OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 28 MAY 1963[1]

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Mr President,
Members of the Court,

On 1 January 1962 the first adjustment of national customs duties to the common external tariff of the European Economic Community took place. The result was that in the Federal Republic of Germany the customs duty on oranges imported from third countries was charged at 11.5% instead of 10% (during the period from 15 March to 30 September) and at 13% (during the period from 1 October to 14 March).

The Federal Government was anxious to avoid this increase in customs duties, because nine tenths of the demand for oranges in the Federal Republic was, in the absence of a sufficient production in the countries of the Community, already met from third countries outside the Community.

It therefore requested the Commission on 16 June 1961 to authorize a partial suspension of customs duties on sweet oranges.

The Commission refused the request by letter of 5 January 1962. It gave as its

1 — Translated from the German.

reasons that the authorization would impede the rational development of production in the Community, even if the other Member States were not at that time fully able to ensure an adequate supply to the market in the Federal Republic both as regards quantity and quality. It would in addition impede the implementation of the plan for the economic expansion of the underdeveloped regions in South Italy.

The Federal Government objected to this Decision by letter of 24 February 1962. It asked the Commission to review its Decision and at the same time made a fresh request for a partial suspension of duty (up to 10%) for the year 1962, and, alternatively, for the grant of a tariff quota of 580 000 metric tons at a rate of duty of 10% for the year 1962. It pointed out in a very detailed statement that the new plantations in South Italy would only come into production in five or six years and that even then they would not be sufficiently large to ensure an adequate supply to the Federal Republic. In addition the Federal Government let it be known that its request would have the effect of guaranteeing the countries in the Community an annually increasing customs preference which already stood at 30%. In addition it was also prepared to increase this preference by an anticipatory reduction of the internal tariff. Finally it argued that economic damage to trade with third countries, which were dependent upon the export of oranges, could only be avoided by the authorization of the customs measures for which application had been made.

At a later stage in the procedure concerning the request for a quota the Federal Government submitted on 8 June 1962 written observations on the views obtained by the Commission from the French and Italian Governments which did not support the grant of the quota.

The Commission also refused the second request by a Decision of 30 July 1962 which was notified to the Federal Government by letter of 22 August 1962.

The present proceedings are concerned with the legal validity of this Decision. The Federal Government seeks the annulment of the Decision while the Commission asks that the application be dismissed. The applicant has classified its numerous arguments under the following heads of submission: infringement of an essential procedural requirement, infringement of the Treaty—in particular of Articles 25 (3), 29 and 39 —as well as misuse of powers. We shall deal with them individually during the legal considerations.

Legal examination

A — Admissibility

I. In the present proceedings it must be emphasized in the first place that the expiration of the year, to which the request for a quota and the Commission's Decision relate, is not a ground for holding that the application is inadmissible for lack of any interest requiring protection in law. Apart from the question whether, after an annulment of the Decision, a positive response to the request can be expected having as its consequence that the imports already effected in 1962 could benefit retroactively from the customs duty concession applied for, the general interest in the clarification of the issues which have arisen and which raise a question of principle is in fact sufficient for the completion of these proceedings, for we are concerned with problems which may be of importance in connection with requests for the year 1963 and possibly for future years. In this respect I refer to the observations which I made on the same question in the case concerning wine intended for distilling brought by the Federal Republic and move on at once to the other problems of this case.

II. In these proceedings a dispute arose concerning the submissions which could be made against the Decision of the Commission. It arose from a written observation of the Commission that the only ground for challenging its Decision, apart from the complaint of deficiency of the statement of reasons, was misuse of powers. By misuse of powers it means the exercise of a power for purposes other than those laid down by law, that is to say, it relies on the definition of French administrative law.

In the oral procedure it indeed became clear that we are concerned not so much with a dispute concerning the admissibility of the submissions used to challenge the Decision as with a discussion over their classification in conceptual terms.

Nevertheless, now that this question has been broached we must spend a little time on it. It originates in the legal nature of the provision which was the basis of the Decision.

As happened in the case concerning wine intended for distilling the applicant claimed that it was entitled to the grant of tariff quotas provided certain conditions were fulfilled; Article 25 (3) is therefore a provision which binds the Commission. On the other hand the Commission claims that it has a discretionary power under Article 25 (3). In these proceedings it developed this argument in great detail.

As you know, in my opinion in the case concerning wine intended for distilling I came to the conclusion that the view of the Commission was correct. I will not repeat my reasons for this. They are based not only on the wording but also on the object of Article 25 (3). Having regard to the present state of the dispute in these proceedings I do not think that this interpretation requires reconsideration.

What effect does this have on the admissibility of the applicant's submissions?

The first point which emerges is that in fact the Commission is not against a review of the legality of its Decision, and that it therefore does not intend to exclude the complaint of infringement of the Treaty.

Any other view cannot in fact be supported by the wording of the Treaty, because, according to Article 173, acts of the Commission (other than recommendations and opinions) can in general be challenged on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application or misuse of powers. There is no provision for any restriction of the right of action, as there is in the ECSC Treaty, where in respect of certain applications only the complaint of 'détournement de pouvoir' (misuse of powers) is admissible and the review of certain questions is only permitted if misuse of powers has been proved. We must therefore conclude from this that the Rome Treaties, in framing provisions for the protection of legal rights, deliberately adopted an approach different from that of the ECSC Treaty, an approach moreover which plainly does not attach so much importance to the distinction between the various submissions as the ECSC Treaty.

So far as the exercise of discretionary powers is concerned, it obviously cannot be unlimited. Its limits fall within the scope of legal review and to exceed them can be treated as an infringement of the Treaty.

Further the exercise of discretionary powers can be linked with certain guidelines. It is a common characteristic of administrative law that there is a tendency for administrative acts to be increasingly permeated by legality.[1] In our case regard must be had to the criteria of Article 29 by which the Commission when deciding whether to grant quotas must be guided or

1 — Cf. Duez–Debeyre, 'Droit Administratif', 1952, p. 210.

'inspired' (to translate literally the word used in the French and Italian texts). If one of the criteria is not taken into account—it is generally recognized that all the aims cannot be *attained* at the same time—there may be an infringement of the Treaty, just as there may if one or other of the criteria has been incorrectly interpreted. Similarly the question whether additional criteria within the context of the discretionary power are to be considered or not may be regarded as a question of legal interpretation and dealt with under the complaint of infringement of the Treaty.

Only the actual area of discretion, to which the balancing and evaluation of the various decisive criteria belong, is not subject to legal review. It can be submitted to judicial review only by means of a complaint of misuse of powers, so that the Court cannot substitute its own reasons for the reasons why the Executive considered its decision to be appropriate.

There apears to me to be no doubt that the *facts* upon which a discretionary decision is based are subject to judicial review. In this connection we do not only have to think of the existence of the conditions for action laid down in a provision but also of the whole background of facts which determine and characterize discretionary decisions. It is indeed disputed which of these mistakes of fact amount to an infringement of the Treaty and which amount to a misuse of powers.

In the present context this question can be left in abeyance so far as we are concerned. Where it does arise—for instance in questions concerning the burden of proof—it is always possible to make the necessary distinction.

For the purpose of considering the question of admissibility it is enough therefore to state that the principal complaints of the applicant, which I will consider later, do not fall within the field in which the Commission exercises its discretion. In any case it is permissible to evaluate them.

B — The substance of the Application

I — Infringement of an essential procedural requirement

In these proceedings too the Commission's Decision is in the first instance challenged on the ground that the statement of the reasons on which it is based is inadequate.

In the case concerning wine intended for distilling I gave a very detailed opinion on the requirements of the obligation to give reasons for a decision. It is to be inferred from my explanations that this duty is based not on theoretical considerations but essentially on the case law established by the Court. These related almost without exception to the ECSC Treaty. However, I do not see to what extent the system of the Rome Treaties could lead to an alteration in that case law.

Therefore it must be accepted that the decisions of the Executive must contain all the essential legal and factual considerations upon which their operative part is based. The statement of reasons, which can always, and in particular in the case of discretionary decisions, be considered as proof that the decision was scrupulously drafted, must be capable of being reviewed judicially and not merely serve as guidance for those persons whom the authority making the decision regards as being entitled to bring proceedings in respect of it. A vague indication of the thinking leading to the decision, which in legal proceedings would first have to be completed with precise legal and factual detail, is therefore insufficient; what is required is a statement of the essential facts and legal considerations which have been adequately particularized.

When the Commission repeatedly refers, with regard to its duty to state the

reasons for its decision, to the administrative difficulties caused by the large number of applications lodged in addition to its normal work load, it can rest assured that the Court understands its situation. As we cannot however assume that the Commission, when it made this observation, intended to say that it did not have the time to deal carefully and adequately with the requests which had been lodged, taking account of all the necessary criteria, which would undoubtedly substantiate the complaint of an infringement of the Treaty, we must ask ourselves whether it is only the burden of the *editorial* preparation of its decisions which justifies its observation. I have serious doubts on this point. I find it impossible to understand to what extent the *presentation* of the reasons for a decision, that is to say the recital of the relevant facts and law, which must be present when the request is examined, could be excessively burdensome to the Commission, because it is clear that this part of its work takes only a small amount of time compared with the whole of the substantive investigation, which is without any doubt difficult and extensive.

So far as the statement of reasons in this particular case is concerned it must be remembered that it relates to a decision under Article 25 (3), which turned out to be negative in character not because serious disturbances of the market were expected, but as a result of a discretionary evaluation of all the relevant criteria. This evaluation must be made having regard to the specific economic circumstances for the period during which a decision to grant a quota limited in time applies. There is nothing in the pleadings to suggest that the Commission proceeded on a different basis, for example that it considered that it need do no more than state general theoretical and economic reasons for giving precedence to one or other of the criteria to be considered under Article 25 (3).

On the other hand it must be noted that the statement of the reasons for the Decision, which is set forth in the first schedule to the application and which covers approximately two sheets of paper, makes little mention of the appraisal of the specific market situation. It is content to state very generally held observations on the need to maintain the price level for fruit at the level laid down by the Common Customs Tariff, on the fact that the supply of one variety of fruit at a low price *usually* reduces the demand for other varieties of fruit and that authorizing *one or more* Member States to suspend customs duties would be detrimental to the creation of storage facilities for fruit produced in the Community, because it would make the raising of investment capital more difficult. It notes in addition that the raising of customs duty through adjustment to the Common Tariff is not likely to have any appreciable adverse effect upon the supply of oranges to the German consumer, to which it adds the incomprehensible conclusion—incomprehensible as it is referring to oranges—that this assumption is all the more probable because *other* varieties of fruit could be supplied at suitable prices in more than sufficient quantities. Finally the statement of the reasons for the Decision mentions that the continuing general increase in consumption gives no cause for the belief that trade with third countries will be adversely affected; moreover this criterion must yield to the requirements of the common agricultural policy.

Whoever reads the statement of the reasons for the Decision cannot avoid the impression that the Commission on the basis of general considerations of agricultural policy thought it right that the situation contemplated by the general rules laid down by the Treaty should continue, and therefore did not investigate the specific economic situation and the effects of the customs measures applied for in respect of the

year 1962, which was necessary if the corrective function of Article 25, for which it was designed was to be fulfilled. It is just because its principal argument consists of the possibility of substituting different agricultural products, the existence and extent of which is not disputed by the parties only, that the Commission must be required to give a more detailed opinion on this delicate question in its statement of the reasons for its Decision.

I am therefore of the opinion that this statement of the reasons does not by a long way enable the Court to review the facts upon which the Decision is based with special reference to Article 25 (3).

I have already indicated that it is in part misleading. In addition reference must be made to its preamble in which it is stated that the Decision is *based* on Article 29 (a) (promotion of trade), Article 29 (d) (rational development of production), Article 39 (1) (d) (assurance of the availability of supplies) and Article 39 (1) (e) (reasonable prices), for it is obvious that the provisions cited do not form the *basis* of the Decision, as their aims cannot be achieved by a negative decision. At all events it can be said that their attainment is not unduly prejudiced by the Decision.

Therefore the Court must—however unsatisfactory it may seem—annul the Decision in this case also on the ground that the statement of reasons for it is inadequate.

I shall however—as in other proceedings—not content myself with this conclusion but shall proceed to a subsidiary investigation of the other important submissions.

II — Infringement of the Treaty

1. In its pleadings the applicant held to be an infringement of the Treaty the fact that the Commission when taking its Decision not only took into account the effects of the customs measures applied for on the market in oranges but also considered in what way it would influence the production and sales of apples, pears and peaches.

According to its original view there can only be an examination under Article 25 (3) of the question whether serious disturbances of the market of the products, in respect of which the quota is requested, can be expected. It refers to the use of the expression 'produits en cause' ('products concerned') in Article 25 (3) which appears in other provisions of the EEC Treaty and the ECSC Treaty, with a quite unequivocal meaning, and also in the regulations establishing the common agricultural policy, which provided for separate treatment of individual agricultural products.

I thought indeed that I could detect in the oral procedure a qualification of this argument, because the applicant then stated that a material possibility of substituting varieties of fruit occurs 'if a normal price change in the case of one product causes a substantial number of consumers to change over to another product'.

So far as the original argument of the applicant is concerned it must first of all be noted that the Commission did not base its Decision on the fear that the grant of the quota applied for could lead to 'serious disturbances of the market of the products concerned'. There is therefore no need to consider what the expression 'products concerned' ('produits en cause') means in this part of the sentence, for, even if we were to proceed on the basis that they can only mean the products described in the request, that would not indicate the limits of the discretionary power of evaluation, which the Commission must exercise after denying the existence of any serious disturbances. In particular we need not therefore make any comparison with the law on competition in the Treaties in which the same expression ('produits en cause') appears.

The Commission has to exercise its

powers having regard to the criteria laid down in Article 29 which primarily determine the limits of its discretion.

As the Commission rightly emphasizes the effect of the wording of Article 29 is not to restrict the matters to be considered, which the applicant regards as the correct approach. I find in this Article only general expressions such as 'developments in conditions of competition', 'competition . . . in respect of finished goods', 'rational development of production' and 'serious disturbances in the economies of Member States'. The last mentioned criterion which simply mentions economies, demands a comprehensive evaluation of all the effects of customs measures under Article 25 (3).

In this context other considerations can be put forward.

When the Commission is faced with the question whether it should authorize a suspension of customs duties or grant tariff quotas at rates lower than those of the common external tariff, it must investigate the functions of the particular customs duties. If it emerges that the object of a customs duty is not only to protect a specific product but in addition to protect indirectly another product, then it is essential that the Commission should include in its considerations the consequences of the abolition of additional function.

However, such an indirect method of protection by customs duty is current in every customs system, and its internal consistency is the very essence of a customs tariff. Individual customs duties must be coordinated with each other, to the extent to which the goods to which they apply are interchangeable, so that a lower rate for one product does not result in undermining the protection afforded by another rate for another product. The Treaty (Article 21) aims at achieving this consistency for the common external tariff.

The question therefore arises what significance must be attributed to the duty on oranges from this point of view.

In my opinion we can accept as correct the Commission's view that in those countries of the Community which do not produce oranges (the Federal Republic and the Benelux countries) the object of the relatively high duty on oranges is not only the raising of revenue, which would be inconceivable because oranges are not semi-luxuries but a popular foodstuff, but also the indirect protection of home production of fruit. The same considerations apply to the customs duty applied to oranges by the common external tariff. In practice the only country which produces oranges is Italy. Its production falls far short of meeting the needs of the Community. While the original Italian customs duty was 4%—which shows to what extent Italian production was regarded as needing protection against foreign competition—the common external tariff of the Community is to be 15% or 20%. It is 15% from 15 March to 30 September of each year, that is to say during the period when the Community production is in practice insignificant. The conclusion to be drawn from this is that the common customs duty on oranges must also to some extent have the indirect effect of protecting the production of other fruit in the Community. If that is the case, however, before any measure aimed at the total or partial suspension of this duty is taken, regard must be had to its effect on the production of other fruit in the Community. The regulations of the Council of Ministers concerning agricultural policy also lead to the same conclusion. The Commission justifies the separate treatment in principle of individual agricultural products on the ground that their protection against direct competition from similar products is the primary consideration. The Member States according to the regulations on agriculture can, when fixing import duties, take account of indirect competition between various types of products. Also, owing to the fact that

previous import duties and prices, which by reason of the organization of national markets for various products have been brought into a state of equilibrium, often serve as a yardstick for import charges, the indirect competition of various types of products can be adequately investigated. The Commission refers in addition to Article 6 of Regulation No 19, which mentions as an objective a Community target price fixed on the basis of an appropriate relationship between the prices of individual products, and also to Article 8 of the same Regulation, which lays down that the import charges for products not produced in the Community are to be fixed according to what indirect protection of the home production of other products competing with them is necessary. It mentions in particular, in my opinion with justification, that the protective clauses of Articles 10 and 11 of Regulation No 23 are also not drafted in such a way that their application would only be possible when account has been taken of the market situation of products, the importation of which could cause serious disturbances, for example because their price falls short of certain reference prices.

I believe the Commission has thereby proved that it is impossible to extract from the agricultural policy implemented, which is crystallized in the regulations of the Council of Ministers, the principle that the interchangeability of various products cannot be considered when these regulations are applied even if in principle they deal separately with each individual product. Such a principle is even less applicable to the general provisions of the Treaty to which Article 25 (3) belongs.

Finally it must not be overlooked what unacceptable results a different view would produce. If the Commission were compelled to consider only the products specified in a request for a quota, it could happen that it would have to grant requests for quotas, although related products, which could be substituted, would be threatened with considerable disadvantages. These disadvantages would have to be removed by some other way—perhaps by means of protective clauses—a result which from the agricultural and administrative points of view would be absurd and cannot have been intended by the authors of the Treaty.

I am therefore of the opinion that the Commission has not exceeded the limits of its powers, in that before making its Decision it had regard to the repercussions on the market for oranges of the measure for which the application was made.

But my opinion is no more than a statement of principle.

2. The question now arises whether the Commission in ascertaining and evaluating the facts forming the basis of the Decision made mistakes, namely in its appraisal of the situation in the fruit market, the development of its principal trends, the causes of this development and the possibility of influencing this development in the future. This investigation of the facts is permissible, as I have already shown. It will be carried out within the limits prescribed by the applicant's complaints.

The essential considerations of the Commission are to be found in the statement of the reasons for its Decision and in its statements during the proceedings. It says: The Community produces in more than sufficient quantities apples, pears and peaches (for the purpose of these proceedings hereinafter called 'other fruit'). It is always very difficult to sell them. On the other hand an increase in the consumption of citrus fruit is evident. This increase is at the expense of other varieties of fruit. If it is curbed, the existing difficulties in selling other fruit will be reduced. Therefore the increase in the customs duty on oranges intended by the Treaty cannot be suspended.

In the first place therefore it is necessary to examine whether it is in fact necessary to protect other varieties of fruit of which there is continuing *overproduction.*

On being asked by the Court, the Commission stated that statistical proof of the alleged overproduction could not be produced, because not even the total production of fruit was statistically recorded in every Member State. It put forward instead a volume of evidence to justify the starting-point of its argument. In most of the Member States, it says[1], the processing of fruit into alcohol is encouraged by state subsidies; consumption of their own fruit by the producers, which is not indeed statistically recorded everywhere, is 'terribly high' (in Germany about 50% of the fruit crop); in most of the Member States (except in the Netherlands and Italy) systems of minimum prices are in force which enable imports to be blocked for long periods in each year; in addition there is every reason to believe that there is overproduction from the fact that Regulation No 23 of the Council excepts fruits of low quality from free circulation.

If it cannot be denied that these facts, to the extent to which they are facts, (within three of the six Member States there is still no assistance given for the processing of fruit into alcohol) do have some evidential value in calculating the total production of fruit, they are not in any way sufficient to assess the extent of overproduction of high quality table fruits. It is conceivable and can be assumed that a considerable proportion of low quality fruit is consumed by the producers themselves. It can also be assumed that, as is well known, it is this quality of fruit which is converted into alcohol, and that varieties of fruit, which are not suitable for direct consumption as fresh fruit, are cultivated in considerable quantities for the express purpose of being processed (apple juice, cider). In this case it would be valuable to know what the market prospects are for fruit, which, having regard to its *quality,* can compete with oranges. If we are to avoid an additional explanation, all we can do for the time being is to assume provisionally, for the purpose of our further examination, that there is a need to protect those varieties of fruit, the protection of which the Commission had in mind in its Decision.

It is therefore a vital point that in the Commission's view the difficulties in selling other varieties of fruit are due to the *increase in the consumption of citrus fruit.* In fact the statistics show a steady increase in the consumption of oranges in the Federal Republic since the year 1950. We must therefore consider whether any causal connection can be established.

The Commission reasons as follows: apples, pears, peaches and oranges all satisfy the same needs. When the proportion of one variety of fruit used in satisfying these needs increases, the proportion of the other varieties decreases. This conclusion would be cogent if it were clear that the total consumption of fruit has reached the limits of its opportunities for expansion. But there is no indication that this is correct. On the contrary it is rather to be inferred from the statements of the Commission that fruit consumption in the Federal Republic during the post-war period has increased considerably. Similarly the Commission's tables (rejoinder, schedule XII) of the total amount of fruit coming on to the market from the home crop and from imports show an upward trend. It follows that a *decline* in the consumption of apples, pears and peaches cannot yet be inferred solely from the increase in the consumption of citrus fruit.

The Commission tries to prove, also

1 — Reply of the Commission of 8 March 1963 to the question of the Court.

with the help of statistics, over the interpretation of which the parties have exhaustively argued, that the increase in the consumption of oranges in the Federal Republic is at the expense of other fruits.

It must first of all be noted that there are no accurate statistics for the quantities of fresh fruit consumed, so that no exact data concerning the trend of *per capita* consumption is available. The Commission therefore endeavoured to draw conclusions *a posteriori* from other figures. It first compares the increase in imports of oranges, with reference to the pre-war average (295%), with the increase in the available quantities of homegrown and imported fruit. It finds that the latter amounted only to 162% and that a rising trend has not been apparent since 1950. In addition it looks at the proportion of the German apple crop coming on to the market and—although the statistics are neither reliable nor complete—at the proportion of the crop sold as fresh fruit in order to read into these figures a declining trend.

In fact the percentages of the proportions of the crops coming on to the market since 1955 are: 49, 57, 40, 46, 54 and 47%. The percentages of sales of fresh fruit in the crop for the years since 1953 give the following picture: 36, 36, 33, 32, 28, 30, 30, 28 and 31%, in absolute figures: 447 000, 581 000, 257 000, 505 000, 113 000, 691 000, 272 900, 696 000 and 233 000 metric tons.

A declining trend in sales of apples in the Federal German market cannot in my opinion be deduced from these figures. A declining trend in *per capita* consumption cannot either be proved with certainty by taking into account the population increase, because it is not known how much of producers' own fruit consumption finds its way directly to private consumers. In fact the figures supplied by the Commission itself concerning the history of the proportion of stone fruit in the total consumption of fruit do not support a rising trend; for the years 1950, 1955, 1956, 1957, 1958, 1959 and 1960 these figures were: 57, 44, 45, 41, 45, 42 and 45%. The particulars submitted by the applicant concerning the amounts spent *per capita* by a worker's family in the Federal Republic each year on the consumption of stone fruit in the years 1957, 1958, 1959, 1960 (DM 13, DM 21, DM 19, DM 24), contradict the Commission's argument as, finally, does the trend of the prices of Grade I apples which the Commission sets out in its reply in respect of the years 1950, 1952, 1956, 1957, 1958, 1959 and 1960 (—.98 Pfg., DM 1.05, DM 1.17, DM 1.33, DM 1.36, DM 1.12, DM 1.29 per kilo). A falling off in prices cannot be extracted from these figures, as would be expected, if there were a decline in demand.

But even if one had to proceed on the basis that the *per capita* consumption of other fruits was stagnant or had declined a little, that would not prove that the increase in the consumption of citrus fruit could be considered as the *cause* and that, if this increase came to an end, there would be an increase in the consumption of apples. The Commission itself has argued that during the years immediately following the end of the war there was a considerable increase in the consumption of fruit in the Federal Republic and that in particular the consumption of apples as fresh fruit was extended to include low quality varieties of apples. If this is true, and there is no reason to doubt it, having regard to the tables showing the *per capita* consumption of fruit in the Member States contained in the proposals of the Commission for the establishment of a common agricultural policy[1], then it is reasonably clear that

1 — Chapter 'Fruit and Vegetables', page 4. Annual consumption per head 1953/54 to 1955/56: Federal Republic 53 kg, France (Metropolitan) 29·9 kg, Italy 54·6 kg, Netherlands 37·3 kg, Benelux Economic Union 60·6 kg.

the consumption of apples in the Federal Republic may have reached a certain saturation point, which must lead to the additional consumption of other varieties of fruit.

I would like therefore to conclude that the figures before us rather disprove the Commission's argument that there has been an increase in the consumption of citrus fruit at the expense of other varieties. In any case only a detailed analysis of consumers' habits and their reasons for choosing a particular fruit, which an expert would have to carry out, can provide us with any accurate and reliable information relating to the connection between the trends referred to.

I am indeed of the opinion that in this case it will not be necessary. There is in fact a number of guiding factors which will yet make it possible to evaluate the facts. It is first of all necessary to grasp the idea of the coincidence *in time* of the supplies of the different kinds of fruit, for one variety of fruit can only displace another on the market if it arrives there at the same time as the other.

The applicant has in this connection compiled figures showing the average quantities of imports over a period of ten years. The Commission on the other hand relies on an examination of the figures for recent years, because the improvements in storage facilities and changes in cultivation have made it possible for other varieties of fruit to be supplied over a longer period of time.

If we select the information supplied by the Commission for the year 1960, the following picture emerges:

Pears:

The months of July to October must be taken as the principal period for imports. During this period approximately 90 000 metric tons were imported as against only 24 000 metric tons during the remaining months of the year. On the other hand only 66 000 metric tons of the entire imports of apples (approximately 700 000 metric tons) were imported in the months July to October.

Peaches:

Here the proportions are much clearer. The months June to October with imports of 160 000 metric tons are the principal importing period. During the remaining months of the year a total of only 42 metric tons are imported. These 42 metric tons should be compared with the bulk of orange imports of about 600 000 metric tons.

It follows from this that the peak periods of imports are clearly separated in time. To the extent to which the periods of imports overlap, the quantities concerned are only of minor importance compared with the total volume of imports.

The picture is not so clear in the case of *apples*. If only imports are considered, 250 000 metric tons of apples arrive during the period from November to June, that is, during the principal period of orange imports (altogether 640 000 metric tons). During the rest of the year 60 000 metric tons of oranges are imported compared with 110 000 metric tons of apples. But a true understanding of the market conditions and the volume of the supplies of fruit is only obtained if account is also taken of the part of the home-grown crop which is consumed as fresh fruit, which should moreover be done in the case of pears and peaches, with the result that the picture we already have would be even clearer. If a calculation is made on this basis (cf. schedule XII to the rejoinder) for the period when imports of apples are at their lowest, such imports are shown to be about 110 000 metric tons and supplies of home-grown apples about 600 000 metric tons (assuming that a certain percentage of the home crop reaches the market at later periods). Seven-tenths of the entire supply of

apples in the Federal Republic arrive on the market at the same time as one-tenth of the entire supply of oranges. Thus, in the case of apples too, the peak periods of sales clearly occur at different times.

It is legitimate to ask whether the Commission has not made in this respect a mistake of fact, because it is reasonable to assume, that by referring in the statement of the reasons for its decision to the *frustration* of the agricultural policy for other fruit, it took a different view of the simultaneous arrival of supplies on the market. The system of related factors which has been demonstrated gives no grounds whatever for fearing, so far as pears and peaches are concerned, and indeed virtually none as regards apples, that the agricultural policy in respect of these products will be *frustrated* if imports of oranges are not to some slight extent restricted.

Let us now consider the trends in the supply of apples and the imports of oranges in the different financial years since 1955/56 from which the Commission—leaving aside the periods when supplies overlapped—seeks to show how far the markets in apples and oranges influence each other. If we make a comparison in each case with the previous financial years the following picture emerges: increase in supply of apples in the financial year 1956/57 27 000 metric tons, decline in imports of oranges 80 000 metric tons; decline in supply of apples 420 000 metric tons, increase in imports of oranges 230 000 metric tons; increase in supply of apples 600 000 metric tons, decline in imports of oranges 30 000 metric tons; decline in supply of apples 270 000 metric tons, increase in imports of oranges 150 000 metric tons; increase in supply of apples 270 000 metric tons, decline in imports of oranges 30 000 metric tons; decline in supply of apples 150 000 metric tons, increase in imports of oranges 80 000 metric tons.

It follows from this that supplies clearly do not produce a complete reciprocity of effects. The decline in the supply of the one fruit is not linked with a corresponding compensation effected by means of the supply of the other. In fact a large increase in the supply of apples has only ever led to a limited decline in the supply of oranges, which shows us either that supplies correspond to different categories of consumers or that the demand is at least very flexible. If, conversely, the increase in the supply of oranges coincides with a larger decline, as a rule twice as great, in the sales of apples, it would be a mistake to conclude that oranges have the capacity to drive apples off the market. This would presuppose that for every given amount of oranges consumed twice that amount of apples must be left unconsumed, which does not correspond to the comparison in prices. It is more reasonable to attribute the large decline to other causes (a bad harvest) and to conclude that oranges are not an entirely suitable substitute for apples. It must also be established to what extent the trend which has been demonstrated was influenced by artificial measures, because in fact the national organization of markets allowed measures to be taken to restrict imports for the benefit of home production. We cannot therefore extract from the above-mentioned table a reliable picture of the extent of the reciprocal effects produced on each other by the supplies of apples and oranges, that is to say of the degree to which they can be substituted for each other.

But there is one more argument which lends weight to the conclusion that the Commission has exaggerated the possible interchangeability of apples and oranges.

At the request of the Court the Commission submitted in full the observations of the Italian and French Governments on the application by the Federal Republic for a quota. These observations

mention only the market in oranges, and make no reference at all to the market in apples and the possible negative repercussions of the grant of a quota on the sales of apples. This fact should be carefully considered. If the Member States which are principally affected, so far as both the production of oranges and of apples is concerned, did not mention, in what were undoubtedly carefully prepared statements, any effect which the quota applied for would have on the sales and production of apples, we can assume that *they* do not consider any such effect exists or is of any importance.

It is a fact (which can be inferred from the statistics produced) that imports of apples into the Federal Republic are in no way declining but—apart from some unimportant variations—show a steady increase. In 1962, when a tariff quota was refused, imports of apples, as we are told by the applicant, also increased in the same way as imports of oranges.

But it cannot be proved that in previous years, when the impact of the supply of oranges was reduced, imports of apples were much greater, all the more so because it is clear that the volume of these imports was not determined by market conditions but could be influenced by measures of market organization taken by states.

Faced with the figures for the trends in the importation of apples the Commission stated that it had to take account of the sales difficulties encountered by the *German* fruit producers when making its decision on the quota and, having regard to the interests of these producers, had to prevent any increase in the consumption of oranges in the Federal Republic.[1] This shows in my opinion that there is another important defect in the statement of the reasons for its Decision. The Federal Republic is better placed than the Commission to evaluate the need to protect German fruit farmers. In particular it is the task of a national government, within the framework of its economic policy, to balance the need for this protection against the interests of the consumer. I therefore agree with the applicant that the Commission must not incorporate in its Decision considerations concerning national agricultural requirements, if the national government principally concerned denies that such requirements exist.

There is one of the many questions of fact which must finally be considered. Assuming, as the Commission does, the existence of reciprocal effects produced on each other by the supplies of apples and oranges, it is then necessary to examine whether the Decision in question in these proceedings could have a favourable effect on the sales of apples, in other words whether in fact the upward trend in the consumption of oranges could be appreciably reduced for the benefit of apple consumption.

We have been told that the refusal of the request for a quota was to lead to an increase in apple prices 'of an average of almost 2 Pfg.' per kilo to the consumer (statement of defence, p. 18). If we consider the relationship between the prices for grade I apples and grade I oranges (statement of defence, schedule 7) and the fact that as a general rule the impact of such small differences in price on consumer habits is practically nil, it must be accepted that the intended effect, as the applicant claims, does not in fact exist, that is to say, that the measures taken by the Commission do not in any relevant way alter the trend which has hitherto been apparent in the demand for fruit. The statement of the reasons for the Decision itself expresses the same view when it states that the development of trade with third countries will not be appreciably restricted by the decision on the request for a quota.

This assumption is in particular also

1 — Rejoinder, p. 21.

confirmed by the actual trend in the importation of apples in the year 1962, which in spite of the small increase in customs duties showed the same increase as before. That seems to me to prove that the measure taken by the Commission could not fulfil the protective function which was assigned to it. In fact the only effect remaining—which even if negligible is in principle undesirable—is an increase in the cost of living.

To sum up, it is my opinion that the Court cannot answer in their entirety the questions of fact which have arisen without the assistance of an expert, but that in the final analysis a preparatory inquiry is not necessary, because some of the basic considerations of fact essential for the purposes of the Decision have been proved in the course of the proceedings to be wrong with the result that they do not provide a justification for the Decision. The Decision must also be annulled for this reason.

3. In further considering the subject matter of this dispute I do not want to go into the question whether the Commission is entitled when making a decision under Article 25 (3) to take account of the agricultural policy objectives of Article 39. It seems to me in fact that this question, which in principle is undoubtedly of importance, does not have any decisive significance in this case.

If I see the matter correctly, the Commission, in balancing the various conflicting interests, regarded, in the last analysis, the rational development of production as the main consideration, which is one of the aims of Article 39 as well as one of the criteria of Article 29.

There are two arguments in support of this view:

— On the one hand the increase in customs duty prescribed by the Treaty is intended to promote the sales of fruit other than citrus fruits and increase agricultural revenue which in turn is required for the implementation of the measures for rationalization.

— On the other hand the Decision is intended to determine with certainty the future development of the fruit market, that is to say, the Commission intended it to have a psychological effect on producers of other fruit and those who supply them with credit. This latter point of view is expressed in the statement of the reasons for the Decision in the following words: 'Such an authorization would in particular be detrimental to efforts to create storage facilities for fruit produced within the Community, which should make possible a better distribution of supplies throughout the whole of the year, because the uncertainty created by such an authorization with regard to the conditions of competition, which will in the future apply in the Community to fruit produced in the Common Market in relation to imports from third countries, would constitute an obstacle to the raising of the large amount of capital required for the creation of the before-mentioned storage facilities.'

The discussion of the difficult questions of fact in this case has led to the conclusion that in the light of experience the attainment of the first mentioned aim—the improvement of the opportunities for selling other fruit—cannot be expected on the basis of the Decision which has been taken. This fact alone diminishes to such an extent the importance of the considerations based on Article 29 (d) (rational development of production), that the discretionary Decision must be regarded as severely shaken.

In addition the question must be raised —and this is one of interpretation of Article 29 and therefore an admissible question of law—whether it is right under Article 29 to consider the psychological effects of a decision on the grant

of a quota on the activities of producers. In my opinion there are serious objections to this view.

First it is extremely doubtful whether the anticipated effect *owing to its nature* will be achieved. On the other hand it is clear and well known that the Commission's Decision relates to a definite period of time and a specific market situation, that is, the year 1962. No one can assume that the Decision is intended to be of fundamental importance for several years, which, having regard to the uncertainty of long-term economic forecasts, would be quite impossible. If notwithstanding this, it is still possible to have doubts, the Commission would be able to remove them with explanations and corresponding references. In other words, therefore, it is not essential, in order to obtain the desired psychological effect, which is to determine economic behaviour *in the future,* that is, in the years ahead, to take measures, which involve specific economic sacrifices by consumers at the present time, if these sacrifices are not warranted from other permissible points of view.

Similarly, looked at from this angle the considerations of the Commission concerning the requirement to ensure the rational development of production are equally wrong. But if it fails in its reasons relating to Article 29, which are crucial, then the discretionary Decision can have no valid foundation.

III — Other Complaints

There remains the examination of the complaints which the applicant has made under the heading 'misuse of powers', *inter alia* with reference to the procedure which was adopted—consultation with the applicant—and with reference to the change in the statement of reasons. However I believe I need not consider these additional complaints because it has become clear, in the context of the examination undertaken so far, that the Decision reveals serious deficiencies in the evaluation of the questions of fact and in the legal reasons on which it is based which make it impossible for it to be upheld.

C — Summary and conclusion

To sum up, I therefore propose that the application be allowed, that the Decision of the Commission be annulled and that the Commission be ordered to bear the costs of the proceedings.