JUDGMENT OF THE COURT (SECOND CHAMBER)
6 MAY 1982 [1]

Wünsche Handelsgesellschaft v Federal Republic of Germany (reference for a preliminary ruling from the Bundesverwaltungsgericht)

(Protective measures — Preserved mushrooms)

Case 126/81

Agriculture — Common organization of the markets — Products processed from fruit and vegetables — Protective measures applicable to imports of preserved mushrooms — Commission's discretion — Regulations Nos 1412/76 and 2284/76 — Validity
(Commission Regulations Nos 1412/76 and 2284/76)

In view of the situation on the market in question, it cannot be denied that the Commission kept within the limits of its discretion in considering, when it adopted Regulations Nos 1412/76 and 2284/76 laying down detailed rules for applying protective measures applicable to imports of preserved mushrooms, that the protective measures introduced in 1974 should not be abolished.

In Case 126/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesverwaltungsgericht [Federal Administrative Court] for a preliminary ruling in the proceedings pending before that court between

WÜNSCHE HANDELSGESELLSCHAFT, Hamburg,

and

FEDERAL REPUBLIC OF GERMANY,

represented by the Bundesamt für Ernährung und Forstwirtschaft [Federal Office for Food and Forestry], Frankfurt am Main, on the validity of certain

1 — Language of the Case: German.

Community protective measures relating to imports of preserved mushrooms from non-member countries,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, A. Chloros and F. Grévisse, Judges,

Advocate General: S. Rozès
Registrar: M. Petersen, Legal Secretary

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and written procedure

1. The plaintiff in the main action, Wünsche Handelsgesellschaft, an undertaking specializing in the import trade, markets *inter alia* preserved mushrooms from non-member countries. By letter of 9 July 1976 it applied to the defendant in the main action for the issue of a licence for the importation of 1 000 tonnes of preserved mushrooms from Taiwan. By notice of 15 July 1976 the defendant rejected that application on the basis of the provisions of Regulation No 2107/74 of the Commission of 8 August 1974 laying down protective measures applicable to imports of preserved mushrooms (Official Journal 1974, L 218, p. 54).

Its objection was rejected and Wünsche then brought an action before the Verwaltungsgericht [Administrative Court] Frankfurt. After the protective measures were abolished with effect from 1 January 1977, the licence applied for was issued. Nevertheless, Wünsche pursued the proceedings in the main action and sought a declaration from the court that the defendant was obliged to grant its application of 9 July 1976. Wünsche takes the view that the

conditions justifying the adoption of protective measures ceased to exist as from 1 July 1976.

By judgment of 25 July 1978 the Verwaltungsgericht dismissed the action as unfounded, taking the view that the Commission had lawfully adopted the protective measures.

Wünsche then lodged an appeal before the Bundesverwaltungsgericht [Federal Administrative Court], contending that the Verwaltungsgericht Frankfurt had failed to apply correctly the Community law on the subject.

2. Article 1 of Regulation No 2107/74, as amended by Commission Regulation No 1869/75 of 22 July 1975 (Official Journal 1975, L 190, p. 23) provides for 1976 that the import of preserved mushrooms shall be subject to the submission of an import licence, for which application must be made before the beginning of the quarter to which it relates.

Under Article 3 of the same regulation, the Commission reserves the power to limit imports to a fixed percentage of a reference quantity, having regard to the evolution of the situation on the market:

"(1) The Commission shall lay down the quantities of products for which the licences are issued by fixing a percentage to be applied to the reference quantity laid down each month for each particular applicant.

This reference quantity shall be equal to:

The quantity of preserved mushrooms imported by the Community in 1973 during each month specified in the application ...".

The percentage in question was fixed by Commission Regulations Nos 1412/76 and 2284/76 of 18 June and 21 September 1976 fixing for purposes of application of the systems of import licences for preserved mushrooms the percentage applicable to the reference quantity (Official Journal 1976, L 158, p. 37 and L 258, p. 5), at 70% of the reference quantity for imports in the course of the third quarter of 1976, and at 100% for imports in the course of the fourth quarter of 1976. In the second quarter of 1976, the percentage had been 55%, and in the first quarter of the same year it had been 40%.

In its Regulation No 3096/76 of 17 December 1976 (Official Journal 1976, L 348, p. 26), the Commission then definitively repealed Regulation No 2107/74 with effect from 1 January 1977.

The last two recitals in the preamble to Regulation No 1412/76 are worded as follows:

"... the application of the protective measures under the conditions defined in the said regulations had led, in the case of cultivated mushrooms, to a certain recovery in the prices of Community and third country products and to a marked decrease within the Community;

... in this situation the percentage applicable to the reference quantity for imports of preserved cultivated mushrooms from third countries should be increased while ensuring that the Community market does not undergo serious disturbances due to these imports".

The direct legal basis of the contested Regulation No 2107/74 is Regulation No 1427/71 of the Council of 2 July 1971 introducing protective measures for

products processed from fruit and vegetables (Official Journal, English Special Edition 1971 (II), p. 468). It was replaced by Regulation No 1927/75 of the Council of 22 July 1975 concerning the system of trade with third countries in the market and products processed from fruit and vegetables (Official Journal 1975, L 198, p. 7). Article 7 (1) thereof reproduces the basic rules contained in Regulation No 1427/71 on the introduction of protective measures:

"(1) If, by reason of imports or exports, the Community market in one or more of the products specified in Article 1 (1) is 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 third countries until such disturbances or the threat has ceased.

The Council, acting on a proposal from the Commission in accordance with the voting procedure laid down in Article 43 (2) of the Treaty, 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".

3. Article 1 of Regulation No 1928/75 of the Council of 22 July 1975 laying down detailed rules for applying protective measures in the market in products processed from fruit and vegetables (Official Journal 1975, L 198, p. 11) provides that:

"In order to assess whether the Community market in one or more of the products listed in Article 1 of Regulation (EEC) No 865/68 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 above-mentioned 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".

Should the situation referred to in Article 7 (1) of Regulation No 1927/75 of the Council arise, Article 2 (1) (a) of Regulation No 1928/75 permits the refusal to issue import certificates for products from non-member countries. However, according to the first sentence of Article 2 (2) those measures "may be taken only to such an extent and for such length of time as is strictly necessary".

4. Since it considered that the dispute pending before it raised questions of Community law, the Bundesverwaltungsgericht decided to stay the proceedings pursuant to Article 177 of the EEC Treaty and it referred to the Court the following question:

"Did Regulation (EEC) No 2107/74 of the Commission of 8 August 1974 laying

down protective measures applicable to imports of preserved mushrooms (Official Journal 1974, L 218, p. 54) infringe the combined provisions of Article 7 (1) of Regulation (EEC) No 1927/75 of the Council of 22 July 1975 concerning the system of trade with third countries in the market in products processed from fruit and vegetables (Official Journal 1975, L 198, p. 7) and Article 2 (2) of Regulation (EEC) No 1928/75 of the Council of 22 July 1975 laying down detailed rules for applying measures in the market in products processed from fruit and vegetables (Official Journal 1975, L 198, p. 11) in so far as it was retained in force after 30 June 1976"?

5. The order of the Bundesverwaltungsgericht referring the question to the Court was received at the Court Registry on 25 May 1981.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the defendant in the main action, represented by D. Ehle, Rechtsanwalt, of Cologne, and by the Commission, represented by M. Hilf, a member of its Legal Department.

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. However, the Court asked the parties to the preliminary ruling proceedings to reply in writing to certain questions before the hearing.

By order of 9 December 1981 the Court decided to assign the case to the Second Chamber.

II — Written observations submitted to the Court

1. *Wünsche* states that the serious disturbances on the market in preserved mushrooms had ceased to exist from 1 July 1976 at the latest. On the German market there had been a shortage rather than a disturbance. On the different criteria for assessment set out in Article 1 of Regulation No 1928/75, Wünsche makes the following observations.

Volume of imports effected or foreseen

The statistics relating to imports from Taiwan showed the following trend: 15 808 tonnes in 1974; 18 174 tonnes in 1975; 7 830.8 tonnes in 1976.

In 1976 the total deliveries therefore fell to about 40% of the total for the previous year. The last consignment cleared was sold and released to the market during the marketing year 1975/76 in Taiwan on 1 April 1976. Apart from about 350 tonnes which remained in stock, Taiwan was unable to supply any more preserved mushrooms until the new harvest, which takes place in the month of December and in respect of which imports cannot begin until February or March at the earliest.

With regard to Korea, the import statistics are as follows: 6 102.5 tonnes in 1974, 2 698.9 tonnes in 1975 and 1 898 tonnes in 1976.

A considerable decrease in deliveries started to become discernible during the first half of 1976. From June 1976 onwards, there had been no known offers from Korea.

The statistics concerning imports from the People's Republic of China are as follows: 21 568.4 tonnes in 1974; 16 291.4 tonnes in 1975, and 16 183.7 tonnes in 1976. In 1976 the People's Republic supplied about the same quantity as in 1975.

As a result of this inability of non-member countries to furnish supplies, some importers even experienced difficulties in using to the full the import certificates with which they had been issued for the third and fourth quarters of 1976.

According to Wünsche, from 1 July 1976 at least, it is therefore certain that there was no longer a threat of serious disturbances by reason of imports. In reality that threat had ceased to exist as early as 1 March 1976.

Quantities of products available on the Community market

Only France was, at the time in question at least, an exporter on the Community market. In the main the Netherlands produced only third-grade bottled mushrooms which were sold as a speciality. Before February 1977 Wünsche received no offers from French suppliers. Other German wholesalers did not receive any offers from France until the second and third quarters of 1977. Moreover, as from February 1976 there had been some difficulties with regard to the continuity of deliveries from France.

According to Wünsche, all those factors show that, at least so far as the period from 1 July to 31 December 1976 is concerned, the quantities offered on the internal Community market were either non-existent or, at any rate, inadequate.

Prices for Community products on the Community market

From July/August 1974 to July/August 1976, prices rose by 90% and 100%. On the German market the protective measure introduced in 1974 therefore resulted in a disproportionate rise in the price of preserved mushrooms in the Community, which did not correspond with the objectives which it was designed to preserve. Between November/December 1975 and June/July 1976, prices rose by about 30%. In Wünsche's opinion, the excessive price rises should have been thwarted by the rapid removal of the protective measures.

Prices obtaining on the Community market for products from non-member countries

In 1976 there was again an increase in the price of products from non-member countries by comparison with both 1974 and 1975. In relation to 1974, prices for preserved mushrooms imported from Taiwan increased in part by as much as 80%. By comparision with 1975, the price rise should be assessed at about 40%. At the Commission's request, Taiwan increased by 15% the price of quantities released for the first quarter of 1976. As a result, prices again underwent an official increase of 25%. The Korean and Chinese producers of preserved mushrooms adopted that level of prices.

According to Wünsche, in the absence of serious disturbance or threat of such disturbance, the objective relating to producers set out in Article 39 (1) (a) to (c) of the Treaty could not be endangered. On the other hand, the Commission infringed the objectives concerning the protection of the consumer, stated in Article 39 (1) (d) to (e) of the Treaty: the availability of supplies of preserved mushrooms to the consumer was not ensured and the consumers were no longer able to buy

preserved mushrooms at reasonable prices.

The Commission ought to have confined its action to the pursuit of the objectives set out in Article 39 of the Treaty. By maintaining the protective measures after 1 July 1976, however, it adopted a unilateral protectionist policy, not covered by Article 39 of the Treaty, in favour of French mushroom producers and the French preserved mushroom industry.

Even if the Commission enjoys a wide discretion, in regard to the application of Article 7 of Regulation No 1927/75, within the framework of Articles 39 and 40 of the Treaty and of Regulation No 1928/75, it clearly misused that discretion in this case: the factual preconditions required even by only one of the criteria for assessment laid down in Article 1 of Regulation No 1928/75 no longer existed by 1 July 1976 at the latest.

Wünsche points out that the protective measures ought to have been abolished as soon as the disturbances on the market had ceased. In this regard it refers to the fourth recital in the preamble to Regulation No 1927/75, to Article 7 (1) of that regulation, to the first recital in the preamble to Regulation No 1925/73 and also to Article 2 (2) thereof.

The Commission could not comply with the principle stated therein by permitting the depletion, to the extent of 70%, and then of 100%, of the quantities stated on the application for licences: it ought to have been possible to avoid any effects, other than those which were desired, by the swift abolition of the protective measures. The most serious disadvantages for Wünsche was the fact that, since it did not have enought import certificates issued in its own name, it was compelled to have certificates issued to other undertakings transferred to it, in order to import the goods.

2. The *Commission* observes that its conduct must be assessed by reference to the moment when the protective measures were decided upon (see paragraph 24 of the judgment of 5 May 1981 in Case 112/80 *Dürbeck* v *Hauptzollamt Frankfurt am Main* [1981] ECR 1095). It considers that it enjoys a wide discretion with regard to the assessment of economic events. It remains free to take into account factors other than those listed in Article 1 of Regulation No 1928/75. It must give special consideration to those factors, but may also adopt measures where just one of the indicators discloses the existence of a serious threat. It must in addition limit or abolish the effect of the measures adopted once they are no longer absolutely necessary. The facts as stated by Wünsche do not correspond to the situation on the market as it appeared to the Commission before the entry into force of the contested measure. The assessments made by the Commission at that time were confirmed by the later trends on the market. The Commission examines next whether the circumstances laid down in Article 1 of Regulation No 1928/75 were present when it adopted the contested rules.

Volume of imports effected or foreseen

On the basis of statistics from the Federal Statistics Office, the Commission notes that imports into the Federal

Republic of Germany from non-member countries amounted to about 20 000 tonnes a year before 1972, 37 633 tonnes in 1973, and 20 434 tonnes in the first half of 1974. The protective measures adopted on 30 August 1974 were not capable of preventing the import of 44 140 tonnes in 1974 and 37 340 tonnes in 1975. Those measures began to have effect in 1976, when 26 797 tonnes were imported. The Commission considers that if it had abolished those measures for the third and fourth quarters of 1976, imports for that year would have been as high as those for 1974. In the following year, the stabilization achieved was demonstrated by the figure of 29 905 tonnes, before a sudden increase, in May 1978, in applications for import licences, for 40 914 tonnes, made it necessary to adopt new protective measures.

Quantities of products available on the Community market

The Commission examines the stocks of the principal suppliers, France and the Netherlands, with regard to France on the basis of statistics prepared by the Association Nationale Interprofessionnelle des Fruits et Légumes Transformés [The National Federal Association for products processed from fruit and vegetables]. As regards France, the highest level of stocks in 1974 was 19 900 tonnes, not appreciably in excess of that of the previous years. In 1975, the level of 24 726 tonnes was substantially higher than the highest stock level for the previous years. The effect of the protective measures was to reduce stocks to 8 306 tonnes by the end of June 1976. At the end of 1976, the stocks available, which still amounted to 5 445 tonnes in October and 4 110 tonnes in December, made it possible to relax the protective measures and even to abolish them on 1 January 1977. During the two following years, stocks in France remained between 5 000 and 10 000 tonnes and they did not again reach the pre-1974 level.

Stocks in the Netherlands reached about 4 500 tonnes at the beginning of 1976 and 3 000 tonnes in the middle of 1976 and fell to about 2 000 tonnes towards the end of 1976.

The Commission concludes that the known figures for stocks in June 1976 did not disclose a shortage on the market. Even at the end of 1976, Community stocks still amounted to more than 6 000 tonnes.

Prices for Community products on the Community market

The documents available to the Commission show that in France the cost price of a tin of 0.5 kg of first-grade preserved mushrooms fluctuated between DM 1.30 and DM 1.40 until the middle of 1974. As a result of pressure from products from non-member countries which were imported in 1974, the market price temporarily dropped to DM 1.15 —1.20 and DM 1.25, to rise again to DM 1.45 at the end of 1975, during the application of the protective measures. The market price was between DM 1.45 and DM 1.50 until June 1976. Because of the persistent pressure on the market of products from non-member countries, however, the Commission at that time considered that it was not yet necessary totally to abolish the protective measures, but rather to relax them, in view of the discernible rise in prices. Recourse to 70 or 100% of the reference quantity for imports from 1973 until the end of 1976 resulted in a new rise in prices until the end of 1976. Average prices on the German market calculated by the Federal Statistics Office retro-

actively confirmed the prices regarded as representative by the Commission. The rise in the level of prices within the Community corresponded with the purpose of the protective measures applied.

Whereas the average prices on the German market for imports from France had always been above DM 1.70 per 0.5 kg, until 1971, those prices dropped below DM 1.50 from 1972 to 1975. Since products from non-member countries had been putting the Community market under pressure, as from 1973 in particular, they at once impeded any normalization of prices. The statistics demonstrate that after the protective measures were discontinued it was possible from 1977 to 1979 to attain once again average prices of DM 2.13, DM 1.89 and DM 1.98.

The documents in the Commission's possession do not confirm the existence of a "rise of 90 or 100%", such as the appellant in the main action alleges in relation to prices in 1974. Moreover, such a rise does not correspond with the information in the possession of the Federal Statistics Office which shows an average price in 1974 of DM 1.31 per 0.5 kg and in 1976 of DM 1.81 per 0.5 kg, amounting to a rate of increase of 38%.

Prices obtaining on the Community market for products from non-member countries

The prices of preserved mushrooms from the main non-member countries, that is to say, Taiwan, the People's Republic of China and South Korea, of which the Commission was notified in the middle of 1974, temporarily dropped from DM 1.20 and above to about DM 1.10. As a result the offer price was about 20 to 30% lower than the cost price obtaining in the Community industry and led to a collapse in the price of Community products.

In the middle of 1976, the prices asked for products from non-member countries were still about 10% lower than the cost price of Community products. It was therefore necessary to maintain the protective measures. The average price for the whole of the year in question was appreciably lower than the average price for Community products, although towards the end of the year a tendency towards convergence could be detected. The earlier abolition of the protective measures would have jeopardized that development. The virtual equality in prices achieved in 1977 may be attributed *inter alia* to the discipline in the matter of prices observed by the non-member countries.

On the basis of the foregoing considerations, the Commission suggests that the question posed by the Bundesverwaltungsgericht should be answered as follows:

"Consideration of the question referred to the Court for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of Commission Regulation (EEC) No 2107/74, No 1412/76 and No 2284/76".

III — Oral procedure

At the sitting on 4 February 1982, oral argument was presented by the following: D. Ehle, Rechtsanwalt of Cologne, for Wünsche Handelsgesellschaft, and M. Hilf, a member of the Commission's Legal Department, acting as Agent, assisted by M. Van Tyghem, expert, for the Commission of the European Communities.

The Advocate General delivered her opinion at the sitting on 25 March 1982.

Decision

1 By order of 25 March 1981 which was received at the Court on the following 25 May, the Bundesverwaltungsgericht [Federal Administrative Court] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the validity of Regulation No 2107/74 of the Commission of 8 August 1974 laying down protective measures applicable to imports of preserved mushrooms (Official Journal 1974, L 218, p. 54), and also Commission Regulations No 1412/76 of 18 June 1976 and No 2284/76 of 21 September 1976 fixing for purposes of the application of the system of import licences for preserved mushrooms the percentage applicable to the reference quantity for imports in the third and fourth quarters of 1976, respectively (Official Journal 1976, L 158, p. 37 and L 258, p. 5).

2 Those regulations fall within the context of the Community rules on the common organization of the market in the sector of products processed from fruit and vegetables. During the period in question, the introduction of protective measures in this sector was governed first by Regulation No 1427/71 of the Council of 2 July 1971 (Official Journal, English Special Edition 1971 (II), p. 468) and then by Regulation No 1927/75 of the Council of 22 July 1975 (Official Journal 1975, L 198, p. 7), of which Article 7 (1), reproducing the wording of Article 1 (1) of Regulation No 1427/71, reads as follows:

"If, by reason of imports or exports, the Community market in one or more ... products ... is 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 third countries until such disturbances or the threat thereof has ceased".

The second subparagraph of the same paragraph authorized the Commission to adopt the necessary measures.

3 By two regulations (Nos 1428/71 and 1928/75), adopted on the same respective dates, the Council had defined the detailed rules for applying protective measures in the above-mentioned sector (Official Journal, English Special Edition 1965-1972, p. 86 and Official Journal 1975, L 198, p. 11). Article 1 of those regulations provided substantially that, in order to assess whether or not a situation such as that described above existed, particular account was to 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 those prices and in particular any excessive upward or downward trend thereof in relation to prices in the years immediately preceding;

(d) where the above-mentioned situation arises as a result of imports, the prices obtaining on the Community market at a comparable stage, for products from non-member countries, and in particular any excessive downward trend in those prices.

In addition Article 2 (2) of those regulations provided that protective measures might be taken only to such an extent and for such length of time as was strictly necessary.

4 In application of those rules of the Council, the Commission adopted Regulation No 1207/74, cited above. In the recitals in its preamble to that regulation, the Commission stated that imports into the Community of preserved mushrooms during the 1973 marketing year and the first six months of 1974 were considerably higher than those in the previous years, that the offer prices from non-member countries were 20 to 30% less than the cost price within the Community industry and that stocks of preserved mushrooms produced within the Community were considerably larger than those recorded in previous years.

5 In Article 3 of the regulation, the Commission reserved the right to limit import licences issued to each applicant to a given percentage of a reference quantity equal to the quantity of preserved mushrooms imported into the Community by the latter in the corresponding period in 1973 or to the average quantity of its imports during the same period in the years 1971 to 1973. Thereafter, the Commission fixed that percentage in successive regulations first at 50%, next at 25%, then at 40% for the first quarter of 1976 and 55% for the second quarter of the same year. By the two Regulations Nos 1412/76 and 2284/76, cited above, the percentage was fixed at 70% for the third quarter and 100% for the fourth quarter of 1976. With effect from 1 January 1977, the protective measures introduced by Regulation No 2107/74 were finally abolished.

6 On 9 July 1976, the appellant in the main action, the undertaking Wünsche Handelsgesellschaft, applied to the German authorities for the issue of a licence to import 1 000 tonnes of preserved mushrooms from Taiwan. The authorities refused the application on the basis of the quota system described above and the undertaking then brought an action before the Verwaltungsgericht [Administrative Court] Frankfurt am Main, claiming that after 1 July 1976 it was no longer justified in maintaining that system. Its action was dismissed and it then brought an appeal on a point of law by way of a direct action before the Bundesverwaltungsgericht.

7 Those are the circumstances in which the Bundesverwaltungsgericht referred to the Court the following question:

"Did Regulation (EEC) No 2107/74 of the Commission of 8 August 1974 laying down protective measures applicable to imports of preserved mushrooms (Official Journal 1974, L 218, p. 54) infringe the combined provisions of Article 7 (1) of Regulation (EEC) No 1927/75 of the Council of 22 July 1975 concerning the system of trade with third countries in the market in products processed from fruit and vegetables (Official Journal 1975, L 198, p. 7) and Article 2 (2) of Regulation (EEC) 1928/75 of the Council of 22 July 1975 laying down detailed rules for applying measures in the market in products processed from fruit and vegetables (Official Journal 1975, L 198, p. 11) in so far as it was retained in force after 30 June 1976?"

8 Since the provisions of Regulation No 2107/74 required for their application the subsequent fixing of a percentage to be applied to the reference quantity and that percentage for the last two quarters of 1976 was fixed by Regulations No 1412/76 and 2284/76, the question put to the Court in reality concerns the validity of those two regulations.

9 The appellant in the main action does not deny that in 1974 the situation on the market in preserved mushrooms justified the introduction of protective measures such as those provided for by Regulation No 2107/74. On the other hand, it contends that, by June 1976 at the latest, none of the preconditions for the maintenance of those measures any longer existed. At that time the German market in preserved mushrooms, for which 95% of Community imports are intended, was suffering from a shortage. In the absence of offers from non-member countries, a number of import licences

which had been issued could not be used to the full, and Community production, which is concentrated particularly in France, was no longer able to satisfy German demand. The prices obtaining on the market for Community products rose by 90 to 100% from July/August 1974 until the same months in 1976, and the prices for imported products particularly from Taiwan rose in part by as much as 80% over the same period.

10 In the observations which it submitted to the Court, the Commission states that that information does not correspond to the information deriving from the data which were at its disposal when Regulations Nos 1412/76 and 2284/76 were adopted and which were confirmed by the official statistics published later. In fact, the protective measures did not begin to produce the intended effects until the first two quarters of 1976. At the time when the two regulations were adopted, the actual situation on the market did not yet permit the abolition of the protective measures. It appeared to be absolutely essential to open the frontiers to non-member countries gradually, in order to avoid jeopardizing the normalization of the market which was taking shape.

11 In view of those two conflicting arguments, it is necessary to consider whether, at the time when the contested regulations were adopted and taking account of the situation on the market in question and the discretion conferred upon the Commission by those provisions, the Commission properly applied Article 7 of Council Regulation No 1927/75 and Articles 1 and 2 of Council Regulation No 1928/75. As more than 95% of imports of preserved mushrooms into the Community are intended for the Federal Republic of Germany, it is above all necessary for that purpose to examine the situation on the German market.

12 In that regard, it is clear from the figures published by the Federal Statistics Office that the volume of imports into the Federal Republic of Germany from non-member countries rose considerably in 1973 and 1974. In 1975 the volume of those imports was similar to that of imports in 1973. It was not until 1976 that the volume of imports fell below that level, although it remained greater than the volume for the years prior to 1973. The monthly figures for 1976, which were provided by the Commission at the Court's request, show few variations from one month to the next and, consequently, scarcely support the contention that there was a lack of offers from non-member countries from June onwards.

13 The information on the stocks of preserved mushrooms in France, with which the Commission was provided by the Association Nationale Interprofessionnelle des Fruits et Légumes Transformés [National Federal Association for products processed from fruit and vegetables] shows a considerable increase in stocks in 1974 and 1975 and a substantial diminution in those stocks in 1976. On the other hand, according to the statistics produced by the Federal Statistics Office, the annual figures for imports of preserved mushrooms into the Federal Republic of Germany from Member States indicate a virtually constant level, not only for the period in question, but for every year from 1972 to 1978. For those imports, too, the monthly figures for 1976 show few variations.

14 As far as prices obtaining on the German market are concerned, the appellant in the main action produced a letter from a commercial broker in Hamburg containing a list of prices of preserved mushrooms from non-member countries which the broker had cleared through customs between August 1974 and December 1976. That list, which does not indicate the volume of such imports, shows a rise in prices of 60 to 70% between the beginning of the period and July 1976.

15 Such a significant rise, which, moreover, is derived only from fragmentary information, is not reflected in the statistics produced by the Federal Statistics Office, from which it appears that the rise in prices of preserved mushrooms in non-member countries during the said period did not exceed 30% or thereabouts. In that regard, it should be recalled that, according to the recitals in the preamble to Regulation No 2107/74, the offer prices from non-member countries in 1974 were 20 to 30% less than the cost price within the Community industry.

16 Finally, with regard to the prices of the products from Member States, the figures of the Federal Statistics Office show that they declined considerably from 1972 to 1974 but recovered to some extent in 1975 and rose considerably during 1976, without, however, until the latter months of that year, for which, moreover, information was not available at the time when the contested regulations were adopted, reaching the level in DM of the years prior to 1972.

17 In those circumstances, it cannot be denied that the Commission kept within the limits of its discretion in considering, when it adopted the contested regulations, that the situation on the market did not yet permit the abolition of the protective measures introduced in 1974.

18 The answer to the question referred to the Court should therefore be that consideration of Commission Regulations Nos 1412/76 and 2284/76 has disclosed no factor of such a kind as to affect their validity.

Costs

19 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable; as these proceedings are, in so far as the parties to the main action are concerned, a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the question referred to it by the Bundesverwaltungsgericht by order of 25 March 1981, hereby rules:

Consideration of Commission Regulations Nos 1412/76 of 18 June 1976 and 2284/76 of 21 September 1976 has disclosed no factor of such a kind as to affect their validity.

Due Chloros Grévisse

Delivered in open court in Luxembourg on 6 May 1982.

J. A. Pompe
Deputy Registrar

O. Due
President of the Second Chamber