lation No 3017/79 and whether or not it has committed manifest errors in its assessment of the facts, has omitted to take into consideration any essential matters of such a nature as to give rise to a belief that subsidization is taking place or has included in the reasons on which its decision is based considerations amounting to a misuse of powers.

In Case 191/82

EEC SEED CRUSHERS' AND OIL PROCESSORS' FEDERATION (FEDIOL), having its registered office in Brussels, represented by Dietrich Ehle, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

OBJECTION, at the present stage of the proceedings, that the application made by the EEC Seed Crushers' and Oil Processors' Federation (Fediol) for a declaration of the nullity of the Commission's communication of 25 May 1982 refusing to initiate an anti-subsidy proceeding in respect of imports of soya-bean oil-cake from the Federative Republic of Brazil, is inadmissible,

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore, A. O'Keeffe and U. Everling (Presidents of Chambers), Lord Mackenzie Stuart, G. Bosco, T. Koopmans, O. Due, K. Bahlmann, Y. Galmot and C. Kakouris, Judges,

Advocate General: S. Rozès
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts

For the purpose of implementing the common commercial policy and of the harmonious development of the external trade of the Community the Council, in Regulation No 459/68 of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the EEC (Official Journal, English Special Edition 1968 (I), p. 80), created, with due regard to the rules laid down in Article VI of the General Agreement on Tariffs and Trade (GATT) and in the Agreement on Implementation of that article, a common system of protection against imports from non-member countries which are the subject of dumping or the grant of bounties or subsidies.

Multilateral trade negotiations resulted in 1979 in a new Agreement on Implementation of Article VI of the General Agreement (1979 Anti-Dumping Code) and in a new Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement and consequently Regulation No 459/68 was repealed and replaced by Council Regulation No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the EEC (Official Journal 1979, L 339, p. 1).

The Council considered that, in order to implement the protective measures, it was necessary to lay down procedures "for anyone acting on behalf of a Community industry which considers itself injured or threatened by dumped or subsidized imports to lodge a complaint". As a result Article 5 of Regulation No 3017/79 provides:

"(1) Any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers itself injured or threatened by dumped or subsidized imports may lodge a written complaint.

(2) The complaint shall contain sufficient evidence of the existence of dumping or subsidization and the injury resulting therefrom.

(3) The complaint may be submitted to the Commission, or a Member State, which shall forward it to the Commission. The Commission shall send Member States a copy of any complaint it receives.

(4) The complaint shall be withdrawn, in which case proceedings may be terminated unless such termination would not be in the interest of the Community.

(5) Where it becomes apparant after consultation that the complaint does not provide sufficient evidence to justify initiating an investigation, then the complainant shall be so informed.

(6) Where, in the absence of any complaint, a Member State is in possession of sufficient evidence both of dumping or subsidization and of injury resulting therefrom for a Community industry, it shall immediately communicate such evidence to the Commission."

Pursuant to Article 5 (1) of Regulation No 3017/79 the EEC Seed Crushers' and Oil Processors' Federation (Fediol) (hereinafter referred to as "the Federation"), having its registered office at Brussels, lodged a complaint with the Commission on 2 April 1980 by which it requested the initiation of an anti-subsidy proceeding against the Federative Republic of Brazil in respect of imports of soya-bean oil-cake.

That complaint followed an earlier anti-subsidy complaint made by the Federation in respect of the same commodity on 3 January 1977 pursuant to the rules laid down in Regulation No 459/68; that initial compaint was, on 14 April 1977, the subject of a notice initiating a procedure (Official Journal C 89, p. 7) and subsequently on 10 December 1977 of a notice of termination (Official Journal C 298, p. 2) because the Commission had received satisfactory undertakings from the Brazilian Government from which it concluded that the introduction of protective measures was unnecessary at that time.

The complaint lodged by the Federation on 2 April 1980 was, like the first complaint, in respect of the direct or indirect grant by Brazil of production and export subsidies for soya-bean oil-cake. It related, more specifically, to four types of subsidy:

The levying of higher export duties in respect of soya beans than in respect of soya-bean oil-cake which is a product derived from them;

The setting of export quotas for soya beans with the result that domestic prices of soya beans for the Brazilian oil industry are lower;

The levying of a higher tax on the movement of goods in respect of the export of soya beans than in respect of soya-bean oil-cake;

The granting of a preferential rate of interest for credit in respect of exports of soya-bean oil-cake.

The Federation's complaint contained numerous data intended to prove the existence of such subsidies and to show the damage suffered as a result by the Community oil-processing industry.

Consequently the Federation requested the Commission once it had undertaken the necessary consultations to apply Article 7 (1) of Regulation No 3017/79, according to which:

"Where, after consultation, it is apparent that there is sufficient evidence to justify initiating a proceeding the Commission shall immediately;

(a) announce the initiation of a proceeding in the Official Journal of the European Communities; such announcements shall indicate the product and countries concerned, give a summary of the information received, and provide that all relevant information is to be communicated to the Commission; it shall state the period within which

interested parties may make known their views in writing and may apply to be heard orally by the Commission in accordance with paragraph (5);

(b) so advise the exporters and importers known to the Commission to be concerned as well as representatives of the exporting country and the complainants;

(c) commence the investigation at Community level, acting in cooperation with the Member States; such investigation shall cover both dumping or subsidization and injury resulting therefrom and shall be carried out in accordance with paragraphs (2) to (8)."

Brazil abolished one of the contested export duties in April 1980 and the Federation's complaint was amended accordingly by letter of 23 June 1980.

The statement of facts and law contained in the complaint was concluded by a number of observations made by the Federation; consultations took place between the Commission and the Member States and between the Commission and Brazil.

By letter of 5 February 1982 the Commission informed the Federation that after detailed examination of its complaint and as a result of consultations with the Brazilian Government, it did not intend to initiate an anti-subsidy procedure. It based its intention on the fact that the contested subsidies were to all intents and purposes no longer being applied and that their total effect was insufficient to justify initiation of a procedure.

By letter of 25 May 1982 the Commission informed the Federation that the supplementary information and observations which it had submitted had not altered its view of the case; consequently and in pursuance of Article 5 (5) of Regulation No 3017/79 the Federation was informed that an anti-subsidy procedure in respect of imports of soya-bean oil-cake from Brazil would not be initiated.

The Commission added that it would continue to watch the development of the situation in that sector, all the more so since the course of Brazilian policy in credit matters gave rise to concern as regards both time-limits and rates.

II — Written procedure

On 29 July 1982 the Federation brought an action claiming that the Court should:

1. Declare void the decision contained in the notification of the Commission dated 25 May 1982 refusing to initiate an anti-subsidy proceeding in respect of the importation of soya-bean oil-cake from Brazil;

2. Order the Commission to pay the costs.

Pursuant to Article 91 of the Rules of Procedure the Commission lodged at the Court on 11 October 1982 a document requesting it to give a preliminary decision on the admissibility of the action, to dismiss the application as inadmissible and to order the applicant to pay the costs.

The applicant in the main action, being the defendant in relation to the objection of inadmissibility, submitted its observations on 11 November 1982 in which it requested the Court not to grant the Commission's request that it should give a preliminary decision as to admissibility, to dismiss the objection of inadmissibility and to order the Commission to pay the costs.

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

III — Submissions and arguments of the parties presented during the written procedure with regard to the admissibility of the action

The *Commission* emphasizes that this case is the first one brought before the Court concerning the legal position, in the context of an anti-dumping or anti-subsidy proceeding, of a complainant or of an industry in a Member State affected by dumping or subsidization. By way of preliminary proceedings and at the level of general principles, it raises the question whether a complainant such as the applicant is entitled to require the Commission to commence a formal proceeding; that question is closely related to the question whether a complainant or any person affected by subsidies granted by a non-member country has a right to require the adoption of measures or in particular the imposition of a countervailing duty. The question is of fundamental importance not only for its side-effects in the sphere of economic and commercial policy and its purely political implications but also for its bearing on legal protection in the Community.

The *applicant*, being the defendant in relation to the objection of inadmissibility, does not contest the importance of the problem of the admissibility of its action which must be seen in the more general context of legal protection against subsidies and dumping effected by non-member countries and the resolution of which must take into account the legal position in other States which are parties to GATT.

A — The applicant's capacity to institute proceedings

The *Commission* contends that the Federation is not a legal person according to the law of one of the Member States but an association without legal capacity having its registered office in Belgium. On a strict interpretation of the second paragraph of Article 173 of the EEC Treaty it has no right to institute proceedings or to appear in court.

Nevertheless, taking account of the powers of a procedural nature given by Regulation No 3017/79 to associations lacking legal personality but acting in the name of a Community industry, it would be illogical to refuse such an association the right to bring an action; it is therefore appropriate to give a broad interpretation of the concept of "legal person" within the meaning of the second paragraph of Article 173 of the EEC Treaty.

The *applicant*, being the defendant in relation to the objection of inadmissibility, for its part considers that in accordance with the generally accepted principle of examining the reality of the situation all combinations which are recognized by law and vested with certain powers, particularly combinations able to express a collective intent in the defence of interests which are legally recognized and protected have in principle legal personality and the capacity to institute legal proceedings.

In any case Article 5 (1) of Regulation No 3017/79 gives "any association not having legal personality" acting on behalf of a Community industry the right to lodge a complaint; it necessarily follows that such an association has the capacity to institute proceedings under the second paragraph of Article 173 of the Treaty.

B — The question whether the contested communication is an act of the Commission

The *Commission* admits that the contested communication (regardless of its legal nature) must be attributed to it as an institution although it was only signed by an official; it was certainly a communication issued in the name of the Commission of the type provided for in Article 5 (5) of Regulation No 3017/79.

The *applicant* considers that the letter of 25 May 1982 does indeed amount to a decision of the Commission with regard to the request to initiate a proceeding.

C — The question whether the contested communication is a decision within the meaning of the second paragraph of Article 173 of the Treaty

The *Commission* is of the opinion that, in order to constitute a decision within the meaning of the second paragraph of Article 173 of the Treaty, it is not sufficient for a communication to have some legal effect; it must have binding legal effect so that it brings about a distinct change in the applicant's legal position: it is not sufficient if his interests are simply infringed.

Thus it is necessary to decide whether the communication sent to the applicant on 25 May 1982 was such as to have such a specific legal effect. The answer is not to be found in the external form of the measure or in its apparent content but in the purpose of the compensatory procedure, regard being had to the applicant's position in relation to the whole proceeding.

(a) With regard to the *purpose of the communication* it must be stated that the Commission, pursuant to Article 5 (5) of Regulation No 3017/79, informed the Federation on 25 May 1982 that its request for the initiation of a new anti-subsidy proceeding against Brazil did not contain sufficient evidence to justify the commencement of an investigation. That decision was based essentially on the working document annexed to the letter of 5 February 1982; the information provided was therefore a matter of substance.

The communication did not go beyond the information provided for in Article 5 (5): it did not contain any decision since no such act was provided for or covered by that provision. It cannot be conceded that the reference to that provision simply concealed the real nature of the communication and that the legal basis for it must be found in Articles 5 (2), 7 (1) and 9 of Regulation No 3017/79 or in the principles of legal certainty and legal clarity.

It is true that the regulation is silent on the matter of the rejection of a request for the initiation of a proceeding. However, the Community legislature deliberately abstained from including such formal rules governing the termination of the preliminary procedure; it is not possible to deduce from the right to lodge a complaint within the meaning of Article 5 (1) and (2) a right to a formal decision capable of being subject to review by the Court. The fact that it is possible to initiate an official investigation does not, in any case, mean that the preliminary procedure which it follows must be terminated by a decision. The general principles of law by no means require such a decision; they may,

at best, lead the Community institutions to provide for a formal closure of the procedure in general or to undertake it in a specific case. Such a step cannot be the subject of an action such as has been brought in this case for a declaration that it is void under Article 173; furthermore the action before the Court has not been brought under Article 175.

(b) With regard to the *legal nature of the information* provided for in Article 5 (5) of Regulation No 3017/79 it should be remembered that:

The communication sent to the applicant on 25 May 1982 constituted the information provided for in Article 5 (5) of the regulation and did not contain any other decisions going beyond the content thereof;

Whilst the information indeed contained a declaration of intent on the part of the Commission that it was not proposing to initiate an official investigation within the meaning of Article 7 at that time, it was nevertheless not a decision capable of being challenged within the meaning of the second paragraph of Article 173 of the Treaty.

The Court's case-law with regard to competition provides hardly any assistance in this context; only the statements contained in its judgment of 18 October 1979 (Case 125/78 *GEMA* [1979] ECR 3173) could be considered to any degree. The fact that a complaint does not result in the action desired does not seem to be of a more definitive nature in an anti-dumping proceeding than in connection with an infringement of competition rules; furthermore there are no reasons to regard the legal position of a complainant as stronger under Regulation No 3017/79 than under the law relating to agreements, decisions and concerted practices.

It follows by implication but clearly from several provisions of Regulation No 3017/79 (Articles 5 (4) and (6), 6 (1), 7 (7) (a) and 11) that the Commission may, as is provided for, furthermore, in Article 2 of the GATT Anti-Dumping Code, commence a compensatory proceeding without a prior complaint having been made to it.

The information given pursuant to Article 5 (5) certainly expressed the Commission's intention not to initiate an official proceeding within the meaning of Article 7 at that time in the situation obtaining; however, the discontinuance of the proceeding is not final: the Commission may if it thinks fit at any time re-examine the evidence provided by the complainant.

At that stage there cannot yet be a formal proceeding properly so called; at best there is a preliminary examination or proceeding and if, following the consultations provided for in Article 6, the examination is not continued it is not possible to speak of the "termination of the procedure".

The complainant's interests are, without doubt, affected by the expression of the Commission's intention not to initiate an official proceeding at that time; however the only decisive question is whether the fact that the interests have been affected in such a manner may be regarded as a distinct change in the complainant's legal position and whether it is necessary, consequently, to recognize that he has a legally enforceable right to have an official investigation initiated if "sufficient evidence" within the meaning of Article 5 (2) has been provided.

(c) With regard to the *complainant's legal position* in the context of the compensatory rules the question is essentially whether Community law gives him a right to the adoption of protective measures. In fact it does not.

According to Article 3 (1) of Regulation No 3017/79 a countervailing duty may be imposed for the purpose of offsetting a subsidy; the institution therefore remains free to decide whether or not to adopt such measures.

Article 7 (9) of the regulation provides that a proceeding is concluded either by its termination or by definitive action. The complete absence of any rules governing the question whether, when and under what conditions definitive measures must be adopted indicates that the Community legislature intended to leave the relevant institution a free hand in that field.

There is nothing automatic about the adoption of definitive measures in the case of injury caused by dumping or subsidization. Definitive measures are to be adopted only if "the interests of the Community call for Community intervention" (Article 12 (1) of the regulation); the relevant institutions therefore have a very wide discretion with regard to policy in defending the interests of the Community and in balancing opposing interests. In this case it is not just a question of balancing the interests of consumers and producers but of resolving much more complex conflicts of interest and, above all, of taking into account the compelling requirements of trade relations with the non-member country in question. When considering whether definitive measures must be adopted the Community institutions ought to have an unlimited discretion free from review by the Court. The phrase "Where ... the interests of the Community call for ... intervention" is too vague for it to be possible to deduce therefrom legal criteria capable of being the subject of judicial review.

To recognize that the complainant has a right to challenge before the Court a decision of the institutions refusing to take action against an exporting country would risk calling in question the results obtained by means of negotiation.

All definitive measures adopted under Regulation No 3017/79 are, by their nature, protective measures falling with the field of commercial policy, even if they serve to protect national production and therefore also coincide with the interests of an individual. It is for the legislature to decide whether, in the light of such personal interests, it intends the persons affected to be empowered to bring an action, in whatever form, against the decisions of the political authorities in that sector; in the area to which Regulation No 3017/79 applies it has not done so.

In granting a right of complaint the legislature certainly did not intend to give the relevant business circles a right to bring an action but intended, as in the case of classic protective measures in the area of commercial policy, simply to give them the formal opportunity to make their opinion known to the Community authorities.

It is not possible to base any argument on the fact that such a right of action exists in other legal systems. GATT and in particular its code on subsidies leaves completely open the question of how to ensure observance at national level of the rules of conduct applicable in international law.

If a complainant has no right to require the Community to adopt protective measures against a non-member country then he cannot have a right to the initiation of an official investigation either.

The recognition of such a purely procedural right does not give the complainant any benefit in the legal sphere except the opportunity to produce to the Commission additional evidence which might, in an appropriate case, alter its attitude; the existence of that opportunity is, however, insufficient to change the complainant's legal position.

Moreover, the probable effect of the recognition of such a right would be to subject the subsequent conduct of the competent authority to judicial review as well, at least in part: the right to the initiation of a proceeding would hardly be consistent with the grant to the Commission or the Council of an absolute discretion to arrive at a decision; at the very least it would imply review of any misuse of power and involve a significant restriction of the discretion of the Community institutions.

The initiation of an official proceeding is itself a measure which is not without effect on trade and relations with the non-member country in question; it is therefore for the political institution responsible for commercial policy to decide whether it is appropriate to initiate a proceeding having such effects. That is particularly the case in relation to compensatory measures.

The idea that the Commission, which is the political institution having responsibility at the preliminary stage, is able to refuse to initiate and conduct an official investigation if such is not in the Community interest and that in that respect it possesses a discretion which is not subject to review by the court, is consistent with Articles 5 and 7 of Regulation No 3017/79 even in the absence of an express reference in Article 5 (5) to the interests of the Community being taken into account. Apart from requirements as to admissibility, Articles 5 (5) and 7 (1) require the complaint to provide sufficient evidence "to justify initiating a proceeding"; the Commission must therefore check that all the circumstances of the case, not only the aspects of dumping, subsidy and injury but also all other relevant circumstances and in particular the general interests of the Community, justify the initiation of an investigation. Above all it must be entitled to refuse to initiate a proceeding where it is convinced that, at the stage of a preliminary investigation, it would not be in the interests of the Community to adopt definitive measures.

The intervention of the Member States in that preliminary examination in the context of the consultations prescribed in any event is justified by the fact that the question of what is appropriate in the circumstances must be taken into account, as is shown in particular by Article 6 (4) (d) of the regulation.

The fact that the complainant is thus deprived of all legal protection against the Commission or the Council in relation to anti-subsidy legislation cannot alter the fact that the protective measures in question are, by their nature, measures falling exclusively within the area of commercial policy which are adopted, as

are all measures provided for in Article 113 of the EEC Treaty, primarily in the general economic interest and prevail over the interests of individuals. The fact that the protective measures are intended to safeguard Community industry is not sufficient to give them a substantially different nature.

There is no provision of Community law which categorizes export subsidies granted by non-member countries as "illegal"; the relevant matter is the objective circumstances, falling within the domain peculiar to the non-member country in question, to which it is possible to react through the instruments of commercial policy permitted by GATT. In that respect there is a substantial difference as against competition law, in the context of which measures which have the effect of distorting competition must, in fact be categorized as illegal; it is therefore not surprising that, in contrast to competition law, anti-dumping and anti-subsidy legislation does not, in the last resort, grant any protection to the persons affected by the conduct of third parties.

The references to GATT and its code concerning subsidies do not apply in this case: the introduction of countervailing duties is not a necessary and automatic reaction to subsidies which do not conform to GATT and the provisions in question amount for the contracting parties to obligations under international law which, according to the Court's case-law, do not have direct effect in Community law.

(d) Finally, the relevant provisions of Regulation No 3017/79 must be interpreted in the following manner:

Any complaint satisfying the conditions laid down in Article 5 (3) must be examined by the Commission in the context of the consultations provided for in Article 6;

After such examination the Commission has the opportunity either to initiate the official proceeding provided for in Article 7 or not to initiate such a proceeding "in the circumstances" and to inform the complainant thereof in accordance with Article 5 (5);

The complainant is entitled to be so informed and may, in default, bring the action provided for in the second paragraph of Article 175 of the Treaty for failure to act;

The complainant nevertheless has no right to force the Commission to initiate an official proceeding; accordingly a decision not to proceed pursuant to Article 5 (5) may not be challenged under the second paragraph of Article 173 of the Treaty.

The *applicant* considers the communication of 25 May 1982 to be a definitive decision which brings to an end the complaints procedure within the meaning of the third paragraph of Article 189 of the EEC Treaty, which expresses the Commission's refusal to initiate an anti-subsidy proceeding and which affects his rights; such a decision is capable of being the subject of proceedings under the second paragraph of Article 173 for a declaration that it is void.

(a) The communication constitutes the Commission's definitive decision on the complaint of 2 April 1980: it was in that communication that the Commission, after it had adopted a provisional attitude more than once, expressed its view in an unequivocal and definitive manner and in a form which made it possible to identify its nature. By that decision the request made by the Federation was rejected and the first essential stage of an anti-subsidy proceeding was brought to a negative

conclusion because the grounds and evidence presented by the Federation were not considered to be sufficient to justify the initiation of a proceeding. The Commission's undertaking to "continue to watch developments in the situation carefully" is irrelevant.

The declaratory nature of the contested communication is quite clear: the Commission refused, formally and definitively, to initiate an anti-subsidy proceeding despite the request contained in the complaint; the preliminary procedure was in fact brought to an end by a decision; without such a decision the applicant would have brought an action under Article 175 of the Treaty for a failure to act.

The contested decision is not merely informative: its alleged informative nature is restricted to the fact that the Commission referred, formally and erroneously, to Article 5 (5) of Regulation No 3017/79; in substance it does not amount according either to its contents or to its function, to the provision of information within the meaning of that provision.

(b) It follows from the whole of the scheme laid down by Articles 5 to 7 of Regulation No 3017/79 that the preliminary procedure is brought to an end by a decision within the meaning of the second paragraph of Article 173 of the Treaty.

The preliminary procedure was separate from an investigation properly so called (Articles 7 to 9 of the regulation); they are two independent phases, each subject to very specific conditions.

The independent nature of the procedure for lodging a complaint is not weakened by the fact that, according to the anti-subsidy code, the Commission may act in the absence of a complaint: the Community legislature has not laid down in Article 5 of Regulation No 3017/79 in precise terms such a right on the part of the Commission to act on its own initiative, thus showing the importance attached to a complaint emanating from the industry in question. The requirement that a complaint be lodged arises from the urgent need to protect the Community in question, which is in the best position to decide whether it is suffering damage, to determine its cause and to assess its effects.

The position is completely different from that found in the field of competition: there the Commission is under a duty, in its capacity as guarantor of competition, to establish infringements of Articles 85 or 86 of the Treaty and to require the undertakings to bring to an end the infringements so established; moreover, with regard to the anti-dumping procedure it is necessary, in order to be able to request the initiation of a proceeding, to prove damage on the basis of very specific criteria and not only to prove the mere existence of a legitimate interest.

The preliminary procedure must necessarily be terminated by a formal decision providing for either the commencement or the renunciation of a proceeding. The need for a formal decision arises all the more from the fact that the relevant provisions lay down not only the conditions for lodging a complaint but also the rules governing the course of the procedure.

It is incorrect to maintain that the Community legislature has voluntarily abstained from providing formally for the termination of the preliminary procedure: Regulation No 3017/79 refers expressly to two possibilities, namely the initiation of a proceeding (Article 7 (1)) and its termination (Article 5 (4)). The view that the

Commission may at any time re-examine the evidence submitted in the complaint is incorrect and somewhat theoretical: anti-dumping and compensatory proceedings presuppose up-to-date evidence of dumping or subsidization as well as of the injury suffered during a specific period; since the Commission is unable to act on its own initiative it may at the most request the complainant to bring the complaint up-to-date or to lodge a fresh one.

In that respect it is not possible to base any argument on the decision in the *GEMA* case: in this case a decision has been adopted by the Commission and, furthermore, anti-dumping proceedings, unlike proceedings in respect of agreements, decisions and concerted practices, require a complaint, supported comprehensively by reasons, the receipt of which by the Commission constitutes the commencement of the first stage of the formal procedure.

(c) The rejection of a request to initiate an anti-subsidy proceeding jeopardizes the legal position of the whole European oil-processing industry, on behalf of which the complaint was lodged.

That damage consists first of its being deprived of the right to have established, by an investigation conducted by the Commission, whether the conditions explained in a convincing manner and proved at least *prima facie* do in fact exist and must lead to protective measures within the meaning of Articles 10, 11 and 12 of Regulation No 3017/79. That denial of justice is all the greater since the Commission alone has the power to carry out the necessary investigations and it alone has the opportunity to collect the necessary information and to place it in a wider context. By the unjustified refusal to initiate an investigation the complainant is deprived of all the procedural guarantees provided for by Article 7 of the regulation before the Commission adopts the decision to terminate the proceeding if it appears that protective measures are unnecessary.

The refusal to initiate a proceeding in the given circumstances amounts *a priori* to a refusal to adopt protective measures unless the Commission has acquainted itself, on the basis of its own investigations, with the existing subsidy and its effects. The termination of the preliminary procedure is not therefore "justified" within the meaning of Article 7 (1) of the regulation.

The protection given with regard to procedure conditions the protection granted by the substantive provisions and guaranteed by the provisions of constitutional law of which an industry and the undertakings belonging to it ought to have the benefit against subsidies which cause them injury.

State subsidies must be regarded as illegal at least in those cases where they cause injury. By analogy with Article 92 of the EEC Treaty and with regard to the anti-subsidy code of GATT the contested subsidies are illegal measures from the point of view of public international law and this accordingly justifies the imposition of a countervailing duty. The subsidies are, at the same time, the cause of injury suffered by the oil-processing industry as Community producers and the injury is known to the Commission. The purpose of Regulation No 3017/79 is to prevent, by means of anti-subsidy measures, interference, such as that suffered in this case by the Community oil-processing industry, with the existence of and the right to engage

in a commercial activity organized by the undertakings in question. The refusal to initiate an anti-subsidy proceeding deprives formal and substantive rights of any protection.

The Commission's argument that the protective measures are, according to their nature in law, "measures belonging exclusively in the area of commercial policy ... adopted essentially in the general economic interest" is not acceptable. A "Community industry" (Article 4 of Regulation No 3017/79), comprising all the producers of similar products in the Community, lies at the centre of the anti-dumping and compensatory proceeding. Requests for the initiation of a proceeding must be lodged on behalf of a Community industry and the injury must be determined by reference to the Community industry in question. The specific implementation of protection against injurious subsidies by the GATT Code and Regulation No 3017/79 which is based on it quite deliberately reduced the aspects concerned with commercial policy and the general economic interest to a great degree; that is confirmed by the fact that the right to lodge a complaint is granted in the first place to the industry in question. The purpose of Regulation No 3017/79 in giving protection therefore requires the industry concerned to benefit from a strong legal position and formal rights in the proceedings following the complaint.

The need to bring to an end by a decision the proceeding commenced by a complaint, the legal position of complainants and the purpose of the regulation in giving protection oblige the Commission to adopt a decision. In this case the decision was adopted definitively and irrevocably in the form of the communication of 25 May 1982; inasmuch as it refuses to initiate an investigation the decision is also capable of being the subject of an action under the second paragraph of Article 173 of the EEC Treaty.

With regard to the complainant's right to the adoption of protective measures it is necessary to state first that the present procedure does not relate to such measures; the question of protective measures only arises, furthermore, when the Commission has initiated an investigation and has proceeded to carry out its own investigations and inquiries. The subject of this action is the Commission's refusal to initiate an investigation.

In any case, by refusing to initiate an investigation on the ground that the applicant has no right to the adoption of protective measures, the Commission is prejudging a decision which is absolutely incapable of being adopted before it has carried out its own investigations and which, in the final analysis, falls within the Council's competence.

The basic provision concerning the termination of an investigation is Article 9 (1) of Regulation No 3017/79. According to that provision a compensatory proceeding is only to be terminated if it is apparent that "protective measures are unnecessary"; in fact that is only the case if the Commission's investigations have shown that the necessary conditions (subsidies, damage, causal relationship) are absent. It is not possible to speak in that respect of a free discretion.

Moreover the Commission may only decide to terminate an investigation if no objection has been expressed in the

Advisory Committee on Protection against Dumped or Subsidized Exports. The Commission's view encroaches on the powers of the Member States and of the Council, which are able to come to a decision on the need for protective measures only on the basis of the inquiries conducted by the Commission in the course of an investigation.

In the case of a damaging subsidy there is a right to the adoption of protective measures. According to the Court's case-law the undertaking carrying out the dumping or the State granting a subsidy has a right to take legal action against protective measures adopted in the form of an anti-dumping or countervailing duty; the Community industry which is injured by the dumping or subsidization must, all the more, have the right to require the competent Community institutions, after the facts have been established, to adopt the necessary protective mesures. Regulation No 3017/79 was adopted in order to protect the industry in question; the Commission might destroy the right to the adoption of the measures necessary to provide that protection if it refused, despite the existence of a complaint supported by convincing evidence, to initiate an investigation and therefore determine the facts.

In addition, the existence of a "discretionary power free from review by the Court" with regard to the decision whether to initiate and conduct an investigation cannot be deduced from the concept of "Community interest".

In contrast to Article 12, Article 7 of the regulation, which lays down the conditions for the initiation and conduct of an anti-subsidy proceeding, makes no reference to the concept of Community interest. When adopting a decision concerning the termination of the preliminary procedure the Commission must therefore restrict itself to considering whether there is "sufficient evidence" within the meaning of Article 5 (2) of the regulation; if so, the initiation of a proceeding is not only justified but also necessary.

The course of the investigation, as provided for in Article 7 of Regulation No 3017/79, shows that the concept of "Community interest" acquires importance only after the proceeding has been initiated and the investigation carried out.

The concept of "Community interest" is of little actual importance in anti-dumping and compensatory proceedings. The decisions of the Community institutions in such proceedings to the present time have, in a manner of speaking, involved practically no specific consideration of the Community interest; the Commission has always been concerned to apply the law strictly, that is to say to decide on protective measures when the necessary conditions (subsidies, injury and causal relationship) were present.

The Commission's arguments in that connection are very general and theoretical: it does not cite any specific reason for refusing, from the point of view of the Community interest, the initiation of a compensatory proceeding against the importation of soya-bean oil-cake from Brazil. Its purpose is, in fact, to obtain judicial recognition of a discretionary power free from control by the Court in relation to the initiation of a compensatory proceeding. This case shows how dangerous such recognition would be for the protection of the applicant: the Commission has already established in 1977 that Brazil had paid illegal subsidies and it has twice failed to fulfil its promise to abolish them. In those circumstances to refuse the

applicant the legal protection it is entitled to by invoking the Community interest would make a mockery of the principle of a fair procedure which is derived from the principle of legality.

Considerations of commercial policy may certainly be taken into account in the decision-making process in the context of the concept of "Community interest"; however, they ought not be pleaded in order to give preference to the maintenance of good relations with a trading partner over the interests of the Community industry which is suffering injury. Brazil, which is a party to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of GATT, knows the rights and duties arising therefrom and cannot object to a compensatory proceeding conducted by its commercial partners in accordance with the rules of that Agreement. Regard being had to Brazil's conduct, the Commission and the Council need be in no way constrained; the Commission has, furthermore, adopted a very different attitude to the same country in other sectors.

Anti-dumping and anti-subsidy proceedings certainly constitute measures to protect trade according to the scheme of the EEC Treaty; however, specific expression has been given to such measures to protect trade in the form of special codes made under GATT, in particular in order to reinforce rights and obligations of the industry in question.

In the context of the interpretation of Regulation No 3017/79 it is essential to take into account, according to the fifth recital in the preamble thereto, the practice of the other contracting parties to GATT and especially of the United States of America; in fact such States allow the industry affected wide powers to bring an action.

(d) To regard the Commission's letter of 25 May 1982 as a decision which is capable of being the subject of legal proceedings corresponds to the requirements of legal protection properly understood and to a precise application of the rules governing anti-dumping and anti-subsidy proceedings. If that should not be the case it would be simple for the Commission to decide, internally, without being bound by law and without the protection of the Court, which proceedings to accept and which to reject. However, no such discretion is given to it by Articles 5 to 7 of Regulation No 3017/79.

IV — Oral procedure

At the sitting on 15 March 1983 the Commission, represented by P. Gilsdorf, assisted in part by Hans-Friedrich Beseler, Director in the Directorate General for External Relations, and the Federation, represented by D. Ehle, presented oral argument with regard to the admissibility of the action and replied to questions put by the Court.

The Advocate General delivered her opinion at the sitting on 31 May 1983.

Decision

1 By application lodged at the Court Registry on 29 July 1982 the EEC Seed Crushers' and Oil Processors' Federation (Fediol) (hereinafter referred to as "the Federation") brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that a communication dated 25 May 1982 by which the Commission informed the applicant pursuant to Article 5 (5) of Council Regulation No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1979, L 339, p. 1) that an anti-subsidy proceeding would not be initiated in respect of imports of soya-bean oil-cake from Brazil, was void.

2 By a document lodged on 11 October 1982 the Commission, pursuant to Article 91 of the Rules of Procedure, requested the Court to give a preliminary decision on the admissibility of the action.

3 It appears from the file that on 2 April 1980 the Federation lodged a complaint with the Commission in which it referred to the subsidization of exports of soya-bean oil-cake by the Federative Republic of Brazil and invited the Commission to initiate an anti-subsidy proceeding under Regulation No 3017/79, to ask the Brazilian Government for explanations and to impose a provisional countervailing duty.

4 In that complaint, later supplemented by further information, the Federation states that Brazil subsidizes its exports of soya-bean oil-cake by a combination of various measures: on the one hand it exerts pressure by means of export restrictions on the domestic price of soya beans so that they are preferentially reserved at a reasonable price for national industry; on the other hand it gives preferential treatment to exports of soya-bean oil-cake by domestic fiscal measures, by levying different duties on exports of soya beans and of soya-bean oil-cake and by the grant of credit facilities for exports of soya-bean oil-cake. As a whole the measures are intended, it is alleged, to encourage the development of the Brazilian soya seed-crushing industry and they create serious difficulties for the European industry thereby jeopardizing its profitability.

5 It is not disputed that the Commission investigated the practices of which the Federation complained, that it entered into negotiations with the Brazilian Government and achieved some results and that, finally, it kept the applicant informed of those discussions.

6 On 30 September 1981 the Federation served notice on the Commission under the second paragraph of Article 175 of the EEC Treaty calling upon it to initiate an anti-subsidy proceeding against Brazil without delay. In the same letter it informed the Commission that it would bring the matter before the Court of Justice and that it reserved the right to hold the Community responsible for the damage caused to it by the refusal to impose a countervailing duty.

7 By a telex message of 4 December 1981 the Commission informed the applicant of the progress of the discussions held with the Brazilian mission in accordance with the terms of the GATT Anti-Subsidy Code and, at the same time, gave notice that it did not for the time being intend to initiate an anti-subsidy proceeding.

8 On 5 February 1982 the Commission sent to the applicant a working document dated 4 February 1982 in which it considers, on the one hand, the various Brazilian measures impugned by the Federation and, on the other hand, the question of the damage suffered by the European industry. In that memorandum the Commission states that the majority of the measures of which the applicant complained had in the meantime been withdrawn by Brazil and that the effect of the remaining measures was to leave a rate of subsidization which was economically negligible. It states that in those circumstances it seems to it "inappropriate" to initate an anti-subsidy proceeding and recalls that a complete assessment of the case requires the consideration not only of the interests of the European industry but also those of consumers.

9 On 5 March 1982 a meeting took place between officers of the Commission and the Federation's representatives. As a result of that meeting the Commission on 25 May 1982 sent the applicant a letter signed by the responsible director in the Directorate General for External Relations, in

which it referred to the aforementioned correspondence and stated as follows:

"For that reason, and in accordance with Article 5 (5) of Council Regulation (EEC) No 3017/79, I am writing to let you know that an anti-subsidy proceeding in respect of imports of soya-bean oil-cake from Brazil is not being initiated by the Commission.

I should like to add, however, that the Commission will keep a close watch on developments in the situation in that sector, particularly as the trend of Brazilian policy relating to credit is such as to give rise to a certain concern, with regard both to time-limits and to rates."

10 The Federation brought an action under the second paragraph of Article 173 of the Treaty for a declaration that that communication was void.

11 In its objection of inadmissibility the Commission contends that its communication of 25 May 1982 constitutes a mere transmission of information in pursuance of Article 5 of Regulation No 3017/79 and that it does not involve any decision having any other scope. In the Commission's view the regulation, whilst recognizing the right on the part of undertakings and federations to lodge a complaint, does not confer on them the right to compel the initiation of an anti-subsidy proceeding. The Commission emphasizes the wide discretion reserved to it in the regulation and states that the exercise of that discretion touches upon the economic and political interests of the Community and of the non-member countries affected. The purpose of the regulation, it states, is not only to protect European industry, but also to safeguard the general interests of the Community in all their complexity.

12 On those grounds the Commission takes the view that its letter of 25 May 1982 cannot constitute a measure open to challenge under the second paragraph of Article 173 and that the action is therefore inadmissible.

13 The applicant, for its part, considers that Regulation No 3017/79 imposes on the Commission a duty to initiate an official investigation under Article 7 as

soon as sufficient evidence to show the existence of a subsidy and injury suffered by the European industry has been submitted to it during the preliminary stage of the procedure. Once those facts have been established the Commission, it is alleged, no longer has any discretion with regard to the inferences to be drawn from them.

14 Consequently the applicant considers that where there is a subsidy and resultant injury Community producers have the right to require the competent Community institutions to adopt the necessary protective measures once they have established the facts. The applicant considers that it is entitled at the present stage, regard being had to the evidence it has adduced, to require the Commission to commence the formal investigation stage provided for by Article 7 of the regulation.

15 That claim must be assessed in the light of the whole scheme of investigation and protection created by Regulation No 301/79. The applicant's rights must be defined in the context of that scheme.

16 According to the wording of Article 5 (1) and (3) any undertaking or association of undertakings in the Community which considers itself injured or threatened by subsidized imports has the right to lodge a complaint with the Commission, or a Member State, which is under a duty to forward it to the Commission. After the complaint has been submitted the governments of the Member States must be consulted in the manner provided for in Article 6 of the regulation.

17 The scope of the consultations to be carried out by the Commission at that stage is defined in Article 6 (4) which sets out the matters to be included in the preliminary consultations in respect of every decision, namely: the existence of a subsidy and the amount thereof, the existence and extent of injury, the causal link between the subsidized imports and injury and, finally, the type of measures which are appropriate to prevent or remedy the injury caused by the subsidy.

18 If, after having carried out consultations on those various matters, the Commission considers that the complaint does not contain sufficient evidence to justify the initiation of an investigation it must so inform the complainant.

19 However, if the Commission considers that there is sufficient evidence to justify initiating a formal investigation, it must, according to Article 7, take a number of measures to publicize the fact, including an announcement in the Official Journal and it must carry out research, either directly or indirectly or in conjunction with the Member States. According to the wording of Article 7 (4), (5) and (6) the information obtained by the Commission must, subject to certain exceptions, be made available to the complainants. On their request the complainants must be heard by the Commission and they may also request the Commission for an opportunity to meet other parties directly concerned with the investigation. At that stage, according to the wording of Article 7 (7), the Community authorities may reach preliminary determinations or apply provisional measures, which must take effect "expeditiously".

20 In order to allow the elimination or neutralization of any effects produced by the subsidy the regulation provides a series of measures consisting of the acceptance of undertakings on the part of the country of origin or of the country exporting the products in question, of the imposition of a provisional countervailing duty and a definitive countervailing duty.

21 Article 10 of the regulation contains detailed provisions concerning the undertakings offered and also provides for measures to be taken in the event of the undertakings not being fulfilled. The undertakings are to be accepted by the Commission after the consulations provided for in Article 6 have taken place.

22 The Commission, acting at the request of a Member State or on its own initiative may, according to Article 11, impose a provisional countervailing duty where a preliminary investigation shows that a subsidy exists and where there is sufficient evidence of injury caused thereby and the interests of the Community call for intervention to prevent injury being caused during the proceeding. The imposition of such duties is subject to the requirement of

consultation provided for in Article 6 except in cases of extreme urgency. Article 11 (4) provides that the Commission shall be required to inform the Council and the Member States forthwith of any decision concerning provisional duties.

23 According to Article 12, where the facts as finally established by the Commission show that there is subsidization and injury caused thereby and the interests of the Community call for Community intervetion, a definitive countervailing duty is to be imposed by the Council, acting by a qualified majority on a proposal submitted by the Commission after consultation.

24 It must be noted that, according to Article 13 (1), countervailing duties, whether provisional or definitive, are to be imposed by regulation.

25 It appears from a comparison of the provisions governing the successive procedural stages described above that the regulation recognizes the existence of a legitimate interest on the part of Community producers in the adoption of anti-subsidy measures and that it defines certain specific rights in their favour, namely the right to submit to the Commission all evidence which they consider appropriate, the right to see all information obtained by the Commission subject to certain exceptions, the right to be heard at their request and to have the opportunity of meeting the other parties concerned in the same proceeding, and finally the right to be informed if the Commission decides not to pursue a complaint. In the case of the proceedings being terminated on the completion of the stage of preliminary investigation provided for in Article 5 that information must comprise at least a statement of the Commission's basic conclusions and a summary of the reasons therefor as is required by Article 9 in the event of the termination of formal investigations.

26 Whilst it is true that the Commission, when exercising the powers assigned to it in Regulation No 3017/79, is under a duty to establish objectively the facts concerning the existence of subsidization practices and of injury caused thereby to Community undertakings, it is no less true that it has a very wide

discretion to decide, in terms of the interests of the Community, any measures needed to deal with the situation which it has established.

27 It is in the light of those considerations, originating in the scheme of Regulation No 3017/79 that it is necessary to decide whether complainants have the right to bring an action.

28 It seems clear, first, in that respect — and the point is not disputed by the Commission — that complainants must be acknowledged to have a right to bring an action where it is alleged that the Community authorities have disregarded rights which have been recognized specifically in the regulation, namely the right to lodge a complaint, the right, which is inherent in the aforementioned right, to have that complaint considered by the Commission with proper care and according to the procedure provided for, the right to receive information within the limits set by the regulation and finally, if the Commission decides not to proceed with the complaint, the right to receive information comprising at the least the explanations guaranteed by Article 9 (2) of the regulation.

29 Furthermore it must be acknowledged that, in the spirit of the principles which lie behind Articles 164 and 173 of the Treaty, complainants have the right to avail themselves, with regard both to the assessment of the facts and to the adoption of the protective measures provided for by the regulation, of a review by the Court appropriate to the nature of the powers reserved to the Community institutions on the subject.

30 If follows that complainants may not be refused the right to put before the Court any matters which would facilitate a review as to whether the Commission has observed the procedural guarantees granted to complainants by Regulation No 3017/79 and whether or not it has committed manifest errors in its assessment of the facts, has omitted to take into consideration any essential matters of such a nature as to give rise to a belief in the existence of subsidization or has based the reasons for its decision on considerations amounting to a misuse of powers. In that respect, the Court is required to exercise its normal powers of review over a discretion granted to

a public authority, even though it has no jurisdiction to intervene in the exercise of the discretion reserved to the Community authorities by the aforementioned regulation.

31 It follows from the foregoing that the attitude adopted by the Commission is excessive inasmuch as it considers that any action brought by the complainants described in Article 5 of the regulation is, in principle, inadmissible. As has been shown above, the regulation acknowledges that undertakings and associations of undertakings injured by subsidization practices on the part of non-member countries have a legitimate interest in the initiation of protective action by the Community; it must therefore be acknowledged that they have a right of action within the framework of the legal status which the regulation confers upon them.

32 It is therefore for the applicant to put forward its submissions in the course of the subsequent proceedings and to show that they fall within the limits of the legal protection given to it by Regulation No 3017/79 and by the general principles of the Treaty.

33 For all those reasons the application must be declared admissible and the proceedings must be allowed to continue.

Costs

34 The costs should be reserved.

On those grounds,

THE COURT,

be way of interlocutory decision, hereby:

1. Declares the action to be admissible;

2. Reserves the costs.

Mertens de Wilmars Pescatore O'Keeffe

Everling Mackenzie Stuart Bosco Koopmans

Due Bahlmann Galmot Kakouris

Delivered in open court in Luxembourg on 4 October 1983.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 31 MAY 1983 [1]

Mr President,
Members of the Court,

This action is brought under the second paragraph of Article 173 of the Treaty by the EEC Seed Crushers' and Oil Processors' Federation (Fediol) (hereinafter referred to as "the Federation"), which has its registered office in Brussels, for a declaration that a decision alleged to have been contained in a letter of the Commission of 25 May 1982 refusing to initiate an anti-subsidy

1 — Translated from the French.