OPINION OF ADVOCATE GENERAL GULMANN

delivered on 8 July 1992 *

Mr President,
Members of the Court,

1. Four German undertakings have brought these two cases against the Commission for a declaration that the Commission has failed to fulfil its obligations by not re-establishing certain import levies on poultrymeat. The first case is an action for failure to act brought under Article 175 of the Treaty and the second case is an action for annulment brought under Article 173.

The Commission contends that the cases should be held inadmissible and the Court has decided to deal with that issue separately.

2. The background to the cases can be summarized as follows:

On 18 December 1989 the Council issued Regulation (EEC) No 3899/89 reducing for 1990 the levies on certain agricultural products originating in developing countries. [1] The regulation meant *inter alia* that the normal levies on imports from non-member countries on ducks and geese were reduced by 50% on ducks up to 3 000 tonnes and on geese up to 25 000 tonnes. It is apparent from the preamble to the regulation that the reduction in levies was intended to give support to Poland and Hungary.

The applicants operate a number of duck and geese slaughterhouses and, according to the information before the Court, in all carry out more than 80% of duck slaughtering and more than 85% of geese slaughtering in Germany. According to the applicants the reduction in the import levies resulted, on the one hand, in a fall in the price of imported ducks and geese, which had repercussions on the prices of ducks and geese produced in Germany, and, on the other hand, an increase in the imports of products from non-member countries which caused a drop in Germany's production of duckmeat.

On 26 September 1990, therefore, the applicants requested the Commission to re-establish completely the levies on ducks and geese from Poland and Hungary. They referred to Articles 4 and 5 in the regulation, according to which the Commission may re-establish the normal levies if it is discovered that the products covered by the arrangements are being imported into the Community at prices that cause or threaten to cause serious injury to Community producers of like or directly competing prod-

* Original language: Danish.
1 — OJ 1989 L 383, p. 125.

ucts. [2] The applicants claim that the conditions for re-establishing normal levies are satisfied and that Article 4 must be interpreted as meaning that the Commission is accordingly under an obligation to re-establish them.

3. The Commission did not reply to that letter and the applicants then brought an action, by application lodged at the Court Registry on 16 January 1991, under Article 175 of the Treaty (Case C-15/91). The applicants claimed that the Commission had unlawfully failed to act by omitting to re-establish completely the levies on geese and ducks originating in Poland and Hungary, which were reduced by 50% by Council Regulation No 3899/89. [3]

By a letter of 18 January 1991, that is to say, two days after the action under Article 175 was lodged, the Commission did reply to the applicants' original request of 26 September 1990. In that letter the Commission rejected the applicants' request that it re-establish the normal levies on geese and ducks from Hungary and Poland, giving reasons for its refusal to do so. That refusal is the subject of the second action brought by the applicants (Case C-108/91). That application, which is brought under Article 173 of the Treaty, is for the annulment of the Commission's decision of 18 January 1991 in which it rejected the applicants' request that the normal import levies applied to specific quantities of geese and ducks originating in Poland and Hungary be re-established.

4. The Commission bases its objections of inadmissibility on the fact that in both cases the applicants are seeking a declaration that the Commission is obliged to issue a new regulation re-establishing the normal levies. It thus claims that the applicants are asking for a general legal measure to be adopted which does not concern them directly and individually and that neither the third paragraph of Article 175 nor the second paragraph of Article 173 allow the Court to entertain such claims.

The Commission points out, moreover, that an action for annulment must be held inadmissible solely on the ground that an action for failure to act is pending in which the applicants may have their claim examined. Since the two cases in fact have the same object and since the conditions for bringing an action for failure to act were satisfied first,

2 — The provisions are worded as follows:
'Article 4
If the Commission discovers that products covered by the arrangements laid down in Article 1 are being imported into the Community at such prices that they cause or threaten to cause serious injury to Community producers of like or directly competing products, the levies applied in the Community may be partly or completely re-established for the products concerned with regard to the countries or territories causing the injury. Such a measure may also be taken in the case of serious injury or the threat of serious injury to a specific region of the Community.
Article 5
1. In order to apply Article 4, the Commission may decide, by adopting a Regulation, to re-establish the normal levy for a given period.
2. Should a Member State ask the Commission to take such action, the Commission shall take a decision within a maximum of 10 working days of receipt of the request ...'.

3 — The applicants claim that that failure to act is an infringement of the EEC Treaty, Regulation (EEC) No 2777/75 of the Council of 29 October 1975 on the common organization of the market in poultrymeat (OJ 1975 L 282, p. 77) and Council Regulation No 3899/89, see footnote 1.

in the Commission's view the applicants have no legal interest in having their claim examined in an action for annulment.

5. The applicants claim that the measure which the Commission is obliged to adopt is of direct and individual concern to them and that the Court has jurisdiction to hear both the case brought under Article 175 and that brought under Article 173. The applicants do not believe that the action for annulment can be held inadmissible merely because an action for failure to act is pending. Moreover, if a choice must be made between the two actions the applicants do not attach great significance to whether the Court hears the action for failure to act or the action for annulment.

6. The cases provide the Court with an opportunity to state its view on certain questions concerning the relationship between Article 175 and Article 173. In addition the cases give the Court an opportunity to consider whether its case-law in the anti-dumping area concerning a private individual's entitlement to bring an action for annulment is material to the individual's entitlement to bring an action in other legal areas.

Can an action on the same set of facts be examined by the Court under both Article 173 and 175?

7. As is clear from the foregoing, the present applications in substance concern one and the same question, namely whether it follows from Article 4 of Regulation No 3899/89 that the Commission is obliged to re-establish completely the import levies for ducks and geese imported from Hungary and Poland.

The question is whether from that set of facts anything can be deduced as to the admissibility of either the one or the other action. Can the same subject-matter be examined under both Article 173 and Article 175?

8. As an introduction, let me recapitulate the relevant content of Article 175 and Article 173.

The first paragraph of Article 175 lays down the basic material condition under which an action for failure to act may be brought. The precondition for such an action is that the Council or the Commission, in infringement of the Treaty, must have failed 'to act'.

It is clear from the first paragraph of Article 175 that such an action may always be brought by the Member States or the other institutions of the Community, including the European Parliament. The third paragraph of Article 175 lays down the conditions under which a natural or legal person may bring an action for failure to act. That condition is 'that an institution of the Community has failed to address to that person any act other than a recommendation or opinion'.

The second paragraph of Article 175 lays down the procedure which must be followed

before an action for failure to act is brought. The first condition is that the institution in question 'has first been called upon to act'. The second condition is that the institution 'has not defined its position' within two months of being so called upon. The third condition is that the action should be brought within a further period of two months.

Under the first paragraph of Article 173 the Court has jurisdiction to review the legality of acts of the Council and the Commission other than recommendations or opinions.

Such actions may be brought by the Member States, the Council, the Commission and in certain cases by the European Parliament. [4] The second paragraph of Article 173 provides that a natural or legal person may bring an action 'against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

Under the third paragraph of Article 173 a case must be brought within two months of publication of the measure in question, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter.

9. The Court has stated that 'there is a close relationship between the right of action given in Article 173, which allows unlawful measures of the Council and Commission to be declared void, and that based on Article 175, which may lead to a finding that the failure by the Council or Commission to adopt certain measures is contrary to the Treaty'. [5] In its judgment in the *Chevalley* case the Court stated that 'The concept of a measure capable of giving rise to an action is identical in Articles 173 and 175, as both provisions merely prescribe one and the same method of recourse.' [6] In those *dicta* the Court would appear to wish to emphasize the analogous nature of the two provisions and the need to construe the provisions in a way that ensures that they complement each other appropriately. The starting point for interpreting the two provisions must thus be, on the one hand, to prevent the development of an area in which the institutions could perpetuate a situation that was contrary to the Treaty without the citizen having any opportunity of challenging it, and, on the other hand, to set a boundary between the two provisions so that one and the same set of facts is not reviewed under both articles.

10. In the present cases the subject-matter is, as stated, the same, whether review takes place under Article 173 or under Article 175 and the basis and extent of the review must thus also be the same. Two actions whose subject-matter is in substance the same should not, for reasons of procedural economy, be accepted by the Court.

If, therefore, it can be held that the conditions for bringing an action are in principle satisfied in both cases, it is my view that one

4 — See the Court's judgment in Case C-70/88 *European Parliament* v *Council* [1990] ECR I, p. 204.

5 — See the Court's judgment in *European Parliament* v *Council* (Common transport policy) [1985] ECR 1513, paragraph 36.

6 — See the Court's judgment in Case 15/70 *Chevalley* v *Commission* [1970] ECR 975.

of those actions must be held inadmissible on the ground that the applicants have no legal interest in having it heard. [7]

11. I mention that circumstance in connection with the fact that the cases before the Court show that there may be circumstances which make it hard for the applicants to decide in advance which type of case should be chosen.

There is nevertheless a need for applicants to be able to act on the basis of principles that are known in advance and reasonably easy to apply indicating which type of action should be chosen for the purpose of having the legality of the institutions' conduct reviewed. If there are such principles there will theoretically be no need for applicants to bring more than one action.

The present cases afford the Court an opportunity to lay down such principles in two respects. In the first place it must rule on the significance of the fact that the Commission expressly informed the applicants, after an application under Article 175 action had been lodged, that it did not regard itself as bound to adopt the measure sought. Secondly, the Court must rule on the question whether individuals have the same right to bring a case under the third paragraph of Article 175 as they have under the second paragraph of Article 173.

These questions only become relevant, however, if the applicants have fulfilled the procedural conditions for bringing an action for failure to act. I shall therefore first state my view on that issue.

Did the applicants call upon the Commission to act, as required under the second paragraph of Article 175?

12. It is apparent from the second paragraph of Article 175 that those bringing an action for failure to act must first have called upon the Commission to take the decision that those concerned believe it is obliged to take. When it is thus called upon to act, it should be possible for the Commission to fulfil its obligation to act if it agrees with those concerned that there is such an obligation. In the Court's case-law weight is attached to the fact that when they call upon the Commission to act, those concerned should indicate their intention to bring an action for failure to act if the Commission does not take the decision requested. [8]

In their letter of 26 September 1990 requesting the Commission to re-establish the normal import levies, the applicants did not comply with the latter part of that condition. No reference was made in the letter to Article 175 and the applicants did not point out that if the Commission did not comply with its request they would bring an action for failure to act.

The Commission did not, however, make that objection. It must therefore be assumed that the Commission does not want the case

7 — See the judgment in Joined Cases 5 to 11 and 13 to 15/62 *San Michèle* v *High Authority* [1962] ECR 449, where the Court stated:
'In these circumstances, the applicants had no legitimate grounds for complaining of a failure to act which no longer existed at the time the actions were brought, since their legal protection was sufficiently assured by the possibility of making an application for annulment of the Decision under Article 33 of the Treaty.
Consequently, the actions for failure to act must be ruled to be inadmissible owing to lack of legal interest.'

8 — See, for example, the Court's judgment in Case 25/85 *Nuovo Campsider* [1986] ECR 1531, paragraph 8, and Advocate General Darmon's Opinion in that case pp. 1535 and 1536.

to be dismissed on that ground. That attitude is perhaps an indication that the Commission was indeed aware that the applicants would react by bringing an action under Article 175 if it did not act as requested. It is also explained in the application that the applicants' representative at made it clear that the applicants would bring such an action when the Commission was dealing with the request.

In those circumstances I do not believe that there are grounds for the Court to hold the action for failure to act inadmissible of its own motion, by reference to that shortcoming in the original request to act. That condition is laid down for the benefit of the defendant institution and I see no reason why the Court should ensure that it is satisfied if the Commission does not so wish.

Has the action for failure to act become devoid of subject-matter as a result of the Commission's express refusal?

13. As explained in the foregoing, the real problem in both the present cases is whether the Commission was under an obligation to act which it has failed to fulfil. At first sight it would seem most natural for such a review to take place in the context of an action for failure to act under Article 175.

If there is, however, some doubt on this point and if the applicants, in order to protect themselves, considered it necessary to bring a subsequent action for annulment, the reason was that, as stated, the Commission informed the applicants a few days after the action for failure to act had been lodged that it did not regard itself as obliged to act as the applicants requested.

14. In a number of cases the Court has held inadmissible actions for failure to act where the Commission has defined its position within two months of being so called upon in the form of an express refusal to adopt the requested measure. [9] The Court has further held inadmissible an action for failure to act where the Commission's refusal was given only after the expiry of the two months' time-limit, the Court pointing out that that definition of its position was given before the action for failure to act was instituted. [10]

On the other hand, in its case-law [11] the Court has stated that a refusal is a measure the legality of which is open to review under Article 173 if the measure which the Council or the Commission refuses to adopt could be challenged under that provision. [12]

9 — See *inter alia* the Court's judgments in Case 48/65 *Lütticke* [1966] ECR 19; Case 42/71 *Nordgetreide* [1972] ECR 105; and Case 125/78 *GEMA* [1979] ECR 3173.

10 — See the judgment in Joined Cases 5-11 and 13-15/62 *San Michèle* [1962] ECR 449, cited above in footnote 7.

11 — See *inter alia* the Court's judgments in Case 30/59 *De Gezamenlijke Steenkolenmynen in Limburg* [1961] ECR 1; Case 42/71 *Nordgetreide* [1972] ECR 105; Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris*; and Case C-87/99 *Société Nationale Interprofessionnelle de la Tomate (Sonito)* [1990] ECR I-1981.

12 — In other words it is not every refusal to adopt a measure which can be challenged under Article 173. Thus a refusal to adopt provisional measures, for example, which are not in themselves open to challenge under Article 173 cannot be made the subject of an action for annulment. Conversely there is nothing to prevent an action being brought for failure to act, on the basis that the Council or the Commission, in infringement of the Treaty, has failed to adopt such a provisional measure, see the Court's judgment in Case 302/87 *Parliament* v *Council* [1988] ECR 5615 (the *Comitology case*), paragraph 16. There is no reason in the present case for the Court to hold whether an express refusal in those circumstances too debars the applicant from bringing an action for failure to act. In paragraph 15 below I shall state my view on an analogous problem in relation to the situation where a refusal may not be reviewed under Article 173 as a result of the applicant's lack of *locus standi*.

That case-law, in so far as it is the natural consequence of the actual wording of the second paragraph of Article 175, has not given rise to major problems. That is probably because, on practical grounds, the issue whether review of the Commission's conduct in the cases in question took place on the basis of Article 175 or Article 173 was a secondary one.

15. Some doubt as arisen as to whether the Court has changed its case-law as described above. Such doubt is caused by a paragraph in the so-called *Comitology* case. [13] The Court stated:

'The argument has also been put forward that, in the absence of any power to bring an action for annulment, the European Parliament would be unable, after calling upon the Council or the Commission to act, in accordance with Article 175, to challenge an express refusal to act issued in response to that request. However, that argument is based on a false premise. A refusal to act, however explicit it may be, can be brought before the Court under Article 175 since it does not put an end to the failure to act.' (paragraph 17).

The question is whether the Court thereby intended to lay down, as a general rule, that a definition of position in the form of an express refusal to adopt the measure requested by the applicants is not a definition of position within the meaning of the second paragraph of Article 175 and thus does not mean that Article 175 becomes inapplicable.

A significant factor in understanding the above-cited paragraph in the *Comitology* case is that the Court was faced with a situation where it was of decisive importance whether the refusal of the Council or the Commission to act could be described as a definition of position. In the judgment in question the Court stated that the European Parliament was not entitled to bring an action for annulment. [14] On the other hand, the Parliament is fully entitled to bring an action for failure to act. Against that background it appears evidently correct that the Commission or the Council should not be able, by confining itself to confirming expressly that it does not intend to adopt the requested measure, bar the European Parliament from being able to bring an action under Article 175 of the Treaty. There is a continued failure to act, but the European Parliament will not be able to have the refusal to act reviewed under Article 173. In my opinion it is important that the Court did not simply state that a refusal to act can be brought before the Court under Article 175, but added 'since it does not put an end to the failure to act'. A sensible interpretation which makes it possible to reconcile that paragraph with the Court's case-law hitherto is probably that the Court's statement in the *Comitology* case was directed solely at the situation where negation of the existence of a duty to act cannot be reviewed under Article 173 on the ground of the applicant's lack of *locus standi* under that provision. The rationale could also be expressed to the effect that the Court's interpretation hitherto of what can be classified as 'a definition of position' only leads to reasonable results when the

13 — See the Court's judgment in Case 302/87 *European Parliament* v *Council* [1988] ECR 5615.

14 — For a later modification of that premise see the judgment in Case C-70/90 *European Parliament* v *Council* [1990] ECR 2041.

locus standi for actions under Article 173 and for actions under Article 175 is analogous.

16. In my opinion the present cases do not give rise to a need for a decision on that issue. In these cases there is a situation on which the Court has not previously given a decision, namely that the Commission's express refusal to adopt the requested measure was given only after the action for failure to act had been lodged. Regardless of how the Court otherwise intends to deal with express refusals given before an action for failure to act is instituted, in my view a refusal which is only communicated to the applicants after an action for failure to act has been lodged should not lead to the case being held inadmissible.

An applicant must be able to assume, after the two month period has elapsed, that the institution in question does not intend to define its position and the applicant must therefore be entitled to expect that an action for failure to act which is brought in due time will be heard by the Court on its merits. Any other result would have unacceptable consequences. That would mean that the institution in question whose inaction is being challenged could force an applicant, by way of an express refusal, to abandon an action for failure to act and instead bring an action for annulment with the delay that that would involve. [15]

I therefore conclude that the fact that, after the action for failure to act was brought, the Commission expressly confirmed that it did not intend to adopt the measure requested by the applicants cannot lead to the action for failure to act becoming devoid of subject-matter and on that ground being held inadmissible.

I shall accordingly give my opinion below as to whether the applicants satisfy the conditions set out in the third paragraph of Article 175 for bringing an action for failure to act.

Should the condition concerning an individual's entitlement to bring an action under the third paragraph of Article 175 be interpreted by analogy to the second paragraph of Article 173?

17. A natural or legal person may, under the third paragraph of Article 175, only complain that an institution of the Community has failed to 'address an act to him'. The question arises whether the third paragraph of Article 175 should be interpreted by analogy with the second paragraph of Article 173 so that a natural or legal person can also complain against an institution's failure to address a decision 'which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

18. There are decisions which can be used to support a narrow interpretation of the third paragraph of Article 175, to the effect that it

15 — A distinction must be drawn between the present situation, where the Commission refuses to adopt the requested measure, and a situation in which the Commission, adopts the measure requested by the applicant after an action for failure to act has been lodged, even if the content of the measure is different from that requested by the applicant. See the Opinion of Judge David Edward in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, at II-2226, and Case T-28/90 *Asia Motor France and Others* v *Commission* [1992] ECR II-2285, paragraphs 90 to 96.

includes only failure to adopt measures of which the natural or legal person in question would be the direct addressee. [16] They are not decisions, however, which can be taken as definitive support for such a narrow interpretation in my view. They are decisions whose outcome was not likely to have been different even if the third paragraph of Article 175 was interpreted in accordance with the second paragraph of Article 173.

Conversely, there are judgments which seem to assume that the third paragraph of Article 175 should be interpreted by analogy to the second paragraph of Article 173. That applies, for example, to the Court's judgment in Case 134/73 *Holtz & Willemsen* v *Council*, [17] where, after citing the third paragraph of Article 175, the Court found it necessary to emphasize that the applicant could not have been directly and individually concerned. The Court stated *inter alia*:

'... the action commenced by the applicant has the object of procuring a provision of a general regulatory nature having the same legal scope as Regulation No 1336/72 and not an act concerning it directly and individually.

Such a regulation cannot be described, by reason either of its form or of its nature, as an act addressed to the applicant within the meaning of the third paragraph of Article 175 ...' (paragraph 5) [18]

19. Many grounds can be adduced for preferring a broad interpretation of the third paragraph of Article 175. First, such an interpretation accords with the Court's basic view that Article 173 and Article 175 should be regarded as an expression of one and the same legal remedy. Secondly such an interpretation implies additional legal protection for the natural and legal persons in question, which is logical since there does not seem to be any reason for treating natural and legal persons differently in principle in relation to their entitlement to bring actions under Article 173 and Article 175. Thirdly, a narrow interpretation would lead, in my view, to an undesirable legal position. A private individual to whom a measure is of direct and individual concern but who is not its addressee would then be able to challenge an institution's express refusal when the latter was called upon to act under the second paragraph of Article 173 but would be without a legal remedy if the institution simply failed to reply. If the entitlement of a natural or legal person to bring an action under Article 175 was more restricted than under Article 173 that could, at least in theory, prompt an institution, contrary to what good administrative practice dictates, to fail expressly to inform those in question that it does not agree that there is an obligation to act under Community law. [19]

On those grounds I take the view that the third paragraph of Article 175 should in

16 — See, for example, the orders of the Court in Case C-371/89 *Emrich* [1990] ECR I-1555 and Case C-72/90 *Asia Motor France* [1990] ECR I-2181, paragraphs 10 and 11, and the judgment in Case 90/78 *Granaria* [1979] ECR 1081.

17 — [1974] ECR 1.

18 — See too the Court's judgment in Case 247/87 *Star Fruit Company SA* [1989] ECR 291, paragraph 13.

19 — See, on the same argument, the Opinion of Advocate General Dutheillet de Lamothe in Case 15/71 *Mackprang* v *Commission* [1971] ECR 797.

principle be interpreted by analogy to the second paragraph of Article 173. [20]

Do the applicants satisfy the conditions for bringing an action under the third paragraph of Article 175?

20. There is no doubt that a measure which the applicants request should be adopted for the purpose of having the full import levies on ducks and geese re-established must, hypothetically, be adopted in the form of a regulation. That is the result of several factors. First, such re-establishment would presuppose an amendment to Regulation No 3899/89 and thus a measure of the same legal status. Secondly, there would be no point in addressing an individual decision to the applicants since the import levies are not payable by the applicants, but by the importers of ducks and geese. Thirdly, Article 5(1) of Regulation No 3899/99 expressly provides that if the levies are re-established it should be done by regulation. The applicants do not, moreover, appear to dispute the fact that in their action they are seeking to obtain the adoption of a regulation.

The question is whether that finding *per se* must lead to a dismissal of the action for failure to act as inadmissible.

It might be claimed that by definition the condition for bringing an action under the third paragraph of Article 175 could never be satisfied when the measure which the applicants claim should be adopted must necessarily be adopted in the form of a regulation. It is clear from the Court's case-law that the purpose of giving a private individual the opportunity of bringing an action for annulment not simply against decisions properly so-called, but also against measures which are issued in the form of regulations, is to prevent the Community institutions from being able, merely by choosing the form of a regulation, to exclude an application by an individual and thus to make clear that the choice of form may not alter the nature of a measure. [21] It can be deduced from that case-law that an individual cannot bring an action for annulment against 'true' regulations, but only against regulations which, because of their true legal nature constitute decisions.

It could, therefore, be maintained that since the measure sought by the applicants cannot be issued as a decision the applicants' action for failure to act must be held inadmissible on that ground alone.

It would not, however, be right to hold the applicants' action inadmissible on that basis. That is because, in its case-law, the Court has allowed actions for annulment against measures even though they had necessarily to be issued in the form of regulations.

The Court has accepted that measures which, taken in their entirety, are in the nature of a regulation can contain provisions which

20 — That is not to say that individuals do not in certain cases have the possibility of bringing an action for failure to act even if they could not have challenged the measure in question under Article 173 where a preparatory measure is involved.

21 — See *inter alia* the judgments in Case 162/78 *Wagner* v *Commission* [1979] ECR 3467, paragraph 16, and Case 307/81 *Alusuisse* v *Council and Commission* [1982] ECR 3463, paragraph 7.

constitute decisions of direct and individual concern to the applicants. [22] In the area of anti-dumping the Court has gone a step further by accepting that regulations which, as regards their nature and their scope, are of a legislative character, inasmuch as they apply to particular natural and legal persons can constitute decisions of direct and individual concern to them. An anti-dumping regulation as such may, in other words, be in the nature of a decision in relation to certain natural and legal persons, regardless of the fact that it is not disputed that an anti-dumping duty must be imposed by regulation. [23]

In the light of that case-law I believe that it is rational to interpret the conditions for bringing an action under the third paragraph of Article 175 to the effect that the Court should examine the question whether the measure sought by the applicants is in fact a decision which, although it must be issued in the form of a regulation, is of direct and individual concern to the applicants.

21. It seems to me clear, however, that a regulation concerning the re-establishment of import levies on ducks and geese is a true regulation and not a decision of direct and individual concern to the applicants if the Court's well-established interpretation of those terms is borne in mind.

According to the Court's case-law, the criterion for distinguishing between a decision and a regulation is to be sought in whether or not the measure in question has general application. A regulation is thus characterized by the fact that it is of a legislative nature and is applicable not to a limited number of persons, defined or identifiable, but to categories of persons viewed abstractly. [24] The Court has stated that a measure does not cease to be a regulation because it is possible to determine the number or even the identity of the persons to whom it applies at any given time as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in relation to its purpose. [25]

A regulation concerning the re-establishment of import levies would, given its content, apply to importers of ducks and geese and in addition be of concern not merely to the applicants but also to other poultry-slaughterers and duck and geese-breeders. Regardless of whether the regulation in question could be found to have been of concern to the applicants at the time it was adopted that legal effect would be produced by virtue of the applicants' objective capacity as poultry-slaughterers. The regulation would be of a permanent nature and would be of concern to every other economic

22 — See the judgment in Joined Cases 16/72 and 17/62 *Producteurs de Fruits* v *Council* [1962] ECR 471, especially p. 479.

23 — See *inter alia* the judgment in Joined Cases 239/82 and 275/82 *Allied Corporation* v *Commission* [1984] ECR 1005, paragraphs 11 and 12.

24 — See the Court's judgment in Joined Cases 16/62 and 17/62 *Producteurs de Fruits* v *Council* [1962] ECR 471, especially p. 478.

25 — See *inter alia* the Court's judgments in Case 6/68 *Zuckerfabrik Watenstedt* v *Council* [1968] ECR 409; Case 307/81 *Alusuisse* v *Council and Commission* [1982] ECR 3463, paragraph 11; and Case 26/86 *Deutz and Geldermann* [1987] ECR 941, and the Court's order in Joined Cases C-232/91 and C-233/91 *Petridi and Another* v *Commission* [1991] ECR I-5353.

operator who might, actually or potentially, find himself in an equivalent situation. [26]

In view of that case-law I am of the opinion that the regulation in question must be regarded as a measure of general application of a legislative nature and the applicants are consequently excluded from bringing an action challenging it.

22. The applicants have, however, claimed that in its judgments in the anti-dumping area the Court has extended the entitlement of private individuals to bring actions and that the principles established on this point are also applicable in a situation such as that before the Court.

The applicants have in particular referred to the Court's judgments in Joined Cases C-133/87 and C-150/87 *Nashua Corporation and Others* v *Commission* [27] and Case C-156/87 *Gestetner Holdings* v *Commission*. [28]

In those judgments the Court stated *inter alia*:

'Regulations introducing an anti-dumping duty are legislative in nature and scope, inasmuch as they apply to all traders generally. Nevertheless, it is conceivable that some provisions of those regulations may be of direct and individual concern to those producers and exporters of the product in question who are alleged on the basis of information about their business activities to be dumping. This is true in general of producers and exporters who are able to establish they were identified in the measures adopted by the Commission or the Council or were concerned by the preliminary investigations ...

The same is true of those importers whose resale prices were taken into account for the construction of export prices and who are consequently concerned by the findings relating to the existence of dumping ...' (paragraphs 14 and 15, *Nashua*, and 17 and 18, *Gestetner*).

'... However, the traders in question, who are limited in number, were identified by the institutions, and it was precisely in order to reflect the particular features of their business dealings with producers that the profit margin used was set at 5%.' (paragraphs 19 and 22 respectively).

At the hearing the applicants maintained that the situation in the present cases corresponds to the situation in the anti-dumping area on certain significant points, which is justification for applying the case-law cited.

26 — See, for example, the Court's judgments in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, especially p. 107; Case 231/82 *Spijker* v *Commission* [1983] ECR 2559, paragraphs 8-10; and Case 147/83 *Binderer* v *Commission* [1985] ECR 257, paragraph 257.
In other words that does not mean that it would be possible to determine definitively those who would be concerned by the regulation when it was adopted. See the Court's judgments in Joined Cases 106/83 and 107/83 *Toepfer* v *Commission* [1965] ECR 405, p. 411; Joined Cases 41/70, 42/70, 43/70 and 44/70 *International Fruit Company* v *Commission* [1971] ECR 411, paragraphs 16-21; Case 88/76 *Societé pour l'Exportation des Fruits* [1977] ECR 709; and Case 264/81 *Savma* v *Commission* [1984] ECR 3915, paragraph 11.

27 — [1990] ECR 719.

28 — [1990] ECR 781.

The applicants pointed in particular to the following facts:

— the Commission's obligation in the anti-dumping area to undertake investigations corresponds to its obligation in relation to Article 4 in Regulation No 3899/89 to investigate and review whether Community producers of like or directly competing products are suffering serious injury;

— both the anti-dumping rules and Article 4 of Regulation No 3899/89 are aimed at protecting those to whom injury is caused; and

— in the anti-dumping area there is a special complaints procedure available to any natural or legal person and the fact that Article 5 of Regulation No 3899/89 mentions the Member States shows that others may also request the Commission to intervene, which is substantiated by the fact that the Commission in fact acknowledged that it had received a request from the applicants and reacted to it.

The applicants have claimed that if the case-law from the anti-dumping area is applied, they should be regarded as individually concerned. In this connection the applicants refer to the fact that it follows from Article 4 of Regulation No 3899/89 that re-establishment of import levies can be restricted to a specific region of the Community, in the case in point Germany, [29] and that the applicants are the only producers of ducks and geese competing, over the entire German market, with equivalent products from Hungary and Poland. In connection with its investigations as to whether the conditions in relation to Article 4 were satisfied the Commission was therefore bound to take the applicants' sale prices specifically into consideration and therefore the applicants are individually concerned by virtue of their position on the market in question.

23. The applicants are correct in their view that an important factor in the Court's case-law in the anti-dumping area is that it is accepted that a regulation may at one and the same time be of general application, that is to say apply to categories of persons regarded generally and in the abstract, yet still have a number of individual addressees.

In my view the applicants can hardly be right, though, when they say that there are such significant similarities between the situation in the present case and the situation in the anti-dumping area that there are grounds

29 — That argument to the effect that the re-establishment of import levies can take place for a single region of the Community is not necessarily based on a correct interpretation of Article 4 of Regulation No 3899/89. A more obvious way to interpret the provision is that serious injury in one region of the Community can prompt the re-establishment of import levies with effect for the whole Community. It is, however, not necessary as far as the problem under discussion is concerned to decide which of those two interpretations is correct.

for extending the Court's case-law in the anti-dumping area to cover a situation such as the present.

24. In its case-law in the anti-dumping area the Court has stressed that anti-dumping duties are introduced on the basis of the results of a comparative examination of particular undertakings' production and export prices. The Court has held that despite being legislative in nature it is conceivable that provisions in such a regulation may be of direct and individual concern, in the sense of the second paragraph of Article 173, to the undertakings who, in the regulation, 'are alleged to be dumping'. The Court has accepted applications brought by producers, exporters or importers who have been identified and individualized in one way or another by the regulation in question. [30]

Thus the Court has held that producers or exporters of a product on which an anti-dumping duty has been imposed will be directly and individually concerned if the anti-dumping charges against them are based on information concerning their business activities, which must be presumed to be the case where an undertaking is named individually in the measure adopted or was concerned in the preliminary investigations. [31]

As far as importers are concerned, they are, first, regarded as individually concerned where the Commission has established the export prices not on the basis of the export prices of the producers or exporters in question, but on the basis of the importers' resale prices. Such a construction of the export prices can *inter alia* be undertaken provided there is an association between the exporter and the importer. [32] The situation in the *Nashua* and *Gestetner* cases was different, inasmuch as evidence of dumping was not adduced on the basis of the applicants' resale prices. The Court attached great weight to the fact that in calculating the normal value of the product in question a profit margin was used which was established in the light of the particular circumstances of certain of the undertakings' association with the producers. The applicant belonged to that group of undertakings whose number was limited and who were identified by the institutions and, as a consequence, was individually and directly concerned by the regulation.

When, conversely, an independent importer has been involved, that is to say an importer who is not associated with the exporter, and the evidence that there is dumping is not

30 — For a study of the Court's practice see in particular Advocate General Mischo's Opinion in the *Nashua* case (Joined Cases C-133/87 and C-150/87 [1990] ECR 719) and Advocate General Jacob's Opinion of 21 March 1991 in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501.

31 — See the above cited paragraphs in the Court's judgments in the *Nashua* and *Gestetner* cases and the judgment in Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005.

32 — See *inter alia* the Court's judgment in Case 113/87 *NTN Toyo Bearing Company* v *Council* [1979] ECR 1185, paragraph 9, and those in Joined Cases C-304/86 and C-185/87 *Enital* [1990] ECR I-2939, C-305/86 and C-160/87 *Neotype Techmashexport* [1990] ECR I-2945 and in Case C-157/87 *Electrompex* [1990] ECR I-3021.

adduced on the basis of the applicant's resale prices, the Court has held the application inadmissible. [33]

25. In the light of the above review I believe that it can be concluded that the present situation can be distinguished from the anti-dumping cases on significant points.

A regulation concerning the re-establishment of import levies will not have the two-sided aspect of an anti-dumping regulation. It will not be a regulation which at one and the same time applies to categories of persons regarded generally and in the abstract and to identified and individualized addressees. The regulation will be applicable to those who wish to import the products in question. There is no reason to identify or individualize specific undertakings either directly or indirectly in the regulation.

The applicants will be concerned neither as producers, exporters or importers of the products on which the import levies are imposed. The regulation will merely have a secondary and indirect significance for the applicants by virtue of its anticipated effect on the level of prices for the products in question.

It is true that the regulation might be adopted because it could be determined that Community producers were suffering injury and it is probably also true that the Commission would take account of information on the applicants' business activities in arriving at its decision.

The fact that private individuals have been involved in the procedure that takes place before a measure is adopted does not, however, according to the case-law of the Court suffice for the measure to be regarded as a decision of individual concern to the persons in question. In the Court's judgment in Case 72/74 *Union Syndicale-Service Public Européen and Others* v *Council* [34] the Court stated as follows:

'... the mere fact that those organizations took part in the discussions which preceded the disputed measure is not sufficient to change the nature of the right of action which, in the context of Article 173, they may possess in relation to that measure.' (paragraph 19)

In its judgment in Case 307/81 *Alusuisse* v *Council and Commission*, [35] the Court stated:

'In favour of the admissibility of its application the applicant also argues that the particular features of the procedure leading to the

33 — See the Court's judgments in Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005, paragraph 15; Case 307/81 *Alusuisse Italia* v *Council and Commission* [1982] ECR 3463, paragraph 9; and the Court's order in Case 279/86 *Sermes* v *Commission* [1987] ECR 3109, paragraphs 16-18. The Court's judgment in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501 demonstrates that special circumstances can also justify the admissibility of actions brought by importers which do not meet the above criteria. The Court ruled in that judgment that there was 'a set of factors constituting such a situation which is peculiar to the applicant and which differentiates it, as regards the measure in question, from all other traders'. Extramet Industrie was by far the largest importer of the product at issue in the case and, at the same time, the end-user of that product. The only producer of the product within the Community was also Extramet's main competitor in the market for the finished product, and Extramet had experienced difficulties in obtaining supplies from that producer. In view of these special circumstances, the Court found that Extramet's business activities were 'seriously affected by the contested regulation' and accepted that the application was admissible on that ground.

34 — [1975] ECR 401.

35 — [1982] ECR 3463.

adoption of the anti-dumping regulations, in particular the participation of the various interested parties in the successive stages of that procedure, lead to the conclusion that the measures in question constitute individual administrative measures which may be contested by individuals under the second paragraph of Article 173 of the Treaty.

That argument must also be rejected since the distinction between a regulation and a decision may be based only on the nature of the measure itself and the legal effects which it produces and not on the procedures for its adoption...' (paragraphs 12 and 13)

In the light of the foregoing there is no basis for applying the Court's case-law in the anti-dumping area to the present cases.

26. The applicants have further claimed (a) that Article 4 of Regulation No 3899/89 obliges the Commission to adopt protective measures in cases where Community producers are caused injury, and (b) that the case-law of the Court indicates that those whom such protective measures are intended to protect must be entitled to bring an action in order to compel the adoption of the protective measures in question.

In this connection the applicants have referred to the Court's judgment in Case C-152/88 *Sofrimport* v *Commission*, [36] where the Court stated as follows:

'It should be observed first of all that the applicant is in the position referred to in Article 3(3) of Council Regulation (EEC) No 2707/72 of 19 December 1972 laying down the conditions for applying protective measures for fruit and vegetables ..., which requires the Commission, in adopting such measures, to take account of the special position of products in transit to the Community. Only importers of Chilean apples whose goods were in transit when Regulation No 962/88 was adopted are in that position. Those importers thus constitute a restricted group which is sufficiently well defined in relation to any other importer of Chilean applies and cannot be extended after the suspensory measures in question take effect.

Secondly, since Article 3 of Regulation No 2707/72 gives specific protection to those importers, they must therefore be able to enforce observance of that protection and bring legal proceedings for that purpose.' (paragraphs 11 and 12)

As is clear from the paragraphs cited, the Court attached weight to the fact that a provision was involved the purpose of which was to protect a closed group of undertakings which was distinct from all others and which could not be extended after the measures in question entered into force.

36 — [1990] ECR I-2477.

The applicants in the present cases are not in a situation corresponding to that in the *Sofrimport* case. It is true that the purpose of Article 4 of Regulation No 3899/89 was to protect Community producers who suffer injury, but that group is in no way restricted and will, moreover, possibly be extended, because a regulation which is adopted pursuant to Article 4 will also protect Community producers who at some later time decide to produce ducks and geese.

That argument cannot, therefore, lead to the action being held admissible either.

27. Finally the applicants claimed (a) that it follows from the Court's case-law that private individuals should be able to bring a case before the Court if they do not have the possibility of bringing a case before a national court, and (b) that no such possibility is available to the applicants in the present case since no measure addressed to them has been adopted pursuant to the regulation at issue in the case.

The applicants have referred to the fact that in its case-law the Court has attached weight to whether or not the undertakings in question have national remedies available to them and in this connection they referred to the Court's judgment in Case 307/881 *Alusuisse Italia* v *Council and Commission*, [37] where the Court stated:

'... That solution is furthermore in conformity with the system of remedies provided for by Community law since importers may contest before the national courts individual measures taken by the national authorities in application of the Community regulations.' (paragraph 13)

That argument cannot lead to the action for failure to act being held admissible either. In the first place it is clear that the statement in the paragraph cited was made solely in support of the outcome which application of the third paragraph of Article 173 required anyway in that case.

Secondly, there cannot be any question in the interpretation of the third paragraph of Article 175 (and the second paragraph of Article 173) of using the applicants' possible entitlement or otherwise to make use of national remedies in order to challenge indirectly the legality of Community regulations as an independent criterion. That would lead to the express restrictions in the Treaty on the private individual's entitlement to bring actions having to be disregarded where those restrictions would mean that those concerned were *de facto* barred from being able to bring an action. Private individuals would then in principle be able to bring an action before the Court in cases where the institutions adopted or failed to adopt general and directly applicable measures which did not have to be implemented by the national authorities. Such a situation appears to me to run counter to both the wording of the

37 — [1982] ECR 3463.

Treaty and its purpose, and could therefore only be achieved by way of a Treaty amendment.

Finally it is worth mentioning that the applicants in the present case are not necessarily without legal remedy, since it follows from the case-law of the Court that in principle they have the possibility of bringing an action for damages before the Court, alleging that they have suffered loss as a result of the Commission's unlawful failure to adopt a regulation. [38]

Do the applicants fulfil the conditions for bringing an action under the second paragraph of Article 173?

28. In paragraph 14 above I mentioned that according to the case-law of the Court [39] an action for annulment may only be brought against a refusal to adopt a measure provided the measure which either the Council or the Commission refuses to adopt could be challenged by way of an action for annulment.

For a reply to the question whether the applicants could bring an action for annulment against a regulation concerning the re-establishment of import levies for ducks and geese, reference need merely be made to the foregoing concerning the conditions for bringing an action under the third paragraph of Article 175. In the course of my review of the said conditions I have thus already assessed the measure whose adoption is sought by the applicants. Since, in my view, the third paragraph of Article 175 must be interpreted by analogy with the second paragraph of Article 173, the same considerations require the action for annulment to be held inadmissible. [40]

Conclusion

29. I accordingly suggest that the Court should hold both applications inadmissible and order the applicants to pay the costs of the case.

38 — See the Court's judgment in Case 153/73 *Holtz & Willemsen* v *Council* [1974] ECR 675, where the Court stated as follows:
'It would be contrary to the autonomy of this action as well as to the efficacity of the general system of forms of action established by the Treaty to regard as a ground of inadmissibility the fact that in certain circumstances an action for damages could lead to a result similar to that of an action for failure to act under Article 175.
Such an action differs from an action for failure to act in that its end is not the adoption of a particular measure but compensation for damage caused by an institution in the performance of its duties' (paragraph 4).

39 — See footnote 11.

40 — See in this connection the Court's judgment in Case 246/81 *Lord Bethell* v *Commission* [1982] ECR 2277, paragraph 16.