OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 28 SEPTEMBER 1971[1]

Mr President,
Members of the Court,

Until 1 July 1961, the date on which it became an independent State, Algeria was made up of a group of French *départements*. The Treaty of Rome and the subordinate Community legislation were thus applicable there as in the other French départements, subject to certain limitations mentioned in Article 227 (2) of the Treaty. In any event, with regard to agriculture, imports into a Member State of products from Algeria were subject to the system of intra-Community imports.

From 1 July 1961 a *de facto* situation developed which the Commission admitted, in a reply to a member of the Parliament,[2] presented legal problems 'of a very complex nature' and gave rise to difficulties in the application of the Treaty.

In fact Article 227 of the Treaty has never been repealed, although one may well wonder whether it has lapsed.

In practice, and at least up to 1969, the Benelux States, Germany, France and Italy applied different schemes, varying moreover in time and going, for example in 1968-69, from the absence of any levy (France, for example) to the application of 'third-country' levies (Italy, for example) with mixed situations in the other countries of the Community.

It was the confusion which was characteristic of this system, particularly in 1963, that was the origin of the difficulties of the Mackprang undertaking.

On 30 January 1963 the German intervention agency for cereals and feedstuffs, the Einfuhr- und Vorratsstelle für Getreide und Futtermittel, published an invitation to tender for imports of certain products, in particular wheat bran. This invitation to tender mentioned Algeria among the Member States of the EEC in a manner that was, I think, moreover very questionable (and I shall return to this in a moment).

Within the context of this invitation to tender Mackprang imported just over 500 metric tons of wheat bran from Algeria. The undertaking had obtained the benefit of the Community regulations on the advance fixing of the intra-Community levy with regard to that importation.

However, a difficulty arose when the transaction was being carried out.

The German authorities required the production of a certificate on Form DD4 which, under the Decision of the Commission of 17 July 1962, is necessary to establish the Community origin of the goods.

The Algerian authorities refused to issue this certificate to Mackprang as they have always maintained that, since Algeria has ceased to be part of the common market from 1 July 1961 and as no Association Agreement has been made since then, they are no longer subject to any of the obligations of the Treaty or of secondary Community law.

After a series of events which it is not necessary to describe with regard to the solution of the present case, the German authorities finally decided that as no certificate on form DD4 had been produced, the 'third country' levy and not the intra-Community levy had to be imposed on these imports.

Mackprang commenced various proceedings in the German administrative and fiscal courts, some of which are, moreover, still pending.

However, and this is what concerns us today, the firm also turned to the Commission.

1 — Translated from the French.
2 — Reply to Question No 298/68 from Mr Vredeling (OJ C 73, pp. 1-3).

The first approach made in August 1970 only received a provisional reply with which the applicant was satisfied. However, on 11 December 1970 it sent a letter to the Commission in which it invoked the provisions of Article 175 of the Treaty and requested it to fill the lacuna which existed in the system applicable to trade between the Member States of the Community and Algeria and (here I quote, since these are the crucial words) 'to take a special decision enabling and compelling the Member States to grant the benefit of the Community system to goods imported from Algeria during 1963 when sufficient evidence is put forward to show that the product is in fact of Algerian origin'.

For the sake of completeness, I would mention that in a letter of 11 March 1971 the Commission expressly rejected Mackprang's request.

However, this fact seems to me irrelevant to the solution of the problem of admissibility with which this Court is now concerned:

(a) because the period of two months laid down in Article 175 which must elapse in order for there to be a 'failure to act' had expired on 12 or 13 February when the decision of 11 March was taken;

(b) because, in these circumstances, the two parties agree that this Court is dealing solely with an application on the ground of a failure to act, and that consequently Mackprang has not submitted any conclusions requesting the annulment of the letter of 11 March;

(c) because finally, as the Court has already held in its judgment of 18 November 1970 in the *Chevalley Case*, to which I shall return in a moment, it is unnecessary for the purposes of a decision on the preliminary objection of inadmissibility to designate the application where that objection is based essentially on the ground that no measure exists capable of forming the subject-matter of an action under Article 175.

It is in fact on the ground that no such measure exists capable of forming the subject-matter of an action under Article 175 that the Commission relies when it requests the Court to reject as inadmissible the application based on a failure to act which has been brought before it.

First of all, I must make a preliminary observation.

I consider that some of the points argued at the oral proceedings between representatives of the Commission and of Mackprang have already been decided in part by the case-law of the Court.

The Commission's representative maintained, if I understood him correctly, that Articles 173 and 175 create two distinct forms of action, and that in particular, it must be emphasized that, in contrast to the ECSC Treaty, Article 175 of the EEC Treaty has not created an action for the annulment of implied decisions rejecting a request but an action on the ground of a failure to act which is a different matter.

He concludes from this that although Article 173 provides the opportunity for an action for annulment brought by an individual against measures which, although adopted in the form of a regulation or a decision addressed to another person, are of direct and individual concern to him, these provisions are not applicable in the case of the procedure laid down by Article 175 which only permits an action on the ground of a failure to act to be brought when the *addressee* of the measure requested can only be the author of the request.

The Commission's argument on this point comes up against a very strong objection.

If the concept of a measure against which individuals could bring proceedings were different in scope with regard to the application of Article 173 from that with regard to the application of Article 175 the result would be that, in certain cases, the existence or absence of a judicial remedy would depend on the actions of the Community authorities to which the request was submitted.

If those authorities replied to the request either by accepting it or by rejecting it, the author of the request would be entitled to proceed under Article 173, even if he is not the addressee of the measure adopted or requested, provided that this measure is of direct and individual concern to him.

On the other hand, if the Community authorities did not reply to the person concerned he would, according to the Commission's argument, be deprived of any method of recourse if he is not the addressee of the measure requested, *even if the latter is of direct and individual concern to him.*

It is obviously difficult to justify making the existence or absence of a judicial remedy depend on the action or inaction of the administrative body to which a request is submitted.

Moreover, in its case law the Court has already brought out more subtle distinctions when ruling on that question.

Whilst indicating that the action under Article 175 was only available where no decision had been taken and not in the event of a negative decision, (Judgment of 13 July 1971 in Case 8/71, *Deutscher Komponistenverband* v *Commission of the European Communities*), the Court expressly held in its judgment in the *Chevalley* case, to which I referred a moment ago, that 'the concept of a measure capable of giving rise to an action is identical in Articles 173 and 175, as both provisions merely prescribe one and the same method of recourse'.

As Advocates-General Roemer and Gand have stressed on several occasions, the admissibility of an application on the ground of a failure to act brought under Article 175 depends on both the nature and the destination of the measure which the individual has requested, and not on one of those elements alone.

Therefore, it is not essentially the fact that the measure requested by Mackprang would necessarily have been addressed to others than that undertaking which seems to me to render its application inadmissible, but rather the very nature of the measure requested.

In fact, two reasons seem to me to lead to the conclusion that the measure which the Commission was requested to adopt was not a measure which can entitle an individual to bring an application on the ground of a failure to act under Article 175.

1. What in fact did Mackprang ask the Commission *expressis vertis?* I quote from its words: 'to empower and to compel the Member States to grant the benefit of the Community system to goods from Algeria imported during 1963 where sufficient evidence is adduced that the product is indeed of Algerian origin'.

The reply thus requested would therefore have been applicable not only to the applicant but to all the importers in the common market, and this would necessarily have been the situation.

However, as Mr Advocate General Gand said in the *Borromeo* case, this means acknowledging as it were, in similar circumstances that the measure requested had all the characteristics of a regulation, that is, according to the definition thereof which the Court gave in its judgment of 14 December 1962 (*Confédération Nationale des Producteurs de Fruits et Légumes and Others* v *Council of the EEC*), a measure applicable not to restricted, specific and identifiable addressees, but to categories considered in the abstract and as a whole.

The applicant is admittedly endeavouring to prove to the Court that, particularly in view of the precise provisions with regard to the date, that was only a pretence and that the measure requested, even if it had been adopted in the form of a regulation or a decision addressed to all the Member States, would have been of direct and individual concern to it. It is doubtful whether the decision would have affected the applicant 'directly'. In my opinion, it would certainly not have affected it 'individually'.

The measure requested would necessarily have been applicable to *all* the traders in the Member States who had imported goods from Algeria during the period in question and not solely to any specific and identifiable German importer.

Therefore, for this reason alone, the application seems to me inadmissible, because of considerations fairly similar to those which the Court stated in Case 69/69 (*SA Alcan Aluminium Raeren and Others* v *Commission of the European Communities*, 16 June 1970, [1970] ECR 385) on the opening of tariff quotes.

2. The same applies in my opinion for a second reason which I shall deal with very briefly for it lies on the boundary between the question of admissibility and the substance of the case.

In my opinion, what the Commission was *in reality* asked to do was to address to the Government of the Federal Republic of Germany an opinion or even a recommendation on the applicability to imports from Algeria of the provisions of the Decision of 17 July 1962 establishing the certificate on Form DD4 as evidence with regard to intra-Community imports.

In fact, all the difficulties of Mackprang arose from the fact that the German authorities considered that this Decision of 17 July 1962 was applicable, which is, at first sight, fairly surprising since:

(a) The certificate on Form DD4 was established as evidence and the only evidence, according to the case-law of the Court, that the product imported into a Member State originated in the Community, whereas it certainly seems that since 1 July 1961 one can no longer speak of Community origin with regard to goods from Algeria.

They may perhaps be subjected to the same levies as goods originating in a country of the Community, but in my view this does not have the effect of giving them the characteristics of goods produced or put into free circulation in a State of the Community.

(b) The annex to the measure establishing the certificate on Form DD4 enumerates, for the purposes of its application, the territories in which the goods must have been bought or produced in order to have Community characteristics.

Algeria does not appear in this list, although the latter is very precise (see for example how the Kingdom of the Netherlands is listed) and, there again, the measure which it partially replaced, that is, the Decision of the Commission of 4 December 1958 established the certificate on Form DD1, expressly mentioned Algeria.

It is therefore understandable in these circumstances that an opinion or recommendation of the Commission on the question whether the Decision of 17 July 1962 establishing the certificate on Form DD4 was applicable to the transactions in issue could be of great interest.

Moreover, the Commission gave an opinion on this point in a letter to the German Government of 16 March 1971 in which it stated that since the independence of Algeria the measures relating to intra-Community imports were not applicable to imports from Algeria, in particular the Decision of the Commission of 17 July 1962 which the Court interpreted in its judgment in the *Craeynest* case.

However, even envisaged as designed to obtain an opinion or recommendation, the application before the Court today is inadmissible because an action under Article 175 cannot, according to the actual wording of this provision, be brought on the ground of failure to give an opinion or to formulate a recommendation.

Therefore, without any hesitation on my part, I submit that:

1. the application by the Mackprang undertaking should be dismissed;

2. the costs of the proceedings should be borne by the applicant.