replying to it.

[3] The expression 'duly pending' must be understood as constituting an application of Article 10 (1) of Regulation No 865/68/EEC of the Council of 28 June 1968 in conjunction with Article 2 (3) (q) and 4 (1) of the Commission's Directive of 22 December 1969; according to these provisions the Member States are obliged to grant applications for import licences for the products in question within a period which is not 'excessive', otherwise they contravene the prohibition of measures having an effect equivalent to quantitative restrictions.

[4] In the present case it is sufficient to note that the Federal Government, which had justified its initiative by reference to an application submitted to it

at the time, might have assumed that the provision at issue was precisely intended to cover applications which had already been submitted. On 15 September 1970, the date when the contested decision was taken, the defendant was aware that the authorization was to extend, in accordance with the wishes of the Federal Government, to applications for licences which were already pending before the German authorities before 11 September 1970, the date on which the German Government applied to the defendant. Therefore, if the defendant intended to exclude these applications from the protective measure it should have expressed this clearly, instead of using the words 'the present authorization likewise covers', with which, by implication, it extended the scope of the first sentence of Article 1 of the decision.

5 Accordingly, since the second sentence of that article must be interpreted as applying to the applicant's case, the provision the annulment of which is sought is of concern to the applicant.

6 (2) The defendant contends that in any event an authorization granted to the Federal Republic is not of direct concern to the applicant since the Federal Republic remained free to make use of it.

7 The appropriate German authorities had nevertheless already informed the applicant that they would reject its application as soon as the Commission had granted them the requisite authorization. They had requested that authorization with particular reference to the applications already before them at that time.

8 It follows therefore that the matter was of direct concern to the applicant.

9 (3) The defendant claims that the contested decision is not of individual concern to the applicant but covers in the abstract all traders wishing to import the products in question into Germany while the decision is in force.

10 However, the applicant has challenged the decision only to the extent to which it also covers imports for which applications for import licences were already pending at the date of its entry into force. The number and identity of importers concerned in this way was already fixed and ascertainable before that date. The defendant was in a position to know that the contested provision in its decision would affect the interests and situation of those importers alone. The factual situation thus created differentiates the latter from all other persons and distinguishes them individually just as in the case of the person addressed.

11 The objection of inadmissibility must therefore be dismissed.

II—The substance

[12] The applicant complains that the defendant has exceeded its powers under Article 115 of the EEC Treaty and thus violated the principle of the proportionality of administrative measures. It maintains that in view of the small quantity of preserved mushrooms which it wished to import—65.5 metric tons, that is to say, less than 0.15% of the annual consumption of preserved mushrooms in the Federal Republic—it was not necessary to extend the authorization at issue to applications for import licences pending at the date when the request was submitted to the Commission.

[13] According to the first paragraph of Article 115: 'In order to ensure that the execution of measures of commercial policy taken . . . by any Member State is not obstructed by deflection of trade, or where differences between such measures lead to economic difficulties in one or more of the Member States,' the Commission may, *inter alia*, 'authorize Member States to take the necessary protective measures, the conditions and details of which it shall determine,' it being nevertheless understood that under the third paragraph of the same article: 'In the selection of such measures, priority shall be given to those which cause the least disturbance to the functioning of the common market'.

[14] Such authorization may in particular constitute an exception to the provisions of Article 9 of the Treaty in conjunction with those of Article 30, whereby the prohibition of quantitative restrictions on imports and all measures having equivalent effect applies not only to goods originating in Member States but also to goods in free circulation in Member States which originated in third countries. Because they constitute not only an exception to the aforementioned provisions, which are fundamental to the operation of the common market, but also an obstacle to the implementation of the common commercial policy provided for by Article 113, the derogations allowed under Article 115 must be strictly interpreted and applied.

[15] It appears from the file that at the date of the contested decision the German authorities were considering only two applications, amounting to a total import of some 120 metric tons, that is to say, about 0.26%, according to the defendant's own statements, of the total of 46 122 metric tons of preserved mushrooms imported into Germany in 1969. In these circumstances, the Commission, by extending the authorization at issue to an application relating to a transaction which was insignificant in terms of the effectiveness of the measure of commercial policy proposed by the Member State concerned and which in addition had been submitted at a time when the principle of the free circulation of goods applied unrestrictedly to the goods in question, has exceeded the limits of what is 'necessary' within the meaning of Article

115—interpreted within the general framework of the Treaty, following the expiry of the transitional period.

16 Accordingly, the contested provision must be annulled without its being necessary to consider the other submissions in the application.

III — Costs

17 Under 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 the Treaty establishing the European Economic Community, especially Article 9, 30 113 and 115;
Having regard to Article 10 (1) of Regulation (EEC) No 865/68 of the Council of 28 June 1968 on the common organization of the market in products processed from fruit and vegetables (OJ L 153 of 1.7.1968, p. 8 *et seq.*);
Having regard to Articles 2 (3) (q) and 4 (1) of the Commission Directive No 70/50/EEC of 22 December 1969 'based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty' (OJ L 13 of 19.1.1970, p. 29);
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 15 September 1970, authorizing the Federal Republic of Germany to exclude from Community treatment certain products originating in the People's Republic of China, which were in free circulation in the Benelux**

countries, in so far as it covers products in respect of which applications for licences were 'currently and duly pending before the German authorities' at the time when the decision came into force;

2. Orders the defendant to bear the costs.

Lecourt Mertens de Wilmars Kutscher

Donner Monaco

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 12 OCTOBER 1971[1]

Mr President,
Members of the Court,

In 1970 the Federal Republic of Germany, for various reasons irrelevant to an understanding of the present case, prohibited the import into territory of mushrooms originating in the People's Republic of China.

It was easy to enforce this prohibition when the German importer wanted to import from China or a third country directly into Germany, that is to say, to effect a 'straight' import, to employ the usual jargon.

On the other hand, the problem was much more delicate when the importer wanted to buy Chinese mushrooms in free circulation in one of the countries of the Community.

Until the issue of Regulation No 865/68 of 28 June 1968 the Federal authorities normally had automatically to issue the licence requested within a very short period since the goods were in free circulation in a Member State.

They could refuse only if they have previously received from the Commission the authorization provided for in the first paragraph of Article 115 of the Treaty, which, in exceptional cases and in particular in cases of deflection of trade, allows a Member State to exclude from Community treatment certain products originating in third countries but already in free circulation in one or more of the other Member States.

Such authorization, as regards mushrooms originating in China, was not requested by the Federal Republic of Germany until 11 September 1970 and was not given by the Commission until 15 September.

It is this situation which is the origin of the present proceedings.

On 4 September 1970 the Book company applied for an import licence for a quantity of Chinese mushrooms valued at DM 150 000 in respect of which it had a firm offer and which it claimed to be in free circulation in the Netherlands.

On 9 September 1970 it reminded the competent Federal authority, that is to say, the Bundesamt für Ernährung und Forstwirtschaft, of its application.

1 — Translated from the French.