# JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

18 September 1995 *

In Case T-167/94,

**Detlef Nölle**, trading as 'Eugen Nölle', of Remscheid (Germany), represented by Frank Montag and Hans-Joachim Prieß, Rechtsanwälte, Brussels,

applicant,

v

**Council of the European Union**, represented by Jorge Monteiro and Jürgen Huber, Legal Advisers, acting as Agents, assisted by Hans-Jürgen Rabe and Georg Berrisch, Rechtsanwälte, of Hamburg and Brussels, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

and

* Language of the case: German.

**Commission of the European Communities**, represented by Eric White, of the Legal Service, assisted by Claus-Michael Happe, a national official on secondment to the Commission, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of the Legal Service, Wagner Centre, Kirchberg,

defendants,

APPLICATION under Article 178 and the second paragraph of Article 215 of the EEC Treaty for compensation for the damage allegedly suffered by the applicant undertaking by reason of the adoption of Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, declared invalid by the Court of Justice in its judgment of 22 October 1991 in Case C-16/90 *Nölle* v *Hauptzollamt Bremen-Freihafen* [1991] ECR I-5163,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(First Chamber, Extended Composition),

composed of: J. L. Cruz Vilaça, President, D. P. M. Barrington, H. Kirschner, A. Kalogeropoulos and V. Tiili, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 18 May 1995,

gives the following

## Judgment

### Facts of the case

1 Following a complaint lodged in April 1986 by the *Fédération Européenne de l'Industrie de la Brosserie et de la Pinceauterie* (the European Brushware Federation, hereafter 'the EBF'), an anti-dumping proceeding was opened concerning imports of certain types of brushes originating in China. The investigation conducted by the Commission was provisionally terminated following an undertaking given by the Chinese company China National Native Produce & Animal By-Products Import & Export Corporation (hereafter 'China National') to limit exports to the Community. This undertaking was accepted by Council Decision 87/104/EEC of 9 February 1987 (OJ 1987 L 46, p. 45) (hereafter 'Decision 87/104').

2 The proceeding thus terminated provisionally was reopened by the Commission following a fresh complaint lodged by the EBF on the ground of the failure by China National to comply with the terms of the undertaking which it had given. Interested parties were informed of this through the publication of a notice announcing the reopening of an anti-dumping proceeding concerning imports into the Community of paint, distemper, varnish and similar brushes originating in the People's Republic of China (OJ 1988 C 257, p. 5). After finding that imports of the products concerned from China into the Federal Republic of Germany and the United Kingdom had, by themselves, considerably exceeded the total quantity of imports fixed by the undertaking, the Commission, by way of Regulation (EEC) No 3052/88 of 29 September 1988 imposing a provisional anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China (OJ 1988 L 272, p. 16) (hereafter 'Regulation No 3052/88'), imposed a provisional anti-dumping duty at an *ad valorem* rate of 69% on the net price per piece of the products in question.

3 On 20 March 1989 the Council confirmed the provisional anti-dumping duty imposed by the Commission and, by Regulation (EEC) No 725/89, of the same date, imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports (OJ 1989 L 79, p. 24) (hereafter 'Regulation No 725/89'), imposed a definitive duty at a rate identical to that of the provisional duty.

4 On 21 November 1988, 8 February 1989 and 14 February 1989, the undertaking Eugen Nölle (hereafter 'Nölle') placed in free circulation within the Community three consignments of cleaning and paint brushes, in respect of which the Hauptzollamt (Principal Customs Office) Bremen-Freihafen (hereafter 'the Hauptzollamt') requested payment of the provisional anti-dumping duty laid down in Regulation No 3052/88. Pursuant to Article 1(4) of that regulation, Nölle lodged a security of DM 52 400, equivalent to the amount owed. By three notices of 14 April 1989, the Hauptzollamt requested Nölle to pay DM 51 217.40, being an amount equivalent to the definitive anti-dumping duty imposed by Regulation No 725/89.

5 Since it took the view that those three notices were unlawful on the ground that the regulation on which they were based had been adopted in breach of higher-ranking Community rules, Nölle first lodged an objection with the Hauptzollamt, which was dismissed, before bringing an action before the Finanzgericht (Finance Court) Bremen in which it sought cancellation of the notices.

6 On 22 January 1990 the national court made a reference to the Court of Justice for a preliminary ruling on a question concerning the validity of Regulation No 725/89. This reference to the Court under Article 177 of the EEC Treaty involved suspension of enforcement of the contested notices.

7 In its judgment of 22 October 1991, the Court of Justice declared Regulation No 725/89 invalid on the ground that the normal value of the products in question had not been determined 'in an appropriate and not unreasonable manner' for the

purposes of Article 2(5)(a) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1) (hereafter 'the basic regulation'). In that judgment, the Court of Justice took the view that Nölle had, during the anti-dumping proceeding, adduced sufficient factors to 'raise doubts as to the appropriateness of Sri Lanka as a reference country' for determining the normal value and that the Commission and the Council had not made 'a serious or sufficient attempt to determine whether Taiwan could be considered as an appropriate reference country', as Nölle had suggested (judgment in Case C-16/90 *Nölle* v *Hauptzollamt Bremen-Freihafen* [1991] ECR I-5163).

8 Following the judgment of the Court of Justice, the Finanzgericht Bremen terminated the proceedings by order of 21 January 1992 and, by order of 31 July 1992, required the Hauptzollamt to pay the costs. In accordance with the relevant provisions of German law, those costs were fixed at DM 10 941.40 plus interest at the rate of 4% from the date on which the application had been lodged.

9 By letter of 30 June 1992 addressed to the Council and the Commission, Nölle requested compensation for the damage which it claims to have suffered by reason of the adoption of Regulation No 725/89, declared invalid. The damage allegedly suffered consisted, first, in the payment of bank interest totalling DM 50 188.15 on the sums which it had borrowed for the purpose of paying the anti-dumping duty, following other decisions of the customs authorities against which it had not taken any legal proceedings, and, second, in the costs of legal representation calculated at DM 39 424.88. The Council and Commission rejected that request by letters of 22 July 1992 and 30 November 1992 respectively.

10 It was against this background that Nölle brought the present action on 25 June 1993 before the Court of Justice, where it was registered under case number C-326/93.

11 Pursuant to Article 4 of Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21), the Court of Justice, by order of 18 April 1994, referred the case to the Court of First Instance, where it was registered under case number T-167/94.

12 By decision of the Court of First Instance of 2 June 1994, the Judge-Rapporteur was assigned to the First Chamber, Extended Composition, to which the case was accordingly allocated. Following the Report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. However, the parties were requested by the Court to reply to a number of written questions. In compliance with this request by the Court, the applicant lodged its replies on 19 April 1994, while the defendants did so on 20 April 1994. The parties submitted oral argument and replied to the oral questions put by the Court at the hearing on 18 May 1995.

## Forms of order sought by the parties

13 The applicant claims that the Court should:

— order the European Economic Community to pay DM 79 834.45 plus interest of 8% from 3 July 1992;

— order the defendants to pay the costs.

14 The Council contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

15 The Commission claims that the Court should:

— dismiss the application as inadmissible;

— in the alternative, dismiss the application as unfounded;

— order the applicant to pay the costs.

**Admissibility**

*Summary of the parties' arguments*

16 In their respective statements of defence, the Commission and Council submit that the application is inadmissible.

17 According to the Council, the application instituting the proceedings fails to satisfy the requirements of Article 19 of the Statute of the Court of Justice of the EEC

and Article 38(1)(c) of the Rules of Procedure of the Court of Justice, which provide that an application must, *inter alia*, state the subject-matter of the proceedings and contain a summary of the pleas in law on which the application is based.

18 The Council cites the judgment of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, in which the Court held that an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against the institution by the applicant may be identified and the reasons for which the applicant considers that there is a causal link between the conduct and the damage which he claims to have suffered. The Council takes the view that the present application does not clearly specify the act or omission of the Community institutions on which the applicant bases its action for compensation or the causal link between the alleged act or omission and the damage suffered. More particularly, the application does not indicate clearly and precisely whether the damage alleged is attributable to the adoption of the regulation that has been annulled or to the mistaken choice of Sri Lanka as the reference country or, further still, to the fact that the Commission failed to consider whether Taiwan might possibly be a more appropriate reference country.

19 Finally, the Council takes the view that the application does not contain any indication whatever tending to prove the existence of a causal link between the conduct of the Community institutions and the damage allegedly suffered and that, contrary to the first subparagraph of Article 42(2) of the Rules of Procedure of the Court of Justice, it was only at the stage of the reply that the applicant relied on circumstances to support the existence of such a link, with the result that the present application ought to be dismissed as inadmissible.

20 The Commission, likewise, takes the view that the application does not satisfy the requirements of Article 38(1)(c) of the Rules of Procedure of the Court of Justice. According to the Commission, the applicant has nowhere set out in its application precisely how the breach of the rule of law which prompted the Court of Justice to declare Regulation No 725/89 invalid caused the damage alleged. It notes that the applicant set out circumstances to support the existence of a causal link between the damage alleged and the wrongful conduct held against the defendants only at

the stage of the statement of reply, contrary to what is laid down in Article 42(2) of the Rules of Procedure of the Court of Justice.

21 The Commission raises a second plea in law against the admissibility of the action by contending that the amounts mentioned by the applicant as constituting damage which it has incurred cannot be claimed in an action brought under the second paragraph of Article 215 of the EEC Treaty. An action for compensation brought under that article can be admissible, according to the Commission, only if the applicant has previously exhausted the remedies available under national law. In the Commission's view, this must *a fortiori* be the case where Community law specifically refers to national law, as in the present case.

22 With more particular regard to Nölle's request before the national court for reimbursement of its costs, the Commission relies on Article 104(5) of the Rules of Procedure of the Court of Justice, which provides that it is for the national court or tribunal to decide as to the costs of the reference. The Commission submits that the issue of costs has thus been conclusively settled by the German court. It points out that, as is clear from the documents in the case, the applicant did in fact receive from the Hauptzollamt reimbursement of costs amounting to DM 10 941.40, with the result that the excess costs that were not reimbursed under the legislation applicable to the national judicial proceedings could not constitute damage capable of being pleaded in an action for compensation based on Article 215 of the Treaty without rendering Article 104(5) of the Rules of Procedure of the Court of Justice nugatory.

23 The Commission takes the view that the same reasoning also applies to the damage consisting in the interest which the applicant was obliged to pay to its bank for the credit facilities which the latter made available to it for paying the anti-dumping duty imposed by Regulation No 725/89. As is clear from Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1) (hereafter 'Regulation No 1430/79'), it is national law alone that regulates all questions concerning the payment of interest in respect of the reimbursement of sums unlawfully levied. According to the

Commission, this fundamental legislative provision exemplifies the case where the same right can no longer be exercised at Community level. Since Regulation No 1430/79 makes no provision for the payment of interest, the Commission takes the view that, in the absence of specific provisions of Community law, the provisions of national law are applicable in the present case (judgment of the Court of Justice in Case 130/79 *Express Dairy Foods* v *Intervention Board for Agricultural Produce* [1980] ECR 1887).

24 Finally, according to the Commission, the public interest precludes the applicant's being able to bring an action in this case. The fact that the action for compensation was brought on 25 June 1993, almost six months after the Commission had rejected its request for reparation of the alleged damage (letter received on 17 December 1992), raises doubts as to its admissibility in the light of Article 43 of the Statute of the Court of Justice of the EEC. The Commission points out that, although the Court of Justice has in the past given a different interpretation of the aforementioned Article 43 (judgment in Case 11/72 *Giordano* v *Commission* [1973] ECR 417), more recent case-law has emphatically stressed the formal and regulatory nature of the provisions on the periods within which actions must be brought (order of 15 May 1991 in Case C-122/90 *Emsland-Stärke* v *Commission*, unpublished, and order in Case C-59/91 *France* v *Commission* [1992] ECR I-525). It takes the view that the combined application of Article 43 of the Statute of the Court of Justice of the EEC and the third paragraph of Article 173 of the EEC Treaty, which provides that proceedings for annulment must be instituted within two months, has the result that the applicant is out of time. This solution, the Commission argues, is consistent with the principle of legal certainty, since it places the applicant in a position of equality with any other importer whose request for reimbursement of anti-dumping duties has been rejected by the Commission pursuant to Article 16 of the basic regulation, and who can contest that negative decision before the Community courts only within the two-month period laid down in the third paragraph of Article 173 of the Treaty.

25 The applicant submits that its application is perfectly unambiguous in determining the fault of the Community authorities. It is clear from its application that the fault alleged relates to the adoption of Regulation No 725/89, which has been declared invalid by the Court of Justice. So far as the causal link is concerned, the applicant submits that it demonstrated clearly and unambiguously in its application the existence of a causal link between the alleged fault and the damage incurred.

26 Furthermore, the question whether the circumstances related in its application are sufficient to establish the existence of a causal link is one of substance and not one of admissibility.

27 So far as concerns the Commission's plea for a declaration that the claim for reimbursement of costs incurred by the applicant and the bank interest which it paid was inadmissible on the ground that the national court had already given a ruling on the matter, the applicant replies that, in the present case, this is a question of substance and not one of admissibility. In any event, national law cannot regulate definitively the rights which the applicant derives from the second paragraph of Article 215 of the Treaty.

28 The applicant also points out in its reply that the amounts which it seeks to have reimbursed cannot in any manner be described exclusively as being the costs of legal representation, in so far as it is clear from the invoices attached to its application that its lawyers also approached a large number of customs offices.

29 With regard to the plea in law based on the late institution of the proceedings, the applicant points out that, as the Commission has itself acknowledged, such a plea is at variance with the relevant case-law of the Court of Justice and ought for that reason to be rejected.

*Findings of the Court*

30 So far as concerns, first, the plea of inadmissibility raised by the Commission on the ground that the applicant could not bring the present action six months after its request for reparation of the damage which it claimed to have suffered had been rejected, the Court of First Instance notes that under Article 43 of the Statute of the Court of Justice of the EEC proceedings against the Community in matters arising from non-contractual liability are barred after a period of five years from

the occurrence of the event giving rise to it. That period of limitation is interrupted if proceedings are instituted before the Court or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Community, on condition that, in the latter event, the proceedings are instituted within the period of two months provided for in Article 173 or the period of four months provided for in Article 175 of the EEC Treaty. The Court of Justice has consistently held that the purpose of Article 43 is merely to postpone the expiration of the period of five years when proceedings instituted or a prior application made within that period start time to run in respect of the periods provided for in Articles 173 or 175, and it is not intended to shorten the five-year limitation period established by that article where, as in the present case, the request for indemnification of damage addressed to the Community institutions has not been followed by an action for annulment or an action for failure to act within the time-limits laid down for that purpose by Articles 173 and 175 of the Treaty (judgments in Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245 and in *Giordano*, cited above).

31 Since the event giving rise to the present action occurred on 20 March 1989, the date on which Regulation No 725/89 was adopted, that is to say less than five years prior to the bringing of this action, the action is accordingly admissible with regard to the time-limit within which it was brought (above judgments in *Kampffmeyer*, at p. 260, and in *Giordano*, point 6).

32 Second, so far as concerns the plea based on breach of the first paragraph of Article 19 of the Statute of the Court of Justice of the EEC, applicable to the Court of First Instance by virtue of the first paragraph of Article 46 of the said Statute, as well as on breach of Article 38(1)(c) of the Rules of Procedure of the Court of Justice, the Court points out that, according to the latter provision, an application must state, *inter alia*, the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. In particular, in order to meet those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against the institution by the applicant may be identified, the reasons for which the applicant considers that there is a causal link between the conduct and the damage which he claims to have suffered and the nature and extent of that damage (judgment of the Court of Justice in Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975 and judgment in *Automec*, cited above, paragraph 73).

33 The Court finds in the present case that the applicant has, in its application, adequately demonstrated for legal purposes that the unlawful conduct held against the defendants originates in the adoption of Regulation No 725/89, declared invalid by the Court of Justice, and that it was that regulation that was the cause of the damage pleaded. The applicant has argued in its application that the regulation in question was the sufficient cause of the damage alleged. It accordingly set out, even if only in a summary manner, the causal link relied on as justification for its claim for compensation. The objection of inadmissibility raised by the Council, based on the ground that the applicant did not specify the act or omission on the part of the Community institutions to which the damage pleaded was attributable and that it did not produce the slightest evidence to demonstrate the existence of a causal link between the conduct complained of and the damage suffered, must for that reason be dismissed.

34 With regard, thirdly, to the Commission's plea that the action is inadmissible because the sums to which the applicant refers as representing the damage suffered cannot be indemnified under the second paragraph of Article 215 of the Treaty, the Court takes the view that it is necessary to draw a distinction between, on the one hand, the damage resulting to the applicant from payment of legal costs that were not reimbursed in full following the decision of the national court terminating the proceedings before it and, on the other hand, the damage which it incurred by having to pay bank interest on the sums which it claims to have borrowed for the purpose of paying the anti-dumping duty imposed by Regulation No 725/89.

35 So far as concerns the admissibility of the claim for compensation in respect of the damage represented by the legal expenses which the applicant was still required to meet following the decision of the national court dealing with the dispute between the applicant and the Hauptzollamt, the Court points out that, according to the settled case-law of the Court of Justice, while the action for compensation under Articles 178 and 215 of the Treaty was established as an autonomous form of action with a particular purpose to fulfil within the system of actions and was subject to conditions imposed in view of the specific objective thereof, it must none the less be appraised in the light of the overall system introduced by the Treaty for the judicial protection of individuals. In the case where an individual feels that he has been adversely affected by the application of a measure of Community law which he considers to be illegal, he has the possibility, when the implementation of the

measure is entrusted to national authorities, to contest, at the time of such implementation, the validity of the measure before a national court in proceedings between himself and the national authority. Under the conditions set out in Article 177, that court may, or even must, refer to the Court of Justice a question on the validity of the Community measure in question. The existence of this action, however, will be able to ensure effective protection for individuals concerned only if it can lead to compensation for the damage alleged (judgments of the Court of Justice in Case 96/71 *Haegeman* v *Commission* [1972] ECR 1005, Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969, Case 81/86 *De Boer Buizen* v *Council and Commission* [1987] ECR 3677 and in Case C-282/90 *Vreugdenhil* v *Commission* [1992] ECR I-1937).

36 The Court notes in this regard that the Court of Justice has ruled that, when an action for compensation before the Community courts may, in certain cases, be subject to prior exhaustion of internal remedies available for challenging the validity of a Community decision, disputes coming within the jurisdiction of national courts must be settled by those courts pursuant to their national law in so far as Community law has not determined the matter, and that, in the absence of Community provisions on the matter, it is for the national authorities to settle all ancillary questions relating to the main dispute (judgment of the Court of Justice in Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677).

37 It follows from the abovementioned case-law that the question of the reimbursement of costs, which is an issue ancillary to the main dispute between the applicant and the Hauptzollamt concerning payment of the anti-dumping duty imposed by Regulation No 725/89, declared invalid, comes within the exclusive jurisdiction of the national court, which, in the absence of relevant harmonizing measures of Community law, must settle such a question, as indeed it has done in this case pursuant to the applicable national law.

38 It should be added that, in any event, according to Article 104(5) of the Rules of Procedure of the Court of Justice, it is for the national court or tribunal to decide as to the costs of the reference. The present case concerns a claim for

indemnification of damage consisting in the burden of the portion of costs that was not reimbursed in accordance with the decision of the national court terminating the proceedings pending before it, following the preliminary ruling given by the Court of Justice on the matter referred to it by the national court under Article 177 of the Treaty. The Court accordingly takes the view that, in so far as the applicant has not demonstrated that recourse to remedies under national law was not capable of providing it with effective protection of its rights under Community law, it cannot place in question, by way of an action for compensation brought before the Court, the existence and exercise of the exclusive jurisdiction which national courts enjoy in the matter under Article 104(5) of the Rules of Procedure of the Court of Justice and thus deprive that provision of its effectiveness.

39 Consequently, in so far as it seeks compensation for the damage consisting in the burden of the portion of costs not reimbursed following the decision of the Finanzgericht Bremen terminating the proceedings on the legality of Regulation No 725/89, the action brought by the applicant is inadmissible, since the Court of First Instance has no jurisdiction under the second paragraph of Article 215 of the Treaty to rule on such a claim.

40 So far as concerns the costs incurred by the applicant in connection with various inquiries which its lawyers made at a large number of customs offices, even supposing that the applicant is entitled to seek indemnification of such loss at the stage of the reply, the Court takes the view that examination of this claim should be reserved until consideration of the substance in the present case.

41 Turning to the applicant's request for reparation of the damage consisting in the payment of bank interest on the sums which it claims to have borrowed in order

to pay the anti-dumping duty imposed by Regulation No 725/89, the Court notes that, as the applicant pointed out in its application and during the hearing on 18 May 1995, without being challenged on this point by the defendants, no remedy under national law would have enabled it to obtain reparation of the damage in question. Since public authorities in the Federal Republic of Germany can incur liability only if fault is established on the part of the authority responsible, and since the declaration of the invalidity of Regulation No 725/89 by the Court of Justice was attributable to the unlawful conduct of the Community institutions and not that of the public authorities in Germany, prior exhaustion of domestic remedies could not, in the present case, ensure effective protection for the subjective rights which the applicant derives from Community law (see the judgments of the Court of Justice in *Unifrex*, cited above, paragraph 12, and in Case C-119/88 *AERPO and Others* v *Commission* [1990] ECR I-2189, paragraph 13).

42 In those circumstances, as the Court of Justice ruled in its judgment in *Vreugdenhil*, cited above, paragraphs 11 to 15, the Court of First Instance has exclusive jurisdiction under Articles 178 and 215 of the Treaty to hear an action seeking compensation for damage attributable to the Community, in so far as the regulation which is at the origin of the alleged damage and which has been declared invalid emanates from the Council. The applicant's action must for that reason be declared admissible in so far as it seeks compensation for the damage attributable to payment of bank interest on sums borrowed in connection with the application of Regulation No 725/89, declared invalid (see also the judgment of the Court of Justice in Case C-55/90 *Cato* v *Commission* [1992] ECR I-2533, paragraph 17).

43 It follows from the foregoing that the action must be declared admissible in so far as it seeks compensation for the damage which the applicant allegedly suffered by reason of the bank interest which it claims to have paid in connection with payment of the anti-dumping duty imposed by Regulation No 725/89, and that it must be dismissed as inadmissible for the rest.

## Substance

*The origin of the non-contractual liability of the Community*

Summary of the parties' arguments

44 The applicant draws a distinction between Community measures that are legislative and those that are administrative, and takes the view that, although adopted in the form of a regulation, anti-dumping measures lie in fact somewhere between those two categories. According to the applicant, a similar distinction also ought to be drawn in respect of the origin of the Community's liability arising from the adoption of unlawful anti-dumping measures. Thus, the applicant contends that where the illegality of an anti-dumping regulation is attributable to a breach of the rules inherent in the assessment of complex economic facts, the stricter conditions as to Community liability, that is to say those governing liability by reason of legislative measures, will apply. In contrast, where the illegality is attributable to a breach of procedural rules or rules of an administrative nature, so-called 'simple' conditions will apply. In the opinion of the applicant, this case comes in principle within the second category. The Commission's fault lay in its breach of the procedural rule set out in Article 2(5)(a) of the basic regulation concerning determination of the reference country.

45 The applicant notes in this connection that although the judgment of the Court of Justice in Case C-122/86 *Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon and Others* v *Commission and Council* [1989] ECR 3959 stated that the stricter conditions governing liability of the Commission by reason of legislative measures involving choices of economic policy apply when the basic regulation is being implemented, that case involved a Commission decision to terminate an anti-dumping proceeding, the nature of which as a measure involving a choice of economic policy cannot be denied. In the present case, by contrast, the application of Article 2(5)(a) of the basic regulation did not really entail the exercise of a power of assessment with regard to economic policy, but simply involved compliance with the rules governing administrative procedures, such as the principle of due

diligence, the obligation to state reasons laid down in Article 190 of the EEC Treaty, and the prohibition of misuse of powers.

46 In view of those considerations, the applicant examines only on an alternative basis the conditions under which the Community may incur liability by reason of a legislative measure.

47 The Commission notes that the applicant is attempting to establish the existence of a criterion of non-contractual liability other than that which obtains in the case of legislative measures. In the area of anti-dumping measures, the Commission submits, applicants are concerned only with the definitive anti-dumping regulation and any error in the drafting of that regulation must be reflected in that regulation in order for an action for compensation to be successfully brought (judgment of the Court of Justice in Joined Cases 294/86 and 77/87 *Technointorg* v *Commission and Council* [1988] ECR 6077). Once the definitive regulation alone is capable of being the cause of damage, the Community can be rendered liable in this case only by reason of a legislative measure.

48 The Council claims that since the applicant is seeking compensation for damage which it claims to have suffered by reason of the adoption of Regulation No 725/89, the issue of Community liability can be examined only in the light of the principles of liability for legislative measures. It points out that the view espoused by the applicant, to the effect that Community liability is not determined according to the nature of the measure giving rise to the alleged damage, but rather according to the nature of the alleged breach, is at variance with the case-law of the Court of Justice (judgment in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061). The Council does, however, acknowledge that if the Community institutions commit a specific breach of the applicable rules in the administrative procedure prior to the adoption of an anti-dumping regulation the person affected may bring an action for compensation, on condition, however, that the wrongful conduct was the sole cause of the damage pleaded. According to the Council, however, the applicant has not claimed in this case that it was the actual choice of Sri Lanka as reference country or the

failure by the Community institutions to consider in more detail whether Taiwan might be a more appropriate reference country that gave rise to the alleged damage.

49 The Council finally points out that if the Community should in the present case be declared liable on the basis of liability arising from an administrative measure, such wrongful conduct would be attributable solely to the Commission, with the result that the present action ought not to have been brought against the Council.

*Findings of the Court*

50 The Court notes that the applicant is seeking compensation for the damage which it claims to have suffered by reason of the adoption of Regulation No 725/89, declared invalid by the Court of Justice.

51 It should be borne in mind in this regard, as the Court of Justice held in its judgment in *Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon*, cited above, that measures of the Council and Commission in connection with a proceeding relating to the possible adoption of anti-dumping measures constitute legislative action involving choices of economic policy and that, in accordance with settled case-law, Community liability can be incurred by virtue of such measures only if there has been a sufficiently serious breach of a superior rule of law for the protection of individuals (judgments of the Court of Justice in *Zuckerfabrik Schöppenstedt*, cited above, Joined Cases 56/74 to 60/74 *Kampffmeyer and Others* v *Commission and Council* [1976] ECR 711, paragraph 13, Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraph 4, Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, paragraph 9; judgments of the Court of First Instance in Case T-489/93 *Unifruit Hellas* v *Commission* [1994] ECR II-1201, paragraph 35, and of 21 February 1995 in Case T-472/93 *Campo Ebro and Others* v *Council* [1995] ECR II-421).

52 In those circumstances, the Court takes the view that the opinion expressed by the applicant to the effect that Community liability ought in this case to be determined on the basis of the nature of the alleged breach (breach of procedural rules) and not on the basis of the Community measure at the origin of the alleged damage is unfounded and that it is for that reason necessary to consider whether the defendant institutions committed a sufficiently serious breach of a superior rule of law for the protection of individuals.

*Liability of the Community for legislative measures*

Fault

53 The applicant claims that, in their application of Article 2(5)(a) of the basic regulation, the Community institutions committed four wrongful acts capable of involving the Community in liability: first, breach of Article 190 of the Treaty; second, breach of the right to a fair hearing; third, misuse of powers; and, fourth, breach of the principles of care and proper administration.

The alleged breach of Article 190 of the Treaty

— Summary of the parties' arguments

54 The applicant submits that, in the *Nölle* judgment, the Court of Justice held that the affirmations made by the institutions concerning the features of the Taiwanese market were not supported by any details or submission of any facts. The applicant also refers to the Opinion of the Advocate General in that case, who had also taken the view that Regulation No 725/89 was inadequately reasoned since it did

not address the question whether Community producers had not also contributed to the damage to the Community industry by selling brushes originating in China.

55 The Commission submits that the applicant's arguments are unfounded in the light of the well-established case-law of the Court of Justice to the effect that a breach of Article 190 of the Treaty is not such as to involve the Community in liability (judgment of the Court of Justice in Case 106/81 *Kind* v *EEC* [1982] ECR 2885).

56 The Council contends that, contrary to the applicant's assertions, the Court of Justice did not hold in its judgment in *Nölle* that Regulation No 725/89 breached Article 190 of the Treaty or that it was inadequately reasoned.

— Findings of the Court

57 The Court of Justice, in its judgment in *Nölle*, did not hold that the Community institutions had breached Article 190 of the Treaty or that the contested regulation was inadequately reasoned. Furthermore, even were it to be supposed that such a breach could be inferred from that judgment, the Court of First Instance points out that in any event, according to the settled case-law of the Court of Justice and Court of First Instance, an inadequacy in the statement of the reasons on which a measure contained in a regulation is based is not sufficient to render the Community liable (judgments in *Kind*, cited above, paragraph 14, *AERPO*, cited above, paragraph 20, and in *Unifruit Hellas*, cited above, paragraph 41).

58 The first plea in law based on an inadequate statement of reasons in Regulation No 725/89 must therefore be rejected.

The alleged breach of the right to a fair hearing

— Summary of the parties' arguments

59 According to the applicant, it follows clearly from the Opinion of the Advocate General in *Nölle*, cited above, that the breaches of the principle of care, of Article 190 of the Treaty and of the prohibition of the misuse of powers ultimately amount to a breach of the right of individuals to an equitable defence, the latter being a fundamental provision laid down in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It notes in this regard that, according to the case-law of the Court of Justice, fundamental rights form an integral part of the general principles of law, whose observance is ensured by the Court (judgment in Case C-49/88 *Al-Jubail Fertilizer* v *Council* [1991] ECR I-3187).

60 The Commission submits that the parties concerned by an anti-dumping proceeding do not all benefit from the same protection for their right to a fair hearing, since the scope of that protection is closely related to their procedural situation. It points out that, according to the case-law of the Court of Justice, only persons adversely affected by a measure are entitled to protection of such rights. In an anti-dumping proceeding, such measures are adopted only as against exporters, and not against importers such as the applicant.

61 The Council disputes the claim that the applicant was entitled to enjoy protection of its right to a fair hearing, and it submits that the obligation on the Community institutions to comply with the general principles of proper administration are not designed in the present case to protect the interests of the applicant, but rather to protect general interests. It adds that the fact that the breach of the principle of the right to a fair hearing may result in the annulment of a measure does not mean that the principles of proper administration are designed to protect individuals.

— Findings of the Court

62 According to the case-law of the Court of Justice, anti-dumping proceedings and any protective measures adopted at the end of such proceedings are directed only against foreign producers and exporters or such from non-member countries as well as, where relevant, associated importers, and not against independent importers such as the applicant (judgment of the Court of Justice in Case C-170/89 *BEUC* v *Commission* [1991] ECR I-5709).

63 The anti-dumping proceeding in the present case was not against the applicant and could not for that reason result in a measure adversely affecting it, since no allegation was made against it. The applicant's plea of breach of its right to a fair hearing is thus unfounded and must accordingly be rejected (judgments of the Court of Justice in *BEUC*, cited above, paragraphs 20 to 23, and in Cases 234/84 *Belgium* v *Commission* [1986] ECR 2263 and 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 28).

The alleged misuse of powers

— Summary of the parties' arguments

64 The applicant contends that, in so far as the Court of Justice held at paragraph 36 of its judgment in *Nölle* that the Community institutions made an unreasonable and inappropriate choice in determining the normal value, it was also established that the same conduct on the part of the Community institutions amounted to a misuse of powers.

65 The defendants did not submit any observations in this connection.

— Findings of the Court

66 It is settled case-law that a Community decision or measure is vitiated by a misuse of powers only if it appears, on the basis of objective, relevant and consistent indications, to have been adopted in order to achieve purposes other than those for which it was intended (judgments of the Court of Justice in Case 198/87 *Kerzmann* v *Court of Auditors* [1989] ECR 2083, paragraph 2 of the summary of the judgment, and in Case C-323/88 *Sermes* v *Directeur des Services des Douanes de Strasbourg* [1990] ECR I-3027, paragraph 33).

67 The Court notes that the applicant has merely made an assertion, without even attempting to demonstrate that it was well founded and without substantiating it with any argument or proof whatever. In those circumstances, the Court takes the view that the plea of misuse of powers is unfounded and must for that reason be rejected (see paragraphs 35 and 36 of the judgment in *Sermes*, cited above).

The alleged breach of the principle of care and the principles of proper administration

— Summary of the parties' arguments

68 The applicant points out that, in its judgment in *Nölle*, the Court of Justice found that the Community institutions had failed to take essential factors into consideration and had not examined the file with the requisite degree of diligence. According to the applicant, such conduct constitutes a breach of the principle of care, which is one of the guarantees conferred by the Community legal order in administrative procedures (judgment in Case C-269/90 *Hauptzollamt München-Mitte* v *Technische Universität München* [1991] ECR I-5469), as well as a breach of the principle of '*Offizialmaxime*', familiar in German law, under which the authority concerned determines the procedure, with the result that, in this case, the Commission ought to have respected the procedural guarantees for individuals when giving effect to Article 2(5)(a) of the basic regulation. Furthermore, the breach of the principle of care amounted in the present case to a breach of the right to be

heard set out in Article 7(1)(b), 7(2)(a), 7(4) and 7(5) of the basic regulation in so far as the Commission ignored the applicant's arguments regarding the choice of the reference country.

69 So far as regards the scope of the protection conferred by the principles alleged to have been breached, the applicant cites, in particular, the case-law of the Court of Justice and the Court of First Instance (judgments of the Court of Justice in Case 324/85 *Bouteiller* v *Commission* [1987] ECR 529 and in Case C-200/89 *Funoc* v *Commission* [1990] ECR I-3669; judgment of the Court of First Instance in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315), according to which the rules of Community law which not only govern the internal working arrangements of the institutions but also guarantee compliance with the principles of legality, legal certainty and proper administration, and which may be relied on by natural and legal persons, 'create rights' and are a factor contributing to legal certainty for the persons concerned, and concludes from this that, by incorrectly applying Article 2(5)(a) of the basic regulation, the Community institutions infringed the rules designed to ensure compliance with the procedural guarantees for individuals (principle of care) and which form the basis of the subjective rights on which individuals may rely against the administration.

70 The Commission disputes the argument that the alleged breach of the principle of care amounts to a breach of a rule of law protecting the applicant as an individual and considers that the applicant's reference to the judgment in *Technische Universität München*, cited above, is irrelevant in the present case on the ground that the role played by an importer in the determination of the reference country is different from that of an importer of scientific apparatus, since an independent importer does not have a determining role in the anti-dumping proceeding and is not directly affected by the decision taken.

71 While the Commission accepts that the principle of '*Offizialmaxime*' means that it is required to comply with the duty of care, it argues that in order to determine whether the principle of compliance with the duty of care may give rise to subjective rights, it is necessary to examine whether, within the context of the application

of Article 2(5)(a) of the basic regulation, an individual is entitled to submit a request which would permit that person to direct the activity of the administration in the manner sought, or whether it is the administration itself that decides on the course of the proceeding in question ('*Offizialmaxime*'). According to the Commission, it is the administrative authority alone that decides on the implementation of the provision at issue, with the result that the applicant does not enjoy any subjective right in the present case. The Commission also contests the assertion that Article 7 of the basic regulation offers procedural guarantees to the applicant, pointing out that that provision sets out only, and even then not exhaustively, the sources of information to which the Community institutions may refer at the opening and during the course of an anti-dumping investigation, importers being in this regard no more than one of those sources and thus entitled only to the rights provided for by the basic regulation (judgment in *BEUC*, cited above).

72 The Council supports the arguments of the Commission and submits that even if the Court of Justice accepted that the institutions had breached the principle of care, it would not follow that they had breached a rule of law protecting the applicant's interests. The Council argues in this regard that in order to determine whether the principle of care is a rule protecting individuals, it is necessary at the very outset to ascertain whether the provision the application of which forms the basis of the alleged breach of that principle is protective in character. It concludes that in so far as Article 2(5)(a) of the basic regulation, which is the provision at issue, does not protect the applicant's interests, the principle of care does not protect them either.

— Findings of the Court

73 The Court notes that, according to the case-law of the Court of Justice, where the Community institutions have a wide power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision (judgment in *Technische Universität München*, cited above, paragraph 14).

74 It follows from paragraphs 30 to 32 of the *Nölle* judgment that the Court of Justice declared Regulation No 725/89 invalid on the ground that the Commission had failed to take account of essential factors in order to determine whether the reference country chosen was appropriate and had not given more detailed consideration to the applicant's proposal as to the choice of Taiwan or to its arguments that the choice of Sri Lanka as the reference country was mistaken. In particular, the Court of Justice held at paragraph 34 of that judgment that the Commission's statements that Taiwan had not been considered as a reference country on the ground that the physical characteristics and production costs of the products in question were different and that the Taiwanese producers who were approached refused to cooperate were not supported by any details or by the submission of any facts.

75 In the light of those findings, the Court takes the view that the conduct of the Community institutions in determining the reference country, which the Court of Justice, in its judgment in *Nölle*, penalized by declaring Regulation No 725/89 invalid, may be regarded as having constituted a breach of the principle of care.

76 The Court also takes the view that the protective nature of the principle thus breached cannot be brought into question in this case. Although the rights conferred on parties involved in an anti-dumping proceeding depend on the particular stage of the proceeding, the capacity in which they are taking part (as a concerned exporter, associated importer, or independent importer), and the various provisions of the basic regulation, where an independent importer successfully demonstrates a sufficient interest as an 'interested party' for the purpose of taking part in an anti-dumping proceeding and the Commission, despite the doubts raised by the importer's arguments regarding the choice of an appropriate reference country, and in breach of its obligation, fails to consider seriously and in detail whether those arguments or proposals are well founded, it is in breach of the principle of care, which is a rule protecting individuals.

77 It is necessary to consider next whether this case involved a manifest and serious breach of that rule, without there being any need to examine whether the principle of care constitutes a superior rule of law.

The manifest and serious nature of the breach of the principle of care and the principles of proper administration

— Summary of the parties' arguments

78 The applicant points out that the Court of Justice found, in its judgment in *Nölle*, that during the procedure relating to determination of the reference country the applicant had provided the Commission with material capable of giving rise to clear doubts concerning the choice of Sri Lanka as the reference country. In so far as the Commission preferred to ignore that information without sufficient justification, the attitude of the Community institutions was mistaken and inexcusable and constituted a flagrant misuse of power, a serious breach inasmuch as the principles violated are fundamental ones (judgment of the Court of First Instance in Case T-120/89 *Stahlwerke Peine-Salzgitter* v *Commission* [1991] ECR II-279, paragraph 111).

79 Moreover, according to the applicant, the breach is also serious in view of the extent of the discretion which the Community institutions enjoy in implementing Article 2(5)(a) of the basic regulation, compliance with the procedural rules, which include the principles of care and proper administration, being particularly important because the Community institutions have a wide discretion in the present case. If, therefore, it was appropriate to attach particular importance to the rules breached when Regulation No 725/89 was adopted because Article 2(5)(a) of the basic regulation confers a wide discretion on the Community institutions, it follows, in the applicant's opinion, that the breaches of the principles of care and proper administration must be regarded as serious. Finally, the applicant argues that

the Court of Justice has held in its more recent case-law that the fact that the breach in question verges on the arbitrary is not a necessary condition for involving the Community in liability (judgment in Case C-220/91 P *Commission* v *Stahlwerke Peine-Salzgitter* [1993] ECR I-2393).

80 The Commission points out that, in its judgment in *Nölle*, the Court of Justice referred solely to the fact that Nölle had provided the Commission with sufficient information to raise doubts as to whether the choice of Sri Lanka as the reference country was appropriate and not unreasonable. In order for the Community to be rendered liable by virtue of a legislative measure, the breach would, according to the Commission, have to be sufficiently serious, that is to say grave and manifest and verging on the arbitrary. In the view of the Commission, that which is doubtful is the opposite of that which is manifest and arbitrary.

81 The Commission also denies that the alleged breach of Article 2(5)(a) of the basic regulation should be regarded as serious. It points out that the Court of Justice has held that the scope of protection for the procedural rights of individuals involved in an anti-dumping proceeding depends on their procedural situation. The Commission takes the view that the applicant cannot plead a serious breach of its procedural rights by relying on the existence of a close connection between the discretion which the Commission enjoys in implementing the provisions of the basic regulation and the strict respect that it owes to the procedural rights of the parties concerned, since the applicant ought not to be treated as a concerned party according to the case-law of the Court of Justice (judgment in *BEUC*, cited above).

82 The Council submits that there is in fact no support in the case-law for the applicant's argument to the effect that conduct verging on the arbitrary is no longer a necessary condition for involving the Community in liability.

83 The Council states that the Community institutions did not act arbitrarily, but merely failed to appreciate the scope of their investigative duties when giving effect to Article 2(5)(a) of the basic regulation.

84 The Council also rejects the applicant's contention that the breach of a rule of law involving the exercise of a relatively wide discretion is automatically to be regarded as serious. According to the Council, such an assessment depends on the particular circumstances of the case in point. The applicant, it claims, has failed to explain why the breach of Article 2(5)(a) of the basic regulation should be treated as serious. Finally, the Council submits that it also cannot be argued that the breach of the provision at issue was serious because of the breach of fundamental principles underlying its implementation, since there was in this case no breach of such principles.

— Findings of the Court

85 The Court points to settled case-law establishing that the requirement of a sufficiently serious breach of a provision means, in a legislative field such as that in the present case, where the exercise of a wide discretion is essential for the implementation of the common commercial policy, that the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (see the judgments in *HNL*, cited above, in *Mulder*, cited above, and in *Campo Ebro*, cited above).

86 In its judgment in *Nölle*, the Court of Justice found that 'Nölle has produced sufficient factors, already known to the Commission and the Council during the anti-dumping proceeding, to raise doubts as to whether the choice of Sri Lanka as a reference country was appropriate and not unreasonable' and that 'although the institutions are not required to consider every reference country suggested by the

parties during an anti-dumping proceeding, the doubts which arose in this case with regard to the choice of Sri Lanka ought to have led the Commission to examine the proposal made by the plaintiff in greater depth' (paragraphs 30 and 32 of the judgment).

87 It must accordingly be held, as is clear from the grounds set out in *Nölle*, that the Court of Justice did not hold that the choice of Sri Lanka as the reference country was inherently wrong, but simply took the view that, in the light of the doubts raised by the applicant, the Commission ought to have carried out a more detailed investigation in order to determine whether, as the applicant had argued, Taiwan might be a more appropriate choice. As the Commission has also quite correctly pointed out, that which is doubtful is far from being manifest and arbitrary.

88 It should be noted in this connection that when the applicant raised doubts as to the appropriateness of Sri Lanka as the reference country, the Commission did not wholly fail to consider whether Taiwan might be a more appropriate reference country — conduct which, in the circumstances, might well have constituted a serious failure to meet its obligations of proper administration *vis-à-vis* the parties involved in the proceeding — but rather it did not make a serious and sufficient effort to that end. This is clear from paragraph 34 of the *Nölle* judgment, in which the Court of Justice found that the letter which the Commission had addressed to the two main producers in Taiwan when determining the reference country could not be regarded as a sufficient attempt to obtain information in view of the wording of that letter and the extremely short period allowed for a reply, which made it practically impossible for the producers in question to cooperate.

89 It follows that, in so far as the Community institutions did not fail completely in the duty of care and proper administration which they owed to the applicant but

simply failed properly to appreciate the extent of their obligations under that principle, the breach of the principle of care cannot in this case be regarded as a sufficiently serious breach or a manifest and grave breach, as defined in the case-law of the Court of Justice (see the judgments in *HNL*, cited above, Joined Cases 116/77 and 124/77 *Amylum and Tunnel Refineries* v *Council and Commission* [1979] ECR 3497, and in Case 143/77 *Koninklijke Scholten-Honig* v *Council and Commission* [1979] ECR 3583).

90 In any event, it must be added that even if the Commission had carried out a more serious investigation as to whether Taiwan might be an appropriate reference country, there could be nothing to prevent Sri Lanka, at the conclusion of such an investigation, from proving to be an appropriate and reasonable choice for the purposes of Article 2(5)(a) of the basic regulation.

91 Consequently, in the absence of a sufficiently serious breach of a rule of law protecting the applicant, and without there being any need to examine whether the other conditions for Community liability have been satisfied in this case, the application must be dismissed as being unfounded, both with regard to the claim for compensation in respect of the bank interest which the applicant was obliged to pay on the amounts which it borrowed for the purpose of paying the anti-dumping duty imposed by Regulation No 725/89 and with regard to the claim for compensation in respect of the costs incurred by reason of the various inquiries made by its lawyers at the customs offices.

## Costs

92 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has failed in its submissions, it must be ordered to pay its own costs as well as those of the Council and Commission, which have applied for their costs to be paid.

On those grounds,

THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

hereby:

**1. Dismisses the application;**

**2. Orders the applicant to pay the costs.**

Cruz Vilaça Barrington Kirschner

Kalogeropoulos Tiili

Delivered in open court in Luxembourg on 18 September 1995.

H. Jung J. L. Cruz Vilaça

Registrar President