JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
15 December 1994 *

In Case T-489/93,

Unifruit Hellas EPE, a company governed by Greek law, established in Athens, represented by Ilias Soufleros, of the Athens Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Xenophon Yataganas, Legal Adviser, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for (i) a declaration that Commission Regulation (EEC) No 846/93 of 7 April 1993 introducing a countervailing charge on apples originating in Chile (OJ 1993 L 88, p. 30) and Commission Regulations (EEC) No 915/93 of 19 April 1993 (OJ 1993 L 94, p. 26), No 1396/93 of 7 June 1993 (OJ 1993 L 137,

* Language of the case: Greek.

p. 9) and No 1467/93 of 15 June 1993 (OJ 1993 L 144, p. 11), all amending Regulation (EEC) No 846/93, are void and (ii) an order for damages against the Commission,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: J. Biancarelli, President, C. P. Briët and C. W. Bellamy, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 22 September 1994,

gives the following

Judgment

Legislative background

1 This dispute falls within the legal framework set up by Regulation (EEC) No 1035/72 of the Council of 18 May 1972 on the common organization of the market in fruit and vegetables (OJ, English Special Edition 1972 (II), p. 437, subsequently amended on several occasions) and relates in particular to the instruments of protection provided for in that regulation for trade with non-member countries, namely countervailing charges and protective measures.

2 The purpose of a countervailing charge is to protect a certain level of prices for fruit and vegetables on the Community market. To that end, Article 23 of Regulation No 1035/72 provides that a reference price is to be fixed each year for each product covered by the common organization of the market in fruit and vegetables 'in order to obviate disturbances caused by offers from third countries at abnormal prices'. Article 25(1) of Regulation No 1035/72 provides: 'If the entry price of a product imported from a third country remains at least 0.60 ECU below the reference price for two consecutive market days, a countervailing charge shall be introduced in respect of the exporting country concerned, save in exceptional circumstances. This charge shall be equal to the difference between the reference price and the arithmetic mean of the last two entry prices available for that exporting country (hereinafter called the "average entry price"). This average entry price shall then be calculated each market day for each exporting country until, in respect of that exporting country, the charge is withdrawn.' The entry price referred to in that provision is, under Article 24(3) of the same regulation, the market price for products imported from non-member countries, calculated on the basis of the average of the lowest representative prices recorded for at least 30% of the quantities concerned which are marketed on all representative markets.

3 The countervailing charge, which is the same for all Member States, is levied in addition to the customs duties in force (Article 25(3) of Regulation No 1035/72). Changes in the items used to calculate it are not to be taken into account 'unless they result in a change over three successive market days of more than 1.2 ECU' and it is withdrawn if the entry price has been at least equal to the reference price for two consecutive market days (Article 26(1) of Regulation No 1035/72).

4 As regards protective measures, under the first indent of Article 29(1) of Regulation No 1035/72, 'appropriate measures may be applied in trade with third countries if: — by reason of imports or exports, the Community market in [a product] experiences or is threatened with serious disturbances which may endanger the objectives set out in Article 39 of the Treaty.' The second indent of Article 29(1)

allows recourse to protective measures — for, *inter alia*, apples — if 'the withdrawal or buying-in operations ... concern significant quantities'. Article 3(1) of Regulation (EEC) No 2707/72 of the Council of 19 December 1972 laying down the conditions for applying protective measures for fruit and vegetables (OJ, English Special Edition 1972 (28-30 December), p. 3) provides that protective measures may include the suspension of imports or exports or the levying of export taxes. In the case referred to in the second indent of Article 29(1) of Regulation No 1035/72, those measures may include 'the suspension of imports or the levying of an additional amount equal to 50% of the difference between the basic price and [a ceiling set for the withdrawal price] . This additional amount shall be added to the customs duties and to the countervailing charges, if any, which may have been introduced pursuant to Article 25 of Regulation (EEC) No 1035/72.'

5 Finally, Article 3(3) of Regulation No 2707/72 provides that protective measures 'shall take account of the special position of products in transit to the Community. They shall apply only to products exported from, or intended for, third countries. They may be limited to products exported from, originating in or intended for certain countries, or to certain qualities, size grades or groups.'

6 On 19 February 1993, the Commission adopted Regulation (EEC) No 384/93 introducing special surveillance of imports of apples from third countries (OJ 1993 L 43, p. 33). That regulation is based on Article 29 of Regulation No 1035/72. Under Article 1 of Regulation No 384/93, the release of apples before 1 September 1993 for free circulation within the Community is to be subject to the presentation of an import licence. Article 2(1) of the same regulation provides that the import licence is to be issued subject to the lodging of a security of ECU 1.5 per 100 kg net and that the security is to be forfeit in whole or in part if, during the period of validity of the licence, the quantities stated in the licence are not released for free circulation or are released for circulation in part only.

7 On 7 April 1993, the Commission adopted Regulation (EEC) No 846/93 introducing a countervailing charge on apples originating in Chile (OJ 1993 L 88, p. 30). That regulation, which refers explicitly to Article 25(1) of Regulation No 1035/72, fixed the charge at ECU 1.84 per 100 kg net. It entered into force on 9 April 1993.

8 That countervailing charge was amended by, *inter alia*, Commission Regulations (EEC) No 915/93 of 19 April 1993 (OJ 1993 L 94, p. 26), No 1396/93 of 7 June 1993 (OJ 1993 L 137, p. 9) and No 1467/93 of 15 June 1993 (OJ 1993 L 144, p. 11).

Facts and procedure

9 The applicant's principal activity is the import and export of fruit and vegetables. In early 1993, it purchased approximately 2 million kg of apples from two companies established in Chile.

10 Those apples were loaded on board two ships in the port of Valparaiso, Chile, to be shipped to Greece. The applicant states that the first ship left Chile on 25 March 1993 and arrived in Greece on 18 April 1993; the second left Chile on 13 April 1993 and reached Greece on 6 May 1993.

11 The applicant further states that it applied to the Greek intervention agency for import certificates on 18 March 1993. The countervailing charge introduced by

Regulation No 846/93 of 7 April 1993, as amended by Regulations Nos 915/93, 1396/93 and 1467/93, was applied to the apples imported by the applicant.

12 Those were the circumstances in which, by application registered at the Court of Justice on 30 June 1993, the applicant brought the present proceedings.

13 By order of 27 September 1993, the Court of Justice referred the case to the Court of First Instance pursuant to Article 4 of Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21).

14 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure without any preparatory inquiry. Nevertheless, the Court put certain questions in writing to the applicant.

15 The parties presented oral argument and answered questions put to them by the Court at the hearing on 22 September 1994.

Forms of order sought by the parties

16 The applicant claims that the Court should:

(i) declare void, or inapplicable as against the applicant, Regulations Nos 846/93, 915/93, 1396/93 and 1467/93;

(ii) declare that the European Economic Community must compensate the applicant for the entire past and future loss (actual loss and loss of profit) incurred by it as a result of the illegal provisions in the abovementioned regulations or as a result of any decision or other act adopted pursuant thereto; and that the Community must determine the amount of that compensation, to include both the loss already incurred, estimated at DR 104 614 783, together with interest at the borrowing rate, and any future loss caused by the illegal and detrimental acts of the Commission, the precise amount of which the applicant reserves the right to specify in the future, the above damages to bear interest at the rate prescribed by law from the date on which the application was lodged;

(iii) take any other measure which it considers necessary or appropriate; and

(iv) order the Commission to pay the costs.

17 The Commission contends that the Court should:

(i) dismiss the claims for annulment and damages as inadmissible;

(ii) in the alternative, dismiss both claims as unfounded; and

(iii) order the applicant to pay the costs.

Admissibility

The claims based on Article 173 of the EEC Treaty

18 The Commission considers that the claim for the annulment of Regulations Nos 846/93, 915/93, 1396/93 and 1467/93 are manifestly inadmissible because the contested measures are regulations of general application which affect all traders in fresh fruit in the Community. The Commission points out that countervailing charges are imposed in an almost mathematical manner whenever the reference price reaches a certain level in comparison with that on the representative markets and considers that, in any event, the regulations in issue are not of direct and individual concern to the applicant.

19 The applicant maintains that it is directly concerned by those regulations inasmuch as they require the national authorities, without allowing them any discretion in the matter, to impose a countervailing charge on the products in question. It further considers, referring to the judgment of the Court of Justice in Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, that it is individually concerned by the regulations because it was one of a restricted group of importers which was sufficiently well defined in relation to any other importers by the fact that the apples purchased on the Chilean market had been the subject of the surveillance measures introduced by Regulation No 384/93 and were, moreover, in transit to the Community.

20 The Court considers that it is clear from consistent case-law (see, in particular, the judgment of the Court of Justice in Case 26/86 *Deutz und Geldermann* v *Council* [1987] ECR 941, paragraph 6) that the second paragraph of Article 173 of the

Treaty, as it applied at the date on which the action was brought, 'makes the admissibility of proceedings instituted by an individual for a declaration that a measure is void dependent on fulfilment of the condition that the contested measure, although in the form of a regulation, in fact constitutes a decision which is of direct and individual concern to him.' As the Court of First Instance pointed out in its order in Case T-476/93 *FRSEA and FNSEA* v *Council* [1993] ECR II-1187, paragraph 19, 'the objective of that provision is in particular to prevent the Community institutions from being able, merely by choosing the form of a regulation, to preclude an individual from bringing an action against a decision which concerns him directly and individually' (see also the judgments of the Court of Justice in Joined Cases 789/79 and 790/79 *Calpak* v *Commission* [1980] ECR 1949, paragraph 7, and in *Deutz und Geldermann*, paragraph 6).

21 It is also settled case-law that the fact that it is possible to determine more or less exactly the number or even the identity of the persons to whom a measure applies at any given time is not sufficient to call into question the legislative nature of the measure, as long as it is established that it applies to them by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose (see the judgments of the Court of Justice in Case 64/69 *Compagnie Française Commerciale et Financière* v *Commission* [1970] ECR 221, paragraph 11; Case 101/76 *Koninklijke Scholten Honig* v *Council and Commission* [1977] ECR 797, paragraph 23; Case 123/77 *UNICME* v *Council* [1978] ECR 845, paragraph 16; *Calpak*, cited above, paragraph 9; Case 242/81 *Roquette Frères* v *Council* [1982] ECR 3213, paragraph 7; *Deutz und Geldermann*, cited above, paragraph 8; Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, paragraph 25; Case C-213/91 *Abertal* v *Commission* [1993] ECR I-3177, paragraph 17; and Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 18; and the order in *FRSEA and FNSEA*, cited above, paragraph 19). In order for a measure of general application adopted by a Community institution to be of individual concern to traders, it must affect their legal position because of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as a person to whom it is addressed (see the judgments of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107, and in *Codorniu*, cited above, paragraph 20; the order of the Court of Justice in Case C-257/93 *Van Parijs and Others* v *Council and Commission* [1993] ECR I-3335, paragraph 9; and the order in *FRSEA and FNSEA*, cited above, paragraph 20).

22 In the present case, the applicant seeks the annulment of Regulation No 846/93 introducing a countervailing charge on apples originating in Chile and of a number of subsequent regulations modifying the amount of that charge.

23 The Court considers that those regulations, which impose a countervailing charge on apples originating in Chile, are not directed specifically at the applicant. They concern the applicant only in its objective capacity as an importer of Chilean apples in the same way as any other trader in an identical situation.

24 The applicant, referring to the judgment in *Sofrimport*, cited above, maintains that it is sufficiently distinguished individually by the fact that its goods were already in transit to the Community at the time when the contested regulations introduced the countervailing charge but that argument cannot be accepted. In the *Sofrimport* case, the applicant sought, *inter alia*, the annulment of Commission Regulation (EEC) No 962/88 of 12 April 1988 suspending the issue of import licences for dessert apples originating in Chile (OJ 1988 L 95, p. 10) and of Commission Regulation (EEC) No 984/88 of 14 April 1988 amending Regulation No 962/88 (OJ 1988 L 98, p. 37). The Court of Justice held that the applicant was in the position referred to in Article 3(3) of Regulation No 2707/72 which requires the Commission, in adopting such protective measures, to take account of the special position of products in transit to the Community. Importers whose goods were in transit to the Community when the measure was adopted thus constituted, in the Court's view, a closed and restricted group which was sufficiently well defined in relation to any other importer of Chilean apples. The Court also considered that because the said Article 3(3) gave specific protection to those importers, they must be able to enforce observance of that protection and bring legal proceedings for that purpose. It therefore held the action for annulment to be admissible in so far as it challenged the application of protective measures to products in transit to the Community.

25 In the present case, the Court considers that those importers whose goods were in transit to the Community at the time when Regulation No 846/93 introducing the countervailing charge was adopted also constituted a closed group of persons identifiable at that moment. However, in accordance with the case-law cited in paragraph 21, above, that circumstance is not in itself sufficient for the regulation in question to be of individual concern to traders. If the present claim for annulment is to be declared admissible, the criteria established in the *Sofrimport* case mean, in addition, that the rules on the introduction of countervailing charges must require the Commission to take account of the special position of products in transit to the Community.

26 The Court notes that, unlike Article 3(3) of Regulation No 2707/72 with regard to protective measures, neither Article 25(1) of Regulation No 1035/72, which provides for the introduction of a countervailing charge when certain conditions are fulfilled, nor any other provision relating to countervailing charges requires the Commission to take account of the special position of products in transit to the Community when it adopts a regulation introducing a countervailing charge.

27 The Court further considers that the fact that the apples purchased by the applicant were the subject of the surveillance measures provided for in Regulation No 384/93 is also not such as to distinguish the applicant individually from any other importer of apples. In that regard, it should be borne in mind that the purpose of the measures introduced by Regulation No 384/93, the legality of which is not contested in the present case, was the surveillance of all imports of apples into the Community, regardless of their origin, and that those measures thus affected the applicant in the same way as any other importer of apples. In those circumstances, the applicant cannot argue that, by reason of the application of the surveillance measures provided for in Regulation No 384/93, its legal position is affected by the regulations introducing and amending the countervailing charge in the same way as a person to whom an individual decision is addressed.

28 Thus, even on the assumption that it were proven that the applicant's goods were in transit to the Community at the time when Regulation No 846/93 was adopted, the applicant would still not be individually concerned by that regulation or by the other regulations amending it, adopted subsequently.

29 In those circumstances, without there being any need to inquire whether the applicant is directly concerned by the contested regulations, the application must be dismissed as inadmissible in so far as it seeks the annulment of Regulations Nos 846/93, 915/93, 1396/93 and 1467/93.

The claims based on Articles 178 and 215 of the EEC Treaty

30 The Commission considers that the claims for damages are manifestly inadmissible because they are closely linked to the claims for the annulment of the contested regulations.

31 It must be borne in mind that an action for damages is an autonomous form of action with a particular function to fulfil within the system of remedies provided for in the Treaty (see, *inter alia*, the judgment of the Court of Justice in Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 32). It is clear from that case-law regarding the autonomous nature of claims for damages that a finding that the claim for annulment is inadmissible does not in itself entail the same finding with regard to the claim for damages (see the order in *Van Parijs and Others*, cited above, paragraph 14).

32 The Court must therefore rule on the claims seeking to have the Community ordered to make good the loss allegedly caused to the applicant by the adoption of the contested regulations.

Substance

Preliminary considerations

33 The applicant argues that the acts and omissions of the Commission on which it bases its pleas in support of its claim for annulment were wrongful acts and omissions which caused it serious damage for which it seeks compensation. In the claim formulated in its application, it assessed the damage suffered at DR 104 614 783, to bear interest at the borrowing rate and at the rate prescribed by law from the date on which the application was lodged.

34 In support of its claim for annulment, the applicant has submitted six pleas in law: (i) breach of Article 25(1) of Regulation No 1035/72; (ii) misuse of powers; (iii) inadequate statement of the reasons on which the contested measures are based; (iv) breach of the principle of proportionality; (v) breach of the principle of equal treatment; and (vi) breach of the principle of the protection of legitimate expectations.

35 It should be noted that the acts which the applicant considers to be the cause of the alleged damage are legislative measures and, according to settled case-law, the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred (judgments of the Court of Justice in Joined Cases 56 to 60/74 *Kampffmeyer and Others* v *Council*

and Commission [1976] ECR 711, paragraph 13; Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraph 4; and Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, paragraph 9).

36 As the introduction of a countervailing charge is effected by a legislative measure which involves choices of economic policy, those criteria must be taken into account in assessing the merits of this application. It must therefore be determined to what extent each of the pleas adduced in support of the claim for annulment relates to a breach of a superior rule of law for the protection of the individual.

37 The first plea, alleging a breach of Article 25(1) of Regulation No 1035/72, comprises two limbs: first, the applicant argues that the Chilean apples affected by the countervailing charge were of superior quality to the apples for which the reference price had been calculated and that the Commission thus made a serious and manifest error of assessment when it introduced a countervailing charge. Since the applicant in fact confines itself, in this first limb, to challenging the Commission's alleged manifest error of assessment as to the quality of the Chilean apples imported, without directly inferring from that manifest error a breach of a superior rule of law for the protection of the individual, that argument — which, moreover, is in no way substantiated by the documents in the case-file — is not one whereby the Community's non-contractual liability might be established.

38 The second limb is based on the argument that Regulation No 846/93 should have taken into account the special position of products which were in transit to the Community at the time when it was adopted.

39 The Court considers that only that second limb — which, moreover, coincides with the applicant's sixth plea — relates to a breach of a superior rule of law for the protection of the individual, namely the principle of the protection of legitimate

expectations (see the judgments of the Court of Justice in Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraph 44; *Sofrimport*, cited above, paragraph 26; and Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 15).

40 With regard to the second plea in support of the claim for annulment, alleging a misuse of powers, it follows from the case-law of the Court of Justice that a Community institution, in the present case the Commission, incurs non-contractual liability if it misuses its powers when adopting a measure contained in a regulation (Case C-119/88 *AERPO and Others* v *Commission* [1990] ECR I-2189, paragraph 19).

41 With regard to the third plea, alleging an inadequate statement of the reasons on which the contested measures are based, it has consistently been held that an inadequacy in the statement of the reasons on which a measure contained in a regulation is based is not sufficient to render the Community liable (judgments of the Court of Justice in Case 106/81 *Kind* v *European Economic Community* [1982] ECR 2885, paragraph 14, and *AERPO*, cited above, paragraph 20). In any event, moreover, a reading of the preambles to the contested regulations reveals that the statement of reasons given is sufficient to comply with the requirements of Article 190 of the Treaty.

42 All the remaining pleas submitted by the applicant relate, in the light of settled case-law, to the breach of a superior rule of law for the protection of the individual. This holds true for the fourth plea, alleging a breach of the principle of proportionality (Case 281/84 *Zuckerfabrik Bedburg and Others* v *Council and Commission* [1987] ECR 49), for the fifth plea, alleging a breach of the principle of equal treatment (*HNL*, cited above, paragraph 5), and for the sixth plea, alleging a breach of the principle of the protection of legitimate expectations (see *Sofrimport*, paragraph 26, *Mulder and Others*, paragraph 15, and *CNTA*, paragraph 44).

43 The Court must therefore examine the applicant's pleas alleging (i) breach of the principle of the protection of legitimate expectations, (ii) breach of the principle of proportionality, (iii) breach of the principle of equal treatment and (iv) misuse of powers.

The alleged breach of the principle of the protection of legitimate expectations

Arguments of the parties

44 In its first and sixth pleas, the applicant claims that the Commission committed a breach of the principle of the protection of legitimate expectations. In order to demonstrate the existence of that breach, it puts forward, essentially, four arguments.

45 First, the applicant considers that the purpose both of the proviso for 'exceptional circumstances' in Article 25(1) of Regulation No 1035/72 and of Article 3(3) of Regulation No 2707/72, which should apply by analogy in the present case, is to protect Community importers of the products referred to in those regulations from the detrimental effects of measures which might be taken by the Community institutions. In the applicant's view, therefore, the imposition by the Commission of a countervailing charge on products in transit to the Community is contrary to the principle of the protection of legitimate expectations.

46 Secondly, the applicant claims that the introduction of special surveillance measures, involving the lodging of a security, as provided for in Regulation No 384/93, was already an initial protective measure which, by its very nature, precluded the imposition of a countervailing charge with regard to undertakings which had sub-

mitted to it willingly and in good faith. In the applicant's view, the imposition of a countervailing charge was unforeseeable because it gives rise to the paradoxical result that if the goods are not imported the importer may forfeit the security provided for in Regulation No 384/93 whereas if they are imported he must pay a countervailing charge even if he has not been guilty of any misconduct which might justify its imposition.

47 Thirdly, the applicant maintains that the fact that the entry price for its products was between 40% and 63% higher than the reference price also made it thoroughly improbable that a countervailing charge would be imposed.

48 Finally, the applicant argues that the conclusion on 20 December 1990 of a framework agreement for cooperation between the European Economic Community and the Republic of Chile (OJ 1991 L 79, p. 1) created such a climate of confidence between the Community and Chile as to preclude the adoption of unilateral measures without prior negotiation.

49 The Commission maintains that the proviso for 'exceptional circumstances' in Article 25(1) of Regulation No 1035/72 concerns only cases where the relevant figures should entail the imposition of a countervailing charge but the volume of trade concerned is so insignificant that such a step is not necessary. That proviso cannot, in the Commission's view, apply to Chilean apples, given the significant quantities imported.

50 The Commission considers that the applicant might have validly alleged a breach of the principle of the protection of legitimate expectations had it been faced with a protective measure not providing for any exemption for goods in transit. The present case, however, concerns a regulatory measure of constant application taken in the framework of the common organization of the market in fruit and vegetables and not a protective measure taken exceptionally in circumstances of immediate economic urgency. The Commission maintains that any exemption for goods

in transit would deprive the measure introducing the countervailing charge, as a measure regulating the markets in fruit and vegetables, of any effectiveness in practice. Lastly, the Commission sees no connection between this dispute and the trade agreement between the Community and the Republic of Chile.

Assessment by the Court

51 It has consistently been held that any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of the protection of legitimate expectations. However, if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted (judgments of the Court of Justice in Case 78/77 *Lührs* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 169, paragraph 6; Case 265/85 *Van den Bergh en Jurgens* v *Commission* [1987] ECR 1155, paragraph 44).

52 It must therefore be determined whether a prudent and discriminating trader could have foreseen, in early 1993, the introduction of a countervailing charge on Chilean apples.

53 Under Article 25(1) of Regulation No 1035/72, when the Commission finds that the entry price of apples imported from non-member countries remains at least ECU 0.60 below the reference price for two consecutive market days, it is to introduce a countervailing charge in respect of such apples, save in exceptional circumstances. Given the automatic manner in which those provisions apply, the Court considers that a prudent and discriminating trader must normally be regarded as being in a position to foresee the adoption of a countervailing charge on products falling within the scope of Regulation No 1035/72.

54 With regard to the applicant's argument that its position falls within the 'exceptional circumstances' referred to in Article 25(1) of Regulation No 1035/72, the aim of that provision being, *inter alia*, to exempt goods in transit to the Community from any countervailing charge, it must be remembered that Article 25(1) of Regulation No 1035/72 provides: 'If the entry price of a product imported from a third country remains at least 0.60 ECU below the reference price for two consecutive market days, a countervailing charge shall be introduced in respect of the exporting country concerned, save in exceptional circumstances.' The Court considers that the proviso for 'exceptional circumstances' must be interpreted as referring solely to situations in which the Commission decides not to introduce a countervailing charge even though all the conditions for the introduction of such a charge are met. It does not, however, allow the Commission, when introducing a countervailing charge, to exempt therefrom certain products, such as goods in transit to the Community.

55 It follows that the proviso for 'exceptional circumstances' in Article 25(1) of Regulation No 1035/72 was not such as to give the applicant a legitimate expectation that its products — which were necessarily in transit to the Community — could no longer be affected by a countervailing charge.

56 It must next be determined whether, as the applicant claims, Article 3(3) of Regulation No 2707/72, which, in order to protect the legitimate expectations of traders (see *Sofrimport*, cited above, paragraph 26), requires the Commission when adopting protective measures to take account of the special position of goods in transit to the Community, must apply by analogy to a regulation introducing a countervailing charge.

57 It has consistently been held (see Case 6/78 *Union Française de Céréales* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 1675, paragraph 4, and Case 165/84 *Krohn* v *BALM* [1985] ECR 3997, paragraph 14) that traders are entitled to rely on an application by analogy of a regulation which would not normally be applicable to them

if they can show that the rules applicable to their case are very similar to those which it is sought to have applied by analogy and also contain an omission which is incompatible with a general principle of Community law and which can be remedied by the application by analogy of those other rules.

58 It follows that, if the provisions of Article 3(3) of Regulation No 2707/72 are to apply by analogy in the context of Article 25 of Regulation No 1035/72, it is first necessary that a countervailing charge be 'very similar' to a protective measure.

59 The first indent of Article 29(1) of Regulation No 1035/72 provides, *inter alia*, that protective measures may be adopted 'if by reason of imports ... the Community market in [a product] experiences or is threatened with serious disturbances which may endanger the objectives set out in Article 39 of the Treaty'. Article 3(1) of Regulation No 2707/72 provides that when such a situation exists, the measure which the Commission may take is 'the suspension of imports'. In the situation referred to in the second indent of Article 29(1), that is to say when withdrawal or buying-in operations concern significant quantities, the Commission may have recourse, under the second indent of Article 3(1) of Regulation No 2707/72, to 'the suspension of imports or the levying of an additional amount equal to 50% of the difference between the basic price and [a ceiling set for the withdrawal price]'.

60 The Court considers that the duty to take account of the special position of goods in transit to the Community when adopting protective measures, imposed on the Commission by Article 3(3) of Regulation No 2707/72, is justified by the fact that protective measures involve essentially, as may clearly be seen from Article 3(1) of Regulation No 2707/72, the suspension of imports into the Community of a given product. In the *Sofrimport* case, for example, the Commission regulations in issue suspended the delivery of import licences for Chilean apples. The obligation

imposed by Article 3(3) of Regulation No 2707/72 is intended, therefore, to protect the legitimate expectation which traders may have that their products already in transit to the Community will not be refused entry when they reach Community territory.

61 The Court considers that a countervailing charge, in contrast, does not prevent a trader from importing the products affected by the charge into the Community market. A countervailing charge — unlike the protective measures provided for in Regulation No 2707/72 to deal with serious market disturbances arising by reason of imports — is not intended to prevent the sale of non-Community products on the Community market but only to protect price levels on that market by restoring entry prices generally to the level of the reference price.

62 Since a countervailing charge is thus not 'very similar' to a protective measure, it is not appropriate to apply by analogy Article 3(3) of Regulation No 2707/72 to a measure introducing such a charge.

63 With regard to the argument that Regulation No 384/93, which introduced special surveillance measures, involving the lodging of a security, was already an initial protective measure which, by its very nature, precluded the imposition of a countervailing charge, it is to be observed that the second indent of Article 3(1) of Regulation No 2707/72 refers explicitly to the application of a protective measure to be added 'to the countervailing charges, if any, which may have been introduced pursuant to Article 25 of Regulation (EEC) No 1035/72.' Since the coexistence of countervailing charges and protective measures is explicitly provided for in Regulation No 2707/72, the applicant may not claim that the adoption of a protective measure gave it a legitimate expectation that no countervailing charge would be introduced, even on the assumption, which is not substantiated by the documents in the case-file, that the applicant did lodge a security prior to the adoption of Regulation No 846/93.

64 As regards the applicant's argument that the entry price for the products it imported was between 40% and 63% higher than the reference price, with the result that the imposition of a countervailing charge was not foreseeable, it must be noted that Article 25(3) of Regulation No 1035/72 provides that the countervailing charge is to be 'the same for all Member States', whatever the entry price for a particular consignment. The countervailing duty thus applies by virtue of the system set up by Regulation No 1035/72 — the legality of which has not been challenged in this case — to all imports of the product in question of a particular origin and the regulation does not provide for exceptions for imports whose entry price is higher than the reference price. Indeed, under that system, the market price in any one of the Member States may at a given time prove to be higher or lower than the reference price or than the entry price, as defined in Article 24 of the same regulation. Such a circumstance has no bearing whatsoever on the validity of the system set up by Regulation No 1035/72 which, on the basis of the principle of unity in the field of the common agricultural policy ('CAP'), fixes a Community reference price applicable in a uniform manner throughout the Community and not, as the applicant maintains, on the market of a particular Member State.

65 Consequently, the circumstance that the entry price of the products imported by the applicant was higher than the reference price, even if it were established in these proceedings, could not have given the applicant a legitimate expectation that no countervailing charge would be imposed upon those products.

66 Finally, with regard to the argument that the conclusion in 1990 of a framework agreement for cooperation between the Community and the Republic of Chile created such a climate of confidence between the Community and Chile as to preclude the adoption of unilateral measures without prior negotiation, it is sufficient to point out that a reading of that agreement reveals that it was in no way intended to amend the provisions of Regulation No 1035/72 concerning countervailing charges in relation to trade between the Community and the Republic of Chile. It follows that this argument too must be dismissed.

67 It follows from all the foregoing that the introduction of a countervailing charge on apples originating in Chile was a contingency which should have been taken into consideration by a prudent and discriminating trader, particularly in an area such as the common organization of the markets whose purpose involves constant adjustments to meet changes in the economic situation (see Case 84/78 *Tomadini* v *Amministrazione delle Finanze dello Stato* [1979] ECR 1801, paragraph 22; Joined Cases 424 and 425/85 *Frico* v *Voedselvoorzienings In-en Verkoopbureau* [1987] ECR 2755, paragraph 33; and Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33). That conclusion is all the more compelling if account is taken of the fact that countervailing charges have regularly been imposed in the past on imports of apples originating in Chile (see, *inter alia*, Commission Regulations (EEC) No 1039/89 of 20 April 1989, OJ 1989 L 110, p. 45; No 1263/89 of 8 May 1989, OJ 1989 L 126, p. 18; No 1574/89 of 6 June 1989, OJ 1989 L 154, p. 15; and No 2580/92 of 3 September 1992, OJ 1992 L 258, p. 12, all introducing a countervailing charge on apples originating in Chile). Consequently, if the applicant entered into contracts for the purchase of apples originating in Chile before the contested regulations were adopted, it has only itself to blame for having failed to anticipate that a countervailing charge might be introduced (see *Frico*, paragraph 34).

68 Analysis of the applicant's first and sixth pleas in support of its claim for annulment has thus not revealed any breach of a superior rule of law for the protection of the individual of such a kind as to render the Community liable.

The alleged breach of the principle of proportionality

69 In its fourth plea in support of its claim for annulment, the applicant argues that the Commission infringed the rule that the objectives set out in Article 39 of the EEC Treaty must be pursued in a balanced manner, and thus also the principle of proportionality. The applicant considers that measures taken in pursuit of one of the objectives set out in Article 39 of the Treaty must affect the achievement of the other objectives as little as possible. It submits that the countervailing charge was intended selectively to ensure a fair standard of living for the agricultural commu-

nity, which is one of the objectives of the CAP set out in Article 39 of the Treaty. That object was pursued to the detriment of another of those objectives, that of ensuring that supplies reach consumers at reasonable prices. The applicant maintains that if the Commission had imposed a protective measure it could have limited that measure, in accordance with Article 3(3) of Regulation No 2707/72, to those markets where the entry price was lower than the reference price. In the applicant's submission, there have been no problems on the Greek market as a result of imports of Chilean apples. Products in transit to Greece could therefore have been exempted from such a protective measure. There was, moreover, no danger that the sale of Chilean apples in Greece might cause disturbance on other markets, in view of the country's geographical isolation and the fact that the concomitant transport costs negated any incentive to intra-Community trade in those apples.

70 The Commission considers that the rule that the objectives set out in Article 39 of the Treaty must be taken into consideration in a balanced manner when measures under the CAP are adopted does not preclude temporary priority being given to one or more of those objectives. In its view, the imposition of a countervailing charge on Chilean apples, seen in the overall context of the rules concerned, seeks to correct at minimum cost a short-term anomaly on the market for those products. The imposition of quotas, as suggested by the applicant, is a much more restrictive measure than the imposition of a countervailing charge. Once it has been exhausted, a quota gives rise to a prohibition of imports, whereas a countervailing charge merely renders imports more expensive, without preventing them from continuing as long as the market can absorb the cost involved.

71 The Court points out that it has consistently been held that the Community institutions may give temporary priority to a particular objective of Article 39 of the Treaty when economic circumstances so require (see, *inter alia*, Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 10; Case C-311/90 *Hierl* v *Hauptzollamt Regensburg* [1992] ECR I-2061, paragraph 13; and Case C-280/93 *Germany* v *Commission* [1994] ECR I-4973, paragraph 47). For example, in Case 5/67 *Beus* v *Hauptzollamt München* [1968] ECR 83, at p. 98, the Court of Justice held that the

objectives set out in Article 39 of the Treaty, 'which are intended to safeguard the interests of both farmers and consumers, may not all be simultaneously and fully attained. In balancing these interests, the Council must take into account, where necessary, in favour of the farmers the principle known as "Community preference".' The imposition of a countervailing charge seeks, *inter alia*, to ensure that Community preference (judgment in Case 77/86 *The Queen* v *Customs and Excise, ex parte National Dried Fruit Trade Association* [1988] ECR 757, paragraph 32). Consequently, even if the Commission had given temporary priority to the objective of ensuring a fair standard of living for the agricultural community, to the detriment of the other objectives set out in Article 39, such a situation would not necessarily mean that it had breached the principle of proportionality.

72 The Court considers, moreover, that the applicant's argument that the countervailing charge was intended selectively to achieve only one of the objectives set out in Article 39 of the Treaty, that of ensuring a fair standard of living for the agricultural community, to the detriment of the objective, also set out in Article 39, of ensuring that supplies reach customers at reasonable prices is not substantiated by any evidence that the imposition of a countervailing charge had any effect inimical to the latter objective. The applicant has not shown, for example, that the reference price for apples, which the countervailing charge was intended to protect, was unreasonable.

73 With regard to the argument that the Commission should have adopted a protective measure rather than a countervailing charge, it must be reiterated that, when the Community market experiences serious disturbances by reason of imports, the protective measure provided for in Article 3(1) of Regulation No 2707/72 is the suspension of those imports. Although a countervailing charge makes imports more expensive, it does not produce such a serious effect. The Court therefore considers that a countervailing charge is less restrictive than a protective measure (see, *inter alia*, paragraph 26 of the *National Dried Fruit Trade Association* judgment, cited above) and that the applicant thus cannot justifiably complain, in any event, that no protective measures were introduced.

74 Furthermore, even on the assumption that a protective measure would in the present case have been less restrictive for the applicant, that argument is in any event irrelevant. Although in exercising its powers the Commission must ensure that the amounts which traders are charged are no greater than is required to achieve the aim which it is to accomplish, it does not however follow that that obligation must be measured in relation to the individual situation of any one trader or group of traders (see, in particular, Case 5/73 *Balkan Import-Export* v *Hauptzollamt Berlin Packhof* [1973] ECR 1091, paragraph 22).

75 Analysis of the applicant's fourth plea in support of its claim for annulment has thus not revealed any breach by the Commission of the principle of proportionality in the adoption of the contested regulations.

The alleged breach of the principle of equal treatment

76 In its fifth plea, the applicant claims that it is in a less favourable position than are other importers of apples of the same quality originating in other countries. It claims that large volumes of apples were also imported from South Africa, New Zealand and Argentina but that the Commission did not impose countervailing charges on those products.

77 The Commission argues that equal treatment relates only to comparable situations. It maintains that it imposed a countervailing charge, calculated separately for each country, on apples originating in South Africa and New Zealand also and that the imposition of an identical charge on products whose entry price into the Community is different would be discriminatory.

78 The Court points out that the principle of equal treatment means that comparable situations may not be treated differently nor different situations identically (judgment of the Court of Justice in Case 265/78 *Ferwerda* v *Produktschap voor Vee en Vlees* [1980] ECR 617, paragraph 7).

79 The Court considers, however, that the applicant has adduced no evidence of a breach of that fundamental principle of Community law. On the one hand, it is not contested that the countervailing charge is applicable to all imports of Chilean apples. On the other, the applicant has not demonstrated that the entry prices of apples from other non-member countries were identical to those of Chilean apples, thus requiring the imposition of the same countervailing charge.

80 Analysis of the fifth plea in support of the claim for annulment has thus not revealed any breach by the Commission of the principle of equal treatment.

The alleged misuse of powers

81 In the applicant's submission, the imposition of a countervailing charge by Regulation No 846/93 constituted a disguised structural-policy instrument aimed at solving problems in the production of medium-quality apples.

82 The Commission considers that the countervailing charge, as it was calculated and introduced, does not constitute a misuse of powers and states that the structural problems are solved by the withdrawal mechanism.

83 The Court finds that the applicant has adduced no concrete evidence that the regulations in issue constituted disguised structural-policy instruments.

84 Furthermore, the Court considers that a misuse of powers can arise only when the institution concerned enjoys wide discretion. Here, as has already been pointed out, Article 25(1) of Regulation No 1035/72, which is the legal basis for Regulation No 846/93, requires the Commission, save in exceptional circumstances, to introduce a countervailing charge if the entry price of a product imported from a non-member country remains at least ECU 0.60 below the reference price for two consecutive market days. A misuse of powers could therefore only be conceivable in the present case if there were 'exceptional circumstances' within the meaning of that article. Since the applicant's argument that the circumstances in the present case were 'exceptional' within the meaning of that article has been rejected (see above, paragraphs 53 and 54), this plea must also be rejected.

85 It follows from all the foregoing that an analysis of the relevant pleas in support of the claim for annulment has not revealed that the Commission, in adopting the contested regulations, committed any breach of a superior rule of law for the protection of the individual of such a kind as to render the Community liable.

86 In those circumstances, without it being necessary to consider whether the other conditions which must be met if the Community is to be held liable are present, the application must be dismissed as unfounded in so far as it seeks to have the Community ordered to make good the damage allegedly suffered by the applicant.

87 The application must therefore be dismissed in its entirety.

Costs

88 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Biancarelli Briët Bellamy

Delivered in open court in Luxembourg on 15 December 1994.

H. Jung J. Biancarelli

Registrar President