OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 9 FEBRUARY 1965[1]

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Mr President,
Members of the Court,

The case on which I am today giving my opinion has been brought by some Italians, private individuals, most of whom are producers of citrus fruit or representatives of commercial associations of producers of citrus fruit. It concerns certain points in the safeguard clause in Regulation No 23 of the Council on the establishment of a common organization of the market in fruit and vegetables, and, more precisely, the fixing of reference prices for certain citrus fruit; thus it concerns substantially the same matters as Cases 41 and 42/64 brought by the Italian Government. The applicants are of the opinion that these reference prices have been fixed so low that preference in favour of the production of citrus fruit within the Community cannot take effect and that difficulties are noticeable in the sale of these products in the Common Market, particularly in the Federal Republic of Germany. For this reason the applicants request that certain Regulations of the Commission concerning the fixing of the reference prices be annulled. Furthermore they complain incidentally of certain defects in the system of safeguard clauses in the Regulation on the establishment of a common organization of the market in fruit and vegetables and in Regulation No 100 of the Commission made in order to apply it. This complaint is intended to lead, in accordance with Article 184 of the EEC Treaty, to the conclusion that these provisions are not applicable.

In accordance with the line of conduct which it has followed in other cases already decided, the Commission has raised a primary objection of inadmissibility against this application and in accordance with Article 91 of the Rules of Procedure of the Court of Justice has requested a preliminary ruling on this question.

The applicants have submitted their writen observations on this limited subject, and a hearing on it took place on 2 February 1965.

So for the moment my examination will concern only the question whether the application is inadmissible or whether, as the applicants claim, the question of admissibility can be decided only after the whole matter has been argued.

For this reason it seems to me logical first of all to explain in detail what are the measures at issue and what place they take in the setting of the common organization of the market in fruit and vegetables.

As you know, Article 11 of Regulation No 23 of the Council on the establishment of a common organization of the market in fruit and vegetables (dated

1 – Translated from the German.

4 April 1962, Official Journal of 20 April 1962) contains a safeguard clause whereby Member States may suspend imports originating in third countries, or impose a countervailing levy on these imports when the markets of the Community experience or are threatened with serious disturbances because of imports from third countries at prices below the reference price. In accordance with Article 11 the reference price shall be calculated 'on the basis of average prices recorded over a certain period on the producer markets where prices are the lowest in the Community for products of Community origin, and for a specific standard of quality'. This Article also provides that the detailed rules for applying paragraph (2) shall be adopted in accordance with the procedure laid down in Article 13 of that Regulation. Therefore in principle the Commission takes the necessary measures through the Management Committee for fruit and vegetables. Where necessary, however, the Council of Ministers may intervene in the procedure and take a decision differing from the Commission's.

Pursuant to these provisions, on 27 July 1962 the Commission adopted its Regulation No 100 (Official Journal 1962, p. 1929) which consists of more detailed provisions on the fixing of reference prices. According to this Regulation uniform reference prices shall apply in all Member States. They are fixed for individual products or for individual varieties or groups of varieties to last for a year or, if need be, for a number of shorter periods. There follow further criteria for making the calculation (use of the arithmetic mean of the lowest national average producer prices; omission of certain national average prices which are markedly out of line; ascertaining the lowest national average producer prices; increasing average prices by a fixed amount). The Regulation also lays down the dates prior to which the different reference prices must be fixed and, finally, it determines the obligation of the Member States as regards cooperation with the Commission in working out the prices concerned.

On the basis of these texts the Commission adopted Regulations Nos 65/64 of 16 June 1964 (Official Journal 1964, p. 1581) and 66/64 of 16 June 1964 (Official Journal 1964, p. 1582) and Regulation No 74/64 of 26 June 1964 (Official Journal 1964, p. 1596) which fixes reference prices for single months or periods of some months of the financial year 1964/1965 for lemons, mandarins, clementines and oranges, expressed in units of account per quintal and for certain quality standards.

If the applicants now seek to upset these Regulations for infringement of primary or secondary Community law, they must first show that they have a right of action in accordance with Article 173 of the Treaty. As you know, the second paragraph of this provision lays down that a natural or legal person may institute proceedings only against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

Therefore in examining the present case we must deal first with two questions:

1. Are the measures, directly contested in the present case, by nature regulations or decisions?
2. If it be admitted that the contested measures are decisions, are they of direct and individual concern to the applicants? (The applicants explicitly admit that the measures were not adressed to them).

1. *Legal nature of the contested measures*

As to the first of these two questions, the Court has been presented with a series of reflections and opinions which

I must first of all analyse. As the applicants aptly emphasise, the official nomenclature given to the contested measures cannot block the discussion because, according to the case-law of the Court (Joined Cases 16 and 17/62), in the determination of the legal nature of a sovereign measure only the substance of it matters.

I agree with the applicants as to the premises from which they start: regulations within the meaning of the EEC Treaty are necessarily legislative in character. They must bring about direct legal consequences relating to persons or groups of persons, defined in a general and abstract way, in the Member States. In other words they must allow for the solution of an indefinite multiplicty of situations, whereas the solution of a particular case or even of a group of particular cases, or a statement of general scope, without legislative character, can at most constitute a decision or other Community measure within the meaning of Article 189 of the Treaty. On this too I can refer to the case-law of the Court, particularly to the judgment in Joined Cases 16 and 17/62 (Rec. 1962, pp. 977 et seq.).

However when during their arguments the applicants attempt to draw conclusions from the fact that in this instance it was the Commission and not the Council of Ministers which acted, they call for the reply that this criterion is of no decisive importance for the classification, and is not even of any secondary significance. Admittedly as a general rule and in the vast majority of cases the Treaty gives the Council of Ministers the power to make originating legislative acts. However it is also indisputable that the Commission can also adopt legislative measures either, in certain cases, basing itself directly on the Treaty, or, in other cases, basing itself on secondary Community law created by the Council, which it can do without specific mention of Regulations in the authorizing provision of the Council. Besides, the applicants unhesitatingly recognize this fact as regards Regulation No 100 of the Commission. However, and this I cannot understand, they attempt to put a different interpretation on the Regulations establishing individual reference prices, although in the final analysis these Regulations derive their validity from the same authorization given in Regulation No 23.

Furthermore it seems to me that the applicants err when they draw conclusions from the method of fixing reference prices. According to them this is nothing more than a mere calculating process, a collation of certain data valid during a given period of time. This they say, proves that declaratory administrative measures are at issue. However the text of Regulation No 100 which authorizes the fixing of reference prices is alone enough to reject this argument. The criteria enumerated in it give the Commission scope for the exercise of this discretion in several respects and it cannot be denied that this discretion affects economic policy in the widest sense of the term. However, even disregarding that, this argument does not seem relevant because it is in the first place about the process of *reaching* the decision, a process which is often based on a number of given economic facts even in the case of measures which are undoubtedly legislative. In order to get the correct idea of the legal nature of a sovereign measure it is essential to look into the *functions* allotted to it by the system of which it forms part, in this case Regulation No 23.

Indeed the later observations of the applicants make it clear that they rely at least in part on an examination of the functions. However, looked at as a whole, these observations contain a serious error.

The applicants deduce from Article 11 of Regulation No 23 that the Member States can take protective measures when import prices fall below the level of reference prices. They conclude from this that it is necessary to look at the true function of reference prices jointly with the *government* measures to be taken in accordance with Article 11, and to assert that the Member States of the Community are the true addressees of the Regulations fixing reference prices.

That this is not so is proved by Article 11 of Regulation No 23 of the Council according to which 'The Management Committee shall decide upon the suspension of imports and the fixing of the amount of the countervailing charge, in accordance with the procedure laid down in Article 13, . . .'. It thus appears that, taking the events in their legal order, the fixing of reference prices is not immediately followed by the adoption of government measures, but when importing below the reference prices occurs it is the Commission which acts in the first place. Thus strictly speaking it is the Commission which is primarily the addressee of the Regulations relating to the fixing of reference prices, whereby it binds itself and not the Member States. This fact makes me consider the fixing of reference prices, once it is decided not to give this an importance of its own, jointly with the protective measures which the Commission may be led to take later where necessary. As to these protective measures however it is not at all clear that they are taken in the form of individual measures to solve particular cases; on the contrary the system set up by Regulation No 23 itself and the need to create an order embracing the whole Common Market forces one to admit that the Commission takes general measures, valid for given periods of time, which are then implemented by the authorities of the Member States in the form of individual measures as occasion arises. I am convinced that in accordance with this view there should be no doubt that the legislative character of the actions preparatory to such measures, in this case the fixing of the reference prices, must be recognized.

But even this line of argument is not yet complete. It seems to me that it is not enough only to take account of protective measures which might be introduced after the reference prices have been fixed, and of the institutions which take action to introduce them. It is also necessary to consider whether the fixing of reference prices as such of itself creates immediate legal consequences for those subject to Community law[1].

As regards our case, we must now consider in this light the repercussions of reference prices on the situation of importers. I agree with the Commission that the fixing of these prices is not to be interpreted simply as a non-binding notification. On the contrary the fixing of the reference prices, looked at in its proper perspective, connotes the crea-

1 — Cf. Rabe: Das Verordnungsrecht der Europäischen Wirtschaftsgemeinschaft, Hamburg, 1963, pp. 30 et seq.: 'As a general rule the provisions of a regulation will concern natural and legal persons in the Member States. However this does not exclude the possibility that the contents of a regulation may be addressed to the Member States themselves or to the institutions of the Community. It has indeed been argued that a legal measure can no longer be described as a regulation when it creates rights and obligations solely for Member States and institutions of the Community. To this it must be added that directives and decisions are the means laid down by the Treaty for such cases and they are in general sufficient for enabling the objectives sought by the Community to be attained. However a discussion along over-rigid lines is not called for here. It might often be very difficult to decide when a provision only concerns Member States as such or their subjects; one may start by saying that individuals are also concerned when the direct obligation on Member States towards the Community creates derived rights for them ('Reflexrechte'). It is more important to discover whether a Community rule prescribes obligations *erga omnes* and whether it is intended for the future to be substituted for the rules or divergent administrative practices of the various Member States. When the creation of a network of obligations between States thus creates objective and general Community law, while not creating obligations only concerning relations between the Member States and the Community, it is certain that such a legal measure must be classed as a regulation.'

tion of mandatory rules of law for commerce, which means for importers, if only in the sense of derivative law ('Reflexrechte'). In other words taken as a whole the safeguard clauses of Article 11 of Regulation No 23, within the framework of which the reference prices are fixed, must assure importers that their activities will not be obstructed by restrictions on imports so long as the import prices do not fall below the level fixed by the reference prices. It immediately becomes clear that without this legal mechanism the freedom of action to do import business and, consequently, to do any business at all would be considerably impaired. It also offers an obvious explanation for publishing reference prices in the Official Journal, which could have been left aside if such publication dealt only with a measure of interest to the Commission itself and to Member States. If, in evaluating the issue, account be taken of this aspect, as I think it should, there can be no doubt that the fixing of reference prices must be considered as a legislative measure. The fact that reference prices are only valid for a short period (in fact for only a month in some cases) does not change anything because the legislative character of a measure does not depend on the period of time for which it is valid.

This, then, is the decisive answer in evaluating the right to bring the case. The present application must be dismissed as inadmissible because individuals cannot contest regulations directly.

2. *Would the application be admissible if the contested measures were to be regarded as decisions?*

For the sake of completeness I shall for a moment leave aside this conclusion which I have reached in what is certainly a very difficult borderline case and, as a secondary issue, I shall ask what evaluation should be put on the contested measures if they were to be considered as decisions within the meaning of the Treaty. Then we should have to examine first of all whether the applicants are concerned individually by the fixing of reference prices as the second paragraph of Article 173 requires.

On several occasions the question of the precise meaning of the expression 'to be of individual concern' has been examined in judgments of the Court and in opinions before it. There is no need for me to cite the definition which the Court has evolved: it is very fresh in all our memories. When mention is made of it I think particularly of the glucose case (Case 1/64) which presented problems similar to clause in the Treaty in favour of those now before us. That case concerned the application of a safeguard French producers of glucose, such application being linked to the levying of a countervailing charge on imports of comparable products into France. Following my opinion the Court, in examining whether an application lay, looked at the effects *as a whole* of the measure adopted and did not pay particular attention to those felt by producers of glucose in other Member States. It observed that a definite influence on business with France was to be seen and, on those grounds, it refused to recognize the existence of a right of action for a Belgian producer of glucose.

Analogous consideration should apply in this case. Admittedly it is indisputable that Article 11 of Regulation No 23 is mainly intended to protect procedures of fruit inside the Community and that the fixing of reference prices for which it provides accordingly gives rise to direct repercussions on the situation of producers of fruit because upon it depends the extent of the protection granted. But it is also equally indisputable that the effects of the measures adopted are not limited to this class of persons, who are probably capable of

being defined. One must also consider perhaps not the situation of dealers in locally grown fruit but at least the situation of importers, because according to Regulation No 23 a fall in import prices below the level of reference prices fixed by the Regulations gives rise to restrictions on imports (levying of import duties: import embargoes). Therefore according to whether the reference prices are fixed at a higher or lower level, import trade will suffer sooner or later from a limitation of its activities. This trade must take this into account when making its plans; thus it can be said that the fixing of reference prices produces direct effects on it also.

Faced with this result the theory of protected right (Schutzgesetztheorie) put forward by the applicants does not seem to me to be relevant. According to that theory the question whether a right of action lies depends on the legal provision allegedly infringed. Should it be that this provision is intended to protect a limited and ascertainable class of persons, the existence of a right of action in favour of this group cannot be denied. Even if it must be admitted that this idea is attractive, especially for anyone versed in German administrative procedure, nevertheless it must not lead us to misunderstand the niceties of the system of legal protection found in the Treaty. On this subject it is significant that the second paragraph of Article 173 of the Treaty employs the words 'is of concern to' ('concernant') which, to my mind, must be understood as synonymous with 'has effect on'. At all events I think that the Treaty does not provide authority for only taking into account classes of persons who are allegedly prejudiced by the infringement of particular protected rights in a concrete case.

If however the system set up by the Treaty requires that in the investigation into the right to bring an action *all* the effects of a measure must be taken into account and if, as I have shown, these include effects on import trade, it is clear that the class of persons concerned is not susceptible of definition or limitation. Producers of citrus fruit are thus barred from the right to bring an action because too their interest does not sufficiently distinguish them individually.

Other arguments of the applicants cannot change this result. This applies especially to the argument which arose in a similar form in the glucose case, that the concept of 'individual concern' only requires proof that there exists an interest within the meaning of Article 33 of the ECSC Treaty or an 'actual and direct interest' or 'direct and individual damage' as required by certain national legal systems.

I cannot agree with such arguments because the authors of the EEC Treaty, with the concepts of the ECSC Treaty and of national systems of administrative law in mind, chose a particular and differing concept for the formulation of the conditions for bringing an action in Article 173 and this allows but one conclusion, which is that they sought to limit in a different way the right to bring an action.

Likewise there is nothing convincing in the applicants' reference to the alleged possibilities of bringing an action under Article 175 if the fixing of reference prices for producers of citrus fruit did not take place at all. Even without going so far as to reproach the applicants for begging the question, it can nevertheless be said against them that in Article 175 we are on exceedingly difficult ground, so far without any established principles and notably without any case-law, which makes it appear that all secondary arguments based on it are necessarily not too well-founded.

Finally the argument of the applicants, according to which the definition considered by the Commission as the cor-

rect one, of the right to bring an action under the second paragraph of Article 173, would not give producers of citrus fruit within the Community enough legal protection, be it at national or supra-national level, leads to no different conclusion, quite apart from the possibilities of claiming damages. This argument can only avail if the applicants first prove that the Treaty gives private individuals concerned a guarantee of direct and complete legal protection, for it clearly cannot fall within the powers of the Court of Justice to amend the Treaty on this point. Further this argument raises the question whether comparable economic measures taken under national law could in fact be brought before the courts in the application of private individuals in the sphere mentioned by the applicants.

3. *Conclusion*

After all I have said I conclude that the evaluation of the facts submitted to us enables me here and now, without going into the whole substance of the issue, to make a definitive pronouncement on the admissibility of the case. Accordingly I would submit the following opinion: the Court must grant the request of the Commission for a preliminary judgment on the admissibility of the application, the application must be dismissed as inadmissible and the costs must be borne by the applicants.