# OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 11 June 1987 *

*Mr President,*
*Members of the Court,*

1. The Court is called upon to give judgment in an action which the Netherlands company De Boer Buizen BV brought on 17 March 1986 against the Council and the Commission of the European Communities under the second paragraph of Article 215 of the EEC Treaty. The applicant, a distributor of steel tubes which it exports chiefly to the United States of America, has since 1983 owned a stockyard in Huntsville, Texas, and operates through a United States subsidiary. In the autumn of 1984 it ordered 3 000 tonnes of tubes from German and French producers. However, by the time that the goods were delivered, in the following spring, a series of measures had limited the exportation of tubes to the United States. De Boer was therefore obliged to put them into stock.

The applicant claims that the Court should (a) declare that the Community is liable for the damage which the applicant has suffered on account of the measures which the Council and the Commission adopted in pursuance of the Arrangement concluded on 7 January 1985 with the United States of America (Official Journal 1985, L 9, p. 1), which blocked its exports to that country with effect from 1 January 1985, and (b) order the parties to come to an agreement on the extent of the compensation payable and, in the absence of agreement, quantify the damage itself.

2. On 24 November 1984 the United States authorities imposed a total ban on the importation of steel tubes produced in the Community. There followed complex negotiations, the outcome of which was that the Community undertook to limit its exports to the United States, initially for the two-year period 1985-86 and then until September 1989, by holding them below a ceiling set at 7.6% of apparent consumption in the United States (7 January 1985).

Pursuant to the Arrangement the Council adopted Regulation No 60/85 of 9 January 1985 (Official Journal 1985, L 9, p. 13), under which the Community's quota is to be allocated amongst the Member States in accordance with 'traditional trade patterns' (fifth recital) and the States are to distribute their respective quotas amongst undertakings 'in accordance with objective criteria' (third recital). In practice, undertakings wishing to market tubes in the United States must hold a licence which the competent authorities of each State issue according to their traditional export patterns and rates of exportation to the United States as traditionally spread out over the year (see second and third indents of Article 5 (2)). Lastly, the ninth recital and Article 5 (4) allow licences to be transferred not only between producer undertakings but also between them and the distributor

* Translated from the Italian.

undertakings, especially where the former sell their products to the latter.

Further rules for the implementation of the Arrangement were laid down by the Commission in Regulation No 61/85 of 9 January 1985 (Official Journal 1985, L 9, p. 19); the most important rule is contained in Article 3 (5), whereby 'each licence may be transferred only once'.

3. Both Community institutions have expressed doubts as to the admissibility of the action. According to the Council, the damage of which De Boer complains is not attributable to the Community but to the Netherlands Government, for two self-evident reasons: first, it was for that State to share out the amount allocated to it among the national undertakings, and secondly, it was the Netherlands Minister for Economic Affairs who did not grant the company the licence essential to the exportation of the tubes. In order to obtain the desired remedy, De Boer must therefore turn to the Netherlands courts, and in particular to the College van Beroep voor het Bedrijfsleven (Administrative Court of Last Instance in matters of trade and industry) to which the applicant, on 26 November 1985, applied for the annulment of the decision refusing to grant it the licence. According to the case-law of the Court, it is the task of the national courts to review the administrative measures whereby Member States apply Community law (judgment of 10 June 1982 in Case 217/81 *Interagra* v *Commission* [1982] ECR 2233); and only those courts have jurisdiction to order compensation for the damage caused by the national authorities (judgment of 26 February 1986 in Case 175/84 *Krohn* v *Commission* [1986] ECR 753, at p. 763).

The Commission's arguments follow the same lines. It contends that an application under Article 215 of the EEC Treaty is precluded where there is some other means of legal redress which ensures the effective protection of the individuals concerned (judgment of 12 April 1984 in Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969); the action brought by De Boer before the College van Beroep, which could certainly request the Court of Justice to rule on the validity of the contested provisions, will enable the applicant to obtain compensation for the damage of which it complains. In the alternative, the Commission refers to the *Krohn* judgment, in particular the part in which the Court held that the liability of the institutions is limited to the damage actually caused by them.

The arguments summarized above are unconvincing. Admittedly, the Court has held that proceedings under Article 215 are permissible only after the national means of redress available for securing the annulment of a national decision have been exhausted. It is, however, necessary that such means should afford effective protection and in the present case that condition is not satisfied. Indeed, even supposing that the College van Beroep refers the matter to the Court and the Court declares both regulations invalid, the Netherlands authority would not be compelled to amend its own decision in the absence of intervention by the Community legislature (see *Unifrex* judgment). It should be added that — as De Boer notes — national institutions are not liable for the damage resulting from the application of a Community measure subsequently held to be invalid (see judgment of 13 February 1979 in Case 101/78 *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623).

4. I shall now turn to the substance of the case. As mentioned above, De Boer

maintains that Regulations Nos 60 and 61/85, adopted by the Council and the Commission respectively to give effect to the Arrangement of 7 January 1985, are illegal and have caused it to incur damage. It claims that, in dividing the burdens arising out of the Arrangement, the legislature acted arbitrarily, in particular: (a) by discriminating against distributors to the benefit of producers, and (b) by allocating the Community quota amongst the Member States without taking account of traditional trade patterns.

On the first point De Boer observes that the provision regarding the transfer of licences between producers and distributors has remained a dead letter. Only the producers, therefore, have benefited under the licensing scheme by using the entire quota assigned to them, either directly or through their subsidiaries; and that discrimination is all the more unfair inasmuch as it was principally the distributors who opened up the United States market for Community products. As regards the second point, it may be noted that both regulations discriminate between the Member States as well. According to the traditional patterns of trade, the quota granted to the Netherlands is higher than it should be, and yet it was used almost exclusively for the benefit of a major producer of which De Boer is not a regular customer.

A further argument put forward by the applicant refers to its own specific circumstances. As was observed above, in September and October 1984 De Boer had ordered from several Community producers a very large consignment of tubes, to be marketed in the United States. At that time — De Boer claims — it could not have foreseen the restrictive provisions or the special licensing scheme which entered into force in January 1985. The damage resulting from the failure to export the tubes cannot therefore be attributed to imprudence on its part.

5. These submissions must be assessed in the light of the principles which the Court has laid down in interpreting Article 215. It will be recalled that the Court has primarily set out three conditions. In order for the Community to be held liable there must be evidence of (a) unlawful acts by the institutions, (b) unjustified damage, and (c) a causal link between the act and the damage (see most recently, the judgment of 17 December 1981 in Joined Cases 197 to 200, 243, 245 and 247/80 *Ludwigshafener Walzmühle and Others* v *Council and Commission* [1981] ECR 3211).

As far as the first-mentioned condition is concerned, it must be observed that the conduct complained of is attributable to a legislative measure. Liability on the part of the Community can therefore arise only in the event of a sufficiently serious breach of a superior rule of law for the protection of the individual, or the manifest and grave disregard of the limits on the powers of the institution in question (judgments of 2 December 1971 in Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, of 25 May 1978 in Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL and Others* v *Council and Commission* [1978] ECR 1209, of 6 December 1984 in Case 59/83 *Biovilac* v *EEC* [1984] ECR 4057, and of 19 September 1985 in Joined Cases 194 to 206/83 *Asteris and Others* v *Commission* [1985] ECR 2815, at p. 2821). It should be added that in major decisions of economic policy the institutions are empowered to exert pressure on the circumstances of certain individual persons if their hardship appears necessary for the pursuit of general interests (judgment of 18 March 1980 in Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *Valsabbia and Others* v *Commission* [1980] ECR 907).

That said, consideration should first be given to the criticism that the contested

measure is arbitrary and, in particular, discriminates against distributors. In that regard the defendant institutions note — correctly, in my view — that the 'traditional trade patterns' referred to do not constitute a superior rule of law designed to protect the individual. It cannot be said that Regulation No 60/85 enshrines an obligation to share out the Community quota on the basis of those trade patterns; this is demonstrated by the wording 'take account of', used in the fifth recital to the regulation, which points to the existence of a margin of discretion in the appraisal of the interests at stake. It is indeed true that the two regulations give dissimilar treatment to producers and distributors. However, those differences are in no way arbitrary or discriminatory: as is shown by the aims of the Arrangement between the EEC and the United States of America, the differences are objectively justified by the disparity between the situations of the two categories of undertaking.

As was observed above, the Arrangement seeks to place a ceiling on the exportation of steel tubes produced in the Community. However, it is self-evident that rules of that kind affect principally the manufacturers of such tubes, because it obliges them to limit their output or to direct it towards other market outlets. On the other hand, by not imposing restrictions on tubes from non-member countries which may be marketed in the United States through undertakings established in the Community, the rules cause little or no harm to the distributors. In other words, the producers may export the goods which they make to the United States *only* on the conditions laid down by the Community legislation, whereas the distributors are subject to such legislation *only* if they market in the United States tubes originating in the Community. In the light of so unbalanced a situation, the legislature had no option but to set up a licensing scheme which favoured the producers. Nevertheless, it did not overlook the distributors and, contrary to the assertions of the applicant, use was certainly made of the provision enabling licences to be transferred to distributors.

The first head of criticism is therefore quite unfounded. Even more unsound, however, is the claim that the Community allocated the total quota in a manner which favoured certain Member States and in particular the Netherlands. Once again, it may validly be argued that it is not legitimate to invoke traditional trade patterns as a superior rule of law designed to protect the individual. Quite apart from that, however, it is unclear how the fact of which De Boer complains could have had an adverse affect on its export opportunities.

I wish to comment briefly on De Boer's claim that it could not have foreseen in time the restrictions introduced at the beginning of 1985. The submissions of the applicant are surprising. A company which derives 75% of its profits from trade with the United States, owns a stockyard in Texas and has a United States subsidiary could not have been unaware that, by the early 1980s, the exportation of Community tubes was very much under review. Although not actually included in the Arrangement with the United States of 21 October 1982 relating to steel (Official Journal 1982, L 307, p. 13), tubes were the subject of an exchange of letters annexed to that

Arrangement in which the European authorities declared that, for the duration of the Arrangement (that is, until December 1985), exports of tubes from the Community would not exceed the average level attained by such exports during 1981-82. It was thus not necessary to be clairvoyant to realize that restrictive measures were in prospect which would be similar to those imposed under the 1982 Arrangement. That is precisely what happened: the licensing scheme established by Regulations Nos 60 and 61/85 is virtually identical to the system introduced three years previously.

6. In view of the foregoing considerations I propose that the Court should dismiss the application lodged on 17 March 1986 by De Boer Buizen BV and, pursuant to Article 69 (2) of the Rules of Procedure, order the applicant to pay the costs.