OPINION OF ADVOCATE GENERAL DARMON

delivered on 14 July 1993 *

Mr President,
Members of the Court,

1. What are the conditions of admissibility for an action brought by an individual for the annulment of a decision of the Commission addressed to a Member State? There have been a number of occasions on which the Court has had to rule on this question.

2. Italian Law No 887 of 22 December 1984, [1] and in particular the last paragraph of Article 19, introduced a system of support tariffs for the transport by railway of certain goods produced in Sicily and Sardinia in the following terms:

'A 30% reduction on national railway tariffs shall apply to the carriage of bulk ores produced in and exported from the islands. This reduction is extended to 60% for products produced and processed in the islands. The amount of the reductions shall be borne by the Treasury which shall reimburse the national railways the amounts due pursuant to Community law.'

3. According to Article 80(1) of the EEC Treaty, Member States are prohibited from imposing, in respect of transport operations carried out within the Community, 'rates and conditions involving any element of support or protection in the interest of one or more particular undertakings or individual industries', unless authorized by the Commission.

4. In Decision 91/523/EEC of 18 September 1991 abolishing the support tariffs applied by the Italian railways to the carriage of bulk ores and products produced and processed in Sicily and Sardinia, [2] the Commission found that that scheme fell within the prohibition laid down in Article 80(1) and decided that Italy should discontinue it.

5. The Commission emphasized, in particular, that these tariffs constituted 'a form of aid with a direct impact on the selling price of the goods in question; ... they favour production of these products *vis-à-vis* competitors in other Member States on the Italian and other Member States' markets'. [3]

6. The Decision was addressed to the Italian Republic alone. [4]

7. By application lodged at the Court Registry on 7 January 1992, the Federazione Sindacale Italiana dell'Industria Estrattiva,

* Original language: French.

1 — Supplement to *Gazzetta Ufficiale* No 356, 29.12.1984.

2 — OJ 1991 L 283, p. 20.

3 — Third recital of the Decision.

4 — Ibid., Article 2.

Società Italiana Sali Alcalini SpA, Thalassia SpA, Laviosa Chimica Mineraria SpA and Società Sarda di Bentonite SpA ('the applicants') brought an action for the annulment of the Decision.

8. By orders of 17 December 1992, the President of the Fifth Chamber gave the regions of Sardinia and Sicily leave to intervene.

9. The Commission raises, as a preliminary issue, an objection of inadmissibility. It emphasizes in particular that since the contested Decision is not addressed to the applicants, it is not of individual concern to them within the meaning of the second paragraph of Article 173 of the EEC Treaty.

10. Before I consider this point, let me resolve a preliminary matter: is an action brought by an individual for the annulment of a decision addressed solely to a Member State admissible? To put it plainly, can the contested Decision be considered to be addressed to 'another person' within the meaning of the second paragraph of Article 173 of the EEC Treaty?

11. In the judgment of *Plaumann* [5] on 15 July 1963, the Court considered that

'(...) the second paragraph of Article 173 does allow an individual to bring an action against decisions addressed to "another person" which are of direct and individual concern to the former, but this article neither defines nor limits the scope of these words. The words and the natural meaning of this provision justify the broadest interpretation. Moreover, provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively. Therefore, the Treaty being silent on the point, a limitation in this respect may not be presumed'. [6]

12. The Court concluded that an action for annulment could be brought by an individual against a decision addressed to a Member State [7] and the fact that the State was not represented in the proceedings was not seen as an obstacle to the admissibility of the application.

13. I now come to the question of whether the contested Decision is of individual concern to the applicants.

14. Here a distinction must be drawn between the undertakings which consider themselves to be concerned because they are specialists in the extraction of ores and the Federazione Sindacale Italiana dell'Industria Estrattiva, which is a professional association representing the interests of industrialists working in this sector.

15. To begin with, therefore, let me examine the admissibility of the action to the extent that it is brought by the former.

5 — Case 25/63 [1963] ECR 95.

6 — Ibid., pp 106 and 107

7 — See also Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, at paragraph 5.

16. As the Court indicated in *Plaumann*,

'It follows ... from Articles 189 and 191 of the EEC Treaty that decisions are characterized by the limited number of persons to whom they are addressed'. [8]

17. As we have seen, the Commission Decision was formally addressed only to the Italian Republic.

18. In the same judgment, the Court specified that

'Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'. [9]

19. In that case, a Commission decision refused to authorize the Federal Republic of Germany partially to suspend the customs duties applicable to certain fruit imported from third countries. The decision was addressed to the Member State alone. The Court held that the action for annulment brought by an importer was inadmissible, stating in particular that the applicant was affected by the contested decision

'by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee'. [10]

20. As regards Commission decisions which are addressed to Member States, the conditions of admissibility for an action for annulment brought by an individual vary between two extremes.

21. A decision abolishing assistance which a government planned to grant to increase the production capacity of *one* cigarette manufacturer concerns exclusively the producer in question, through the Member State. The Commission did not dispute the admissibility of an action by the producer. [11]

22. At the other extreme, a decision to abolish a State aid taking the form of a preferential tariff for natural gas could not be contested by the growers using that product.

'Since the aid in question benefits a very broad category of businesses, the Commission decision requiring that aid to be discontinued cannot be regarded as being of direct and individual concern to the applicant growers'. [12]

8 — P. 107.

9 — Ibid.

10 — Ibid.

11 — *Philip Morris Holland* v *Commission* (cited above) at paragraph 5. See also Cases 296/82 and 318/82 *Pays-Bas and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809.

12 — Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, at paragraph 12.

23. Another illustration is given by the judgment in *Union Deutsche Lebensmittelwerke* v *Commission*. [13] This originates from a decision of 25 February 1985 addressed by the Commission to the Federal Republic of Germany on measures for the promotion of sales of butter on the West Berlin market. Four margarine producers who supplied a substantial proportion of margarine sold on the Berlin market brought an action for the annulment of the decision.

24. The Court concluded that their action was inadmissible, stating that

'... the contested decision does not apply to a closed circle of persons who were known at the time of its adoption and whose rights the Commission intended to regulate. Although the contested decision affects the applicants, it is only because of the effects it produces on their position on the market. In that regard, the decision is of concern to the applicants just as it was to any other person supplying margarine on the West Berlin market while the contested operation was in progress, and it is not therefore of individual concern to them for the purposes of the second paragraph of Article 173 of the EEC Treaty'. [14]

25. It is only in exceptional circumstances that the Court will hold admissible an action for annulment brought by individuals against decisions addressed to Member States.

26. In *Toepfer*, [15] two German importers of French cereals and fodder applied for import licences from the German customs authorities in respect of very large quantities at a zero rate of levy. [16] The notice of the rates of levy at the customs office was taken down immediately after their application and the German government immediately took protective measures. A Commission decision on the same day fixed a new free-at-frontier price for imports from France and, two days later, authorized the Federal Republic of Germany to maintain the protective measures. This intervention by the Commission reflected its intention to find an immediate solution to a risk of serious disturbances on the German cereal market provoked by the licence application of the two companies alone.

27. The Court stated that

'... the only persons concerned by the said measures were importers who had applied for an import licence during the course of the day of 1 October 1963;

... the number and identity of these importers had already become fixed and ascertainable before 4 October, when the contested decision was made;

... the Commission was in a position to know that its decision affected the interests and the position of the said importers alone;

13 — Case 97/85 [1987] ECR 2265.
14 — At paragraph 11.
15 — Cases 106/63 and 107/63 [1965] ECR 405.
16 — Ibid. p. 407.

... the factual situation thus created *differentiates* the said importers, including the applicants, from all other persons and *distinguishes them individually just as in the case of the person addressed*', [17]

and concluded that the action was admissible.

28. It was, in fact, obvious that the decision was expressly directed at the applicants and that its purpose was to rectify a situation which they had directly brought about.

29. In *Bock* [18] an importer of foodstuffs from a third country applied to the German authorities for an import licence. The latter indicated that it was 'intended to reject (its) 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'. [19] On 15 September 1970, the Commission decided to authorize the Federal Republic of Germany to exclude the relevant products from Community treatment. The importer brought an action for the annulment of that decision.

30. In targeting 'the imports of these products in respect of which applications for licences are currently and duly pending before the German authorities', in particular, the Commission decision was directly aimed at the applicant's request, the applicant being the only one to have an application outstanding at the date the decision was taken.

31. The Court therefore stated that

'... 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 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'. [20]

32. It can be seen that an action by an individual can only be held admissible if the operators targeted by the decision can be identified and are of a fixed number or constitute a 'closed circle of persons who are known at the time of its adoption'.

33. The *purpose* of the regulation must also be to take into account or to affect the *specific interests* of a distinctive group of

17 — Ibid. p. 411; the emphasis is mine.
18 — Case 62/70 [1971] ECR 897.
19 — Ibid. ECR 899.
20 — Ibid. para. 10; the emphasis is mine.

operators, particularly in the context of a known operation.

34. The judgments in *Toepfer* and *Bock* show that the admissibility of an action depends, in practice, on whether the decision, although addressed to the Member State for reasons of competence, was a decision taken *ad personam* and is aimed at the situation of specific operators. The general and statutory form of the decision obscures one (or more) individual measure(s).

35. Such is also the case with a Commission decision notified to a Member State authorizing the latter to introduce a quota system for textile imports from another Member State for a limited period.

36. The Court has accepted that only the exporters of those products who proved that they were party to contracts during the period the quotas applied were particularly affected by that decision and found themselves 'by reason of those contracts particularly affected by the decision at issue,' [21] and consequently were able to show that it was of individual interest to them. [22]

37. The case of *Spijker* v *Commission* [23] illustrates the restrictive nature of the case-law perfectly.

38. On 18 June 1982, a Dutch importer applied to the customs authorities for an import licence for a consignment of brushes originating in China. A Commission decision of 7 July 1982 authorized the Benelux States to exclude this product temporarily from Community treatment. Spijker obtained an import licence, its application having been made prior to the entry into force of the Commission decision. Spijker contested the decision only in so far as it might affect future imports. The decision had been taken as a result of the conduct of Spijker, a company which was, moreover, the *only* importer of the relevant products in the Benelux States.

39. The Court ruled that

'With regard to the importers of such products (the decision) is therefore a measure of general application covering situations which are determined objectively and it entails legal effects for categories of persons envisaged in a general and abstract manner'. [24]

'That conclusion is not invalidated by the fact that the applicant, according to its statement which was not disputed by the Commission, is the only trader-importer established in the Benelux States regularly importing into the Netherlands brushes originating in the People's Republic of China and that it was one of its imports which led to the adoption of the contested decision. As the Court stated in its judgment of 6 October 1982 in Case 307/81 *Alusuisse* [1982] ECR 3463, a measure does not cease to be a regulation because it is possible to determine

21 — Case 11/82 *Piraiki Patraiki* [1985] ECR 207.

22 — Ibid. para. 31

23 — Case 231/82 [1983] ECR 2559.

24 — At paragraph 9

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]

40. Commission Decision 91/523/EEC abolished the Italian system of support tariffs for the carriage by railway of bulk ores from Sicily and Sardinia, regardless of whether the ores are merely produced there or are also processed there.

41. This Decision indisputably affects the interests of the undertakings *producing* the ores and those which *process* them.

42. The former must be holders of a concession for quarry exploitation granted by the public authorities and can therefore be easily identified. By contrast, the industrialists who process the ores are not subject to this condition. [26]

43. It cannot therefore reasonably be maintained that the support tariffs benefit only the 'closed category' of undertakings who produce the ores and who hold a concession. [27]

44. Furthermore,

'the possibility of determining more or less precisely the numbers or even the identity of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them'. [28]

45. The applicant companies have not proved — as it is incumbent upon them to do — that the Decision affects them except to the extent that they form part of a general and abstract category of persons at whom this measure is directed.

46. The Decision cannot therefore be considered to be of individual concern to the applicants other than the professional association. Their action for annulment must, therefore, be declared inadmissible.

47. As far as the admissibility of the action brought by the Federazione Sindacale Italiana dell'Industria Estattiva is concerned, my observations will be brief.

48. The Commission Decision does not concern the 'association's *own* interests *as an organization*'. [29]

49. The Court does not accept 'the principle that an association, in its capacity as the representative of a category of businessmen, could be individually concerned by a meas-

25 — At paragraph 10.

26 — Commission observations on the objection of inadmissibility, p. 4 of the French translation.

27 — See the observations of the region of Sardinia on the list of the aid beneficiaries, p. 3 of the French translation.

28 — Joined Cases C-232/91 and C-233/91 *Petridi and Another* v *Commission* [1991] ECR I-5351, para. 10.

29 — See the Opinion of Advocate General Mancini in *Defi* (cited below) at p. 2473; the emphasis is mine.

ure affecting the general interests of that category'. [30]

50. Since the Commission Decision is of no more concern to the commercial traders who are applicants than it is to all other traders in the relevant sector, the Court cannot accept the right of action of an association set up to represent the collective interests of those traders. [31]

51. For its action to be admissible, the association would have had to prove, which it has not done, a personal interest distinct from the interests of the undertakings it represents.

52. The action brought by the Federazione Sindacale must therefore also be declared inadmissible.

53. I therefore propose that the Court declare the actions inadmissible and order the applicants to bear their own costs.

30 — Cases 16/62 and 17/62 *Confédération National des Producteurs de Fruits et Légumes* v *Council* [1962] ECR 471 at 479-480.

31 — Ibid., and Case 282/85 *Defi* v *Commission* [1986] ECR 2469, at paragraph 16