OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 16 DECEMBER 1963[1]

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1 — Translated from the German.

Mr President
Members of the Court,

The College van Beroep voor het Bedrijfsleven, a Netherlands administrative court whose judgments are not subject to appeal, has made reference to the Court under Article 177 of the EEC Treaty for a ruling on certain difficulties of interpretation and on the legality of certain Decisions of the Commission, questions which arose in two cases brought before it by the same parties on identical problems.

These are the facts on which the national proceedings are based:

Owing to the economic difficulties of German manufacturers of fondant paste caused by a large increase in imports of fondant paste from other countries of the Economic Community, where production costs — in particular raw material prices — are lower, the Federal Government several times applied to the EEC Commission for protective measures to be taken. The Commission granted its requests, and under Article 226 of the Treaty authorized the Federal Republic to impose coutervailing duties on the import of fondant paste from Belgium and the Netherlands, on the express condition that these states did did not already impose corresponding export duties (Decision of the Commission of 27 July 1960). The original authorization was extended and varied several times (Decisions of the Commission of 21 December 1960, 28 June 1961 and 22 December 1961), and finally by the Decision of 27 February 1962.

The Netherlands Minister of Agriculture and Fisheries, on the basis of the above-mentioned reservation contained in these Decisions, issued an order imposing a duty on fondant paste providing for the payment of certain countervailing duties on the export of fondant paste to the Federal Republic of Germany. This order entered into force on 5 August 1960 and, after various amendments, its latest version is dated 2 April 1962.

These rules affected the plaintiffs in the Netherlands proceedings, the second plaintiff because it manufactures dry fondant powder, the first plaintiff because it exports fondant powder to the Federal Republic. For the exports made between January and March 1962 the first plaintiff received several notices of assessment requesting the payment of certain sums by way of countervailing duties.

Legal proceedings were brought to obtain the annulment of the notices of assessments. The actions were founded not only on submissions drawn from Netherlands law but also on arguments based on Community law.

Considering that in order to give judgment on these actions it is necessary to answer questions of Community law, and in view of the obligation for national courts of last instance to refer these problems to the European Court of Justice for a preliminary ruling, the College van Beroep suspended the proceedings and referred to this Court the following questions:

1. 'Does the Decision of the Commission of the European Economic Community of 27 July 1960 (extended on 21 December 1960, renewed on 28 June 1961 and again amended on 27 February 1962) fixing the protective measures concerning the importation into the Federal Republic of Germany of bread and fondant paste originating in other Member States authorize the Netherlands to impose a duty on the export of fondant paste to the Federal Republic of Germany?
2. If Question 1 is answered in the affirmative:
   (a) was the Commission competent, under Article 226 of the EEC Treaty, to grant this authorization to the Netherlands when the latter did not apply for it? If not:
   (b) is the Decision thereby invalid in so far as it confers this author-

ity on the Netherlands?

3. If the answers to Question 2 do not establish the invalidity of the Decision:
   (a) do the difficulties referred to in Article 226 (1) of the Treaty include those arising exclusively from the application of the mandatory provisions of the Treaty and especially from the application of the rules concerning the elimination of customs duties? If this Question is answered in the negative:
   (b) can it be concluded from this that the Decision is invalid in so far as it confers the above-mentioned authority on the Netherlands? Or can it be concluded on other grounds that the Decision is invalid because it contravenes the law of the European Communities, as suggested by the plaintiffs' argument, that in making its Decisions the Commission had recourse to Article 226 of the Treaty in order to avoid the procedure under Article 235 of the Treaty?'

During the written proceedings the Dutch parties submitted their observations on the reference and the defendant referred to the arguments which it had maintained before the Netherlands court. The EEC Commission and the Government of the Federal Republic of Germany also submitted their observations.

Legal Consideration

I—Preliminary questions

Before I embark on the reply to be given to the questions posed, certain preliminary questions should be examined, some of which are raised by the Commission and some by the Federal Republic of Germany.

1. The Commission points out that the first question does not mention among the authorizing Decisions of the Commission that of 22 December 1961, although it is also of importance to the facts in the case because it extended to 28 February 1962 the authorization granted on 28 June 1961 and because the exports in question occurred during the period from January to March 1962. It proposes that, giving a logical interpretation to the order making the reference, the Court should extend its examination to this unmentioned Decision. There should be no objection to this, for in fact it is apparent from the grounds given in the order making the reference that the Netherlands court, in order to deal with all the objections submitted by the plaintiffs, examined all the authorizing Decisions. The fact that this Decision was not expressly mentioned in the questions referred to the Court is plainly the result of an oversight.

2. The Commission further remarks that the Articles of the Treaty expressly referred for interpretation are not the only ones of importance in the national proceedings. In particular, the Netherlands court itself interpreted Article 12 of the Treaty when it declared that the fondant paste in question fell within its provisions and that the countervailing duties authorized by the Commission were charges having equivalent effect to customs duties which, under Article 12, should not have been reintroduced. The Commission therefore raises the question whether the Court should not draw attention to the obligation of national courts to submit to it all questions of interpretation and whether it should not give judgment also on the scope of Article 12 of the Treaty, in spite of the absence of a question on this point.

I do not consider that the Court should follow this suggestion.

It cannot give an interpretation of particular Articles of the Treaty which has not been asked for it, expressly or

by implication, by a national court or tribunal, even if this interpretation should play a part in the national proceedings.

As regards the remark concerning the obligation to make a reference, which must naturally be fulfilled as conscientiously as possible in the interests of the uniform application of European law, it does not seem necessary in the present case in view of the judgment in Cases 2 and 3/62, in which the concept of charges having equivalent effect to customs duties (with which we are here concerned) was analysed in detail (Rec. 1962). By an extended application of the arguments on which the judgment in Cases 28 to 30/62 was based I believe that it can be maintained that, after the judgment in Cases 2 and 3/62 was given, it would only be necessary to raise a matter again before the Court of Justice if the national courts found arguments liable to lead to a change in case law, whereas, apart from this, it might be that the obligation to make a reference for a preliminary ruling ceased to exist.

3. Finally, the Federal Government raised further questions, the reply to which may influence both the order to be followed in examining the points contained in the reference and the admissibility of certain questions. They allude to the scope of the jurisdiction of the Court laid down in subparagraph (b) of the first paragraph of Article 177 which mentions rulings on the *validity of acts of the institutions* of the Community.

Two problems should be examined:

— Does validity imply legality?
— If so, does Article 177 allow examination of the legality of decisions addressed to Member States?

(a) According to the arguments of the Federal Government, it is conceivable that the concept of 'validity' refers to the formal aspects of legal acts, and therefore that subparagraph (b) of the first paragraph of Article 177 allows examination only of the question whether there is a legal act or a non-existent act, or whether a legal act has become invalid through later acts (by the institution concerned) or through a judgment of the Court. In support of this argument the Federal Government refers particularly to the different wording used in Article 173 which expressly speaks of the *legality* of acts of the institution.

Doubts arise in many respects with regard to this view, which clearly was not adopted as an argument but was only advanced with the intention of identifying an existing problem.

—First, the general principle must not be forgotten that divergences in the text and in the drafting of certain provisions of the Treaty, especially when they are limited to a single concept, cannot have the same importance in the interpretation of the European Treaties as in the exegesis of carefully drafted national codifications.

—As regards the concept of 'validity', the ordinary meaning of the word in no way implies that it designates only the formal aspects of acts. This is particularly clear if we look at the French wording. 'Validité', according to Capitant (Vocabulaire Juridique 1930), is the 'qualité d'un acte qui n'est entaché *d'aucune cause de nullité*'. Likewise, the 'recours en appreciation de validité' to which allusion is occasionally made in the analysis of Article 177, certainly allows the legality of acts to be examined, without imposing any limitation on the 'moyens' (cf. Encyclopédie Dalloz, Droit administratif 1959, Vol. II, p. 743; Odent, Contentieux administratif 1957/58 p.325). For the German legal language, I refer to the commentary on the Law of the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz) where the question of validity arises in connexion with judicial review of the conformity of laws with the constitution (cf. Geiger,

Kommentar zum Bundesverfassungsgerichtsgesetz, 1952 pp. 239, 241, 245). We are accustomed to see other treaties limit judicial review over certain acts in clear terms and not by resorting to the use of ambiguous expressions (cf. the second paragraph of Article 33 of the ECSC Treaty providing for the institution of proceedings by undertakings against general decisions, invoking misuse of powers; the third paragraph of Article 38 of the ECSC Treaty which allows an application against an act of the Assembly or of the Council only on grounds of lack of competence or infringement of an essential procedural requirement; Article 18 of the Euratom Treaty which limits the examination of decisions of the Arbitration Committee to formal validity and the interpretation of the Treaty).

—The Federal Government admits moreover that in view of Article 184 the legality of regulations can also be examined under Article 177 and this cannot be doubted. But if that is so it must be recognized that the concept of 'validity' includes legality, for Article 177 contains no special provision for regulations.

—Nor would the narrow interpretation of the term 'validity' correspond to the importance which the Treaty's system of judicial protection attributes generally to Article 177. I refer in this respect to the official observations of the German and Italian Governments on the EEC Treaty: they note the similarity of the reference procedure to the German procedure for testing the constitutionality of laws (Article 100 of the Basic Law (Grundgesetz)) and to the indirect Italian procedure used for the same purpose (Law No 87 of 11 March 1953) (Bundestag Doc. No 3440 of 4 May 1957 Appendix C page 148; Italian Chamber of Deputies Doc. No 2814 of 26 March 1957 page 27). It seems hardly appropriate to initiate a procedure as cumbersome as that of Article 177, involving the participation of all the Member States and a decision of the full Court, merely to obtain a judicial opinion on the *formal* legal aspects of an act, when such an opinion, and one which could be relied on, in the form of information on matters of law, could often be procured from the Executive itself.

— Finally, it is difficult to see why the Court has provided in its Rules of Procedure, with regard to references for preliminary rulings (Article 103 of the Rules of Procedure), for the application of provisions on the preparatory inquiry (Article 44 et seq. of the Rules of Procedure). They are hardly ever likely to have any importance in questions of interpretation. They serve to clarify the disputes of fact which occur particularly when judging the legality of an act, but not in the examination of its formal validity.

Thus in principle there can be no objection to the Court's examining the legality of the actions of the Community institutions under Article 177.

(b) Secondly, the question is raised whether Article 177 should be interpreted restrictively so as to exclude from the examination as to legality those decisions which are addressed to Member States, especially the decisions taken on the basis of Article 226 of the Treaty. The Federal Government refers on this point to the general scheme of the system of legal protection established by the Treaty which provides, under the second paragraph of Article 173, that individual persons may not contest decisions addressed to Member States since they do not concern them individually and directly.

Those familiar with the case law of the Court will recall on this occasion the judgment given in Cases 2 and 3/60, an action by undertakings against a decision of the High Authority taken under Article 37, the protective clause of the ECSC Treaty. The Court declared this action inadmissible, on the ground that the purpose of Article 37 was to preserve, in a given circumstance of necessity, the

equilibrium between the interests of a Member State and the general interests of the Community. The High Authority should try to ensure this equilibrium by taking the necessary and appropriate measures; it thus exercises, as it were, the functions of an arbitrator. The application of Article 37 is a matter of assessing the economic situation, to which the Member States could contribute by supplying useful information. Article 37 brings into play the political responsibility of the Governments of the Member States, which are at the same time responsible in the Council of Ministers for the protection of Community interests. Consequently, the right to submit to judicial review measures taken on the basis of a protective clause must be reserved to the *Member States*.

All these points of view apply equally to Article 226 of the EEC Treaty; this could justify the conclusion that measures taken pursuant to that Article should not be submitted to judicial review, irrespective of the context, except on the *initiative of the Member States*.

Before arriving at this conclusion, and without proceeding to a critical examination of that judgment, we must note in the scheme of the two Treaties a difference which has played an important part in the reasoning of the Court. In fact, the grounds of the judgment lay great emphasis on the point that Article 37 of the ECSC Treaty gives a special jurisdiction not only to the High Authority but also to the Court. In assessing the High Authority's conduct, the Court has unlimited powers of review, that is to say, it may examine in detail the High Authority's considerations of expediency and, should the occasion arise, vary the High Authority's decision.

This circumstance, especially, may have given rise to talk of a compensation of interests by way of *arbitration* in which private persons affected cannot be involved. But Article 226 of the EEC Treaty does not imitate the system laid down in Article 37 to this extent. That is why I believe that, in judging the present case, the Court is justified in not following the judgment given in Cases 2 and 3/60.

The first important consideration in determining the scope of subparagraph (b) of the first paragraph of Article 177 is its wording. As in the first paragraph of Article 173, this speaks of 'acts' in a general sense and no indication is given of a limitation in the sense of an exclusion of certain acts. Had this been the intention, it could have been expressed in the text of Article 177 just as well as in the second paragraph of Article 173. This would have been all the more natural since in general it is not only Member States, in whose interests a drafting of Article 177 in broad terms might seem appropriate, which appear as parties in the proceedings leading to orders referring questions for preliminary rulings under Article 177. By far the greatest number of actions before the national courts is brought by individuals. Viewing this matter from the point where the reference procedure begins, that is, in the normal context of the national proceedings, there would thus have been every reason to express in clear terms any limitation which might be desired on the Court's powers of review.

It must further be asked what would remain of the supervision of legality under Article 177 if the interpretation proposed by the Federal Government were accepted. As regards directives addressed to Member States, the same should apply to them, according to this proposition, as to decisions addressed to Member States. If the dispute concerns decisions addressed to individuals which can therefore be contested under the second paragraph of Article 173, one may well wonder whether, after the expiry of the time-limit for bringing an action, they could still become indirectly subject to review in proceedings

under Article 177. If one excludes recommendations and opinions, which under Article 189 are not binding and so which can surely only play a minor part for the purposes of Article 177, only regulations of the institutions of the Community would remain, according to the Federal Government, to be supervised as to legality under Article 177 in the usual case of national proceedings between individuals. In view of this practical conclusion, it would be quite impossible to understand why a form of words of an entirely general nature should none the less be chosen for subparagraph (b) of the first paragraph of Article 177.

In particular, however, it must not be forgotten in this respect that the interpretation contemplated by the Federal Government would divest Article 177 of a quite essential function, that of compensating in part for the rather unfortunate limitation of the judicial protection under Article 173. The implementation of the Common Market necessitates to a large extent legal acts of the Community institutions which are addressed only to Member States but which – and this is always pointed out as being characteristic of the Community system — should at least be directed within a legal framework even if there are no detailed rules or if the powers provided are expressly discretionary. If the only judicial protection existing with regard to these Community acts were left to the initiative of the Member States and determined by them, the interests of persons affected, of the citizens of the Community, would certainly be inadequately protected, for it is a fact that the actions of Member States are frequently governed by political considerations and points of view. The practical result would be a diminution of legal protection, for in failing to institute legal proceedings Member States could thus tolerate departures from the rules of law which were introduced for the benefit of the citizens of the Communities. At the same time this would involve accentuating those features of international law which are inherent in the Community, and to which the idea of a binding Community constitution, in the sense of a federal structure, must take second place.

I do not think we need accept these consequences, especially after the judgment in Case 26/62 in which, with regard to Article 12, mention is made of the establishment of *individual rights* which the national courts must also respect when faced with national legislative measures, and in which this much cited passage occurs:

'The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which compromise not only Member States but also their nationals.'

I do not, therefore, propose to follow the suggestion of the Federal Government, but on the contrary to give preference to an interpretation which is favourable to an extensive assurance of judicial protection, and to subject to judicial review, under Article 177, the legality of decisions addressed to Member States, as the judgments in Cases 31 and 33/62 (Rec. 1962) have already indicated.

II—Answers to the individual questions

After these preliminary remarks, I now turn to the answers to the individual questions, and I shall adhere, after all that has been said, to the sequence adopted in the order making the reference.

First Question:

Do the authorizations contained in the various Decisions of the Commission apply equally to the Netherlands and do

they cover the imposition of an export duty by the exporting state?

In contrast to the other parties to the proceedings, the plaintiffs in the Netherlands proceedings are alone in having expressed doubts as to whether an affirmative answer should be given to the first question of interpretation.

The following points in the Decisions themselves are of importance in this connexion:

In the first Decision, the ninth recital expressly states that one suitable means of remedying the difficulties consists in raising the prices for fondant paste, in the form either of a duty on its entry into the Federal Republic or of a *duty on its exportation* from the exporting country.

In the operative part of the Decisions, so far as it is not limited purely and simply to extending earlier Decisions, the authorization is always expressed to be subject to the condition that the exporting state does not already impose a countervailing duty on the export. All the Decisions, except the first, expressly fix the amount of the duty where the exporting state does impose it. Finally, all the Decisions are unanimous in describing the Netherlands as addressee and they are addressed to that State.

I therefore have no objection to acknowledging that, in view of all the circumstances, a reasonable interpretation of the Decisions must find that they contain an authorization for the Netherlands, even though it did not take the same form for that country as for the Federal Republic.

Second Question:

The second question is subdivided into two parts which are complementary, as the Federal Government justly remarked. The question here is whether the Decisions are valid inasmuch as they comprise authorizations for the exporting countries although they did not request an authorization.

The plaintiffs in the Netherlands proceedings plead invalidity; the EEC Commission and the Federal Government on the other hand believe that the Decisions are valid.

It is certain, first of all on the basis of the wording of Article 226, that this protective clause operates only at the request of the Member State which desires protection. The 'State concerned' within the meaning of Article 226 (2) can only be a State in which a sector of the economy is in serious difficulties which are liable to persist or a State which establishes a serious deterioration in the economic situation of a given area. It must further be admitted that the *wording* of Article 226 could lead to doubts as to whether the protective measures provided also include authorizations for other Member States. These doubts arise from the words 'a Member State *may apply for authorization* to take protective measures *in order to rectify the situation* and adjust the sector concerned to the economy of the Common Market' (French text: 'un Etat membre peut *demander à être autorisé* à adopter des mesures de sauvegarde permettant de rééquilibrer la situation et d'adapter le secteur intéressé a l'économie du marché commun'). But I am sure that the clear sense and purpose of this provision enable the literal interpretation of the text to be modified. The essential purpose of Article 226 should be regarded as being to ensure the most efficacious protection possible. This purpose is decisive; the choice of means and procedure is in principle reserved to the Commission, as appears especially from paragraph (2) which authorizes the Commission in *general* terms to determine 'the protective measures *which it considers necessary*' and to specify 'the circumstances and the manner in which they are to be put into effect'. In doing this, the Commission may, under paragraph (3), depart from the rules of the Treaty; the only requirement is that it should give priority to such measures as will least disturb the functioning of the Common Market. It

must be deduced from this last-mentioned reservation that in a given case the Commission must not confine itself to measures which only have effect in the actual state which is in need of protection. The Commission has justly pointed out that it might not appear equitable, in fixing countervailing duties as protective measures, to deprive of the receipts from that duty the Member State which gained a competitive advantage by making special efforts to achieve rationalization. But if the Comsion were able to order, in the context of the circumstances and manner in which the protective measures are to be put into effect (Article 226 (2)), that the importing state should put at the disposal of the exporting state the receipts coming from the countervailing duties (which in principle appears beyond dispute), it should also be permitted directly to authorize the exporting state to impose the duties.

In support of this proposition, reference can also be made to Article 46 of the Treaty which likewise contains a kind of protective clause against adverse effects upon the competitive position produced by national market organizations. In this typical case, the Treaty expressly provides that the importing States which are put at a disadvantage shall apply a countervailing charge unless the Member State, the national market organization of which is affecting the competitive situation, imposes a countervailing charge on export.

Finally, it may be recalled that the effects on trade are the same, irrespective of whether the duty be imposed on export or import, and thus that the exporters are not made to bear an additional burden as a result of the authorization granted to their own state.

Consequently, the Decisions of the Commission are not illegal although they contain an authorization for the Netherlands in addition to that granted to the Federal Republic.

Third Question, first part:

The third question contains, first, a preliminary question of the interpretation of Article 226, which should, however, at the same time help in judging the legality of the Decisions. We must see whether the difficulties referred to in Article 226 also include those which arise only from the application of the provisions of the Treaty.

The Federal Government, like the Commission, has expressed the opinion that it is precisely *these* difficulties which constitute the principal cause for the application of Article 226. In support of this they have put forward arguments which seem to me to be sound.

— The wording of Article 226 must first be considered: it is drafted so generally that it covers difficulties attributable to every kind of cause.

— Next, it must be recognized that the application of Article 226 would be extremely complicated, if not impossible, if only some causes of economic crises were to be regarded while others had to be excluded. In this respect, one might recall the first proceedings for minor revision of the Treaty (Rec. 1958–1959); in those proceedings the Court made the following observations on Article 95 of the ECSC Treaty, which also speaks of unforeseen *difficulties* emerging after the end of the transitional period in the application of the Treaty:

'The Court, whilst taking account of the possibility that the difficulties to which the first of the alternative reasons refers are due to a multiplicity of causes, nevertheless declines to make a more detailed examination of the order of importance of these causes, all the more so because such an enquiry will *always end in uncertain results*, since the causes of disturbance in the Common Market are continually changing.'

—Further, it must not be forgotten that Article 226 applies to the transitional period. This suggests that it envisages primarily the difficulties which result

from the adaptation of the national economy to the Common Market, that is to say, from a normal application of the Treaty.

Furthermore it should be remarked, as the Commission justly emphasizes, that Article 226 (3) permits derogations from the rules of the Treaty in the application of protective measures. The purpose of Article 226 thus consists at least in preventing the *continuance* of the difficulties resulting from the application of the Treaty. But if this is so it is impossible to understand how under Article 226 it is possible to exclude the application of the Treaty as a *cause* of difficulties.

Finally, reference must be made to the parallel case of Article 37 of the ECSC Treaty. On this subject the Court has stated in its judgment in Cases 2 and 3/60 (Rec. 1961) that this provision served to 'guard against the consequences which might result from the *application of the Treaty provisions*'.

Consequently, there is no reason for interpreting Article 226 restrictively and for not recognizing that it is applicable to the difficulties which result from the normal application of the Treaty.

Third Question, second part:

The validity of the Commission's Decisions has also been thrown in doubt in the Netherlands proceedings by the argument that the Commission applied Article 226 in order to avoid the procedure under Article 235.

The objections of the plaintiffs in the Netherlands proceedings are based on the following reasoning:

The purpose of Article 226 is to authorize *provisional* measures to compensate for economic difficulties and to adapt the economy to that of the Common Market. The difficulties in which the German sugar-processing industry found itself resulted from a difference in the prices of raw materials in force in the different Member States. This difference originates in the different structures of the national market organizations for agricultural products; it can be eliminated only by developing market organizations within the framework of the common agricultural policy. As such a modification of the national market organizations is not at present foreseeable, it must be assumed that the difficulties which have been found to exist are not of a temporary nature. Consequently, the only means of remedying the situation would be to supplement the Treaty under Article 235.

This line of reasoning is correct in principle, but it does not provide a ground for laying a complaint at the door of the Commission. In fact the Commission was well aware of the nature of the economic difficulties which it should help to eliminate when it issued the first authorizing Decision. At that time, as appears from the preamble to the Decisions, the procedure of Article 235 had already been set in motion. But by its very nature it is a relatively long one (the Council decides unanimously on a proposal from the Commission and after consulting the Assembly). In the end, it resulted in the Council's Decision of 4 April 1962 providing for the imposition of a countervailing duty on certain goods processed from agricultural products (Official Journal, 1962, p. 999).

Thus the only question can be whether Article 226 could be called in aid to cover a transitional period of a peculiar nature, that is to say, until the entry into force of a supplement to the Treaty adopted under Article 235, which would once more permit the normal application of the Treaty. I consider that the provisions of Article 226 are not infringed if they are used in this way to remedy difficulties in a particular case for which a general and permanent regulation can be awaited with certainty in the form of a supplement to the Treaty, the necessity for which is generally recognized. There is no question

here of avoiding Article 235, but rather of reasonably *complementing* this long procedure, a measure without which it would have been impossible to bring assistance to the threatened industry of a Member State for several years.

4. In sum then, the questions of validity submitted to the Court provide no basis for finding that the authorizing Decisions are invalid.

III—Examination of further questions

But we should ask ourselves whether the subject matter of the proceedings is thus exhausted or whether other problems arise. The general form in which the third question is framed might give rise to an extension of the examination: it speaks of 'other grounds' for the invalidity of the Decisions; there is also the argument of the plaintiffs in the Netherlands proceedings to be considered.

1. In principle, as regards the drafting of the third question, I am of the view that a national court cannot pose a completely general question on the validity or invalidity of acts of the institutions in its order making the reference. As in national law (cf. paragraph 80 Bundesverfassungsgerichtsgesetz; Geiger, Kommentar zum Gesetz über das Bundesverfassungsgericht 1952, note 4 on paragraph 80, note 1 on paragraph 84, note 3 on paragraph 85; Lechner, Kommentar zum Bundesverfassungsgerichtsgesetz 1954, note 2 on paragraph 80), the court making the reference must clearly state the questions on which it requests a preliminary ruling and must indicate the grounds which are said to entail the invalidity of a particular act. That is as far as the opinion of the Court of Justice may extend. If it were otherwise, the matter in dispute, other than in annulment proceedings, would not be precisely defined and the Court would have to make an examination from all imaginable points of view, which might be contrary to the intention of the parties in the national proceedings. Its answer to a question framed in general terms would then have a scope which would perhaps not correspond to its knowledge of all the facts underlying a decision, and such an answer would have legal effects which — contrary to the intention of the Treaties — would extend beyond the proceedings giving rise to the reference.

2. If, then, an exhaustive examination of the Decisions which are the object of the reference is out of the question, we must perhaps decide on an *extensive* interpretation of the order making the reference with the aid of the reasons on which it is based and its factual elements, and that may lead to other questions.

(a) The preamble to the order making the reference raised the question whether the Commission's Decisions could be invalid by reason of an infringement of Articles 16 and 38 of the EEC Treaty. The question was not taken up in the operative part of the order because the Netherlands court considers that such an infringement, if it occurred, could be covered by Article 226 in the same way as a contravention of Article 12.

If, however, we wish to examine it, this view will be essentially confirmed. This is particularly clear in the case of *Article 16*.

As regards *Article 38*, the Commission has shown, in my opinion quite clearly, that the protective measures which it took did not lead to any change in the system under the Treaty which makes a distinction in principle between agricultural products and industrial products. Fondant paste is not subject to the regulations applicable to agricultural products. The important special rules for agricultural products thus apply no more now than previously. Consequently, the invalidity of the Decisions cannot be based on an infringement of Article 38.

(b) It also appears from the order

making the reference that the Dutch plaintiffs have expressed doubts as to the validity of the Decisions with reference to the observance of certain procedural requirements (publication and statement of reasons). I shall examine this point of view briefly.

—It is possible that the obligation to *publish* authorizing Decisions was not fulfilled on the adoption of the first two Decisions. The later Decisions, which are the only ones to enter into consideration for the Netherlands proceedings since the exports in question only took place at the beginning of 1962, were published in the Official Journal. Furthermore, the argument put forward by the plaintiffs as the basis of the obligation to publish does not seem to me to be valid. They cite a passage from the judgment in Cases 2 and 3/62 (Rec. 1962):

'It follows, then, from the clarity, certainty and unrestricted scope of Articles 9 and 12, from the general scheme of their provisions and of the Treaty as a whole, that the prohibition of new customs duties, linked with the principles of the free movement of products, constitutes an essential rule and that in consequence any exception, which moreover is to be narrowly interpreted, must be *clearly* stipulated.'

This passage does not give me the impression that the Court intended to reinforce the formal requirements of the Treaty. It merely declared that all breaches of the prohibition in Article 12 had to be clear and unequivocal, and the Court expressed no view on the question of publicity. That is governed exclusively by the provisions of the Treaty, namely under Article 191 which only requires publication for regulations, while it is enough for decisions that they be notified to those to whom they are addressed. As the present case is in fact concerned with decisions and not regulations, the lack of publication has no effect on their legal validity.

Nor can the legal validity of the decisions be affected by a deficiency in the statement of reasons which the plaintiffs think they see in relation to the economic difficulties envisaged by Article 226. The first authorizing Decision, upon which the following ones depend, at least shows us the essential elements which cause the Commission to conclude that difficulties do exist in the German sugar-processing industry. The preamble to the Decision contains a comparison of the sale prices of fondant paste, a comparison of the prices for raw materials, figures on the increase of imports of fondant paste into the Federal Republic during the years 1957 to 1959 and the indication that the German fondant industry has almost completely closed down. The later Decisions, extending the first, do no more than state that there has been no important change in this situation.

Measured against the criteria laid down by the Court in Case 34/62 this statement of reasons must be considered sufficient, and so it cannot be said that the authorizing Decision infringed an essential procedural requirement.

3. But all the supplementary arguments that the plaintiffs in the Netherlands proceedings put forward in the course of the written procedure and during the oral proceedings represent an entirely new departure from the order making the reference and seek to extend the scope of that order. To admit these arguments for discussion and to consider them seems to me to be entirely out of the question because the character of the procedure of reference for preliminary rulings would thereby be distorted. What is primarily important is that the institution of the reference procedure *interrupts* the proceedings before the national court. The parties cannot therefore continue the national proceedings before another court by developing new arguments after the stay of proceedings. For them, the national proceedings remain in the state in which they were when the order

making the reference was made.
According to the intention of the authors of the Treaty it is exclusively for the national courts and not the parties to the national proceedings to take the initiative in instituting, and in prescribing the legal limits of, the procedure of reference for a preliminary ruling. It would be otherwise if the national courts limited themselves to pronouncing a stay of proceedings and, as in French law for example, left to the parties the task of pursuing the interlocutory proceedings. Under the system laid down by the Treaty, the national courts have thus both the right and the duty to select and assess the arguments which relate to European law.
It falls on them alone to form an idea of the relevance of particular questions and arguments to the determination of the issues in the national proceedings. If the parties in the action were given a free hand in presenting their arguments in the reference proceedings, it might happen that the Court would give an opinion which would have no legal importance for the national proceedings. Finally, an extension of the subject-matter of the litigation, as it is described in the order making the reference, would put the other participants in the proceedings, especially the Commission, who have primarily to give their observations on the *order making the reference*, in a situation in which they could only reply to the new arguments in the course of the oral procedure.
For all these reasons, the Court should reject those arguments of the plaintiffs which are not limited to observations on the order making the reference and refer them to the possibility of pressing if need be, within the framework of the national proceedings, for an extension of the reference procedure.
Therefore, I see no reason to discuss these new arguments, which have, moreover, been partially changed in the course of the oral proceedings, and so to give an opinion on the question whether a correct application of the provisions on temporary importation or exportation for processing (Article 10) and on government aid (Articles 92 to 94) might have rendered superfluous the adoption of the protective measures under Article 226 and whether the objective prerequisites of Article 226 (serious economic difficulty liable to persist) were fulfilled. It seems to me that, furthermore, these questions were not adequately prepared even after their introduction into the oral proceedings, so that, at any rate at the present stage in the proceedings, it appears to be impossible to deal with them conclusively.

IV—To sum up, I propose the following answers to the questions referred:

Question No 1

The Decision of the Commission of 27 July 1960, extended on 21 December 1960, renewed on 28 June 1961, extended on 22 December 1961 and renewed on 27 February 1962, includes an authorization for the Netherlands to impose a duty on the exportation of fondant paste to the Federal Republic.

Question No 2

The Decisions are valid, although the Netherlands did not request an authorization.

Question No 3

(a) The difficulties mentioned in Article 226 also include those which are exclusively the consequence of the application of the mandatory provisions of the Treaty.

(b) The Decisions are valid, as they are not founded upon the avoidance of the procedure under Article 235.

Even in so far as the Decisions were not published, they are still to be regarded as valid. They do not infringe any essential procedural requirement; on the contrary the statement of the reasons on which they are based satisfies the requirements of the Treaty.

According to the case law of the Court the question of costs is one for the court which made the reference; the costs of the Commission and of the Federal Republic are not recoverable.