OPINION OF ADVOCATE GENERAL JACOBS

delivered on 30 April 1996 *

1. In this case the Court is asked to rule upon the validity of two regulations which imposed a minimum import price on frozen strawberries imported from Poland between July 1990 and September 1991. The Hauptzollamt (Principal Customs Office) Stuttgart-West levied a countervailing charge on imports effected by Binder GmbH and Co. International, the applicant in the main proceedings, which failed to comply with the minimum import price. In proceedings before the Finanzgericht (Finance Court) Baden-Württemberg Binder has contested the countervailing charge and has challenged the validity of the protective regulations. The Finanzgericht has referred to this Court the question of the validity of the regulations.

The relevant Community legislation

2. In the years before the protective measures in issue were applied, the Community had concluded a series of annual agreements with Poland, under which the Polish Government agreed to ensure that an average price for frozen strawberries imported by the Community from Poland was complied with. The last of those agreements was for the marketing year ending on 31 May 1990. However, as the Commission explains in its written observations, that agreement was affected by the collapse of the political system in the Central and East European countries in 1989. The liberalization of the economic system in Poland meant that the Polish authorities were unable to control exports and to guarantee that the average import price agreed with the Community was respected.

3. As a result of those political changes, the price of imported Polish frozen strawberries decreased in the first five months of 1990, with an accompanying increase in the volume of imports. At the request of the United Kingdom Government the Commission decided to take protective measures against the imports.

4. The provisions under which the Commission took the protective measures are contained in Council Regulation (EEC) No 426/86 on the common organization of the market in products processed from fruit and vegetables ('the basic Regulation'). [1] Article 1 of the basic Regulation provides that it shall apply to, *inter alia*, frozen strawberries. Article 15 makes frozen strawberries subject to an import licence. Protective measures may be taken under Article 18, which

* Original language: English.

1 — OJ 1986 L 49, p. 1.

provides as follows:

'1. If by reason of imports or exports, the Community market in one or more of the products specified in Article 1 is exposed or is likely to be exposed to serious disturbances which might 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.

The Council, acting by a qualified majority on a proposal from the Commission, shall adopt rules for the application of this paragraph and shall define the cases and the limits within which Member States may take protective measures.

2. Should the situation referred to in paragraph 1 arise, the Commission, acting either at the request of a Member State or on its own initiative, shall decide what measures are necessary and communicate them to the Member States; such measures shall be immediately applicable.

Requests received by the Commission from Member States shall be acted upon within 24 hours of receipt.

3. Any measure taken by the Commission may be referred to the Council by any Member State within three working days of the day on which they were communicated. The Council shall meet without delay. It may, acting by a qualified majority, amend or annul the measure in question.'

5. The second sentence of Article 18(1) was implemented by Council Regulation (EEC) No 521/77 laying down detailed rules for applying protective measures in the market in products processed from fruit and vegetables ('the implementing Regulation'). [2] The implementing Regulation was originally adopted to implement the identically worded Article 14 in Council Regulation (EEC) No 516/77. [3] When that regulation was replaced by the basic Regulation, the same implementing Regulation was maintained. The provisions relevant to the present case are found in Articles 1 and 2 of the implementing Regulation which read as follows:

2 — OJ 1977 L 73, p. 28. The regulation was repealed, with effect from 1 July 1995, by Council Regulation (EC) No 3290/94 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations, OJ 1994 L 349, p. 105; see Article 6 and Annex XIV.

3 — OJ 1977 L 73, p. 1.

'Article 1

In order to assess whether the Community market in one or more of the products listed in Article 1 of Regulation (EEC) No 516/77 is, by reason of imports or exports, experiencing or threatened with serious disturbances which might endanger the objectives set out in Article 39 of the Treaty, particular account shall be taken of:

(a) the volume of imports or exports effected or foreseen;

(b) the quantities of products available on the Community market;

(c) the prices for Community products on the Community market or the foreseeable trend of these prices and in particular any excessive upward or downward trend thereof in relation to prices in the years immediately preceding;

(d) where the abovementioned situation arises as a result of imports, the prices obtaining on the Community market, at a comparable stage, for products from third countries, and in particular any excessive downward trend in these prices.

Article 2

1. Should the situation referred to in Article 14(1) of Regulation (EEC) No 516/77 arise, the measures which may be taken under paragraphs 2 and 3 of that Article shall be:

(a) for products subject to the system of import certificates:

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

— the rejection of all or some of the applications for the issue of certificates which are being examined;

(b) ...

(c) for all products:

— 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,

...

2. The measures referred to in paragraph 1 may be taken only to such extent and for such length of time as is strictly necessary. They shall take account of the special situation of products which are already on their way to the Community. They may not extend to products other than those imported from or intended for third countries. They may be restricted to products imported from or originating in particular countries, to exports to particular countries or to particular qualities or types of presentation. They may be restricted to imports intended for particular regions of the Community or to exports from such regions.

...'.

6. From 31 July 1990 minimum import prices were applied to frozen strawberries imported from Poland, pursuant to the basic Regulation and implementing Regulation, by Commission Regulation (EEC) No 2198/90 on protective measures applicable to imports of frozen strawberries, frozen raspberries, provisionally preserved strawberries and provisionally preserved raspberries originating in Poland ('the first protective Regulation'). [4]

7. The preamble refers to competition from third countries at prices significantly below the prices at which the Community products can be marketed. It points out that imports for 1989 and the first six months of 1990 were significantly higher than the average for the last three years. The preamble concludes that 'in these circumstances the Community market is exposed to serious disturbances which might endanger the objectives set out in Article 39 of the Treaty', and that it is necessary to apply protective measures. The aim of those measures is 'to exclude the marketing of imported products at abnormally low prices'. That objective could be achieved by introducing minimum import prices to be respected on import into the Community. The level of those prices should be set taking account of the prices previously agreed with the country in question and the quality and presentation of the products concerned.

4 — OJ 1990 L 198, p. 53. The English version of the regulation erroneously refers to 'strowberries'; in Article 1 it even introduces the concept of 'provincially preserved strowberries', where it should read 'provisionally preserved strawberries'.

8. The first protective Regulation provides, in so far as material for the present case:

'Article 1

1. On import into the Community of frozen [strawberries] ... originating in Poland, the minimum import price shall be as set out below:

CN Code	Description of goods	Minimum import price (ECU/100 kg net)
0811 10 90	Frozen strawberries without added sugar	88
...		

2. Where the import price is less than the minimum price set out above, a countervailing charge equivalent to the difference between those two prices shall be levied.

Article 2

1. The minimum import price shall be respected when the import price expressed in the currency of the importing Member State is not less than the minimum import price applicable on the day on which the entry for release for free circulation is accepted.

...

Article 6

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

It shall apply until 31 December 1990.'

9. The first protective Regulation is silent as to the rate of exchange which should be used to convert the minimum import price into the currency of the importing Member State in order to make the comparison required by Article 1(2). However, by virtue of Articles 1 and 2 of Council Regulation (EEC) No 1676/85 on the value of the unit of account and the conversion rates to be applied for the purposes of the common agricultural policy, [5] agricultural conversion rates were automatically applicable to the first protective Regulation, so that the minimum import price was fixed at 88 'green' ECU/100 kg. Agricultural conversion rates differ significantly in some currencies from the open market conversion rates for the ECU.

Products	Agricultural conversion rates			
	ECU 1 = DM ...	Applicable until	ECU 1 = DM ...	Applicable from
Processed fruit and vegetables:				
...				
– other processed fruit and vegetables	2.34113	10.10.1990	2.35418	11.10.1990

11. With effect from 1 January 1991 the first protective Regulation was replaced by Commission Regulation (EEC) No 3797/90 on protective measures applicable to imports of certain semi-processed red fruits originating in Poland and Yugoslavia ('the second protective Regulation'). [8]

10. The agricultural conversion rates were set by Council Regulation (EEC) No 1678/85. [6] Those rates were adapted from time to time by the Commission to take account of realignments in the European Monetary System. The rates applicable to the first protective Regulation are given in Commission Regulation (EEC) No 2929/90: [7]

12. The preamble to that regulation refers to the circumstances under which the first protective Regulation was adopted. It adds that 'supplies of the products in question in Poland and Yugoslavia are currently considerable', and that:

5 — OJ 1985 L 164, p. 1.
6 — OJ 1985 L 164, p. 11.
7 — OJ 1990 L 279, p. 42; see Annex III.
8 — OJ 1990 L 365, p. 22.

'in the absence of an agreement with the exporting countries to comply with a free-at-frontier price for the remaining part of the current marketing year, large quantities would be imported into the Community at very low prices'.

It was therefore considered necessary to maintain the minimum import price system. The preamble also refers to the need to set minimum import prices taking account of quality differences between the various products, and to the need to set explicitly the conversion rate to be used for converting the minimum import price into national currencies.

13. The second protective Regulation provides, so far as material:

'Article 1

1. On import into the Community of:

— frozen strawberries and raspberries originating in Poland, ...

...

the minimum import price shall be as set out below:

CN Code ...	Description of goods	Minimum import price (ECU/100 kg net)
0811 10 90	Frozen strawberries without added sugar	
ex 0811 10 90	Whole fruit	92
ex 0811 10 90	Other	65
...		

2. Where the import price is less than the minimum price set out in paragraph 1, a countervailing charge equivalent to the difference between those two prices shall be levied.

3. The minimum import price shall be converted into the national currency of the Member State of release for free circulation using the conversion rate referred to in Article 3a of Commission Regulation (EEC) No 3152/85 [9] and applying on the date of acceptance of the declaration of release for free circulation.

4. The price set for the products indicated above as "other" shall apply to products other than whole IQF frozen fruit of Class I or "Extra" Class (strawberries) or "Extra" Class (raspberries), certified by a Polish or Yugoslav quality control body and accompanied on release for free circulation by a certificate indicating the quality class.

Products not satisfying the abovementioned conditions shall be released for free circulation provided they comply with the minimum price for the "whole fruit" category.

Article 2

1. The minimum import [price] shall be respected when the import price expressed in the currency of the Member State of release for free circulation is not less than the minimum import price applicable on the day on which the declaration of release for free circulation is accepted.

...

Article 5

This Regulation shall enter into force on 1 January 1991.

It shall apply until 31 March 1991.'

14. The second protective Regulation was extended until 31 July 1991 by Commission Regulation (EEC) No 810/91 [10] and until 25 September 1991 by Commission Regu-

9 — OJ 1985 L 310, p. 1.

10 — OJ 1991 L 82, p. 49.

lation (EEC) No 2152/91. [11] Both those regulations refer to the continued availability of major quantities of the products in question in Poland and in Yugoslavia.

15. The basis on which the minimum import price was to be converted into the currency of the importing Member State was made explicit in Article 1(3) of the second protective Regulation, to bring it into line with the practice used for the minimum import prices of other agricultural products. The conversion rate applied is the agricultural representative rate used to calculate monetary compensatory amounts. The relevant conversion rate was DM 2.35418 = ECU 1 on 1 January 1991. [12] The conversion rate on 1 August 1991 was the same. [13]

16. The combined effect of the minimum import price and agricultural exchange rates is illustrated by the following table, which refers to the average and minimum import prices in German marks at various times:

Frozen strawberries imported from Poland	ECU/100 kg	DM/100 kg
Agreed average price 1989/90 (at market rate applicable on 1.8.90)	88 ECU (open market rate)	181.95
Minimum import price to 10.10.90	88 green ECU	206.02
Minimum import price from 11.10.90 to 31.12.90	88 green ECU	207.17
Minimum import price on 1.1.91		
— whole fruit	92 green ECU	216.58
— other	65 green ECU	153.02
Minimum import price on 1.8.91		
— whole fruit	92 green ECU	216.58
— other	65 green ECU	153.02

17. The Commission notes that the system of minimum import prices continues to be applied today, in the framework of the agreements which the Community has concluded with Poland. [14]

11 — OJ 1991 L 200, p. 16.

12 — Commission Regulation (EEC) No 3830/90, OJ 1990 L 369, p. 51.

13 — Commission Regulation (EEC) No 2197/91, OJ 1991 L 207, p. 42.

14 — See Council Decision (29/228/EEC) on the conclusion by the European Economic Community of the Interim Agreement between the European Economic Community and the European Coal and Steel Community, of the one part, and the Republic of Poland, of the other part, on trade-related matters, OJ 1992 L 114, p. 1 (see the Annexes to Annexes VIIIb and Xc to the agreement); Decision of the Council and the Commission (93/743/Euratom, ECSC, EC) on the conclusion of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, OJ 1993 L 348, p. 1 (see again the Annexes to Annexes VIIIb and Xc to the agreement).

The facts and the referring court's questions

18. Between November 1990 and September 1991 Binder imported frozen strawberries from Poland. The Hauptzollamt Stuttgart-West, the respondent in the proceedings before the Finanzgericht, carried out a check and concluded that the prescribed minimum import prices were not being observed by Binder. It took the view that the contractual prices actually agreed were lower than the invoice prices (which corresponded to the minimum import prices) and that the difference was being made up by Binder being under-invoiced when importing fruits not subject to minimum prices. The Hauptzollamt therefore assessed countervailing charges by way of a levy payable by Binder, based on the protective Regulations, amounting in total to DM 2 024 043.10.

19. Binder instituted administrative opposition proceedings against the countervailing charges, in which it denies undercutting the minimum import prices. Those proceedings have not yet been determined. The Hauptzollamt dismissed an application to stay execution of the assessment.

20. Binder then applied to the Finanzgericht for suspension or stay of execution of the assessment by way of interim relief pursuant to Paragraph 69(3) of the German Finanzgerichtsordnung (Code of Procedure before the Finance Court). In those proceedings Binder argues that the protective Regulations are invalid.

21. On 6 July 1994 the Finanzgericht referred to this Court the issue of the validity of the protective Regulations. The Finanzgericht also suspended enforcement of the Hauptzollamt's assessment, security having been provided by Binder, pending the ruling of this Court.

22. The questions referred by the Finanzgericht are as follows:

'(1) Is Commission Regulation (EEC) No 2198 of 27 July 1990 on protective measures applicable to imports of frozen strawberries, frozen raspberries, provisionally preserved strawberries and provisionally preserved raspberries originating in Poland (OJ 1990 L 198, p. 53) invalid for the entire period of its application until 31 December 1990?

(2) Is Commission Regulation (EEC) No 3797/90 of 21 December 1990 on protective measures applicable to imports of certain semi-processed red fruits originating in Poland and Yugoslavia (OJ 1990 L 365, p. 22) invalid for the initial period of its application until

31 March 1991, for the extended period of its application until 31 July 1991 (Commission Regulation (EEC) No 810/91 of 27 March 1991 amending Regulation No 3797/90, OJ 1991 L 82, p. 49), and thereafter for the further extended period of its application until 25 September 1991 (Commission Regulation (EEC) No 2152/91 of 22 July 1991 amending Regulation No 3797/90, OJ 1991 L 200, p. 16)?'

The issues

23. Binder did not submit written observations in the proceedings before this Court; only the Spanish Government and the Commission did so. From the order for reference, it appears that Binder challenges the validity of the protective Regulations on three grounds, of which the third has three parts:

(a) The Commission was not entitled to take protective measures under the basic Regulation because, on the basis of the factors which the implementing Regulation required to be considered, the Community market was not exposed and was not likely to be exposed to serious disturbances.

(b) The protective Regulations fail sufficiently to state the reasons on which they are based, contrary to Article 190 of the Treaty.

(c) The protective Regulations violate the Community law principle of proportionality in that:

(i) the first protective Regulation, unlike the second protective Regulation, made no distinction between various classes of quality of imported frozen strawberries;

(ii) by linking prices to the 'green' ECU, the first protective Regulation contained a hidden rise in the minimum import price;

(iii) the protective Regulations lasted longer than necessary, because the value of imported produce from Poland rose above the minimum price before the end of the period of application of the Regulations.

24. Binder also provided an experts' report which deals with the questions of fact concerning the state of the Community straw-

berry market. [15] The report supports the view that the Community market was not exposed to serious disturbances.

Market disturbance

25. The first argument advanced by Binder is that the Commission was not entitled to take protective measures under the basic Regulation because, on the basis of the factors which the implementing Regulation required to be considered, the Community market was not exposed and was not likely to be exposed to serious disturbances. That precondition to the adoption of measures is found in Article 18(1) of the basic Regulation. Article 1 of the implementing Regulation gives four factors of which particular account should be taken in assessing market disturbance: (a) the volume of imports effected or foreseen; (b) the quantities available in the Community; (c) the prices for Community products; and (d) the prices for imported products.

26. The experts' report addresses each of those four factors in turn. As to (a), the report admits to the increase of imports from Poland but states that that was due to an increasing demand in the Community for high quality frozen strawberries for processing (for specialized products such as quality jams and yoghurts) which could not be satisfied by Community producers but required strawberries of the variety Senga Sengana. Senga Sengana strawberries were available in Poland, but only grown in very small quantities in the Community. Community Senga Sengana strawberries are processed fresh, without freezing, and so are said to be left undefended by the protective Regulations. As to (b), the report argues that the increase in imports from Poland was also due to an unsatisfied demand for frozen strawberries in the Community. The report argues that, following large harvests in 1987 to 1989 in which surpluses of fresh strawberries were frozen and sold to an expanding Community processing industry, fewer strawberries were cultivated in the Community, leaving the processing industry with demands that could not be satisfied by Community production. As to (c), the report states that contractually pre-arranged prices of Community strawberries for processing have remained broadly stable in the years 1989 to 1993. As to (d), the report asserts that the mean price of imported Polish frozen strawberries in 1990 and 1991 was higher than in 1989. Finally, the report argues that, because (in 1992) only 7% of the strawberries produced in the Community were destined for processing, imports of frozen strawberries intended for processing could never threaten a serious disturbance to the Community market.

27. Essentially, the experts' report appears to argue that the frozen strawberries imported

15 — Report by Dr H. C. Behr and Dr W. Ellinger of the Zentrale Markt- und Preisberichtstelle für Erzeugnisse der Land-, Forst- und Ernährungswirtschaft GmbH of February 1994, annexed to the order for reference.

from Poland were exclusively of the Senga Sengana variety for use in high-grade industrial processing; that Community production of Senga Sengana strawberries is negligible; and that the Community's processing industry could not diversify to other varieties of strawberries, and was thus wholly dependent on imports of the Senga Sengana variety.

28. The Commission and the Spanish Government seek to refute the arguments contained in the experts' report.

29. The Commission, in particular, emphasizes that in the first five months of 1990 the Polish Government was no longer able to ensure that the agreed average import price for frozen strawberries was complied with. Imports for those five months, at 23 499 tonnes, already exceeded the total volume of imports in 1989, which was 21 985 tonnes. [16] That increase was accompanied by a drop in the average price of Polish frozen strawberries from the agreed level of 88 ECU/100 kg to 64 ECU/100 kg for May 1990 and 60 ECU/100 kg for June 1990. Prices of frozen strawberries produced and sold in the Community also fell, as did the average price of all third country imports. In the light of that situation the Commission instituted protective measures by enacting the first protective Regulation. The Commission also points out that not all frozen strawberries imported from Poland were of the Senga Sengana variety. Account had to be taken of the situation prevailing in the whole of the market in frozen strawberries, and not just of certain varieties, for which there are no specific statistics. Moreover, the Commission takes the view that the Community's processing industry is not exclusively dependent on a specific variety of strawberries (Senga Sengana, as the report suggests), but only on a certain quality of strawberries. Other varieties, including those grown in the Community, may be of the same quality.

30. The Commission also contends that, in the field of agricultural policy, it enjoys as the competent authority on an issue such as the present one a wide measure of discretion in establishing the basis for its measures, with the implication that only a limited power of review can be exercised by the Court.

31. I do not think that that approach is altogether correct. It is of course correct to say that, where the Community authorities have to choose between different measures, which may involve competing policy objectives, they must be accorded a wide measure of discretion. In such cases it is certainly not for the Court to substitute its own assessment for theirs. Where however the adoption of the contested Community measure is made conditional upon certain findings of fact, the Court must in my opinion review those findings carefully, even if it will not normally hold such a measure unlawful unless it finds

16 — See the Eurostat figures at Annex 1 to the Commission's observations.

that there has been a manifest error in the assessment of the facts.

32. Both situations may arise in the same case, but they can and should be distinguished. Thus in *Wuidart and Others* the Court said: [17]

'However, with regard to judicial review of compliance with the conditions for implementing that prohibition [the prohibition against discrimination], it must be stated that, in matters concerning the common agricultural policy, the Community legislature has a broad discretion which corresponds to the political responsibilities imposed upon it by Articles 40 and 43 of the Treaty (see the judgment of 11 July 1989 in Case 265/87 *Schräder* [1989] ECR 2237, paragraph 22). More specifically, where the Community legislature is obliged, in connection with the adoption of rules, to assess their future effects, which cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question.'

33. Further, as the Court has recently held: [18]

'Where the evaluation of a complex economic situation is involved, [the competent authorities] enjoy a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it discloses manifest error or constitutes misuse of power or a clear disregard of the limits of its discretion on the part of that institution.'

34. On the present issue, the question is not whether the Commission has exceeded the limits of its discretionary powers, but whether it has committed a manifest error. It is relevant, on that question, in the light of the above statements by the Court, that the Commission had to act on the information available to it at the time, and had to assess both the existence or otherwise of a serious disturbance to the market, and the more speculative matter of whether the Community market would in future be exposed to serious disturbance. At the time of the adoption of the protective Regulations the Commission did not and could not have at its disposal the detailed information contained in the 1994 experts' report.

17 — Joined Cases C-267/88 to C-285/88 [1990] ECR I-435, paragraph 14 of the judgment.

18 — Joined Cases C-296/93 and C-307/93 *France and Ireland* v *Commission* [1996] ECR I-795, paragraph 31.

35. Moreover the Commission had to consider whether imports of Polish frozen strawberries would seriously disturb not only the frozen strawberry market, but the whole of the market for strawberries in the Community to the extent that there is competition between those products. [19] The Commission therefore had to consider disturbances, and the prospect of disturbances, to the market in frozen strawberries, in strawberries for processing, and the market in strawberries generally.

36. In mid-1990 the Commission was faced with the collapse of the Community's agreement with Poland and a substantial increase in imports of Polish frozen strawberries, accompanied by a drop in price of both Community and Polish imported frozen strawberries. Binder's arguments concerning unsatisfied Community demand are unconvincing and do not explain the decreasing prices. In a situation of unsatisfied demand, an increase in price would be expected.

37. The Eurostat figures which the Commission has produced show a marked deterioration, in the course of the first six months of 1990, in three of the four factors which the Commission had to take into account. Only the quantities produced in the Community remained stable; that was to be expected, since there is a substantial time-lag between planting and cultivation. In my opinion, the Commission was entitled to conclude that the Community market in frozen strawberries was exposed or was likely to be exposed to serious disturbances. The aim of protecting the Community strawberry industry was in principle consistent with Article 39 of the Treaty. Thus the Commission was entitled to take appropriate protective measures. The imposition of a minimum import price was in principle an appropriate means of accomplishing that aim, since it would have the effect of cancelling out the price advantage enjoyed by imported Polish strawberries, thus striking at the cause of the disturbance.

38. Moreover, some of the statements in the experts' report appear to be incorrect in the light of the information available to the Court. For example, the argument that the increase in imports was caused by a reduction in the supply of Community frozen strawberries is contradicted by the Eurostat figures supplied by the Commission. Those figures show a slight increase in trade in frozen strawberries within the Community in the first six months of 1990, as compared with the first six months of 1989, albeit at the expense of a reduction in price (in order to hold their own against the cheaper imports). The report itself admits that at the right price, Community fresh strawberry production can be sold for processing. Therefore, considering the strawberry market as a whole, imports of cheap Polish frozen strawberries could affect the market in both fresh and frozen Community strawberries, and could themselves lead to a reduction

19 — Case 95/80 *Dervieu-Delahais* v *Directeur Général des Douanes et Droits Indirects* [1981] ECR 317, paragraph 11 of the judgment.

in cultivation (which may explain the fall in production of frozen strawberries in the Community in 1991 while the protective measures were still in force).

39. Similarly, the point that the prices of Community strawberries remained stable in the years 1989 to 1993 must be seen in the light of the protective measures taken by the Commission: it suggests that those measures achieved the aim of protecting the Community market against disturbance.

40. The statement that the mean price of imported Polish strawberries in 1990 and 1991 was higher than in 1989 also appears to be incorrect. According to the Eurostat figures, the mean price of Polish frozen strawberries was lower in both 1990 and 1991 than in 1989, notwithstanding the protective measures.

41. Some of the arguments in the experts' report are anticipated in a letter dated 3 August 1990 from the Waren-Verein der Hamburger Börse e.V. (Commodities Association of the Hamburg Exchange) to the Bundesministerium für Ernährung, Landwirtschaften und Forsten (Federal Ministry of Food, Agriculture and Forestry), which asks the German Government to intervene to have the first protective Regulation suspended. The letter does not contain any facts which are not found in more detail in the experts' report. The letter does make the further argument that Community processors had pre-existing contracts for imports at prices which were compromised by the minimum import price. Although that argument is not mentioned in the order for reference, it is worth noting that the Court has previously dealt with the question of the legitimate expectations of traders in agricultural products. In *France and Ireland* v *Commission* the Court recalled: [20]

'Furthermore, whilst the protection of legitimate expectation is one of the fundamental principles of the Community, traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary powers will be maintained; this is particularly true in an area such as common organization of markets which involves constant adjustments to meet changes in the economic situation .... Traders cannot therefore claim to have a vested right to maintain an advantage which establishment of a common market organization has given them and which they have at a given time enjoyed ...'.

42. I therefore conclude that it has not been shown that the Commission made any manifest errors of assessment. On the contrary, it

20 — Cited at note 18.

would appear that there was a genuine threat of disturbance to the Community market, and it cannot be said that the adoption of the protective Regulations to counter such disturbance was unreasonable, in the light of the information available at the time.

Insufficient reasoning

43. Binder argues that the protective Regulations are invalid for failure to state the reasons on which they are based as required by Article 190 of the Treaty. It alleges that the Commission did not consider the position of the strawberry market as a whole and did not make it clear whether the individual criteria in Article 1 of the implementing Regulation were considered.

44. The Court has consistently held that the statement of grounds required by Article 190 of the Treaty must disclose the reasoning followed in such a way as to enable persons concerned to defend their rights and the Court to exercise its supervisory jurisdiction. However, details of all factual and legal aspects do not need to be given and account must be taken of practical realities and the time available for making the decision. Moreover, the requirement to state reasons must be assessed with regard not only to the wording of the measure in issue but also to its context and to all the legal rules governing the matter in question. [21]

45. In the present case the recitals to the first protective Regulation cite the failure of the price level agreement and the increase in volume and drop in price of imports of Polish frozen strawberries. The preamble states that frozen strawberries are imported at prices significantly below the prices at which Community products can be marketed, and that in those circumstances the Community market is exposed to serious disturbances which might endanger the objectives set out in Article 39 of the Treaty. The second protective Regulation contains similar reasoning.

46. In my opinion the decision to take protective measures is sufficiently reasoned in both protective Regulations. As has been shown above, the reasoning correctly identifies the factors which justified the decision. Moreover, as the present case demonstrates, the reasoning fully enables persons concerned to defend their rights and the Court to exercise its supervisory jurisdiction.

21 — Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16 of the judgment.

Proportionality

47. The protective Regulations are subject not merely to the general principle of proportionality, but also to the particularly stringent proportionality test laid down in Article 2(2) of the implementing Regulation. According to that provision, measures may be adopted 'only to such extent and for such length of time as is strictly necessary'. [22] Binder submits that the measures adopted by the Commission do not comply with those requirements.

48. Before examining Binder's specific arguments I would point out that, in general, the effect which the protective measures had on imports from Poland do not suggest that those measures were disproportionate. The Eurostat figures produced by the Commission show that in 1990 and 1991 imports of frozen strawberries continued to rise substantially, notwithstanding the minimum import price system. [23] On average, moreover, the system did not lead to an increase of the price of those imports compared with the prices charged in 1989.

22 — See paragraph 36 of my Opinion in Case C-24/90 *Werner Faust* [1991] ECR I-4905, Case C-25/90 *Wünsche* [1991] ECR I-4939 and Case C-26/90 *Wünsche* [1991] ECR I-4961.

23 — In 1989 imports amounted to 21 985 tonnes; in 1990: 41 540 tonnes; in 1991: 62 934 tonnes.

49. I now turn to the three specific arguments advanced by Binder under the head of proportionality.

(i) Differentiation as to quality

50. Binder argues that in the first protective Regulation the Commission should have fixed different minimum import prices for different quality classes of frozen strawberries. The Commission did indeed make such a differentiation in the second protective Regulation. The experts' report says that the majority of Polish imports were of class II strawberries which are 20% to 30% cheaper than class I strawberries.

51. The Commission however states that the agreement with Poland had set an average price and therefore quality certification had not been required (high quality imports balancing low quality imports to arrive at the average price), and that in July 1990 there was no reliable system for certifying the quality of Polish strawberries. From 1 January 1991 there was a system of official quality certificates and the Commission replaced the first protective Regulation with the second protective Regulation which set different minimum import prices for two different quality classes. At the hearing Binder disputed that no quality certification was available in July 1990. The Commission's reply

was to say that at that stage it was not possible for the Commission to rely on any quality certification system which would have been available.

52. I accept the Commission's argument that it was not required to set different minimum import prices for the various qualities of frozen strawberries if that proved impracticable. Article 2(2) of Regulation No 521/77 authorized, but did not require, the Commission to differentiate. [24] The Commission could set a single minimum import price in the first protective Regulation, and set it at a level sufficiently high to prevent substantial imports of lower quality strawberries.

(ii) Use of the 'green' rate of currency conversion

53. The first protective Regulation was silent as to the rate at which the minimum import price should be converted into the currency of the importing Member State in order to make the comparison with the actual import price. By virtue of Regulation No 1676/85, [25] agricultural exchange rates were automatically applicable.

54. The Commission set the minimum import price at the same level as that previously agreed as an average price in the agreement with Poland. That had been 88 ECU/100 kg, which at the market rate on 1 August 1990 was equivalent to 181.90 DM/100 kg. However, the minimum import price was set at 88 'green' ECU/100 kg, equivalent to 206.02 DM/100 kg. Thus, in its operation in Germany, the first protective Regulation set the minimum import price 13.3% above the previous average price (although the increase appears to have been far less in other Member States), whereas over the previous four years the average price had increased by, on average, only 1.4% per year. The aim of the first protective Regulation was stated to be 'to exclude the marketing of imported products at abnormally low prices'. [26]

55. Binder, supported by the experts' report, argues that 'imported products at abnormally low prices' would be expected to be cheaper than the previously agreed average

24 — See my Opinion of 14 March 1996 in Case C-295/94 *Firma Hüpeden & Co. KG* v *Hauptzollamt Hamburg-Jonas* [1996] ECR I-3375, and Case C-296/94 *Bernhard Pietsch* v *Hauptzollamt Hamburg-Waltershof* [1996] ECR I-3409, paragraph 56.

25 — Cited at note 5.

26 — See the third recital to the first protective Regulation.

prices, which allowed for imports at both higher and lower prices.

56. The Commission points out that the price rise was intentional: there had been no price rises under the previous agreements with Poland since 1988, the aim was to encourage higher quality imports, and the previous real prices had been higher than the average prices agreed with Poland.

57. That the minimum import price was not set at too high a level is in my view supported by the fact that imports from Poland have continued to rise from 1990 to 1993, as is shown by the Eurostat figures annexed to the Commission's observations. The Commission was not in any way required to maintain the average price level under the previous agreements. It could set the minimum price at a level appropriate for protecting the Community market, and the subsequent evolution in imports from Poland shows that the level chosen was indeed appropriate.

(iii) *Duration*

58. Finally, Binder argues that the protective Regulations lasted too long because the value of imported produce from Poland rose above 100 ECU/100 kg as early as the fourth quarter of 1990.

59. The Commission states that that price increase merely shows that the protective measure was having the intended effect. The Commission argues that, in the absence of an agreement with Poland on import prices, the suspension of the measure would have led to a fresh disturbance to the Community market. When the second protective Regulation expired it was replaced by an agreement with Poland on minimum import prices of strawberries destined for processing, which is still in force today.

60. In my opinion, given that the import price of frozen Polish strawberries did not increase on average during the period of operation of the Regulations as compared with the period before the imposition of protective measures [27] and in the absence of an agreement with Poland, the protective Regulations were not of a disproportionate duration.

27 — See Annex 1 to the Commission's observations.
1989 — monthly average ECU 86.1, weighted average (by volume) ECU 86.1
1990 — monthly average ECU 80.0, weighted average (by volume) ECU 76.4
1991 — monthly average ECU 76.5, weighted average (by volume) ECU 76.3

Conclusion

61. Accordingly, I am of the opinion that the questions referred by the Finanzgericht should be answered as follows:

(1) Consideration of the questions referred has disclosed no factor of such a kind as to affect the validity of Commission Regulation (EEC) No 2198/90 of 27 July 1990 on protective measures applicable to imports of frozen strawberries, frozen raspberries, provisionally preserved strawberries and provisionally preserved raspberries originating in Poland for the entire period of its application until 31 December 1990.

(2) Consideration of the questions referred has disclosed no factor of such a kind as to affect the validity of Commission Regulation (EEC) No 3797/90 of 21 December 1990 on protective measures applicable to imports of certain semi-processed red fruits originating in Poland and Yugoslavia or of Commission Regulation (EEC) No 810/91 of 27 March 1991 or Commission Regulation (EEC) No 2152/91 of 22 July 1991 which extended the period of application of Regulation No 3797/90 to 31 July 1991 and 25 September 1991 respectively.