OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 9 JUNE 1983 [1]

Mr President,
Members of the Court,

Spijker Kwasten, a company with limited liability [hereinafter referred to as "Spijker"] has brought an action before the Court for a declaration that a decision adopted by the Commission of the European Communities on 7 July 1982 is void.

Pursuant to Article 91 of the Rules of Procedure the Commission requested the Court to decide in the first place whether the action was admissible without considering the substance of the case.

By order of 23 February 1983 the Court agreed to the request. My opinion is therefore limited to consideration of that question.

It is necessary however to refer to the facts which gave rise to the dispute and then to the arguments put forward by the Commission in support of its objection of inadmissibility.

I — Spijker is a company established in the Netherlands, part of whose business is trade in and the importation of brushes and similar products, especially brushes originating in the People's Republic of China (subheading ex 96.01 of the Common Customs Tariff).

It is common ground that in the Benelux States Spijker is the only trader in and importer of such products originating in China which in fact it obtains from the Federal Republic of Germany where they are in free circulation.

On 18 June 1982 it applied to the Centrale Dienst voor In- en Uitvoer [Netherlands Central Office for Imports and Exports] for an import licence in respect of a consignment of 5 400 dozen (that is to say 64 800) brushes costing DM 76 130.

On 28 June 1982 the Netherlands Government "in agreement with its Benelux partners" requested the Commission for authorization to take protective measures within the meaning of the first paragraph of Article 115 of the Treaty.

On 29 June 1982 Spijker was informed that that request was "pending" and of the risk that the importation which it was seeking to effect might be excluded from Community treatment.

In the event, on 7 July 1982 the Commission authorized the Benelux States not to apply Community treatment until 31 December 1982 to brushes (falling within subheading ex 96.01 of the Common Customs Tariff) originating in the People's Republic of China and in free circulation in other Member States as regards licences applied for after 25 June 1982.

That decision had two consequences: first, Spijker obtained the licence for which it had applied, since it had lodged its application before 25 June 1982; on the other hand, until 31 December 1982 any new application on its part would be rejected automatically. The latter measure affects it adversely.

II — In support of its objection of inadmissibility the Commission maintains that the decision of 7 July 1982 which is

1 — Translated from the French.

addressed to the Benelux States is neither of direct nor of individual concern to Spijker.

(a) With regard to the first point the Commission states that the decision is addressed to "the Benelux States" which remain free to make use of it or otherwise and that therefore it cannot be regarded as of "direct" concern to Spijker.

I would point out that it is established that the Netherlands national authorities requested authorization to take protective measures following the only application for a licence, made by Spijker on 18 June 1982.

(b) With regard to the second point the Commission refers to the Court's judgment in *Plaumann*, [1] and takes the view that Spijker is neither differentiated nor distinguished individually in the same way as the person addressed, that is to say the Benelux States in the present case. The fact it is an importer of brushes originating in China does not mean that it can be differentiated from all the other traders in the countries in question which import the same products originating in the same place and the fact that it is recognized as the only trader and importer in the Benelux States is irrelevant since that activity may be engaged in at any time by any other person on the same basis.

III — 1. It is clear that, of the States to which it is addressed, the contested decision is of interest primarily to the Netherlands and, of the brushes which are in free circulation in the other Member States, it concerns those in the Federal Republic of Germany.

Although the decision refers to a request made by the Governments of the Benelux States, there is merely a request made by the Kingdom of the Netherlands "in agreement with its Benelux partners". No further details are given as to the existence of that agreement or the form which it took.

It should be noted that on 29 June 1982 the Permanent Representation of the Netherlands forwarded a communication from the Minister for Economic Affairs in The Hague to the Directorate-General for External Relations of the Commission which, again using the phrase "in agreement with its Benelux partners", contained supplementary information in support of its request for authorization to take protective measures. The reason given for the request was that:

"The Netherlands Government has recently discovered a major fraud as regards declaration of the country of origin. When importing goods to be put into free circulation in the Netherlands, an importer deliberately gave a false origin in respect of 'brushes' that is to say the Federal Republic of Germany instead of the true country of origin which was China . . . ."

The document went on to give the value in *guilders* of the goods fraudulently imported between 1976 and 1982 and statistics with regard to economic difficulties and national production in the sector in question.

The contested decision gives figures only in *guilders*, which relate to the Netherlands alone and not to all the Benelux States. The fifth recital in the preamble to the decision merely repeats

1 — Judgment of 15 July 1963 in Case 25/62 [1963] ECR 95.

the figures given in the document submitted on 29 June 1982 by the Minister for Economic Affairs in The Hague (page 7 of that document), which relate to the total imports into the *Netherlands* from non-member countries and to the proportion of the "internal" market for which they account in comparison with national production and not in comparison with the production of the Benelux States.

If required, further evidence to indicate the Member State to which the decision is addressed is to be found in the fact that the original language of the decision was Dutch; the French version produced by the Commission is only a translation.

2. Moreover, it is clear that Spijker's conduct and application were the cause of the approach to the Commission made by the Netherlands authorities "in agreement with its Benelux partners".

In making its request the Netherlands wished to prevent the grant of an import licence for a transaction which had been concluded by Spijker in April 1982. That is confirmed by the reply given to the company on 29 June 1982 by the Centrale Dienst voor In- en Uitvoer in which it states that

"a request for the application of Article 115 of the EEC Treaty is pending before the European Commission in respect of *this* transaction."

Although the Commission's decision does not identify the person who applied for the import licence "from the *Member State* making the request in the present case" for Community treatment not to be applied, it does, in the final recital, mention the precise amount of the importation in guilders (83 743).

However, since Article 3 (3) of the Commission Decision of 20 December 1979 states that

"The introduction of the request by the Member States may not prevent the issue under the conditions and within the period laid down in Article 2 of import documents for which application was made *prior* to the Commission's decision",

the Commission took care to exclude the consignment ordered by Spijker from the *Federal Republic of Germany* from the authorization not to apply Community treatment to brushes originating in the People's Republic of China and in free circulation in Member States other than the Benelux States.

The argument to the effect that the decision is intended to protect a sector of the economy of the *Benelux States* and simply gives those *Member States* an authorization of which they may or may not avail themselves is devoid of substance: in my opinion, the Commission's decision is of direct concern to Spijker.

3. The applicant is the only company established in the Benelux States which regularly imports, via the Federal Republic of Germany, goods of that kind originating in the People's Republic of China. The decision is not only of direct but also of *individual* concern to it since, as has been held by the Court, it affects Spijker "by reason of certain attributes which are peculiar to [it] or by reason of circumstances in which [it is] differentiated from all other persons".

Those attributes or circumstances relate to the fact that, in the view of the Netherlands authorities, Spijker committed a major fraud in relation to the declaration of the origin of the product.

The Commission's decision itself reiterates that fact. It states that:

"according to the information provided by the authorities in the Benelux States, internal production faces massive competition from illegal imports"

and that:

"further indirect imports in addition to those already completed or *planned* might aggravate those difficulties."

The Netherlands authorities made it clear that they would use the requested authorization automatically and specifically in relation to Spijker in respect of any future imports by it from the Federal Republic of Germany.

It is even reasonable to conclude that during the period of its validity the Netherlands authorities used the authorization, — if indeed they actually needed to use it — only in relation to Spijker: no other trader-importer in Belgium or the Grand Duchy of Luxembourg would have been able, during that period, to enter into a commercial agreement for the importation of the kind of product in question originating in the People's Republic of China via any Member State other than the Federal Republic of Germany.

However, that question may remain open sice the Court has never so far held that for a decision to be of *"individual"* concern it must be of *"exclusive"* concern.

My opinion is that the objection of inadmissibility should be rejected and that the Commission should be ordered to pay the costs incurred in connection with this procedural issue.