JUDGMENT OF THE COURT
26 OCTOBER 1971[1]

C. Mackprang jr.
v Commission of the European Communities

Case 15/71

Summary

Application on the ground of a failure to act — Natural or legal persons — Complaint to the Court — Acts of a general nature — Inadmissibility of application (EEC Treaty, Article 175)

A general provision taking the form of a decision addressed to the Member States cannot be described as an act which could be addressed to a natural or legal person within the meaning of Article 175 (3).

A natural or legal person cannot bring an action on the ground of a failure to act against a Community institution on the ground that it has failed to adopt such a provision.

In Case 15/71

C. MACKPRANG JR., having its registered office in Hamburg, represented by Fritz Modest and Walter Röll, Advocates at the Hamburg Bar, with an address for service in Luxembourg at the Chambers of Félicien Jansen, Huissier, 21 rue Aldringen,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Friedrich-Wilhelm Albrecht, acting as agent, assisted by Dieter Oldekop, member of the Legal Service of the Commission, with an address for service in Luxembourg at the Chambers of its Legal Adviser Emile Reuter, 4 boulevard Royal,

defendant,

Application at the present stage of the proceedings for a declaration on the admissibility of an application on the ground of a failure to act whereby the applicant undertaking complains that the Commission, in contravention of Article 155 of the EEC Treaty, failed to complete its decision of 17 July 1962 establishing special methods of administrative cooperation for the application

1 — Language of the Case: German.

of intra-Community agricultural levies by a decision enabling the Member States to impose the intra-Community levy on goods which were imported from Algeria in 1963 even in the absence of a movement certificate on Form DD4,

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and A. Kutscher, Presidents of Chambers, A. M. Donner, A. Trabucchi, R. Monaco and P. Pescatore (Rapporteur), Judges,

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

On the basis of an invitation for tenders issued by the Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Import and Supply Office for Cereals and Feedstuffs), Frankfurt am Main, on 30 January 1963 and published in the Bundesanzeiger of 30 January 1963, the undertaking C.A. Mackprang jr. imported 513 796 kg of wheat bran from Algeria into the Federal Republic of Germany during September and October 1963.

The invitation for tenders mentioned Algeria amongst the Member States of the EEC.

Consequently the import certificate issued by the Einfuhr- und Vorratsstelle für Getreide und Futtermittel necessitated fixing in advance the intra-Community levy laid down by Article 2 of Regulation No 19 of the Council of 4 April 1962 on the progressive establishment of a common organization of the market in cereals (OJ 1962, p. 933).

There was attached to the import certificate a schedule in which the Einfuhr- und Vorratsstelle für Getreide und Futtermittel specified that evidence that the goods originated in Algeria had to be furnished by means of a movement certificate on Form DD4.

In fact, under the Decision of the Commission of 17 July 1962 addressed to the Member States and establishing special methods of administrative cooperation for applying the intra-Community levies introduced within the framework of the common agricultural policy (OJ 1962, p. 2140) and Regulation No 86 of the Commission of 25 July 1962 embodying provisions to prevent diversion of trade in cereals (OJ 1962, p. 1894), the condition for the application of intra-Community levies was the production of a movement certificate on Form DD4 to the competent authorities of the importing Member State.

Since the Algerian customs authorities refused to issue DD4 movement certificates, the Mackprang undertaking was

unable to produce to the German customs authorities a document which they considered sufficient to justify application of the system of intra-Community agricultural levies.

The Hamburg-Reiherstieg and Hamburg-Niederhafen customs offices therefore imposed not the intra-Community levy but the higher rate of levy applicable to imports from third countries.

Mackprang appealed against these decisions to the competent German tax authorities.

Further, on 9 October 1963 it lodged with the Einfuhr- und Vorratsstelle für Getreide und Futtermittel an objection against the additional clause in the import certificate and asked for it to be deleted.

By the decision of 22 July 1964 the Einfuhr- und Vorratsstelle für Getreide und Futtermittel dismissed this objection.

By order of 12 May 1970 the Bundesfinanzhof (Federal Finance Court) dismissed an appeal brought by the Einfuhr- und Vorratsstelle für Getreide und Futtermittel against a judgment of the Finanzgericht Hessen (Hessen Finance Court) which had declared the additional note relating to the production of a movement certificate on Form DD4 to be illegal and void.

The Bundesfinanzhof ruled that only the customs authorities and not the Einfuhr- und Vorratsstelle für Getreide und Futtermittel are competent in the matter.

By letters of 11 and 14 August 1970, Mackprang asked the Commission to make a decision empowering and requesting the Federal Republic of Germany to accept evidence other than the movement certificate on Form DD4 for the application of the intra-Community levies to the wheat bran which it had imported in September and October 1963.

In its reply of 24 September 1970 the Directorate-General for Industrial Affairs of the Commission informed Mackprang that the question whether Member States are empowered to make the benefits of the intra-Community movement system subject to the production of a movement certificate on Form DD4 was the subject-matter of a question which had been referred to the Court of Justice of the European Communities for a preliminary ruling (Case 12/70, *Paul Craeynest and Michel Vandewalle* v *Belgian State*; a question referred by the Belgian Cour de Cassation for a preliminary ruling) and that for this reason it did not seem appropriate to suggest to the Commission that it give any reply whatsoever to the request which had been submitted to it.

Following the judgment of the Court in Case 12/70 ([1970] ECR 905) delivered on 22 October 1970, by letter of 11 December 1970 Mackprang asked the Commission on the basis of Article 175 of the EEC Treaty to fill in the lacuna which existed in the system applying to trade between Member States of the EEC and Algeria and 'to take a special decision empowering and compelling the Member States to grant the benefit of the Community system to goods from Algeria imported during 1963 where sufficient evidence is adduced that the product is indeed of Algerian origin'.

On 11 March 1971 the Directorate-General for Industrial Affairs of the Commission informed Mackprang that the judgment of the Court in Case 12/70 did not apply in the present case, that its application on the ground of a failure to act did not fulfil the conditions laid down by Article 175 (3) of the Treaty, that the Commission was under no duty to address a binding measure to the Federal Republic of Germany and that in any case it was under no duty to adopt such a measure in relation to Mackprang.

II — Procedure

On 26 March 1971 Mackprang lodged the present application whereby it requested the Court to 'declare that the Commission has infringed Article 155 of

the EEC Treaty by failing to adopt in implementation of the obligations imposed upon it by that provision and in accordance with the applicant's request of 11 December 1970 a decision which, by supplementing its decision of 17 July 1962 and in application of Article 10 of the EEC Treaty in conjunction with Article 227 (2) of that Treaty, enables and orders the Member States to impose the lower intra-Community levy on products imported from Algeria during 1963 even in the absence of a movement certificate on Form DD4, if it is proved by means of sufficient other evidence that the goods are of Algerian origin'.

By a statement of the procedural issue, lodged on 11 May 1971, the Commission asked the Court to give a ruling under Article 91 of the Rules of Procedure on the admissibility of the application without dealing with the substance of the case and to declare it inadmissible.

Mackprang submitted its observations on the objection of inadmissibility in a document lodged on 17 June 1971.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure on the objection without any preparatory inquiry.

The parties presented their oral observations on the admissibility of the application at the hearing on 13 July 1971.

The Advocate-General delivered his opinion on the admissibility of the application at the hearing on 28 September 1971.

III — Submissions and arguments of the parties on the admissibility of the application

The submissions and arguments of the parties on the admissibility of the application may be summarized as follows.

The Commission, the defendant in the main action and applicant in the procedural issue points out that by letter of 16 March 1971 it drew the attention of the government of the Federal Republic of Germany to the fact that the question of the production of a movement certificate on Form DD4 in respect of the imposition of the intra-Community levy on imports from Algeria does not come within Community law and that the decision as to the documents which may be required is a matter for the Federal government.

From a legal point of view it must be held that the present application does not fulfil the conditions of admissibility laid down by Article 175 (3) of the EEC Treaty.

(a) The failure to act of which the Commission is accused consists in the fact that it did not address a decision to all the Member States of the Community. It follows from the third paragraph of Article 175 that a natural or legal person may only bring an application before the Court on the ground of a failure to act in order to complain that one of the institutions of the Community has failed to address to *that person* a measure other than a recommendation or an opinion: the purpose of such an application must therefore be to obtain a binding measure which by its nature and purpose must be addressed to the applicant himself.

(b) The admissibility of the application cannot be deduced by analogy from Article 173 (2) which with regard to applications for annulment recognizes that natural or legal persons have the right to appeal not only against decisions addressed to them but also against decisions addressed to another person which are of direct and individual concern to them. The difference between the rules laid down by Article 175 (3) and those laid down by Article 173 (2) establishes the fact that an application by a private individual on the ground of a failure to act may only seek the taking of a decision with regard to the Member States even if that private individual is directly and personally affected by the failure to take such a decision.

In contrast to the rules laid down in

the ECSC Treaty (Articles 33 and 35), the Commission's silence cannot be interpreted within the framework of the EEC Treaty as an implied decision rejecting the request which is subject to the rules governing applications for annulment.

Article 175 of the EEC Treaty refers to the case where, in infringement of the Treaty, the Council or the Commission fails to act. Article 176 refers to a failure to act which has been 'declared contrary to this Treaty'. Since the application on the ground of a failure to act seeks a declaration that there has been an illegal failure to act it is therefore subject to its own particular conditions. An analogy cannot be drawn between the conditions for an application for annulment under Article 173 (2) and those for an application on the ground for a failure to act under Article 175 (3).

(c) The fact that private individuals cannot oblige the institutions of the Community by means of an application on the ground of a failure to act to address decisions to the Member States is explained by the concern felt by the authors of the Treaty to limit the influence that may be exercised by private individuals on the relationship between the Community institutions and the Member States; this concern is also shown by the procedure laid down in Article 169.

The restrictions thus placed on bringing an application on the ground of a failure to act do not affect the observance of Community law or the rights which individuals derive therefrom. Thus the applicant can have referred to the Court of Justice under Article 177 the question of the interpretation of the Community provisions in question, in particular the Decision of the Commission of 17 July 1962 within the framework of the proceedings which it has initiated before the 'Finanzgericht' against the legality of the decisions by which the German customs authorities fixed the levy, to obtain a preliminary ruling in particular on their applicability to imports from Algeria.

(d) Alternatively, the Commission argues that even if private individuals can bring an application on the ground of a failure to act against the failure to take a decision addressed to the Member State, such an application would only be admissible on condition that that omission is of direct and individual concern to the applicant.

In any case the absence of the decision requested in the present case is not of individual concern to the applicant.

Assuming that the Decision of the Commission of 17 July 1962 did not allow the customs authorities of Member States to accept any other evidence than a certificate on Form DD4 for the application of intra-Community levies, even with regard to Algeria, then the absence of a decision changing that legal situation would affect all undertakings in the Community which import any product from Algeria which is subject to the system of intra-Community levies. This would not only affect importers who had imported certain products from Algeria in 1963 but also all the importers who had imported Algerian products from the introduction of movement certificate DD4 in 1962 until its abolition in December 1969 or, as the case may be, until the time when the Member State ceased to apply preferential levies to Algeria. The absence of the decision requested does not therefore affect the applicant by reason of certain attributes which are peculiar to it by reason of circumstances in which it is differentiated from all other persons.

Mackprang, the applicant in the main action and defendant in the procedural issue considers for its part that its application is admissible.

(a) The conditions for admissibility laid down by the second paragraph of Article 175 with regard to form and time limits are fulfilled in the present case.

(b) The Commission has infringed the Treaty by its failure to act.

It follows from the combined effect of Articles 10 and 155 of the EEC Treaty that the Commission is under an obliga-

tion to decide and has the means of deciding the methods of administrative cooperation relating to the system applied to products which are in free circulation. In taking its decision of 17 July 1962 it has only incompletely fulfilled this obligation and is thus guilty of having infringed Article 155.

Under Article 227 (2) of the EEC Treaty and Article 2 of Regulation No 19/62 of the Council, imports from Algeria should be subject to the intra-Community levy. Nevertheless by its Decision of 17 July 1962 the Commission authorized movement certificate on Form DD4 as the sole evidence of the origin of the products. Since it was aware that it is in fact impossible to obtain a DD4 certificate in respect of goods from Algeria, the Commission was under an obligation to issue special rules with regard to evidence of the origin of Algerian goods. It ought to have done so by means of a decision addressed to all the Member States so as to ensure equality of treatment for Algerian products in all the States of the Community. Because it has not fulfilled this obligation, the Commission has infringed the Treaty.

(c) Article 176 (1) establishes that the application for annulment laid down in Article 173 and the application laid down in Article 175 are the two procedural aspects of the same remedy. They pursue the same aim of legal protection and have the same effects. The application under Article 175 is therefore subject to the same general conditions of admissibility as the application under Article 173.

The Commission's failure to act in the present case is of direct and individual concern to the applicant undertaking.

The failure of a Community organ to act is of direct concern to a private individual when only that organ's illegal failure to act prevents the actual exercise of a right defined in the abstract.

This is the case here: by virtue of Regulation No 19/62 an importer has a subjective right to the application of the intra-Community levy which is lower than the levy applied to third countries. The exercise of this subjective right has been prevented by the default of the Commission which has illegally failed to issue special rules for imports from Algeria.

The applicant is also individually concerned by the Commission's failure to act.

A private individual is individually concerned by the illegal failure of a Community institution to act where that person differs from the class of persons affected in a general and abstract manner, by the fact that it fulfils all the material conditions necessary for the exercise of a right defined in the abstract and where it is only the default of the Community organ which deprives it of the exercise of that right. From the time when it imported wheat bran from Algeria the applicant undertaking has been in that situation.

This finding cannot be countered by the argument that it is not only the applicant undertaking which is affected by the Commission's failure to act: just as an application for annulment is available to a number of persons belonging to a limited and objectively identifiable group where they are affected by several individual measures having the same effect, so an application on the grounds of default can be lodged where the failure to act has identical results in a number of cases which have been objectively limited.

(d) Besides the admissibility of an application on the ground of a failure to act ought not to be appraised too restrictively particularly in cases where a private individual has no other way of asserting his rights.

Within the framework of the proceedings which it has brought before the Finanzgericht against the legality of the decisions on the imposition of the levy by the customs authorities, the applicant can no longer request the Court of Justice under Article 177 to give a preliminary ruling on the interpretation of the applicable provisions of Community law. In fact the Decision of the Com-

mission of 17 July 1962 was interpreted by the Court in Case 12/70 as meaning that the DD4 movement certificate is the only evidence which is allowed for the application of the intra-Community levy. The Bundesfinanzhof, for its part, has adopted the same viewpoint. Finally, the German government has given no reply to the Commission's letter of 16 March 1971.

The Commission's restrictive argument that Article 175 (3) only allows a private individual to complain that a Community institution has failed to take a decision which would have been addressed to him, cannot be accepted. As in the case of the proceedings under Article 173 (2), it must be admitted on the other hand that it is sufficient for the applicant to be the quasi-addressee within the framework of the application laid down in Article 175 (3): the applicant is the quasi-addressee of the decision which it asked the Commission to take, for, within the meaning of the judgment of the Court of 6 October 1970 in Case 9/70 (*Franz Grad* v *Finanzamt Traunstein*; a request for a preliminary ruling by the Finanzgericht München, [1970] ECR 825) it had an interest in the execution of that decision.

It is in no way contrary to the legal system established by the EEC Treaty to acknowledge that a decision of the Commission addressed to the Member States is capable of creating rights and obligations for individuals, since the group of addressees directly and substantively concerned does not necessarily coincide with that of the formal addressees of the notification. The identity of this group follows from the content and the context of the decision. The determining criterion in this respect is the fact that the individual who is not the direct addressee of the decision is affected by the latter either because it directly imposes obligations upon him or because it creates obligations for the Member States and consequently rights for the individual.

Since the Decision of the Commission of 17 July 1962 gave rise to rights and obligations for the individual, a decision which it adopts in order to complete it with regard to the system of evidence of the origin of Algerian goods also gives rise to rights and obligations for the individual. Since the applicant imports cereal-based products from Algeria, the Commission's failure to act directly and individually violates its rights.

It must therefore be possible for it to bring an application against the Commission based on the latter's failure to act for the purpose of making a complaint that it had refrained from taking a further decision which, by completing its first decision would put an end to an intolerable legal situation.

Grounds of judgment

1 By application lodged on 26 March 1971 under Article 175 of the EEC Treaty, the applicant complains that the Commission, in breach of its obligation under Article 155, has failed to address to the Member States a measure which, by completing its Decision of 17 July 1962 on methods of administrative cooperation for the application of intra-Community agricultural levies (OJ 1962, p. 2140), empowered or ordered them to impose the intra-Community levy on goods from Algeria imported in 1963 even where a movement certificate on Form DD4 which is prescribed by the abovementioned provision is not produced, if it is established by means of sufficient other evidence that the goods are in fact of Algerian origin. At this request of the

Commission to apply Article 91 of the Rules of Procedure, the Court has decided to give a ruling on the admissibility of this application without going into the substance of the case.

[2] It is not contested that the applicant imported certain quantities of wheat bran from Algeria into the Federal Republic of Germany in 1963, following an invitation to tender issued by the Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Frankfurt am Main, in which Algeria was mentioned among the countries belonging to the EEC. Because of the refusal of the Algerian authorities to issue the movement certificates on Form DD4 referred to in the Decision of 17 July 1962, the applicant firm was unable to produce any document to the German customs authorities which in their opinion justified the application of the intra-Community agricultural levies. Consequently, the higher levy fixed with regard to imports from third countries was imposed on the imports in question.

[3] After the applicant had failed to obtain satisfaction from the national authorities, it asked the Commission to ensure, by means of an order addressed to the Federal Republic of Germany or an appropriate amendment of the Decision of 17 July 1962, the application of the intra-Community levy to the applicant's case by allowing evidence other than production of the certificate on Form DD4. In its request addressed to the Commission under Article 175 (2) and in its originating application, the applicant specified the subject of the dispute to the effect that it requests the Commission for a decision supplementing the Decision of 17 July 1962 and directed to the same addressees.

[4] Under Article 175 (3), any natural or legal person may, under the conditions laid down in paragraphs (1) and (2) of that article, complain to the Court of Justice that the Commission, in breach of the Treaty, 'has failed to address to that person any act other than a recommendation or an opinion'. The summary given above shows that the application lodged by the applicant requests the Commission to issue a general provision which would have the same legal scope as the Decision of 17 July 1962. Such a decision cannot, either because of its form or its legal nature, be described as an act which could be addressed to the applicant within the meaning of Article 175 (3).

[5] Moreover, in view of the distribution of powers between the Community and the Member States, as results from the agricultural rules in force at the time of the imports in question, an application requesting that the field of application of the Decision of 17 July 1962 be defined with regard to imports which were from a third state, even if they should have received the benefit of the intra-Community system could only be lodged with national courts.

The Court of Justice could only give a ruling within the context of such proceedings if its jurisdiction was invoked under Article 177 of the Treaty.

6 The application must therefore be dismissed as inadmissible.

Costs

7 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. The application has been declared inadmissible. The applicant must therefore be ordered to bear the costs of the proceedings.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties on the objection;
Upon hearing the opinion of the Advocate-General on the objection;
Having regard to the Treaty establishing the European Economic Community, especially Article 175;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69 and 91;

THE COURT

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicant to bear the costs of the action.**

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 26 October 1971.

A. Van Houtte
Registrar

R. Lecourt
President