In Case 34/62

GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, represented by A. Deringer, advocate at the Oberlandesgericht, Cologne, with an address for service in Luxembourg at the Chancery of the Embassy of the Federal Republic of Germany, 3 Boulevard Royal,

applicant,

v

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, represented by Hubert Ehring, Legal Adviser of the European Executives, acting as Agent, with an address for service in Luxembourg at the office of Henri Manzanarès, Secretary of the Legal Department of the European Executives, 2 Place de Metz,

defendant,

Application for the annulment of Decision III/COM (62) 219 déf. of the Commission of the European Economic Community of 30 July 1962, refusing to authorize the Federal Republic of Germany to suspend in part customs duties applicable to fresh sweet oranges, imported from third countries,

THE COURT

composed of: A. M. Donner (Rapporteur), President, L. Delvaux and R. Lecourt (Presidents of Chambers), Ch. L. Hammes, R. Rossi, A. Trabucchi and W. Strauß, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts of the case may be summarized as follows:
By a letter from its permanent delegation in Brussels dated 16 June 1961 the applicant requested the Commission to authorize it, under Article 25 (3) of the Treaty, to suspend the collection of the customs duty of 13% laid down by the Common Customs Tariff for oranges, fresh, sweet, imported from third countries and to apply the duty of 10% laid down by the German customs tariff. By letter of 5 January 1962 the Commission, having heard the views of the other Member States, refused this request.

By a letter dated 24 February 1962 the applicant, having stated its reasons for objecting to the refusal of this request, again asked for:

— the partial suspension of duties applicable to oranges under tariff headings ex 08.02 A I and 08.02 A II and a reduction of the rate of duty to 10% for the year 1962;

— alternatively, a tariff quota of 580 000 metric tons, subject to a customs duty of 10% for the year 1962.

In this letter the applicant adds that it is prepared to extend further the principle of Community preference for oranges, although the use of this preference is already adequate.

By letters of 5 and 10 May 1962, the Commission sent the applicant the observations of the French and Italian Governments. The applicant replied to these observations by a letter of 8 June 1962. By Decision of 30 July 1962, notified to the applicant by letter of 22 August 1962, the Commission refused this new request.

It is this Decision which is the subject matter of this application lodged at the Registry on 20 October 1962.

II — Conclusions of the parties

The *applicant* claims that the Court should:

— annul the Decision of the Commission III/COM (02) 219 déf. of the EEC of 30 July 1962;

— order the defendant to pay the costs.

The *defendant* contends that the Court should:

— dismiss the application and order the applicant to pay the costs.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

The *applicant* puts forward three submissions: infringement of an essential procedural requirement, infringement of the Treaty and misuse of powers.

A — Infringement of an essential procedural requirement

The arguments put forward by the *applicant* may be summarized as follows:

— The Commission must state the reasons on which its decisions are based in accordance with Article 190 of the EEC Treaty. The statement of reasons must not be vague and limited to a repetition of the provisions of the Treaty, because otherwise judicial supervision of the legality of the measure to which it refers would be impossible.

— The defendant's argument that the statement of the reasons on which Community decisions are based, in particular in the case of discretionary decisions, can pass in silence over facts which are of common knowledge, and all the relevant circumstances known to the parties concerned, overlooks the fact that in the world of economic realities the concepts of 'experience' and 'facts of common knowledge' are very controversial as this case has clearly shown.

— The contested Decision quotes in its preamble various articles of the Treaty, and then gives a general statement of the economic reasons which led the Commission to refuse the applicant's request without indicating the facts found by the Commission in the course of investigating the situation and without establishing the connection which should exist between its statement and the articles quoted.

— The contested Decision does not state whether the proviso, to which the grant of a tariff quota under Article 25 (3) of the Treaty is subject, was found to have been complied with in this case.

— The contested Decision confines itself to mentioning some of the objectives set out in Articles 29 and 39 of the Treaty

without indicating whether the objectives not mentioned were considered.

— The Commission does not define the meaning and scope of the expression 'adjusted price level', or state which are the objectives of the common agricultural policy which would be 'jeopardized' by the grant of the tariff quota in dispute. In addition the statement of reasons discloses a certain number of inner contradictions and contains incomplete or incorrect assessments of the matters of fact upon which the request made by the Federal Republic of Germany is based.

The *defendant* replies to the applicant with the following arguments:

— In stating the reasons upon which decisions are based it is sufficient if they disclose to the natural or legal persons entitled to institute proceedings before the Court, that is to say the Member States and the Council, in the case of an application under Article 25 of the EEC Treaty, the particulars of fact and law upon which the decisions are based. Moreover Member States are, in this case, very familiar with the facts which are the subject matter of the contested Decision, so that many facts, of which the administrations of these States are aware, need not be mentioned. In addition, from the legal point of view, the statement of reasons must consist of an indication of the provisions upon which it is based and it is not necessary that it should go into any legal considerations on the scope of these provisions. It need only permit the parties concerned and the Court to check the basis of the decision.

— The argument that the Commission restricted its statement of reasons for its Decision to repeating more or less in their entirety the text of the articles of the Treaty has no foundation. It is sufficient for this purpose to see how few provisions of the Treaty are quoted in the statement of reasons.

— It should be noted that the contested Decision does mention the facts upon which it is based. It is clear from the wording of the statement of reasons that the contested Decision was made by virtue of the discretionary power of the Commission. The nature of the connection between the articles quoted and the relevant findings of fact in the statement of reasons becomes clear if one reads the provisions of the Treaty, in particular Article 25 (3), from which the Commission derives its discretionary power, and Articles 29 and 39, which have been quoted for the sole purpose of showing beyond doubt that the Decision was taken in conformity with the objectives which they lay down. And it is with the object of not encumbering the statement of reasons with unnecessary repetition that the Commission refrained from setting out the recitals so as to correspond to each of the constituent elements of these articles, to the extent that the recitals given in connection with one of these elements by implication covered the others.

— The argument that the particulars supplied by the Commission do not indicate what it means by 'adjusted price level' and what rates and prices are involved is not enough to show that the statement of reasons is incomplete. In fact it is fairly clear, on the one hand, that this part of the statement of reasons refers to fruit prices and, on the other hand, that the word 'fruit' is to be applied to all varieties of imported fruit which can compete with home-grown varieties of fruit and to all varieties of home-grown fruit which are exposed to this competition. This is proved by the reference in the contested Decision to the fact that 'the different varieties of fruit which reach the market at the same time can easily be substituted for each other according to consumer demand . . . .'

With regard to the question what 'the price level adjusted to the rates of the Common Customs Tariff . . .' ought to be, it must first of all be emphasized that the adjustment towards the rates

of the Common Customs Tariff applicable to fruit entails reductions as well as increases of customs duties applicable in Member States. Secondly it is clear that this price level will be the one arrived at by supply and demand, if the import prices are increased by the amount of the customs duties of the Common Customs Tariff. There is no doubt that a price level adjusted in this way to the rates of the Common Customs Tariff is necessary to guarantee the employment and standard of living of producers in the Community, because, in the present stages of the conversion and rationalization of fruit-growing in the Common Market this price level is not sufficient to ensure the attainment of such an objective.

— It is equally incorrect to state that the Commission does not set out the objectives of the agricultural policy in the fruit sector, the implementation of which could be frustrated by an exception to the Common Customs Tariff duties applicable to oranges. In fact it is explained in the preamble to the contested Decision that the uncertainty which such an exception would cause with regard to future conditions of competition in relation to imports originating in third countries could discourage other necessary investment for the rationalization of growing and selling of fruit within the Community. It is therefore clearly visible from the contested Decision that the objective in view is that laid down by Article 39 (1) (a) of the Treaty.

B — Infringement of the Treaty or of rules of law relating to its application

1. Mistakes of law

The *applicant* puts forward the following arguments:

— The rules laid down by Article 25 (1) and (2) of the Treaty are stricter than those laid down by paragraph (3) of the same Article. A careful study should have led the Commission to find that the conditions laid down in Article 25 (1) have in fact been fulfilled in this case. There is all the more reason why the Commission should have granted this quota according to the provisions of Article 25 (3), particularly as no danger of any serious disturbance of the market has been established.

— In most of the decisions adopted so far the Commission has itself acknowledged that tariff quotas can also be granted for the products listed in Annex II of the Treaty, in order to remove in particular the difficulties in supplying the demands of Member States which can result from the alignment of national duties on the Common Customs Tariff. Therefore if the Commission now argues that the grant of a tariff quota under Article 25 (3) would jeopardize the attainment of the objectives of the common agricultural policy, its argument is inconsistent with its previous decisions and fails to grasp the relationship of this Article to Articles 39 to 46 of the Treaty.

— The Commission was wrong in thinking that the concept 'products concerned' contained in Article 25 (3) of the Treaty includes all the products listed in Annex II of the Treaty and not just the products referred to in the application for a suspension of customs duties.

— In addition the Commission has misunderstood the extent of its discretionary powers. Article 29 states the guidelines by which it should be influenced in achieving the tasks laid down by Article 25. The Commission must grant the measures referred to in Article 25 (3) so far as these guidelines are not in conflict with them. Moreover the fundamental principle of interpretation that regard must always be had to the context of an article does not allow article 25 to be interpreted in the context of the Title relating to agriculture.

— The Commission was guided by cer-

tain criteria which are not in the Treaty and has on the other hand disregarded other criteria which the Treaty expressly lays down. On the one hand the contested Decision infringes Article 29 (a) by disregarding the necessity to promote trade between Member States and third countries. 88% of the imports of oranges into the Federal Republic originate from third countries.

On the other hand the Commission is misapplying Article 29 (d) by taking into consideration only one of the factors laid down in this provision, namely the expansion of consumption within the Community, whereas it should have been guided equally by the need to avoid serious disturbances in the economies of Member States. In addition the Commission should have established that the tariff quota applied for does not jeopardize the rational development of production, within the Community, of oranges and other varieties of fruit.

— If the view is held that the Commission had to take account of Articles 38 and 39, it has infringed these Articles.

— The reference made by the Commission to Article 38 (4) of the Treaty, stating that the operation and development of the common market for agriculture must be 'accompanied' by the establishment of a common agricultural policy among the Member States is not relevant. However that may be, Article 38 (2) of the Treaty provides that the rules laid down for the establishment of the common market, including the provisions of Articles 25 (3) and 29, shall apply to agricultural products 'save as otherwise provided in Articles 39 to 46'.

— In addition, so far as Article 39 of the Treaty is concerned, the Commission's findings of fact were wholly inadequate and it therefore made an incorrect evaluation of the various principles stated in Article 39. In particular it could not rely on Article 39 (b) because the objectives set out in that subparagraph, according to the actual wording of this provision ('thus'), are only to be achieved by the methods stated in subparagraph (a).

— With regard to subparagraph (d) it must be noted that the modest increase in the external duty on oranges has no effect on the supply of other varieties of fruit, their production within the Community being in any case adequate.

— Finally so far as the objective in subparagraph (e) is concerned, it must not be forgotten that the increase in the duty applicable, however small it may be, nevertheless represents an additional duty of roughly 10 million DM on a supply of 580 000 metric tons.

— The Commission wrongly relies on Article 8 of Regulation No 23. Article 8 merely repeats Article 23 (3) which does not limit the application of Articles 25 and 29.

— Finally it must be noted that the defendant did not attach any importance to the fact that the applicant offered other Member States comparable facilities for the importation of apples, pears and peaches.

In fact, according to the Commission, what is important above all is the protection of Community products. Regulation No 23 contains nevertheless provisions which enable each Member State to protect, within restricted limits, its production against other Member States, but it does not contain any provisions empowering the Commission to intervene in internal decisions of these States, which do not adversely affect Community production.

2. Mistakes of fact

With the aid of various statistics and documents the *applicant* argues that the contested Decision has no adequate foundation in fact and disputes the truth of the facts alleged by the defendant. The principal conclusions it draws from its statement are as follows:

— Imports of oranges, mandarins and clementines are not affected by the production and large fluctuations of the national fruit crops.
— Imports of oranges, mandarins and clementines have not affected imports of other varieties of fruit.
— In spite of fluctuations of fruit crops imports of other varieties of fruit have increased in the Federal Republic of Germany during the years under review much more than imports of oranges, mandarins and clementines.
— The different varieties of fruit, in particular oranges, on the one hand, and apples, pears and peaches on the other hand, which are offered on the market at the same time, cannot be substituted for each other in such a way that a supply at low prices of one of these varieties reduces the demand for the others.
— Oranges, like all citrus fruits, are primarily intended to satisfy certain specific needs, in particular in vitamins, which cannot be satisfied, or at least not in the same way, by apples, particularly in the spring.
— Nor is it correct that the consumption of citrus fruit increases at the expense of the consumption of stone fruit, fruit with pips or in particular of apples.
— It is wrong to suppose that the production of apples, pears and peaches can be encouraged by raising the customs duties on oranges. The policy adopted by certain States in this connection proves the contrary.

The applicant finally enters into a technical discussion with the defendant concerning the evidential value of the statistics and data submitted by both parties in support of their arguments.

The *defendant* remarks first of all that the applicant was wrong to include some of its above-mentioned complaints under the heading 'Infringement of the Treaty'. It points out that the Decision at issue was made by the Commission in the exercise of its discretionary powers and that, except when the Commission exercises its power outside the limits fixed by the Treaty, such a decision can only be disputed on the ground of misuse of powers. If the complaints mean that the Commission has wrongly exercised its powers, there is a misuse of powers. According to the defendant this is important, because the case law of Member States shows that misuse of powers only occurs in a limited number of cases.

The *applicant* replies that the scope of the expressions 'détournement de pouvoir' and 'Ermessensmissbrauch' ('misuse of powers') contained respectively in the French and German texts of the EEC Treaty must be defined in the light of the national laws of all Member States, because in fact the concept of 'Ermessensmissbrauch' under German law goes further than 'détournement de pouvoir' under French law, to the extent that it also includes the concept that both a mistake of law and a material error of fact are infringements of the law.

Subject to this qualification the *defendant* replies to the above-mentioned complaints as follows:

Mistake of law

— Article 25 (3) of the Treaty must not be interpreted as meaning that a partial suspension of customs duties should be authorized whenever no serious disturbance of the market of the products concerned can result from such a suspension.
— The actions of the Commission must be guided by the objectives stated in Article 29 of the Treaty. These objectives should be considered as a whole but, if it is impossible to reconcile them, it is for the Commission to make a choice.
— Moreover the wording of Article 25 (3), which states that the Commission 'may' suspend customs duties, proves that a discretionary power is conferred upon the Commission.

— Article 29 of the Treaty does not exhaustively enumerate all the criteria by which the Commission must be guided in the application of Article 25 (3).

— The Common Customs Tariff plays an essential, indeed a unique, part in the attainment of the objectives of the common agricultural policy. The exercise of the discretionary power conferred by Article 25 (3) of the Treaty must have regard to this function of the Common Customs Tariff in the common organization of agricultural markets.

— It is not an infringement of Article 25 (3) of the Treaty to take account of fruit other than that for which the authorization was requested. Agricultural policy constitutes a whole, at least when, as in this case, products in competition with each other on the market are concerned. Moreover the expression 'products concerned' in Article 25 (3) refers to all products listed in Annex II to the Treaty. This interpretation is indirectly confirmed by decisions of the Court on Article 65 of the ECSC Treaty.

— The argument of the applicant that the contested Decision was contrary to Article 29 (a) would mean that every refusal of a grant or authorization under Article 25 (3) of the Treaty would infringe this provision. In fact a charge on imports is never successful in promoting trade with exporting countries and increasing the consumption of imported products.

— Since a fair standard of living for the agricultural community is ensured by rationalization of production, the Commission considered that it was obliged to pursue the objectives laid down by Article 39 (1) (a) and (b) of the Treaty by refusing the grant applied for. In this case the objectives laid down in Article 39 (1) (d) and (e) were not in conflict with such a refusal. The Commission on the other hand took the view that the increase in consumer prices and the difficulties thus created in ensuring the availability of supplies were so negligible that they were much to be preferred to the difficulties which would have been created by the grant applied for.

— In its Decision the Commission referred to Article 8 (2) of Regulation No 23 of the Council for the simple reason that this Article confirms the vital part played by the common external tariff in the common organization of agricultural markets.

Mistakes of fact

Having stated that, as this case involves a discretionary decision, it falls to the applicant to prove that the evaluation of the facts made by the Commission is not correct, the *defendant* disputes the accuracy of the facts supplied by the applicant and the conclusions it draws from them. With the help of a number of documents and statistics the defendant submits a series of conclusions the chief of which may be summarized as follows:

— A continuous increase in the consumption of oranges, mandarins and clementines at the expense of the consumption of stone fruit and fruit with pips and in particular apples has been noted. This increase cannot be regarded as a development which is independent of prices. Such an assumption is first of all contrary to the customs policy of all countries which do not produce citrus fruit. Further the circumstances surrounding this development show clearly that the constant reduction in the prices applicable to citrus fruit compared with the prices of other fresh fruit is one of the principal reasons for the growing volume of the consumption of citrus fruit.

—The interaction between the supply of apples and imports of citrus fruit is quite sufficient to prove that these products can be marketed at the same time. Moreover the new storage facili-

ties make such marketing easier. In addition it is to be noted that the well-known overproduction of apples, pears and peaches makes the fulfilment of the objectives laid down in Articles 39 (1) (c) and 43 (3) (a) of the Treaty difficult. This overproduction can only be halted by the rationalization of agricultural production laid down by Article 39 (1) (a), a measure which, if adopted, would require considerable investment. In these circumstances it is imperative to refuse to depart in any way from the Common Customs Tariff in this matter, all the more so as the increase in duties provided for by this tariff is very modest in this case.

— Moreover an exception granted when the customs duties are first raised would discourage Community growers in their efforts to rationalize production. Growers would, in fact, no longer obtain the necessary capital if the protection of fruit-growing in the Community became uncertain as a result of such exceptions.

— The fact that in the Federal Republic there has been a greater increase in the volume of imports of other fresh fruit, compared with the pre-war period, than in the volume of imports of oranges, mandarins and clementines can be easily accounted for by the extremely low level at which this development began.

On the other hand the amount of fresh fruit, other than citrus fruit, harvested or imported, available in the Federal Republic, does not show any increase during the post-war period. This fact is decisive in this case, because within the framework of the common agricultural policy, it is necessary to concentrate in particular on the marketing of Community production. Moreover this increase in imports of fresh fruit other than citrus fruit has taken place at the expense of that part of the German crop which is marketed as fresh fruit and is not sufficient to solve the problem of overproduction in the Community in the sectors in which the exporting Member States are interested.

C — Misuse of powers

The *applicant* maintains that the Commission is guilty of a misuse of powers by using its alleged discretionary power for a purpose other than the one prescribed in Article 25 (3) of the Treaty. The arguments which it puts forward in support of this complaint may be summarized as follows:

— The Commission refused the applicant's second request giving completely new reasons. It is thus for the Court to consider whether the fact that the Commission suddenly put forward new reasons, with regard to which the applicant was moreover unable to define its position, does not constitute a misuse of powers.

— The contested Decision is based on the finding, which is quite incorrect, that oranges on the one hand, and apples, pears and peaches on the other hand, are interchangeable so far as consumers' requirements are concerned.

— The Commission contradicts itself in its Decision by stating, on the one hand, that the tariff quota would 'jeopardize' the attainment of the objectives of the common agricultural policy and by claiming, on the other hand, that the increase in the duty applicable to oranges does not hinder trade with third countries.

— The contested Decision restricts the German consumers' freedom of choice in respect of consumer goods and therefore introduces a restriction contrary to the fundamental principles of the Common Market.

— The contested Decision aims at protecting the production of apples, pears and peaches within the Community, whereas Article 25 (3) of the Treaty does not confer upon the Commission the power to take account, in the decisions which it takes under this Article, of the effects which they may have on

'other' Community products. By its Decision the Commission has therefore pursued an objective other than that in respect of which it has a discretionary power.

— The Commission exceeds the powers conferred on it by Article 25 (3) of the Treaty by refusing its authorization, out of consideration for the interests of the German apple producers, although the refusal did not adversely affect the other countries of the Community, as they themselves admit.

The *defendant* replies as follows:

— With regard to the argument that the Commission is guilty of a misuse of its powers by basing its Decision on criteria which have not been raised and discussed beforehand with the applicant, it must be noted that the Commission is not required, under Article 25 (3) of the Treaty, to enter into discussions or open negotiations with the Member States concerned before adopting decisions under that Article. Moreover, in its first request the applicant had simply asked for a reduction of customs duties on oranges and the question was whether it was possible to authorize such a measure having regard to the need to protect the production of oranges in the Community. On the other hand in its second request the applicant had suggested that the customs duties on oranges in the Federal Republic be reduced to the same extent with regard to other Member States. Since in this case the suspension of the customs duties in question would not have affected the Community preference applicable to oranges, the problem which it raised had to be examined having regard to the repercussions which such a suspension would have had on the growing of other fruits.

— The free choice of the German consumer cannot be seriously restricted by such a small increase in prices as that of which the applicant complains.

— An increase in customs duties is the normal result of the establishment of the Common Customs Tariff and, therefore, the suspension of these duties is only to be authorized in wholly exceptional circumstances; no such circumstances have been mentioned by the applicant in this case.

— As the Commission has in similar cases authorized the reduction of customs duties, the applicant complains that it has acted in an arbitrary manner. This complaint has no foundation, because the applicant forgets that Annex II to the Treaty, to which Article 25 (3) refers, lists several products which are not always, or only to a small extent, in competition with other agricultural products.

IV — Procedure

The procedure followed the normal course.

Grounds of judgment

The applicant challenges the contested Decision on the grounds of infringement of an essential procedural requirement, infringement of the Treaty and misuse of powers.

The complaint of infringement of an essential procedural requirement

The applicant complains that the contested Decision did not expressly state that there was in this case no danger of any serious disturbance of the market

of the products concerned. This complaint is unfounded because the Commission does not have to mention expressly that in its opinion there is no danger of serious disturbance.

In addition the applicant complains that the statement of reasons does not specifically deal with all the criteria of Article 29 and all the objectives listed in Article 39. As the Commission does not have to take into account the criteria and objectives not relevant to the case in point, it may be inferred from its silence that it considered that the criteria and objectives not mentioned in the statement of reasons were inapplicable. The omission of the said considerations does not therefore constitute a defect in the statement of reasons.

The applicant also claims that the statement of reasons for the contested refusal is inadequate to the extent that it is restricted to mentioning a price level adjusted to the rates of the Common Customs Tariff for fruit without stating what level, what products, what prices and what rates are involved.

It is clear from the statement of reasons that the price level concerned refers to fruit in general and in particular to apples, pears and peaches on the one hand and oranges on the other hand. It is equally clear that the Commission by using the words 'adjusted to the rates of the Common Customs Tariff' intended to refer to the protective function of the external tariff as a means of guaranteeing the level of Community prices against the reduction which might result from the importation of competing products originating in third countries at prices which are too low. It cannot therefore be said that the statement of reasons is insufficiently clear.

The applicant complains that the statement of reasons should not refer to Article 8 of Regulation No 23 of the Council, a provision which has no connection with the facts and cannot therefore serve as a basis for the Decision. This complaint, in so far as it is not a point of substance, cannot be upheld, because, if in fact the Article referred to proved to be irrelevant, it would in no way affect the legal basis of the contested Decision.

The applicant finally complains that the statement of reasons is contradictory, because the Commission considers the requested authorization as an obstacle to the implementation of the agricultural policy and at the same time finds that the effect of the refusal on the prices and quantities of imported oranges will be minimal.

The alleged contradiction is one of appearance only. When the Commission took the view that the refusal of the requested exemption was unlikely to restrict imports of oranges and therefore affect the volume of this trade, it

merely intended to record that the disadvantages resulting from the need to adjust the duties charged by the Federal Republic to the Common Customs Tariff were not a determining factor. This view is not inconsistent with the Commission's finding that the reduction in the price of oranges by the applicant government is however capable of impeding the establishment of the price level necessary for the implementation of the objectives of the agricultural policy for apples, pears and peaches.

The objections to the statement of the reasons for the contested Decision therefore do not appear to be well founded.

The complaint of infringement of the Treaty

In support of this complaint the applicant alleges that the wording of Article 25 (3) is less strict than the wording of paragraphs (1) and (2) of that Article and that in view of the extreme flexibility of paragraph (3) the Commission should have granted the suspensions applied for as soon as it had established that there was no danger of serious disturbances of the market of the products concerned, unless difficulties arose from a possible conflict with the criteria of Article 29.

Although it is true that the powers conferred upon the Commission by the said paragraph (3) are of wider application than the narrowly defined powers provided by paragraphs (1) and (2), that does not imply that the Commission must grant every request which does not create the risk of serious disturbances. In fact the use of the word 'may' in Article 25 (3) shows clearly that the Commission, in the exercise of the powers referred to above, has a wider discretion under this paragraph than under paragraphs (1) and (2). When considering whether a possible grant of tariff quotas is lawful and expedient it is necessary to bear in mind that the measures authorized by Article 25 are in derogation of the Common Customs Tariff laid down by Articles 3 and 18 and of the provisions of Article 9. Therefore the Commission, guided by the criteria set out in Article 29 of the Treaty, must have regard to the system and fundamental rules of the Common Market.

The applicant complains that the Commission took into consideration the effect of a possible grant on the market for apples, pears and peaches, instead of confining itself solely to the market in the products concerned, that is to say oranges.

As the Commission did not raise the question of serious disturbance there is no need to consider the expression 'markets of the products concerned' which, according to Article 25 (3), is only of significance when taken together with

the concept of serious disturbance. In considering whether an authorization is appropriate, the Commission is legitimately entitled to take account of its effects not only on the market for the products mentioned in the request but also on the market for competing products. A restriction of the concept of a market, which is the applicant's argument, would lead to an artificial separation of the markets for different products. Such a concept would not take account of the interdependence of the various markets and would disregard the facts of economic life.

The applicant complains that the Commission disregarded the criteria set out in Article 29 of the Treaty and by so doing infringed this provision.

These criteria relate to different objectives which may conflict with each other or not be applicable at the same time, so that the complaint that the Commission has not considered all of them is only valid if they were all relevant to this case. It is not disputed that the criteria set out in Article 29 (b) and (c) have nothing to do with this case. If the Commission was in any case obliged to be guided only by the need to promote trade with third countries the result would be that any request for exemption ought to be granted, and this would entirely destroy the efficacy of the Common Customs Tariff.

Finally, the defendant rightly argues that it has complied with Article 29 (d) by examining its application not only to the orange market but also to the market for apples, pears and peaches.

This complaint is therefore unfounded.

The applicant complains that the Commission did not base its Decision exclusively on the criteria laid down in Article 29, but also took into consideration the objectives of the common agricultural policy as laid down in Article 39 of the Treaty.

Although it is true that the provisions laid down for establishing the Common Market are, in the absence of any provision to the contrary, applicable to agricultural products and that Article 39 cannot be regarded as being in conflict with the normal application of Article 25 of the Treaty, it is equally true that, in exercising its power under paragraph (3) of this Article, which only relates to the products listed in Annex II, the Commission cannot ignore the effect of its decisions on the common agricultural policy and may therefore legitimately avoid taking any decision which would interfere with this policy. When applying Article 25 (3), account must in the first instance be taken of Article 39, although it is not so important as Article 29, because the objectives which it

sets out must be taken into consideration and the danger of impeding the attainment of these objectives must be a factor in assessing, as the Commission is required to do under the said paragraph, the expediency of granting an authorization.

Alternatively the applicant complains that the Commission failed to understand Article 39 because the objectives laid down in subparagraph (1) (b) of this Article can only be attained by the methods laid down in subparagraph (1) (a). However in this case it is not a question of achieving the objectives laid down in subparagraph (1) (b) but only of ensuring that their attainment is not impeded by the application of other provisions of the Treaty, in this case Article 25. It follows that, if the Commission admits that there is competition between oranges on the one hand, and apples, pears and peaches on the other, the stabilization of the market for these latter products may be impeded by the importation of cheap oranges. Finally if the contested refusal leads to an increase in the price of oranges, this does not imply that these prices are therefore no longer reasonable within the meaning of Article 39 (1) (e).

When the Commission states that 'it is known that in the case of most agricultural products the people would be assured better and less expensive supplies if an agricultural policy having as one of its objectives the stabilization of the market could be abandoned etc.', the Commission has correctly stressed that the expression 'reasonable prices', has to be considered in the light of an agricultural policy as laid down by the Treaty and cannot be taken to mean the lowest possible prices.

The complaint that Article 39 has been infringed must therefore be dismissed.

According to the applicant the Commission has also infringed the Treaty by relying on Article 8 (2) of Regulation No 23 of the Council referring to the progressive establishment of a common organization of markets in the fruit and vegetable sector.

The defendant has replied that it quoted this provision because it confirms the great importance of the part played by the Common Customs Tariff in the establishment of a common market in fruit and vegetables.

It has not been shown that by this provision the Council intended to impose obligations on the Commission in the exercise of the powers conferred upon it by Article 25 (3).

This complaint therefore is unfounded.

Finally the applicant disputes the relevance of the statements of fact upon which the Commission has based its refusal and challenges in particular the arguments that, on the one hand, oranges, apples, pears and peaches can be substituted for each other, and on the other hand, that the grant of the exemption requested would impede the agricultural policy in the fruit sector and, finally, that the importation of cheap oranges would prevent the rationalization and stabilization of the markets for apples, pears and peaches.

The statement of reasons for the contested Decision is based on the assertion that the said fruits can be sold on the market at the same time and can be substituted for each other without difficulty. The Commission concludes from this that a reduction in the price of oranges might prevent the attainment of certain objectives of the agricultural policy with regard to many varieties of fruit and in particular frustrate the efforts which are being made to obtain a more uniform distribution throughout the year by means of a better system of storage, such an improvement requiring substantial investment which presupposes a certain safety margin with regard to the conditions of competition with other varieties of fruit. The applicant claims that oranges, on the one hand, and apples, pears and peaches on the other, cannot in practice be substituted for each other, because public preference is predominantly influenced by taste and the need for vitamins, while the defendant states that the public's choice is chiefly dictated by the price. Each of these diametrically opposed views appears to be too rigid because they assume that one simple fact among many others may alone determine the public's choice. The statistics supplied by the parties show that at the present time demand is governed chiefly by the volume of supplies from time to time available according to the season and varies according to the price level and the quantities available. In the circumstances it was open to the Commission to draw the conclusion that an increased supply of apples out of season caused by better storage increases the consumption of these fruits. It was equally open to the Commission to hold that the price level of oranges, a principal table fruit during the season, is a factor which can indirectly affect the success of a policy of storing apples. Therefore, however extravagant the statement may appear that the grant of the exemption applied for would necessarily frustrate the agricultural policy in the sector of apples, pears and peaches, it does not appear to be entirely without foundation.

The questions of the extent of and reasons for the over-production of apples in the Community and of the likely trend of the consumption of apples in the Federal Republic have little relevance in this case, more especially since the object of the contested Decision, as is clear from the statement of reasons, is not to reduce the supply of oranges on the German market, but simply to maintain it at a price level compatible with the Common Customs Tariff.

It follows from this that the applicant, although it has shown that certain assertions in the statement of reasons may be regarded as exaggerated, has not proved that the essential reasoning in it is wrong. The statements put forward by the Commission can in fact validly substantiate the contested Decision.

The complaint of infringement of the Treaty must therefore be dismissed.

The complaint of misuse of powers

Apart from the complaints of misuse of powers put forward by the applicant and already examined, the applicant has stated that the Commission, having by its Decision of 5 January 1962 refused the request for an exemption on the ground that the Community production of oranges must be protected, again refused the same request, submitted in a form which took into account the interests of this production, for a completely new reason. From this the applicant concludes that the Commission refused its application for reasons which were arbitrary and unconnected with the facts.

The Court, however, holds that the reasons for the Commission's Decision are valid and relevant. Although these reasons are entirely different from those for the earlier Decision, they do not raise the presumption that the Commission acted in an arbitrary way. As the statement of reasons may in fact be limited to the most important aspects of the case, the Commission is entitled to base a decision identical with an earlier decision on fresh grounds if the reasons for the earlier decision are no longer valid in the case in point. Moreover, although it may appear appropriate that governments which have applied for exemptions should be informed at the earliest opportunity of the likely objections, the Court cannot, by using the simple expedient of the concept of misuse of powers, force the Commission to issue a prior notification of this kind which is not laid down in the relevant provisions.

Nor can the complaint be justified by the fact that the Decision is based on reasons which have not been invoked by the governments consulted, because the Commission must evaluate all the material facts, whether they are called in aid by the said governments or not.

The applicant claims that, as its refusal restricted the free choice of the German consumer, the Commission was also guilty of a misuse of its powers. It is, however, only necessary to note that the restriction, to the extent to which it exists, has been brought about by the common external tariff itself and that therefore when the Commission, by virtue of the powers conferred upon it, refuses a request for exemption it cannot be restricting the freedom of choice of consumers. Such an effect, if it were proved, would moreover constitute an infringement of the Treaty and not a misuse of powers.

Finally the Commission is blamed for being guided by the interests of German producers of apples, pears and peaches, which, as purely national interests, must, according to the applicant, be assessed by the Federal Government alone and cannot therefore be used to oppose a request for an exemption made by this government in the national interest.

Even if this allegation was correct, it would not in itself justify the complaint because the Commission is entitled to take into account the interests of economic groups no matter to which Member State they belong.

The complaint of misuse of powers must therefore be dismissed.

Costs

Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's conclusions.

The defendant has submitted that the applicant should be ordered to pay the costs. The applicant, having failed in its action, must bear the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 2, 3, 9, 18, 25, 29, 39, 173 and 190 of the Treaty establishing the European Economic Community;
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.

THE COURT

hereby:

1. **Dismisses the application;**
2. **Orders the applicant to pay the costs.**

Donner Delvaux Lecourt

Hammes Rossi Trabucchi Strauß

Delivered in open court in Luxembourg on 15 July 1963.

A. Van Houtte
Registrar

A. M. Donner
President