1. The additional amounts provided for in Article 1 of Regulation No 796/81 adopting protective measures applicable to imports of preserved mushrooms and Article 1 of Regulation No 1755/81 adopting protective measures applicable to imports of preserved cultivated mushrooms must be levied not only on imports in excess of the quantities for which an import licence has been issued but also where it becomes apparent, following the release of such preserved products into free circulation in the Community, that the import licence accompanying them was not valid.

2. By fixing, by Regulations Nos 796/81 and 1755/81, additional amounts to be levied on imports of preserved mushrooms and preserved cultivated mushrooms at a flat rate corresponding to the cost price on the Community market of grade 1 preserved mushrooms originating in the leading producing country in the Community, the Commission infringed the principle of proportionality. It was not necessary to fix that amount at such a level in order to achieve the objective pursued by its introduction, namely the prevention of disturbances on the Community market, and thereby penalize importers of lower-grade mushrooms by imposing a disproportionate financial charge on them. That was not the objective pursued by the levy of the amount in question and in any event Article 2(2) of Regulation No 521/77 authorized the Commission to take account, *inter alia*, of the origin or quality of the mushrooms and if necessary, in the light of those factors, to fix additional amounts of different levels. Accordingly, Article 1 of both Regulation No 796/81 and Regulation No 1755/81 are invalid as regards the level of the additional amount fixed.

REPORT FOR THE HEARING
in Case C-26/90 *

I — Legislative background

1. Preserved mushrooms, being 'vegetables prepared or preserved otherwise than by vinegar or acetic acid' (subheading number 20.02 of the Common Customs Tariff), are covered by a common organization of the market, pursuant to Article 1 of Council Regulation (EEC) No 516/77 of 14 March 1977 on the common organization of the market in products processed from fruit and vegetables (Official Journal 1977 L 73, p. 1).

2. Regulation No 516/77 provides that imports into the Community of the products listed in Annex IX are to be subject to an

* Language of the case: German.

import certificate issued by the Member States (Article 10) and authorizes the Commission, in the event of serious disturbances on the market by reason of imports or exports of the products which it covers, to decide on measures necessary to remove the disturbances or the threat thereof (Article 14).

3. The Commission adopted Regulation (EEC) No 3429/80 of 29 December 1980 adopting protective measures applicable to imports of preserved mushrooms (Official Journal 1980 L 358, p. 66). According to Article 1 of that regulation, release into free circulation in the Community of preserved mushrooms within subheading 20.02 A of the Common Customs Tariff other than those referred to in Article 4 and exceeding the quantities laid down pursuant to Article 2(1) and (3) was to be subject, from 1 January 1981 to 31 March 1981, to a levy of an additional amount of ECU 175 per 100 kg net.

4. Regulation No 3429/80 was replaced by Commission Regulation (EEC) No 796/81 of 27 March 1981 adopting protective measures applicable to imports of preserved mushrooms (Official Journal 1981 L 82, p. 8), the provisions of which are largely the same as those of Regulation No 3429/80. Regulation No 796/81, which entered into force on 30 June 1981, also provided for and additional amount to be levied of ECU 175 per 100 kg in excess of the prescribed quantities.

5. A further regulation superseded Regulation No 796/81 — Regulation (EEC) No 1755/81 of 30 June 1981 adopting protective measures applicable to imports of preserved cultivated mushrooms (Official Journal 1981 L 175, p. 23). The latter regulation fixed the additional duty as ECU 160 per 100 kg for the period from 1 July to 30 September 1981.

6. Article 2 of each of the three regulations provides for determination of the quantitative limits applicable to import licences for the goods in question.

II — Facts and procedure before the national court

7. It is apparent from the order for reference that during the period from 26 June to 3 July 1981 Wünsche applied, under the simplified customs procedure available to it, for the release into free circulation of 90 000 cartons of goods declared as wild mushrooms in cans. The customs authorities granted that request. The declarations in respect of all the goods reached the Hauptzollamt on 6 July and 6 August 1981. Wünsche submitted import licences covering wild mushrooms from which the Hauptzollamt deducted the quantities imported. It then fixed the import duty in accordance with the application, that is to say at the rate of 23%, subject to verification.

8. After the goods had been released into free circulation, a dispute arose as to whether they were really wild mushrooms.

9. Following experts' reports, the Hauptzollamt took the view that the imported goods were cultivated mushrooms and, accordingly, that the imports had not been covered by a valid licence. In particular, the Hauptzollamt refused to accept, on the ground that it was out of time, an import licence in respect of cultivated mushrooms presented on a later date than the import application.

10. Relying on the combined provisions of Council Regulation (EEC) No 1697/79 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (Official Journal 1979 L 197, p. 1) and Regulations Nos 796/81 and 1755/81, the Hauptzollamt required Wünsche to pay additional duties amounting to DM 2 870 912.33 for the imports of June 1981 and DM 1 185 407.33 for the imports of July 1981.

11. After a complaint lodged by it was dismissed by decision of the Hauptzollamt, Wünsche brought an appeal before the Finanzgericht (Finance Court) and the latter quashed the Hauptzollamt's decision. The grounds given by the Finanzgericht were, essentially, that the Hauptzollamt was not justified in levying the additional amount because Regulations Nos 796/81 and 1755/81 did not provide for any measures in the event of irregular imports. The release into free circulation of the preserved mushrooms, even without an import licence, made it impossible to attain the purpose of the rules, which was to protect the Community market. Consequently, the levying of the additional amount was merely a penalty. Furthermore, the level of the additional amounts constituted a breach of the principle of proportionality.

12. The Hauptzollamt appealed on a point of law to the Bundesfinanzhof (Federal Finance Court). Considering that the outcome of the dispute depended on the interpretation and validity of Regulations Nos 796/81 and 1755/81, the Bundesfinanzhof, by order of 24 October 1989, stayed the proceedings and referred the following questions to the Court:

'1. Is an additional amount under Article 1 of Regulation (EEC) No 796/81 and Article 1 of Regulation (EEC) No 1755/81 also to be levied in the case of preserved mushrooms which have been released into free circulation without a valid import licence?

2. If Question 1 is answered in the affirmative, are Regulations Nos 796/81 and 1755/81 valid, in particular as regards the level at which the additional amount is fixed?'

13. In the grounds of the order, the Bundesfinanzhof first points out that the Finanzgericht did not establish whether the imported mushrooms were wild or cultivated. For that reason it proceeds on the assumption that the imported goods were cultivated mushrooms.

14. With regard to the interpretation of Article 1 of the three regulations, the Bundesfinanzhof considers that, in view of the wording and the objective of the regu-

lations, the additional amount must be levied where preserved mushrooms have been released into free circulation without a valid import licence.

15. As to the validity of the three regulations in question, the Bundesfinanzhof, referring to the Court's case-law (judgments in Case 345/82 *Wünsche Handelsgesellschaft* v *Federal Republic of Germany* [1984] ECR 1995, Case 77/86 *The Queen* v *Customs and Excise, ex parte National Dried Fruit Trade Association* [1988] ECR 757 and Case 291/86 *Central-Import Münster* v *Hauptzollamt Münster* [1988] ECR 3679), expresses doubts as to whether, in view of the excessively high level of the additional amounts, the principle of proportionality was observed. According to the Bundesfinanzhof, if the Court were to consider that that principle was observed, it would be necessary to examine whether the Commission correctly appraised the facts in fixing the additional amount.

16. The order for reference was received at the Court Registry on 24 January 1990.

17. Pursuant to Article 20 of the Statute of the Court of Justice of the EEC, written observations were submitted by the defendant in the main proceedings, Wünsche, represented by Klaus Landry, Rechtsanwalt, Hamburg, and the Commission of the European Communities, represented by its Legal Adviser, Dierk Booss, and Ulrich Wölker, a member of its Legal Service, acting as Agents.

18. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and, pursuant to Article 95(1) and (2) of the Rules of Procedure, to assign the case to the Sixth Chamber.

III — Written observations submitted to the Court

The scope of Regulations Nos 796/81 and 1755/81

19. As to whether or not the goods in question come under the abovementioned regulations, *Wünsche* states that those regulations concern protective measures for preserved mushrooms falling within subheading 20/02 A of the Common Customs Tariff. Consequently, it considers that the measures laid down by those regulations apply not only to preserved cultivated mushrooms but also to preserved wild mushrooms.

20. According to the *Commission*, on the other hand, there was never any question of wild mushrooms being covered by the contested regulations: Regulation No 1755/81 does not apply only to preserved cultivated mushrooms but also to other cultivated mushrooms in cans; as regards Regulation No 796/81, the Commission points out that where that regulation refers to mushrooms they are always cultivated mushrooms — the German word used is ambiguous (the other language versions being clearer: '*champignons de couche*' or '*champignons de Paris*' in French, the '*couche*' being the place where the mushrooms are cultivated).

Question 1 (the interpretation of Article 1 of Regulations Nos 796/81 and 1755/81)

(a) Literal interpretation

21. *Wünsche* states that it follows from the wording of Article 1 of each of the two regulations that the levy of the additional amount is linked solely to the release into free circulation of quantities of the product in excess of the quantities laid down in those regulations. Neither regulation makes any provision for the additional amount to be levied on imports already effected in respect of which no import licence was issued pursuant to Article 2 thereof.

22. The *Commission*, although it also considers that, according to the wording of Article 1 of both regulations, the conditions for the levy of the additional amount are that certain quantities are exceeded and the goods in question released into free circulation, points out, none the less, that the regulations do not make the levy of additional amounts subject to any limit in time. The existence of Regulation No 1697/79, permitting post-clearance recovery, also shows that, subject to certain limits, Community law is based on the principle of post-clearance recovery of duties which, without good reason, were not levied at the time of importation.

(b) Teleological interpretation

23. *Wünsche* submits that the objective and the aim of the regulations at issue support the above literal interpretation because it follows from the preambles to the regulations that the Commission intended to restrict the volume of imports. It considers that once the goods are released into free circulation the additional amount may not be levied because protection of the Community market can then no longer be achieved. According to Wünsche, it is clear that for the protection of the market all that mattered was those maximum quantities and not the question whether or not the import licences were issued, the latter merely being means of controlling and monitoring imports.

24. The *Commission*, on the other hand, states that the interpretation which it suggests above also derives from the purpose of the additional amount. According to the Commission, the levying of that amount, which is intended to protect the Community market against imports, can only perform that function if it can be recovered after clearance. Otherwise, it would be possible to circumvent the provisions of the contested regulations, particularly under the simplified procedure pursuant to which import licences need be submitted only after the goods have been released into circulation, so that an additional amount could never subsequently be levied.

25. According to the Commission, that possibility of post-clearance recovery of a duty also meets the requirements of the principle of equal treatment: the amount of the duty to be levied cannot be dependent on the time when it is discovered that the conditions for it to be levied are satisfied. Post-clearance recovery of that kind cannot be regarded as an unacceptable penalty. In

so far as the levying of a duty may generally be regarded as an 'economic penalty', the penalizing aspect of such a measure cannot, essentially, be denied, but it must be assessed only in accordance with the principle of proportionality.

26. The Commission adds that the outcome advocated by Wünsche would compromise the effectiveness of protective measures and would also threaten the overall functioning of the system of licences in that sector, because such an interpretation would mean that all importers — although running the risk of high additional amounts where total quantities were exceeded — would be able to import goods into the Community without submitting import licences and that the authorities would in all cases be reduced to establishing that the quantities had been exceeded and levying the additional amount after the goods had been imported.

27. *Wünsche* also states that the annual import quota fixed by the regulations in question was not exhausted and that, since the licences for the wild mushrooms had been issued without an additional amount being fixed, importers could presume that the quota had not yet been exceeded. No provision of the regulations had been circumvented. As a result, since the additional amount must be levied on goods released into free circulation in excess of those quotas, there was no irregular import and the possibility of levying those amounts was precluded.

28. The *Commission* points out in that respect that Article 1 refers to the 'quantities laid down pursuant to Article 2', which, in its view, refers to the import licences; in other words, observance is required not of the total quantities indicated in that article but rather of the import licences issued on the basis of those total quantities.

29. *Wünsche* suggests the following answer:

'The levy of the additional amount is unconnected with the question whether the imported consignment released into free circulation gave rise to the issue of a valid import licence. On the contrary, an additional amount can be levied only to the extent to which the imported consignment in question exceeds the maximum quantity for the quarter concerned and the maximum annual quantity. As regards the maximum quarterly quantities and the maximum annual quantities, account must be taken of the licences issued for the import of preserved wild mushrooms.'

30. The *Commission*, believing that the first question should be answered in the affirmative, suggests the following answer:

'An additional amount within the meaning of Article 1 of Regulations Nos 796/81 and 1755/81 must also be levied in respect of preserved mushrooms which have been released into free circulation without a valid import licence.'

Question 2 (the validity of Regulations Nos 796/81 and 1755/81)

(a) The Court's case-law

31. *Wünsche* claims that both the regulations at issue are invalid. It considers that the judgment in the *Wünsche* case, referred to above (Case 345/82), in which the Court found no factor of such a kind as to affect the validity of Regulation No 3429/80 (the Court has not delivered any judgment concerning Regulations Nos 796/81 and 1755/81), does not prevent the Court from again examining the validity of that regulation. In its judgment in that case, the Court did not consider the level of the additional amount and did not examine the validity of Regulation No 3429/80 from that point of view.

32. According to Wünsche, the validity of the regulations at issue should be examined in the light of the judgments in the *National Dried Fruit Trade Association* case (Case 77/86) and the *Central-Import Münster* case (Case 291/86), cited above, in which, in analogous circumstances, Commission Regulation (EEC) No 2742/82 of 13 October 1982 on protective measures applicable to imports of dried grapes (Official Journal 1982 L 290, p. 28) was declared invalid in so far as it had established a countervailing charge at a fixed rate equal to the difference between the minimum price and the lowest world-market price.

33. The *Commission* considers that the validity of the regulations at issue, examined in the light of the judgments in those two cases, leaves no room for dispute. According to the Commission, the abovementioned judgments concerned the invalidity of Regulation No 2742/82 in so far as that regulation fixed a countervailing charge on imports from non-member countries.

34. According to the Commission, the cases decided by the Court in 1988 differ from this case on the following points:

(a) the countervailing charge is radically different from the additional amount at issue in this case;

(b) the purpose of the countervailing charge on imports of dried grapes was to ensure the observance of the minimum import price, whilst in this case the aim pursued is to prevent the entry into the Community market of goods in excess of a specified quantity;

(c) the countervailing charge was applied to all imports where the minimum price was not observed, whilst in this case the quota quantities are exempt from the additional amount;

(d) the countervailing charge affected imports of dried grapes even where there was little difference between the Community price and those of non-member countries (that is to say even if the objective of the regulation had already been virtually achieved), whilst in this case the difference in price is generally very significant (the aim in view being entirely different). The Commission concludes that in view of those differences the abovementioned judgments of the Court cannot be relied on to call in question the validity of the regulations at issue in this case.

(b) The principle of proportionality

35. *Wünsche* considers that the laying down of an additional amount of ECU 175 (Regulation No 796/81) and ECU 160 (Regulation No 1755/81) per 100 kg is contrary to the principle of proportionality; consequently, the regulations at issue are invalid, because an additional amount of that level was not necessary for the effective achievement of the objective pursued by the protective measures. Even the idea of deterring imports did not justify the Commission's fixing the additional amount at whatever level it chose, because it was in any event required to observe the principle of proportionality. Furthermore, according to Wünsche, the Commission should reflect on the way in which the additional amount would affect the importer by taking into consideration the effect of the additional amount actually levied.

36. The *Commission* considers that it did observe the principle of proportionality because it did not announce a complete prohibition of imports but adopted a less restrictive measure — even though a prohibition was involved in certain cases — which facilitated adaptation to the requirements of the market. That was the finding made in the judgment in the *Wünsche* case (Case 345/82, cited above) and the Court did not dispute the Commission's assessment in that instance.

(c) The possibility of adopting less restrictive measures

37. According to *Wünsche* the additional amount is an excessively restrictive measure and is not in conformity with the provisions of Regulations Nos 516/77 and 521/77, which require the adoption of the necessary measures.

38. The *Commission* is opposed to such an interpretation:

(a) it takes the view that post-clearance recovery forms an integral part of the system of duties, with all the legal and economic consequences which follow. If the levy of a duty is thus lawful in itself, the collection of duty after clearance cannot change that fact;

(b) the Commission points out that anyone contravening an import prohibition risks a heavy fine, which may be imposed only in the case of fault (intentional or through negligence), whilst on the other hand the additional amount does not imply any criticism of the importer;

(c) the Commission claims that, even in the absence of fault constituting a criminal offence, the importer is not unaware of the strict rules regarding imports and must exercise prudence in order to avoid the risk of breaching those rules. Being objectively responsible for the proper conduct of import operations, he most, accordingly, assume the risks and the responsibility resulting from the choice and conduct of his partners and also from any difference — which may, moreover, be difficult to establish — between the goods declared and the goods actually delivered.

39. The Commission adds that Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of

import or export duties (Official Journal 1979 L 175, p. 1), even though not applicable to this case, shows the extent of the commercial risk assumed by the importer, mentioned above. Consequently, the Commission considers that the level of the additional amount fixed is not open to dispute.

(d) The level of the additional amount

40. According to *Wünsche*, the additional amount should be fixed at a level such as to offset a price advantage. That amount could be determined according to the difference between the cost of preserved mushrooms produced within the Community and the import price of comparable products from non-member countries, but should not exceed that difference. It thus considers that it was all the more unlawful to rely exclusively on the highest production costs within the Community, namely those of grade 1 French products, and to apply such an inflated uniform additional amount to imports of grade 3 products too — the cost price of the Chinese product, even according to Commission's findings, was not less than the cost price of the French product and was greater than the cost price of the Netherlands product. Furthermore, Wünsche disputes the accuracy of the cost prices on which the Commission relied in fixing the additional amount and claims that the Court should undertake inquiries to determine cost prices and production costs in the Community.

41. The *Commission* states that, not being permitted to choose an arbitrary level, it chose an amount fixed according to objective criteria. According to the Commission, an additional amount equal to the difference between the price in the exporting country and the price within the Community could not suffice because, at such a level, the additional amount would only have brought the price of the imported goods into line with the level of Community prices. At such a level, disturbances on the market could not be prevented. It was for that reason that the amount fixed at ECU 175, and then ECU 160, per 100 kg corresponded to the cost price of grade 1 preserved mushrooms (the most significant category of Community production) originating in France (the leading producer in the Community) including delivery to the market in Germany (the main purchaser). It was in that way that the desired prohibitory effect was achieved.

42. *Wünsche* suggests that the second question should be answered in the negative.

43. The *Commission* suggests that the second question should be answered as follows:

'Examination of the questions referred to the Court has disclosed no factor of such a kind as to affect the validity of Commission Regulations Nos 796/81 and 1755/81'.

C. N. Kakouris
Judge-Rapporteur