OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 24 NOVEMBER 1983 [1]

Mr President,
Members of the Court,

The Court has before it a preliminary question from the Verwaltungsgericht [Administrative Court] Frankfurt concerning the validity of Article 1 of Commission Regulation (EEC) No 3429/80 of 29 December 1980 adopting protective measures applicable to imports of preserved mushrooms.[2] In view of the originality of the protective machinery which is created by that regulation, it seems appropriate to consider, firstly, the legislative background to the present case, secondly, the circumstances which gave rise to the litigation before the German court — but which do not raise any difficulties — and, finally, the arguments supporting the allegation of invalidity.

I — The legislation at issue

Although the Court is not unfamiliar with the basic legislation relating to the market under consideration,[3] it none the less seems necessary to recall its structure in order to define precisely the respective powers of the Council and the Commission in the matter. Thus, I shall examine first the basic regulations and then the machinery set up by the Commission.

1. The basic regulations

1.1 The common organization of the markets in products processed from fruit and vegetables is set up by Council Regulation (EEC) No 516/77 of 14 March 1977.[4] It governs, *inter alia*, preserved mushrooms,[5] the importation of which is subject to a system of import certificates.[6]

The Council regulation set up a system of common prices and levies designed to stabilize the Community market; the possibility that that system might "in exceptional circumstances" prove inadequate demands that the Community "should be allowed to take any appropriate action as quickly as possible".[7] That proviso is clarified by the following provisions:

(a) Article 13 (2) provides as follows: "Save as otherwise provided in this regulation or where derogation therefrom is decided by the Council,

...

the levying of any charge having equivalent effect to a customs duty,

and

the application of any quantitative restriction or measure having equivalent effect,

shall be prohibited in trade with non-member countries."

(b) Article 14 (1) provides as follows: "if, by reason of exports or imports, the Community market in one or more ... products ... is or is likely to be exposed to serious disturbances which might

1 — Translated from the French.

2 — Official Journal of 31. 12. 1980, L 358, p. 66

3 — Judgment of 15. 7. 1982, Case 245/81 *Edeka* [1982] ECR 2745.

4 — Official Journal of 21. 3.1977, L 73, p.1.

5 — Article 1 and Annex IV: subheading 20.02 A.

6 — Article 10 (1) and Annex IV mentioned above.

7 — Twelfth recital of the regulation.

endanger the objectives set out in Article 39 of the Treaty, appropriate measures may be applied in trade with non-member countries until such disturbances or the threat thereof has ceased." It is a matter for the Council to adopt the detailed rules for the application of that paragraph, but when "the situation envisaged in paragraph 1" arises it is the Commission which "decides what measures are necessary".[1]

1.2. The detailed rules of application were therefore laid down by Council Regulation (EEC) No 521/77 of 14 March 1977,[2] which defines both the preconditions for the adoption of the protective measures and the nature of the measures which may be envisaged. In the case of imports subject to the system of import certificates, Article 2 makes provision for two possible types of protective measure:

(a) Measures aimed at the issue of import certificates:

"the total or partial discontinuation of the issue of certificates, as a result of which new applcations will not be accepted,

the rejection of all or some of the applications for the issue of certificates which are being examined," [3]

(b) Measures specifically aimed at prices:

"the introduction of arrangements under which, if the price for an imported product falls below a certain minimum, a condition may be imposed whereby that product may be imported only at a price which is at least equal to such minimum".[4]

Since the entry into force of the basic legislation, the Commission has had constant recourse to the protective clause contained therein and has adopted a series of regulations serving to restrict or suspend the issue of import certificates. Regulation No 3429/80, on the other hand, reflects a remarkable change in the policy pursued by the Commission in this sector.

2. The machinery set up by the Commission

The machinery is built around two sets of provisions, namely;

(a) Article 2 of Regulation No 3429/80, which provides for:

(i) the fixing of a quota for imports in respect of which applications for import licences are to be accepted; the quota corresponds to "26% of the quantities for which import licences were issued during the first 11 months of 1980"; [5]

(ii) the allocation, between the main countries of supply outside the Community, of the quotas thereby calculated.[6]

(b) Article 1 of the same regulation, which provides that the importation into the Community of preserved mushrooms in quantities exceeding the quotas thereby determined is, during the first quarter of 1981, "subject ... to [the] levy of an additional amount of 175 ECU per 100 kilograms net."

Later regulations of the Commission employed that machinery in respect of

1 — Ibid. Article 14 (2).
2 — Official Journal of 21. 3. 1977, L 73, p. 28.
3 — Article 2 (a) of Regulation No 521/77.
4 — Ibid., Article 2 (c).
5 — Regulation No 3429/80, Article 2 (1).
6 — Ibid., Article 2 (2).

the second and third quarters of 1981;[1] in Regulation No 1796/81 of 30 June 1981[2] which applied from 1 October 1981,[3] the Council itself took action to adopt provisions which were similar but which set the additional amount at 160 ECU.

Such is the legislative background to the present case, the facts of which I shall now describe.

II — The facts of the case

As an undertaking which specializes in the import trade, Wünsche markets, amongst other products, preserved mushrooms originating in non-member countries. On 23 February 1981, having exhausted the quantities due to it under the protective measures, Wünsche requested the Bundesamt für Ernährung und Forstwirtschaft [Federal Office for Nutrition and Forestry Management, hereinafter referred to as "the Bundesamt"] in Frankfurt to issue an import certificate containing no reference to the additional amount of 175 ECU to cover 3 500 tonnes of preserved mushrooms from the People's Republic of China. It was against the imposition by the Bundesamt of the additional amount that Wünsche brought an action before the Verwaltungsgericht Frankfurt. A reading of the order referring the matter to this Court discloses two main arguments supporting the allegation of invalidity:

(i) First, the conditions for the adoption of protective measures laid down by the basic regulations[4] were not satisfied at the time when the Commission adopted the contested regulation;

(ii) Secondly, irrespective of whether the Commission's assessment of the state of the market at the time in question was lawful, the Commission was not empowered by the Council regulations to adopt a protective measure of the type under consideration.

III — Arguments supporting the allegation of invalidity

A logical approach to this question demands that the sequence of the two arguments set forth above should be reversed. In the first place I shall consider whether the Commission was legally competent, by virtue of the powers delegated by the Council regulations, to introduce the new protective machinery contained in the regulation at issue (subheading 1 below); the reply to that question, a question of law concerning the very nature of the protective measure introduced, will determine the competence of the Commission. In the second place I shall investigate a question of fact, namely the need for the measures adopted, and inquire whether the Commission's appraisal of the economic circumstances permitting the adoption of the protective measures was manifestly incorrect (subheading 2 below).

1. In adopting the contested measure, has the Commission exceeded the powers conferred on it by the Council? (lack of powers).

The preliminary question raised by the German court relates only to the validity of Article 1 of the Commission regulation. However, as the Commission stated at the hearing, the two com-

1 — Regulation No 796/81 of 27. 3. 1981, Official Journal of 28. 3. 1981, L 82, p. 8; Regulation No 1755/81 of 30. 6. 1981, Official Journal of 1. 7. 1981, L 175, p. 23.

2 — Official Journal of 4. 7. 1981, L 183, p. 1.

3 — Article 7 of the regulation.

4 — Article 14 of Regulation No 516/77 and Article 1 of Regulation No 521/77.

ponents which make up the protective machinery form a composite whole, consisting of a system of quarterly quotas which, if exceeded, cause an additional fixed amount to be levied.

What are the factors liable to vitiate the competence of the Commission? At this stage of my opinion, I do not wish to consider whether the Commission has correctly applied the conditions laid down by the basic legislation for the adoption of the protective measure. In this first part, I should prefer to analyse, not the legality of the manner in which the Commission exercised its powers, but the very existence of powers on the part of the Commission to introduce a protective measure of the type under dispute.

1.1. In line with the arguments put forward by Wünsche and the Commission, the view might be taken that the *Council*, when instituting a *new* protective measure, *enjoys powers which are independent* of any intervention by the Commission; on the other hand, it might also be maintained that the *Commission enjoys a certain power of adaptation* with regard to the basic rules.

1.1.1. *According to Wünsche*, it is a matter for the Council alone to decide on the nature and content of the protective measure to be adopted, the Commission merely having the freedom to select the most appropriate measure from amongst those set out in the basic regulation. In support of its view, Wünsche puts forward essentially two lines of argument:

(i) The list of possible protective measures, set out in this instance by Article 2 (1) of Council Regulation No 521/77, is exhaustive, as the Court acknowledged in the *Dürbeck* [1] and *Edeka* [2] cases;

(ii) Article 13 (2) of Council Regulation No 516/77 reserves to the Council, and to it alone, the power to decide on any derogation with regard to the introduction of charges having equivalent effect to customs duties in trade with non-member countries; Wünsche, comparing the additional amount to a charge of that kind, states that Regulation No 516/77 does not expressly provide an exception in respect of preserved mushrooms and that the only derogation affecting those products was introduced by a Council regulation, which repeats, in essence, the provisions of the Commission regulation.[3]

1.1.2. *In the Commission's opinion* the list set out in Article 2 (1) of Regulation No 521/77 is not exhaustive, since the basic regulations allow it a certain power of adaptation in the establishment of proper protective measures.

(i) As the Court held in the *Edeka* judgment, Regulations Nos 516 and 521/77 "state that the protective measures must be limited to that which is strictly necessary"; [4] consequently, the Commission claims to be competent to institute protective measures which are not expressly mentioned in Article 2 (1), provided that they are less restrictive

1 — Judgment of 5. 5. 1981, Case 112/80, [1981] ECR 1095.

2 — Case 245/81, [1982] ECR 2745.

3 — Regulation No 1796/81, mentioned above.

4 — Judgment of 15. 7. 1982, paragraph 22, [1982] ECR 2745, at p. 2757.

than the latter.[1] The levying of an additional amount, it maintains, is less coercive than the total or partial suspension of imports. It has the twofold advantage of preserving traditional patterns of trade, without compromising the outcome of the negotiations commenced with non-member countries on the renewal of voluntary restraint agreements.

(ii) Article 13 (2) of Regulation No 516/77 does not rule out the competence of the Commission, but applies "save as otherwise provided in this regulation", which, in the Commission's view, is a reference to Article 14, which empowers it to take any measure required.

1.2. In a consistent line of decisions the Court has indeed acknowledged that the Commission enjoys discretionary power in the exercise of the authority delegated by the Council when, as here, urgent measures based on an analysis of a complex economic situation are involved.[2] The fact remains, as Mr Advocate General Mayras rightly emphasized in his Opinion in Case 23/75, that this wide discretionary power must be exercised "within the framework of the principles laid down by the Council" and that it cannot in any event permit the Commission to "arrogate to itself a power which the Council has not expressly delegated to it".[3] In the present instance, it seems that both Article 2 (1) of Regulation No 521/77 and Article 13 (2) of Regulation No 516/77 reserve to the Council alone the power to establish any new protective measure.

1.2.1. The type of protective measure which is possible emerges from Article 2 (1) of Regulation No 521/77, which specifies the measures which may be decided on by the Commission. That is therefore the list of possible measures which should be consulted in the present case; the introduction of an additional amount chargeable whenever predetermined quotas are exceeded does not *as such* appear therein. However, the Court has held that the Commission has a degree of discretion:

(i) In the aforementioned *Dürbeck* judgment, the Court held that the Commission was competent to negotiate voluntary restraint agreements with certain non-member countries; however, that case was concerned, not with a *new* protective measure, but with *forestalling* any new protective measures by reconciling the interests of the exporting countries with the requirements of stability on the Community market under consideration;

(ii) On the other hand, in accordance with the Opinion of Mr Advocate General Roemer, the Court's judgment in the *International Fruit Company* case [4] endorsed the legality of the Commission's action in introducing a *new* protective measure and in doing so based itself, first, on its

1 — See in particular: judgment of 13. 5. 1971, Joined Cases 41 to 44/70 *International Fruit Company* paragraph 65, [1971] ECR 411, at p. 427; judgment of 5. 5. 1981, Case 112/80 *Dürbeck* paragraph 39, [1981] ECR 1095, at p. 1118; and *Edeka*, mentioned above.

2 — See in particular: judgment of 6. 5. 1982, Case 126/81 *Wünsche* paragraph 11, [1982] ECR 1479, at p. 1491; and, more generally, the judgment of 30. 10. 1975, Case 23/75 *Rey Soda* paragraph 11, [1975] ECR 1279, at p. 1300.

3 — Opinion in the *Rey Soda* case, [1975] ECR 1307, at pp. 1310 and 1311.

4 — Joined Cases 41 to 44/70 [1971] ECR 411.

similarity to one of the types of measure provided for by the basic legislation [1] and, secondly, on its less restrictive effect. [2]

Thus the introduction of a new protective measure presupposes at the very least that two complementary conditions are satisfied; the measure must be equivalent to, and less coercive than, the one for which it is substituted. The protective machinery set up by the Commission does not meet the requirement of similarity; the only provision with it might tentatively be linked relates to the creation of a system of minimum prices (Article 2 (1) (c) of Regulation No 521/77).

Like the Commission, I think that such a link is artificial. Certainly, the additional amount was calculated by reference to the cost price of French mushrooms; however, its objective is not to align the price of the product imported from outside the Community with that cost price, since it affects only the volume in excess of the quotas fixed for each country.

The protective machinery therefore rests principally on a quota system the limits of which are guaranteed by the levying of an additional amount as a deterrent; despite that characteristic, it cannot be compared to the classic measures whereby imports are suspended or discontinued,[3] because it preserves traditional trade patterns.[4]

It is therefore a measure *sui generis*, which cannot as such be based on Article 2 (1). That provision, adopted pursuant to Article 14 (2) of Regulation No 516/77, empowers the Commission to take the appropriate protective measures set out therein. Consequently, in exercising the power of adaptation granted to it, the Commission must have regard to the type of measure laid down by the basic legislation; it may adopt other measures, but only on condition that they constitute a *less restrictive variant* of the measures specified by the Council. On the other hand, it may not, without exceeding the scope of its authority, introduce an *atypical* protective measure. The Court has further held, on the subject of protective measures based on Article 115 of the EEC Treaty, that, being in derogation of Articles 9 and 30 thereof, they "must be strictly interpreted and applied".[5] It seems to me that that solution may be applied to the present case; it presupposes at least that the Commission cannot absolve itself from compliance with the wishes expressed by the Council; if it were otherwise, the effectiveness of Article 2 (1) would be nullified. That conclusion is all the more imperative in relation to Article 13 (2) of Regulation No 516/77.

1.2.2. In Wünsche's view, the latter article reserves to the Council alone the power to introduce a charge having equivalent effect to a customs duty in trade with non-member countries; consequently the Commission was not empowered to subject imports in excess of

1 — Ibid., paragraph 63, p. 427.

2 — Ibid., paragraphs 64 and 65, p. 427.

3 — Regulation No 521/77, Article 2 (1) (a).

4 — Ibid., third recital.

5 — Judgment of 23. 11. 1971, Case 62/70 *Bock* paragraph 14, [1971] ECR 897; judgment of 8. 4. 1976, Case 29/75 *Kaufhof KG* paragraph 5, [1976] ECR 431.

the predetermined quotas to the levy of the additional amount at issue. Without there being any need to inquire whether this may be applied to the restrictions placed by Community institutions on the freedom of trade with non-member countries, it should simply be recalled that the Court has declared that the Community has exclusive competence in the matter.[1] The latter point is worthy of attention. Article 13 of Regulation No 516/77 reaffirms clearly the principles laid down by this Court, but to which institution does it reserve the power to introduce restrictions on the freedom of trade with non-member countries?

(a) The general prohibition in Article 13 (2) is directed at Member States, as is shown by paragraphs 3 and 4 of the same article. The Council alone has the power to derogate therefrom; it is the Council which is entrusted with the task of authorizing a Member State or allowing the Community to establish restriction on the freedom of trade with non-member countries.

(b) Article 13 (2) enacts the prohibition subject to the following two provisos:

(i) *"Save as otherwise provided in this regulation . . ."*

Paragraphs 3 to 5 of Article 13 authorize Member States to maintain national restrictions on the importation of products from non-member countries, either permanently or until the advent of a Council regulation.

Article 2 institutes a levy "in addition to customs duty", and Article 3 "a minimum import price" in respect of products other than preserved mushrooms. Is it possible to view Article 14 as a general derogation as the Commission contends? It must simply be said that the article, which makes it possible in certain circumstances to curtail the freedom of trade with non-member countries, reflects the principle of the exclusive competence of the Council, since the Commission acts only in order to put into concrete form, in response to a given situation, one or other type of protective measure provided for by the basic rules.

(ii) *". . . or where derogation therefrom is decided by the Council"*

It was thus a Council regulation which introduced the possibility of making the issue of an import certificate subject to a further formality, the detailed implementing rules being specified by the Commission;[2] as regards the regulation in which the Council repeated in essence the terms of the Commission regulation establishing the disputed protective machinery, it is expressly based on Article 13 (2), the Commission acting to ensure its application.[3]

It may be seen from the above considerations as a whole that it is the business of the Council, and the Council

1 — Judgment of 1. 7. 1969, Joined Cases 2 and 3/69 *Diamantarbeiders* [1969] ECR 211; judgment of 13. 12. 1973, Joined Cases 37 and 38/73 *Diamantarbeiders* paragraphs 22 to 25, [1973] ECR 1609, at p. 1624.

2 — Regulation No 1203/80 of 13 May 1980, derogating from Regulation (EEC) No 516/777 (Official Journal of 15. 5. 1980, L 122, p. 3); and Regulation No 1218/80 of 14 May 1980 (Official Journal of 15. 5. 1980, L 122, p. 34).

3 — Article 6 of Regulation No 1796/81, mentioned above, and Commission Regulation No 3433/81 of 26 November 1981 (Official Journal of 2. 12. 1981, L 346, p. 5).

alone, to impose, whether at national or Community level, such restrictions on the freedom of trade with non-member countries as are necessary for the protection of the common market in fruit and vegetables. By substituting itself for the Council — albeit temporarily — for the purpose of establishing a new type of protective measure, the Commission has therefore exceeded the scope of its authority by infringing, first, Article 13 (2) of Regulation No 516/77 and, secondly, Article 2 (1) of Regulation No 521/77. In a more general sense, the Commission has failed to observe the allocation of powers as laid down by the Treaty itself; Articles 40 (3) and 43 (3) reserve to the Council the power to adopt "all measures required to attain the objectives set out in Article 39 ...", that is to say, measures which the common organization of the market may entail; this covers in particular measures restricting the importation of products from non-member countries. On the strength of those considerations as a whole, my conclusion therefore is that Commission Regulation No 3429/80 is invalid.

Consequently, consideration of the other arguments put forward by the parties may seem unnecessary. I shall deal with them briefly, in the alternative.

1.2.3. The Commission points to the less restrictive effect of the protective system set up by the regulation at issue. It may, indeed, be maintained that the quota and the additional amount, in combination, are less restrictive on imports of preserved mushrooms from non-member countries than the other types of protective measure expressly set out by Article 2 (1) of Regulation No 521/77. In that regard, however, it should be pointed out that the Commission and Wünsche have put forward differing appraisals of the economic consequences of levying the additional amount. Without there being any need to go into the details of that controversy, it is sufficient to note the following points:

(a) The quota set for all the non-member countries in respect of the first quarter of 1981 represents 26 % of the imports effected between January and November 1980 under the system of import certificates; furthermore, it may be observed that the level of that quota for the first quarter of 1981 amounts to slightly less than one quarter of the definitive annual quota under Council Regulation No 1796/81,[1] fixed at 34 750 tonnes. Those figures show that the Commission intended to guarantee imports in keeping with the traditional pattern of trade. The protective measure established by the Commission may thus be seen to be less severe than a suspension, or *a fortiori* a total or partial discontinuation, of the issue of certificates, especially since the quota may, at least in theory, be exceeded provided that the additional amount is discharged.

(b) The economic repercussions of the additional amount have been the subject of differing interpretations. Wünsche pointed, in particular, to the excessive nature of the costs entailed when the additional amount is applied to imports exceeding the pre-determined quota, which effectively rules out any importation beyond that limit. The Commission acknowledges that applications for certificates beyond the quotas have — apart from those submitted by Wünsche itself

1 — Articles 3 and 7.

— related only to negligible quantities (one tonne for the first quarter of 1981). The Commission further admits that the quotas themselves have not been exhausted by all countries [1] and that the additional amount was calculated so as to protect Community products which were directly threatened, by bringing imports in excess of the quota up to a price level at which the amount represented more than half the final resale price.

None the less, the Commission considers that the above system, which relieves importers of the commercial risks arising from the total or partial closure of the market while the year is in progress, enables traders to carry out better economic planning. It is more flexible than traditional protective measures because the additional amount is itself capable of modification; the additional amount is indeed a deterrent, but that is wholly in keeping with the objective sought, namely to secure compliance with the import quota whilst avoiding interruption in supply which might affect traditional patterns of trade.

It seems to me that the Commission correctly demonstrates the less restrictive character of the system which it has set up, by stressing first and foremost the quotas which it institutes in relation to which the additional amount is merely ancillary; whilst the latter may seem to be fixed at an excessive level, the reason is that it was set at a fixed rate for deterrent purposes.

The fact remains, however, that the less coercive effect is not, in itself, sufficient to justify the establishment of the protective machinery under dispute. The Commission must, on the one hand, have adopted an appropriate measure and, on the other hand, have correctly assessed the situation in the relevant market.

2. Did the state of the market justify the adoption of the measure at issue? (inappropriate measure or manifestly incorrect assessment).

For the purpose of assessing whether the measure under consideration is commensurate with the objective pursued by the Commission, I would refer to the earlier discussion of the question of the less restrictive character of the protective measure instituted by the Commission. In the present case the protective machinery set up by the Commission meets the requirement of proportionality inasmuch as it preserves the traditional patterns of trade whilst protecting the Community market.

As the Court has already had occasion to emphasize, the Court allows the Commission a wide discretion with regard to the objective conditions which, under the basic rules, justify recourse to the protective clause. Indeed, according to the case-law of the Court, the Commission must have "manifestly and gravely exceeded the limits of the discretion which it enjoys with respect to the appraisal of economic information" before it may be penalized by having its regulation declared invalid. [2] The Court's review will, in that connection, be focused particularly on criteria which reflect the state of the market under

1 — Regulation No 871/81 of 1 April 1981 (Official Journal, L 88 of 2. 4. 1981, p. 22).

2 — Judgment of 28. 10. 1982, Case 52/81 *Faust* v Commission paragraph 9, [1982] ECR 3745, at p. 3758.

consideration (such as the volume and trend of imports and stocks and the movement of prices for Community products and imports from non-member countries), on the basis of which the Commission must take its decision.[1]

However, should the view be taken, as the Commission suggests in its observations, that any one of the criteria which it is obliged to take into account may on its own justify the measure adopted? I have already remarked in another case [2] that the conditions mentioned above seem to be *complementary* inasmuch as they relate to *interdependent* economic factors. In particular, it is only when the four criteria set out in the basic rules are satisfied that it is possible to have a comprehensive view of the state of a market. To be complete the Court's review must operate on all the economic criteria which the Commission must at least take into consideration when adopting protective measures. I shall therefore examine, in turn, each of the conditions set out by Article 1 of Council Regulation No 521/77, namely volume of imports, available quantities and prices.

2.1. Volume of imports

It is common ground that the quantities imported in 1980 exceeded the total imported in 1979 (respectively 35 700 and 29 741 tonnes).

Wünsche maintains that the increase is due to a reopening of trade with Taiwan and Korea, after being interrupted by previous protective measures.[3] In my opinion the main point is to connect the increase mentioned above with the difficulties encountered by the Commission in renewing the voluntary restraint agreements with certain non-member countries and in particular with the People's Republic of China, which is by far the leading supplier to the Community (accounting for more than 70% of imports from non-member countries). The Commission rightly argues that this situation made it foreseeable that the trend which had appeared in 1980 would be contined and indeed accentuated in 1981.

Wünsche also claims that the importation into the Community of preserved mushrooms fron non-member countries has been governed since 1978 by a permanent protective system, with the result that the Commission may no longer, in view of the supervisory system thereby established, justify the introduction of new measures by reference to the state of the market. It seems to me, on the contrary, that the disruption caused by the failure to comply with the regulatory principles laid down by the Commission is all the more serious inasmuch as it affects a controlled market.

Thus it seems to me that the Commission exercised its discretion properly in taking the view that the foreseeable trend in the volume of imports was liable to cause serious disruption on the market.

2.2. Quantities available in the Community

The Commission points to the presence of high stock-levels; in France and the

1 — Article 1 of Regulation No 521/77, mentioned above.

2 — Case 126/81, mentioned above, [1982] ECR 1479, at p. 1496, II.1.

3 — See the *Edeka* case, mentioned above.

Netherlands, the main producers in the Community, stocks stood at 28 500 tonnes in December 1980 as against 18 800 tonnes in 1979.

(a) Wünsche maintains that in the same period it had to contend with a positive shortage, which prevented it from taking supplies from French and Netherlands producers despite the increase in exports from France and the Netherlands into other Community countries. Wünsche concludes that the situation arose because the stock level was inadequate to satisfy commercial demand.

(b) Wünsche cannot, however, deny that during 1980 French and Netherlands stocks were higher on average than in 1979, their rate of increase having accelerated until November; in December the stock level was in any event higher than the previously reached. In France, average stocks did not decline until 1981. In the Netherlands, the statistics are even more significant; the average stock level was about 3 000 tonnes in 1979, then 5 000 tonnes until October 1978, when it climbed to 12 000 tonnes; only in the course of 1981 did the average return gradually to 5 000 tonnes.

Difficulties in marketing the output were thus foreseeable; Wünsche itself states that, in spite of an increase in its sales in 1980, France had been unable to exhaust the surpluses yielded by a plentiful production in 1979. Those factors are, in my opinion, sufficient to indicate that the Commission correctly evaluated the trend in available stocks on the Community market.

2.3. Price of preserved mushrooms on the Community market

The price should be appraised on the German market, which accounts for 95% of the imports into the Community of preserved mushrooms. The statistics put forward respectively by the Commission and by Wünsche on the movement of prices for both homegrown products and products originating in non-member countries relate either to different categories of product or to separate countries or origin (France or the Netherlands), whilst prices are expressed sometimes in German marks and sometimes in Franch francs, per tin or per kilogram. It is understandable that the resulting analyses are often contradictory.

(a) In Wünsche's view, the prices of the Community products increased in 1980, as did those of the imported products, which therefore became less competitive.

(b) In the Commission's view, on the other hand, the price of Community preserved mushrooms declined in the course of 1980, but the prices of products from outside the Community nevertheless remained lower on average during that year, with the result that they retained their competitive advantage.

A study of the various documents supplied, especially the statistical tables, suggests that Community prices during 1980 displayed a definite downward trend, in spite of the rate of inflation. At the same time, prices of imports from non-member countries underwent a relative increase, which kept them on average on a level with Community prices. The Commission therefore found itself confronted with a depressed Community market in late December 1980. The trend was all the more liable to become accentuated since the cost price of the French product was, according to the Commission, higher on average than the sale price of the same product. Paradoxical as the prolonged maintenance of such an adverse situation may be, it may be concluded from a comparison of the various statistics on prices, on the foreseeable growth in imports and on the presence of unduly high stock levels that the disruption on the Community market threatened to grow still worse in 1981.

In the light of all those factors, and despite the excessively sketchy information supplied by the Commission, it does not appear that the latter, in appraising the state of the market, committed a serious and manifest error such as would invalidate Regulation No 3429/80.

IV — Further legal points

Wünsche raised two procedural questions:

1. Which court is competent to evaluate the economic circumstances giving rise to the protective measure under dispute? According to the plaintiff in the main proceedings, the task falls upon the national court by very reason of the division of functions under Article 177 of the Treaty.

(a) I cannot but subscribe to that view, one which this Court has, moreover, consistently upheld; in the context of a reference of a preliminary ruling it is the court making that reference which must undertake any inquiry which may shed light on the main proceedings, whereas the Court of Justice has the sole task of interpreting or appraising the validity of Community law.[1]

(b) Clearly, in order to exercise that power to the full, the Court of Justice must be as fully informed as possible; that requirement manifests itself particularly on occasions when the validity of a protective measure introduced by the Commission is under consideration. In such circumstances, the Commission is obliged to supply this Court with the relevant economic data concerning each of the criteria on which its decision is based. It thereby enables the Court effectively to review the legality of the measure at issue.

2. As to the onus of proof, the plaintiff in the main proceedings considers that it falls upon the Commission by very reason of the exceptional character of the protective measure. However, it is

1 — Judgment of 29. 4. 1982, Case 17/81 *Pabst & Richarz* paragraph 12, [1982] ECR 1331, at p. 1346; judgment of 1. 4. 1982, Joined Cases 141 to 143/81 *Holdijk* paragraph 6, [1982] ECR 1229, at pp. 1311 and 1312.

my opinion that, in the context of the preliminary ruling procedure, which is grafted on to the national proceedings, it is not for this Court to give judgment on a question which falls exclusively within the scope of domestic procedural law and hence within the jurisdiction of the national court.

On the basis of the above considerations, I conclude that the Court, in reply to the question put to it by the Verwaltungsgericht Frankfurt, should rule as follows:

Commission Regulation (EEC) No 3429/80 of 29 December 1980 adopting protective measures applicable to imports of preserved mushrooms is invalid.