2. orders the applicant to pay the costs.

Lecourt	Monaco	Pescatore
Donner	Mertens de Wilmars	Kutscher
Ó Dálaigh	Sørensen	Mackenzie Stuart

Delivered in open court in Luxembourg on 20 February 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 4 JULY 1973 [1]

Mr President,

Members of the Court

I — The Facts

Wünsche Handelsgesellschaft, a partnership with limited liability, whose registered office is at Hamburg, deals in the import of preserved fruit and vegetables, and in particular of tomato concentrates from Greece and Portugal.

Tomato concentrates, under Tariff Heading 20.02, are comprised in the common organization of the market in products processed from fruit and vegetables created by Regulation No 865/68 of the Council of 28 June 1968.

Imports of these products into the Common Market from third countries were originally liable only to the payment of Common Customs Tariff duty. Furthermore there was no co-ordination or unification of the import arrangements applied by Member States vis-à-vis third countries.

Because of disturbances which were threatening the relevant market as a result of extensive imports at prices likely to jeopardize the objectives set out in Article 39 of the Treaty, the Council found it necessary to introduce protective measures during the summer of 1971.

This was the objective of Regulation No 1427/71 of 2 July 1971, together with Regulation 1428/71 of the same date, which laid down the conditions for the application of those measures in the sector in question.

You have already had occasion to consider the provisions of these Regulations in the case of Schroeder, 40/72 (Judgment of 7 February 1973, not yet published).

1 — Translated from the French.

It is only necessary therefore to recall that they grant the Commission the option of implementing two types of protective measure, namely:

— either the total or partial suspension of such imports;

— or the imposition of minimum prices, so that imports can only be effected on the basis of prices higher than the fixed minimum prices.

The Commission made use of both these systems:

— the first laying down quantitative restrictions, was enacted by its Regulation No 1558/71, regarding imports from third countries, apart from Greece and those countries which had given an undertaking to adhere to minimum prices (notably Portugal);

— the second arises from its Regulation No 1643/71, which specifically applies to imports from Greece; it institutes a system of minimum prices and makes all imports subject to prior conclusion of a contract providing for delivery of the products at a price higher than the minimum prices for the quality in question, as fixed according to a scale annexed to the Regulation.

In October 1971 the applicant purchased 100 metric tons of double-strength tomato concentrate, in five-kilo cans, while also taking an option on the delivery of a further 400 metric tons of the product.

In accordance with the minimum price system this transaction was concluded on the basis of $US 340 per metric ton, that is, DM 5·60 per can, in spite of a more favourable offer from the Greek supplier.

The applicant contends that the minimum price was fixed at too high a level, as was subsequently made clear by the fact that Italian canners sold tomato concentrates on the German market at prices lower than the minimum applied to imports of the Greek product. The applicant was thereby forced to sell a proportion of the imported goods at a price lower than that paid for it, suffering a consequent loss of DM 780, to which may be added DM 318 for loss of profit, calculated on the basis of a normal profit margin of 5 %.

The Wünsche Company considered this loss to have been caused by the intervention of Regulation 1643/71 of the Commission, in that this Regulation had illegally fixed minimum prices at a higher level than was required by market conditions and requested the Commission, on 17 April 1972, to make available to the Company a sum of DM 1 098, in compensation for the loss suffered.

This request was rejected on 28 June 1972. The applicant Company therefore requests you to find that the Community has incurred non-contractual liability as provided for by Article 215 of the Treaty of Rome and to order the Commission to pay the Company the sum of DM 1 098 as compensation.

II — Admissibility of the action

We consider the admissibility of the application to be undeniable: it has been brought before the Court less than five years after the event giving rise to the alleged detriment and thus complies with the time limit imposed by Article 43 of the Protocol on the Statute of the Court, regarding the barring of proceedings for compensation.

For its part, the defendant expressly refrains from raising any objection to the admissibility of the action in view of the Court's decisions in the following cases:

— Lütticke (28 April 1971, Rec. 1971, p. 325);

— Zuckerfabrik Schöppenstedt (2 December 1971, Rec. 1971, p. 984);

— Compagnie d'Approvisionnement des Grands Moulins de Paris (13 June 1972, Rec. 1973, p. 391);

which recognize the admissibility of requests for compensation filed by individuals on the ground of culpable illegality of community Regulations.

In our opinion in the Merkur Case, 43/72, presented on 27 June, we attempted to show why this view should be maintained.

First, the action for indemnity is an autonomous — not a subsidiary — type of action, subject only to those procedural requirements laid down in view of its objective; it is this objective which distinguishes it from the action for annulment provided for by Article 173, whereby an individual's right to bring an action for annulment is strictly limited to acts adversely affecting his subjective rights, the provisions of that Article not being transferable to actions based on liability.

On the contrary, individuals are entitled to invoke the liability of the Community on the grounds of a wrongful act committed by an institution in the exercise of its power to make regulations.

Furthermore, we have attempted to satisfy you that while applicants have the option, in the event of a dispute bearing on the particular application to them of a Community Regulation by the government of a Member State, of contesting the validity of that Regulation before the relevant national court, an application for a preliminary ruling under Article 177 should not be regarded as a necessary precondition for admissibility of a direct action for compensation on the grounds of the illegality of the Regulation.

The structure of the system of judicial remedies set up by the Treaty, the interests of the parties and the essential requirement of the proper administration of justice seem to us to exclude the 'procedural detour' which would be imposed needlessly upon applicants if such a precondition were accepted.

Finally, this situation is not similar to the one in the Haegeman case, in that here we are not dealing with litigation regarding the recovery of a Community tax or the grant of a compensatory payment by a national government.

Following this brief résumé, therefore, we would refer you to our opinion in the Merkur case for a fuller discussion of the problem of the admissibility of the application.

III — Legality of Regulation No 1643/71 of the Commission

Pursuant to the directives which emerge from your judgments in Zuckerfabrik Schöppenstedt and Compagnie d'Approvisionnement — Grand Moulins de Paris, non-contractual liability on the part of the Community, resulting from the culpable illegality of an act of regulation, presupposes, 'at the very least, the illicit character of the act alleged to have caused the detriment'.

In other words: no illegality, no fault and, therefore, no liability.

Further, where the disputed Regulation is — as is incontestably the case with Regulation No 1643/71 of the Commission — 'a legislative measure implying choices as to economic policy', the Community cannot, in view of the provisions of Article 215 of the Treaty, incur liability in respect of a detriment allegedly suffered by individuals as a result of that measure, save in the event of a sufficiently flagrant violation of a higher rule of law for the protection of the individual'.

Your recent examination of the Schroeder case, 40/72, led you, on a reference from the Administrative Court of Frankfurt-on-Main to a consideration of the legality of this same regulation of the Commission, both from the point of view of the Treaty of Rome and from that of the basic regulations adopted by the Council and constituting the basis of the Commission's relevant powers and from the point of view of certain general principles of law.

In your judgment of 7 February 1973 you held that examination of the questions put to you for preliminary rulings had failed to disclose any factors

affecting the validity of the Regulation in question.

Your judgment does not of course apply *erga omnes* and your answers to the questions of the German Administrative Court would not necessarily be binding on you.

However, in that the grounds of this application are substantially the same as those put forward by the plaintiff in the main action in Case 40/72, we feel that the solutions you reached in that case may be accorded the status of a 'precedent'.

We therefore feel justified in referring you to the grounds of your judgment in Schroeder, save for a fuller explanation of certain new arguments raised by the Wünsche Company.

The applicant itself admits in its reply, made after 7 February 1973, that it has only continued the action, notwithstanding your judgment, because it has produced information which the Schroeder Company had not brought to your attention and because it thought it necessary to amplify certain arguments insufficiently developed by that company.

The Commission, for its part, considers that your judgment has deprived this action for damages of all foundation, since in its opinion the applicant has not raised any *fresh grounds* tending to establish the illegality of the Regulation at issue.

Section I

However, before concurring in this assertion, let us recall the circumstances which led the Commission to introduce the protective measure by its Regulation No 1643/71, that is, the requirement as to minimum prices for imported goods, and the considerations which led you to find that measure justified, in view of the real threat of serious disturbance on the Community market in tomato concentrates as a consequence of such imports.

To this end we need only return to the opening grounds of your judgment of 7 February 1973.

During the marketing seasons from 1968 to 1970, the Commission noted a steady, sharp rise (from 4 000 to 22 000 metric tons) in imports of tomato concentrates from Greece, at prices between 30 and 40 % lower than the cost price to the Community industry.

This price differential led to the closure of many Italian tomato-processing concerns, and this in turn caused a market reduction of possible outlets for fresh tomatoes produced in that country. This situation was clearly a permanent one and the Commission concluded that the Community market was threatened with serious disturbance, as regards both the processing industry and the sale of the home-grown product, since the fall in internal prices under these circumstances was liable to jeopardize the objectives of Article 39 of the Treaty.

Protective measures were therefore necessary, and the needs for them had to be evaluated, as you yourselves held, in view of the volume of imports not only from Greece but also from other third countries, the adverse effect upon the internal market being the result of the total volume of imports which, having risen between 1967 and 1970 from 18 000 to 70 000 metric tons, was equal to 36 % of Community production in 1970.

The concept of 'serious disturbance' is defined in relation to the objectives of the common agricultural policy as set out in Article 39 of the Treaty, and thus the Commission — as you recognized — was rightly able to take into account not only the objective of stabilizing the market but also that of ensuring a fair standard of living for the agricultural community, and consequently to evaluate the risk of disturbance by the effect such imports might have both upon possible outlets for the home-grown product and upon the processing industry. The Commission could also properly conclude with good reason that

the tonnage of concentrate imported in 1970 constituted a serious threat for the sale of fresh tomatoes produced in Italy.

You observed finally that the criteria defined by Article I of Regulation No 1428/71 of the Council, that is: the volume of imports effected or foreseen, the available quantity of the product on the market, the price of the domestic product and finally the price of the imported product, had been taken into account by the Commission, which had thereby neither exceeded its discretion nor infringed Article 40 (3) of the Treaty or Regulation Nos 1427/71 and 1428/71 from which it derives its relevant powers.

On these grounds you upheld the validity, in principle, of the protective measure introduced.

The Wünsche Company does not contest this principle.

The first ground of its action is based on the allegation that the minimum price system, as applied to the import of tomato concentrates from Greece, is *inappropriate* to the attainment of the objective, laid down in Article 39 (1) of the Treaty of Rome, of stabilizing markets; that therefore the Regulation at issue infringes the provisions both of that Article and of Article 40 (3) of the Treaty.

The applicant observes that the system of minimum prices is ineffective, in that it presents traders with a large number of opportunities for circumvention, in particular by the conclusion of fictitious contracts for the recovery of over-payments or by imports effected through subsidiaries or undertakings in the same field of economic activity, having their registered offices in the exporting country or in other third countries.

This, Members of the Court, is a line of argument you expressly rejected in your judgment of 7 February 1973, where you observe that 'the legality of a Community act [such as Regulation No 1643/71] cannot depend on retrospective considerations of its efficacy. Since in the present case it is a question of complex economic measures, which necessarily require a wide discretion as to their expediency, and frequently present an element of uncertainty as to their effects, it suffices that at the moment of their adoption it does not appear that they are obviously inappropriate to contribute to the realization of the desired object'.

You were of the opinion that this was not so in the case of the Regulation at issue, and that the marked decrease in imports from Greece observed after the coming into force of the Regulation showed that the latter 'was not as ineffective as alleged'.

The applicant accepts your reasoning, while maintaining that the principles adduced in your judgment should not have been applied to the facts at issue.

It is the applicant's contention on this point that you were misled by the statistical data produced by the Commission, both as regards the increase in imports of Greek tomato concentrates into the Common Market and in the matter of the price levels at which these products were offered for sale by Greek exporters and Italian producers.

Firstly, it is alleged, statistics as to foreign trade from Greece do not confirm the 'marked decrease' in imports of tomato concentrates from that country into the Member States, said by the Commission to emerge from its own statistics. In the applicant's opinion this disparity can only be explained by the existence of 'secret' imports, at prices below the fixed minima.

It would be very difficult for the Court to come to a decision on this point, there being, in the words of one commentator, 'lies, damned lies and statistics'.

The necessity for such a decision does not however arise, since the argument claiming a basis in Greek customs data adds nothing to the proposition already put forward in the Schroeder case,

according to which the minimum price system was illegal because it was unsuitable, ineffective and rather easily circumvented. Such retrospective considerations as to the efficacy of the measure in question must therefore be dismissed.

Secondly, the Wünsche Company attempts to derive support from the fact that offer prices for tomato concentrates were in reality much lower than the minima imposed. The company calls attention to certain proposals made by Greek exporters and also claims that between 1969 and the first six months of 1972 Italian producers were offering concentrates at more than 24 % below the minimum prices.

These statements, the exactness of which is not in question, lead the company to deduce that the minimum prices had been fixed at too high a level.

But the Commission can reply, in all fairness, that these assertions do nothing to call into question the legality of its Regulation; the economic forecasts it felt bound to make were necessarily accompanied, as is natural in this sphere, by a measure of uncertainty. It is merely necessary to show, as this Court has held, that at the time the Regulation was adopted 'the system applied did not appear as being obviously inappropriate to contribute to the realization of the desired object'.

Indeed a contradiction in the applicant's argument here becomes apparent in that, while reproaching the Commission for having fixed minimum prices at a level higher than that alleged to have been required by market conditions, it recognizes that prices in force on that market were rising in all sectors as from June 1972, in the face of the poor tomato crop which, we are told, it was then clear that the whole of southern Europe would suffer. In the absence of this fact the minimum price system would, in the applicant's view, have been an evident failure.

We would only say that, due perhaps to this natural occurence, the Commission's forecasts were at least partially borne out by the facts.

Here again, however, the applicant is indulging in the easy game of 'hindsight', basing its argument upon retrospective explanations totally irrelevant in contesting the legality of the Regulation.

Finally, it is difficult to understand how its objective, namely, to restrain imports from Greece, could have been reconcilable with the fixing of minimum prices at a level lower than that of Community market prices.

Section II

There then remains a number of grounds which you have already dealt with fully in your judgment of 7 February 1973. The first of these is based upon the infringement of two general principles of law, that of proportionality and that of legal certainty:

— *Infringement of the Principle of proportionality,* in that the minimum-price system is alleged to have made conditions more difficult for importers without offering any compensating advantages.

This argument is barely distinguishable from the claim that the Regulation was inappropriate. We should remember, to quote once again from your judgment, that 'if the Commission, in relation to Greece, preferred a minimum-price system, it did so because in this matter it was bound to observe the obligations of the Assocation Agreement concluded between the Community and that State'.

Article 41 of this Agreement provides, by way of a protective measure, two forms of a minimum-price system:

— The first provides for a quota system when prices on the internal market fall below a minimum level;

— The secound corresponds exactly with the system employed in this case.

This was the only course of action open to the Commission; the other would

have necessitated a mechanism of periodical price quotations, which did not exist at the time the protective measure — which had to be adopted urgently — was decided upon.

The Commission was thus, in any event, bound to introduce a system for restricting imports from Greece, based upon minimum prices.

You observed in your judgment that the Commission could not be reproached for having acted illegally in fulfilling an obligation imposed upon it by the Association Agreement.

You added that it would moreover have been impossible for it to impose restrictions upon imports from all third countries with the single exception of Greece.

In consequence, in weighing the disadvantages for importers inherent in a minimum-price system against the significance of the measure taken with regard to third countries in relation to the various objectives of Article 39 of the Treaty, it cannot be said that the Commission exceeded the limits of its discretion in deciding in favour of the system actually applied.

— *Infringement of the principle of legal certainty,* in that the possibilities of circumventing the system are alleged to have introduced a measure of uncertainty into the import trade, by preventing buyers from negotiating under normal conditions.

This claim is unfounded since the minimum-price system did not constitute any threat to established rights, and the fact that some imports could be effected in a secret or illicit manner, not subject to those prices, was not likely to prevent importers from conducting business under normal conditions of competition, while adhering honestly to the Regulation.

Furthermore it is in the nature of a paradox to question the legality of a Community Regulation while implicity expressing regret at not having circumvented it.

The applicant company also adopts some of the arguments used in the Schroeder case, claiming, first, the existence of an order of priority in favour of quantitative restrictions and that, of the two measures provided for by Article 2 (1) of Regulation No 1428/71 of the Council, the total or partial suspension of imports would have limited the freedom of importers less severly than the minimum-price system. This order of priority is said to emerge also from Article 41 of the Association Agreement. The applicant asserts, moreover, that this system had a prohibitive effect.

As to the first point, we have recalled that the Commission, in implementing protective measures, was bound to observe the obligations arising from the Association Agreement and was bound, in relation to Greece, to resort to one of the two variations of the minimum-price system; you found that neither the text of Article 2 of Regulation 1428/71 nor that of Article 41 of the Association Agreement implies, by the enumeration of the measures provided therein, an order of priority as between those measures; that moreover it is in keeping with the objective of those measures that the authority should be able to choose that which seems to it to be the most suitable in view of the circumstances.

With regard to the claim that the Commission, by fixing minimum prices at too high a level, gave the system a prohibitive effect, you dismissed it, finding that the Commission had taken account of the various items involved in the calculation of the market price of tomato concentrates.

In order to calculate the relation between the Greek free-at-frontier offer price and Community market prices, the Commission rightly used the official data provided by the Italian Ministry of Agriculture, Italy being the Community's largest tomato producer. The applicant offers no fresh evidence here which would cast serious doubts upon the correctness of this evaluation; moreover,

you were of the opinion that the fact that offer prices for tomato concentrates, after the introduction of the contested measure, were alleged to be persistently below the minimum price of 34 u.a., which was not reached until June 1972, is not in itself sufficient proof of the illegality of the establishment of the minimum price. Furthermore, you noted that whereas internal prices fluctuated around 30 u.a. during the second half of 1971, they subsequently displayed a steady tendency to rise to the minimum price.

Finally, you found that, given the complex nature of the economic forecasts involved in the protective measure, it does not emerge that the Commission, in its evaluation of the prices to be taken into account, went beyond what might be considered necessary for the realization of the objectives as to the stabilization of markets and the maintenance of a fair standard of living for the Community's agricultural producers.

As regards the fact that following the implementation of these measures imports from Greece are alleged to have decreased by half, in particular in Italy, this is not sufficient proof, in the words of your judgment, of their 'prohibitive' nature.

We must therefore ask you, Members of the Court, to dismiss the applicant's case in its entirety and to reaffirm, in relation to most of the arguments put forward, your findings in the Schroeder case.

We would only add that, in the area of the Community's non-contractual liability deliberately chosen by the Wünsche Company, the absence of any factor likely to affect the legality of the contested Regulations is sufficient proof of the absence of any breach of duty, in the context of Article 215 of the Treaty.

As the applicant does not claim to have suffered any exceptional and special detriment, the question whether the Community could incur liability independently of any fault does not arise.

In these circumstances, we think it unneccessary to discuss the reality and extent of the alleged detriment.

We are therefore of opinion that you should:

— dismiss the application;

— order the applicant to pay the costs.