July 1971, nor Article 41 of the Association Agreement with Greece laid down an order of priority between the protective measures indicated therein.

It is consonant with the objective which these measures are intended to achieve that the authority may select, according to the circumstances, that which it deems most appropriate.

In case 40/72

Reference to the Court for a preliminary ruling under Article 177 of the EEC Treaty by the Verwaltungsgericht, Frankfurt on Main in the case pending before the said Verwaltungsgericht between

I. SCHROEDER KG, Hamburg,

plaintiff,

and

THE FEDERAL REPUBLIC OF GERMANY, represented by the Federal Office for Food and Forests, Frankfurt on Main,

defendant,

on the validity of Regulation (EEC) No 1643/71 of the Commission dated 28 July 1971 (OJ L 171, 13. 7. 1971, p. 2) establishing a system of minimum prices in connection with the import of tomato concentrates from Greece and as ancilliary thereto on the interpretation of Article 2 (1) of Regulation (EEC) No 1428/71 of the Council, 2 July 1971 (OJ L 151, 7. 7. 1971, p. 6) defining the conditions for applying the protective measures in the sector of products processed from fruit and vegetables,

THE COURT

composed of: R. Lecourt, President, R. Monaco, President of Chambers, A. M. Donner, J. Mertens de Wilmars (Rapporteur), H. Kutscher, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts in the course of the proceedings can be summarized as follows:

The common organization of the market in products processed from fruit and vegetables was established by Regulation (EEC) No 865/68 of the Council of 28 June 1968 (OJ L 151, 1. 7. 1968, p. 8).

In the absence of coordination and standardization of import systems applied by each of the Member States with regard to third countries, the Council was led to enact Regulation No 1427/71 of 2 July 1971 (OJ L 151, 7. 7. 1971, p. 5) of which the object is to permit the Community 'to take without delay such necessary measures as will enable the Community to cope with situations of serious disturbance to which the market in the relevant products can be exposed because of the imports made under conditions particularly as regards price which jeopardise the objectives fixed in Article 39 of the Treaty'.

The conditions for applying Regulation No 1427/71 were laid down by the Council in a second regulation No 1428/71 also dated 2 July 1971 (OJ L 151, 7. 7. 1971, p. 6).

The protective measures which can be taken by the Commission are enumerated in Article 2 (1) of this Regulation:

'(a) The total or partial suspension of imports or exports;

(b) a system of minimum prices below which imports may be subject to the condition that they may be at a price higher than the minimum price for the product in question'.

On the basis of Regulation No 1427/71 and taking into account the principles laid down in Regulation No 1428/71, the Commission has laid down two protective measures which make the import of tomato concentrate subject to the obtaining of an import licence.

The first, enacted by Regulation No 1558/71 (OJ L 164, 22. 7. 1971, p. 14), is applicable to third countries with the exception of Greece and establishes a system of quantitative restrictions; the second, which is contained in Regulation No 1643/71 is applicable to Greece and provides for a system of minimum prices.

Under Article 2 of this latter, the obtaining of the import licence is subject to the written undertaking by the importer to ensure:

'aa) .....

bb) that import is pursuant to a contract providing for the sale and delivery free-at-frontier of the Community or at a place situated outside it at a price above that contained in the Annex to the present Regulation for the quality in question and

cc) that this price will in fact be paid'.

The company Schroeder, plaintiff in the main action, requested 10 September 1971, the Federal Office for Food and Forests, the defendant in the main action, for an import licence for tinned tomato concentrate from Greece (Tariff No 20.02). This request was refused by Decision of 15 September 1971 because the party concerned refused to sign undertakings which Article 2 of Regulation No 1643/71 required for the delivery of an import licence. The appeal against this decision, having been refused, the plaintiff issued a summons in the Verwaltungsgericht, (administra-

tive court) Frankfurt-on-Main to have the decision against it reversed.

It considers that Article 2 of Regulation No 1643/71 is null and void and conflicts with the authorities on which it is alleged to be based i. e. Article 39 (1C) of the EEC Treaty and Article 1 (1), first sentence of Regulation No 1427/71 because the minimum price system established by it would not permit the object to be achieved of stabilizing the market since there were many ways of circumventing them. Moreover, there was an order of priority between the introduction of quantitative restrictions and minimum prices. The plaintiff alleges further the conditions for adopting protective measures had not been fulfilled because there was no serious disturbance in the market nor any risk of such. Finally, the minimum price which was fixed was too high and would have a prohibitive effect.

The administrative tribunal of Frankfurt-on-Main, having doubts as to the validity of Regulation No 1643/71 has put the following questions to the Court:

1. (a) Does Article 2 of Regulation No 1643/71 infringe the joint provisions of Article 40 (3) and Article 39 (1c) of the EEC Treaty?

   (b) Does Article 2 of Regulation No 1643/71 moreover, infringe the authority on which it is based, in particular Article 1 (1), first sentence of Regulation No 1427/71 of the Council of 2 July 1971?

2. In addition: does Article 2 of Regulation No 1643/71 violate fundamental principles of law in particular the priciple of proportionality and the principle of protection of good faith,

3. In addition: is Article 2 of the Regulation invalid because the minimum prices fixed in the Annex to this provision are higher than the prices obtaining in the Member States and have a prohibitive effect,

4. In addition: must Article 2 (1) of Regulation No 1428/71 of the Council like Article 41 of the agreement of 9 July 1961 creating an association between the EEC and Greece be interpreted in a sense that there is an order of priority between the measures which are mentioned there?

The order referring the matter of 19 June 1972 was registered at the Court 4 July 1972.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, the plaintiff, in the main action, the Commission and the Council have submitted written observations.

On the report of the Judge-Rapporteur after hearing the Advocate-General, the Court decided to proceed without any preparatory enquiry.

The plaintiff, represented by Mr Modeste, Rechtsanwalt, the Commission represented by Mr Gilsdorf and the Council, represented by Mr Schloh presented oral arguments at the hearing on 22 November 1972. The Advocate-General presented his opinion at the hearing on 10 January 1973.

II — Observations submitted under Article 20 of the Statute

The observations submitted under Article 20 of the Statute can be summarized as follows:

Reviewing the whole of the Community Regulations concerning the import of tomato concentrate, the Company Schroeder, the plaintiff in the main action, observes that the Commission has made the import of tomato concentrate from third countries subject to an import licence from the importing state, and introduced quantitative restrictions on imports, (Regulation No 1558/71 and No 1785/71 of the Commission, OJ L 164, 22. 7. 1971, p. 14, and OJ L 184, 14. 8. 1971, p. 55.

Imports from Spain, Portugal, Morocco and Greece are subject to a different system. As tho the first three countries, the Commission has exempted importers from the requirement of obtaining an import licence and also from quantitative restrictions (Regulation (EEC) No 1738/71 of 6 August 1971; OJ L 178, 17. 8. 1971, p. 14). The Commission asserts, in this respect, that the governments of these countries have declared themselves ready to guarantee, on the import into the Community of products from their territory, that the price would not be below a certain minimum level and that any diversion of traffic would be avoided. The regulation applicable to Greece differs, both from that applicable in respect of the three aforementioned countries and from that applicable in respect of third countries.

The plaintiff argues that the Regulations of the Commission contain no transitional provisions which would have permitted importers to complete their contracts of import concluded before the entry into force of the protective measures.

According to the Company Schroeder, the Federal Republic of Germany was opposed to the protective measures taken on the initiative of the Italian Republic on the ground that there were no reliable figures as to the cost-price of the Italian tomato industry and that the difficulties of that industry were not due to the import from third countries at low cost-price but were of a structural nature. Citing Articles 12 and 19 and 41 of the Association Agreement between the EEC and Greece, the plaintiff observes that according to the last provision, protective measures could be taken only to the extent that the elimination of duties would endanger the objects of Article 39 of the Treaty. In such a case a system of minimum prices could be applied whereby imports which undercut them would either be temporarily halted or limited or made subject to the condition that they be transacted at prices above the fixed minimum prices.

As regards the facts, the Company Schroeder makes the following observations which concern more especially the report of the Commission to the Council of 7 March 1972 on the application of protective measures to the import of tomato concentrates.

The plaintiff asserts that the protective measures have been taken on the initiative of Italy and France, that there is nowhere established in this report that disturbances in the market have appeared in other Member States and that they result *per se* from imports from third countries. Neither has the report investigated the existence of disturbances in the sale of Italian and French tomato concentrates in the other countries of the Community.

The report contains no figures as to what amount of tomato concentrate has been produced in the Community altogether and in each Member State individually in the years before the introduction of the minimum-price regulation and what amount in the period after its introduction. Basing itself on the Year Book for 1971 of the Office for Statistics of the European Economic Community, the plaintiff estimates the total production for 1968 as 396 000 tons, for 1969 as 581 000 tons and for 1970 as 686 000 tons; these figures include tomato concentrate in pots (Statistics al Nomenclature No 07.03).

The plaintiff asks that the Commission be ordered to provide figures of the total production in the Community and the Member States and also of the Italian and French exports of tomato concentrates to the other Member States.

The plaintiff likewise raises doubts as to the correctness of the figures in the report relating to the import of tomato concentrate from third countries before and after the protective measures. Thus the level of Greek imports into Italy after the coming into force of the protective measures has remained basically the same taking into account fraud practised as to the origin of products.

Further, the plaintiff notes that the Commission's report to the Council contains no figures or calculations as to the cost-price to the manufacturer of tomato concentrate in the individual Member States. In fixing the minimum prices, the Commission has based itself solely on a communication from the Italian Government in which the factory price of tomato puree and moreover the leading product with a content of 28 to 30 % dry matter is 36 units of account per 100 kg. Such a price leaves for the importer from Greece preference of only 1·4 u.a. as against 35·4 u.a. for Portugal, Spain and Morocco, whereas it should be, on principle, 5·4 u.a. in accordance with the Association Agreement with Greece.

The plaintiff asserts further that after the coming into force of all the protective measures the prices on the market have not appreciably approached the minimum fixed prices but have remained well below. As regards this it refers to the prices free-at-German frontier for the Italian tomato concentrate which correspond moreover to the offers of two German import companies at this period.

The plaintiff bases its case in law on the principle of proportionality: 'the freedom of the subject must be limited by measures only to the extent and only with such means as are necessary to give effect to a particular object in the interests of the general good. The interference must be necessary as such; it must not exceed the necessary measure and from among the means which are available to realise this object the one which must be employed is that which on the one hand is of a nature such as to permit the object determined upon to be attained in the general interest and which on the other hand burdens the subject the least.

This principle is part of Community law and is expressed both in Article 40 (3) of the Treaty and in Article 1 (1) of Regulation No 1427 of the Council which makes the use of protective measures dependent upon there being, or being threatened, serious disturbances as a result of import or export. The grounds of Regulations No 1428/71 of the Council and 1643/71 of the Commission (this latter refers to the said criteria in Article 44 (2) and (3) of the Treaty) spring from the same principle.

The protective measures are in the plaintiff's view legal and valid only on the following conditions:

1. Serious market disturbances must exist or threaten. These market disturbances must be caused by importations from third countries.

2. The protective measures must be necessary.

3. The protective measures must be appropriate to remove the actual or threatened disturbance.

4. If it is necessary as a protective measure to establish minimum prices these must be based on principles which take into account in particular the average national cost prices in a Member State having regard to a reasonable price paid for the raw material to the agricultural producer;

5. The minimum prices must not have a prohibitive effect;

6. It is necessary to enquire as to the measure — complete or partial suspension of imports or a system of minimum prices — which would mean the least interference in the freedom of the subject.

Proceeding from these points the plaintiff has the following objections against the protective measures in question:

1. The existence or threat of serious market disturbances has not been investigated by the Commission. It has relied solely on complaints made by Italy and France. The prices stated by the Italian Government were 'list prices' which did not only contain the cost price of the Italian industry. The Federal

Republic of Germany has made objections to this effect.

The Commission has not established whether the market disturbances, if such there be, were due to imports from third countries. Indeed imports from third countries in the year 1970 represented only 8·5 % of the market and imports from Greece represented only 3·1 % of the total volume of sales in the Community. Prices after the coming into force of the protective measures confirm the hypothesis that imports of tomato concentrates from third countries did not cause the serious disturbances which were attributed to them.

2. The plaintiff maintains that the protective measures were not necessary. Even if one were to admit that at least in Italy and France there had been serious market disturbances caused by imports from third countries it would have been sufficient to limit the protective measures to imports into Italy and France in accordance with Regulation No 1428/71, Article 2 (2), last sentence.

3. The measures taken are not practical. The actual change in market prices after the coming into force of the protective measures shows that the object has not been achieved. Moreover, the system of minimum prices established by the Commission by Regulation 1543/71 gives rise to abuse and circumvention which it is impossible to control and which is in some cases even legal.

4. The Commission's report to the Council shows that the minimum prices are not related to the cost prices of the manufacturers in the Community but to a 'list price' which the Italian Government wanted and proposed and which the Italian manufacturers would obtain as a result of the institution of the protective measures.

5. In the plaintiff's view every minimum price regulation has a prohibitive effect since its object is to restrict imports so long as the market price in the Community is below the minimum price. This prohibitive effect is unobjectionable so long as it is temporary. If it is permanent it would constitute an absolute prohibition which would be incompatible with Article 44 (2) of the Treaty.

Since it as been shown that the market prices have continued and will continue to lie below the cost prices and in any case below the minimum prices, these latter have a permanent prohibitive effect.

6. Of the two measures foreseen in Article 2 (1) of Regulation No 1428/71 of the Council, the complete or partial suspension of imports limits the freedom of the importer to a lesser extent than does the minimum-price regulation. This order of priority appears not only from the said Article 2 of Regulation No 1428/71, but also from Article 44 (1) of the EEC Treaty. The most serious infringement arises from the fact that in the case of a partial limitation such as is provided by Regulation No 1558/71 imports remain possible even if restricted in volume. A system of minimum prices would completely and in the present case also permanently prohibit them. This system would moreover compel importers to revise contracts made before the measures were instituted.

The fact that the Greek prices had been 60-70 % below the cost prices in the Community while the prices offered in the other third countries were only from 30-40 % below did not justify the Commission in selecting the severest method for Greece.

Even restricting the imports to 50 % as had been done for the other third countries in Regulation No 1785/71 of 13 August 1971 would have had in the plaintiff's view a greater effect on the volume of imports but would have been less of a burden to the importers.

In the premises the plaintiff seeks a declaration that Article 2 of Regulation No 1643/71 of the Commission with the exception of paragraph a, subparagraph aa is a nullity.

The *Commission* makes the following observations:

By way of introduction it observes that although the fourth question put to the Court is in the form of a request for interpretation it in fact goes to the validity of the said regulation for, if the alleged order of priority were to obtain, a 'quantitative restriction or suspension of imports' would first of all have had to have been introduced, which would have led to Article 2 of Regulation No 1643/71 being invalid. The Commission does not wish to enter into the question as to whether a provision in the Agreement with Greece can serve as a standard for an examination of validity under Article 177(b). It considers indeed that Article 3 of Regulation No 1428/71 of the Council is the authority for judging the validity since it refers to the contractual obligations under the Treaty with Greece.

First question

In so far as this question concerns the 'appropriateness' of the protective measures the Commission considers that letters a and b of this question can be considered together.

Article 1 of Regulation No 1427/71 relates the 'appropriateness' of the measures to be taken to the 'objects of Article 39 of the Treaty'. It observes further that in consequence paragraph 1 (b) of this last provision, which seeks to secure a proper living standard for the agricultural population, must be taken into account.

As far as concerns the doubts that have been expressed as to the 'appropriateness' of the disputed measures on account of the possibilities for fraud and evasion it observes that in so far as this criticism is of general application a similar system is provided in Article 44 of the Treaty.

In its Decision of 4 April 1962, re minimum prices under Article 44 (OJ No 30, 20. 4. 1962, p. 995/62) the Council of Ministers has preferred the system, described by the plaintiff as inappropriate, to the system of complete or partial prohibition of import below the minimum prices, because it is les of an obstruction to imports.

In the Commission's view, therefore, very special circumstances would have to be shown in order to be able to establish that the disputed system of minimum prices was inappropriate as such. In this respect one could not rely on the possibilities of illegal circumvention. In so far as the so-called 'legal' possibilities of circumvention are concerned, that is to say basically the linking of subsidiary and associated companies in the exporting country, the Commission observes that these do not impair the effectiveness of the system of minimum prices as a measure for limiting imports and stabilizing the market. It would be different if the importing principal company were to use the profits made by its subsidiary or associated company to put the goods on the import market below the minimum price. Such a result does not necessarily or automatically follow. Moreover, it would be worthwhile to establish associated companies in the export country only if the regulation were for a certain duration, a consideration which presents an uncertainty factor in view of the temporary nature of the protective measures.

The Commission then alleges that the import of tomato concentrates from Greece had substantially diminished after the introduction of the protective measures.

Finally, the Commission joins issue with plaintiff's allegation that the regulation in question is quite unusual within the framework of the common regulation of the EEC Market. If it is true that the disputed measure constitutes the first instance in which the system of minimum prices had been applied as a protective measure, there are however in other fields regulations which make the applicable system of imports dependant upon the observation of certain minimum prices.

Second question

Under this question the Commission discusses four objections:

1. that the principle of proportionality is infringed since the measure in question burdens import trade unnecessarily and is therefore not required;

2. that the principle of legal certainty is infringed since the import trade can no longer rely on the fact that 'it can conclude and conduct its affairs under normal conditions of competition';

3. that there is a further infringement of the principle of proportionality since the regulation is not limited in time;

4. finally, there is an infringement of the principle of proportionality since there was 'possible' neither a serious market disturbance nor the threat of one.

On this it remarks as follows:

1. The first objection is partly contained in the objection which is the subject matter of the first question namely in so far as it is maintained that the measure is not apposite to the desired object. On the necessity of the measure the Commission remarks: if one proceeds from the basis that no measure was necessary at all then this argument is covered by what is said under 4 above; if on the other hand a less drastic measure is to be understood then it is covered by the question as to the priorities of the measures.

2. The second objection is inappropriate. The fact that certain imports from Greece could be effected circumventing the minimum price does not deprive the importer of the possibility of concluding and transacting his business 'under normal conditions of competition' (which means: in the confidence that the system of minimum prices functions on the whole).

3. With regard to the absence of a time-limit the Commission observes first that it was the main feature of the protective measure that it should last so long as the market disturbance or threat of such existed. The only limitation arose from the principle enunciated in Article 2 (2) of Regulation No 1428/71 of the Council 'these measures (must)... be taken only to the extent and for the period which are absolutely necessary'. If and in so far as the regulation of the Commission does not respect this limitation in the regulation of the Council it is or *will be* defective. In view of this provision a formal limitation on the period as is customary for protective measures would have been neither necessary nor appropriate.

In so far as concerns the argument based on the limitation of duration — this limitation is provided for in the minimum-price Decision of the Council of 4 April 1962 (OJ No 30, 20. 4. 1962, p. 995/62) pursuant to Article 44 (3) of the Agreement with Greece provides that on the application of the minimum prices the principles referred to in Article 44 (2) and (3) of the EEC Treaty must be respected. Nevertheless the Commission disputes the fact that the provisions of the Decision of the Council of 4 April 1962 would be applied without further ado to the relationship between the Community and Greece.

The limitation of the application of Article 1 of the minimum price decision to a year is to be understood only in the context of Article 44 aimed at removing trade values between the Member States during the course of the transitional period.

4. The objection that no serious market disturbance existed or was threatened is not very convincing.

First not only the imports from Greece but those from all third countries must be considered. If one does this it will be seen that the total imports from 1967 to 1970 had increased from 18 000 tons to 70 000 tons, that it an increase of almost

300 %. Related to a Community production of 194 000 tons the imports for 1970 already represented 36 % of the Community production.

On this the Commission observes that the amount in question for the total Community production is in fact 194 000 tons and not 492 000 tons since the tomato conserves, contrary to the view of the plaintiff, did not include concentrates of tomato but exclusively peeled tomatoes and therefore it did not come into consideration in the present case.

The Commission is of the opinion that even with this volume of imports, in view of the consequences resulting from it, an effective market disturbance could be spoken of, and, since the continuation of this development had to be reckoned with, it must be accepted, at least, that there was a threatened market disturbance.

The considerations at the root of Regulations No 1643/71 and No 1558/71 showed that this disturbance has taken on serious proprotions. Dozens of tomato processors had to cease their activities in the trade year 1970, since they were no longer in the position to meet the pressure of competition from the producers from third countries.

The decisive factor for the necessity of the protective measures lay above all in the diminished capacity on the part of the Community industry to take up any more and its effects on the agricultural producer. There would have been considerable surpluses had these measures not been introduced (200 000 tons of fresh tomatoes according to the fifth recital in Regulation No 1643/71.

Such surpluses would have led to a fall in price in the market for fresh tomatoes and thus the object of stabilizing the market would have been seriously threatened. Possible intervention measures would have been without effect for the intervention price level would have been so low as to present the producer with no inducement to produce and would not have led to the attainment of the object set by Article 39 of the Treaty of ensuring a fair standard of living.

The Commission refers in this connection to the judgment of the Court in the joined cases 41 to 44/70 from which it is to be inferred that the necessity of intervention in the prices of the market of the Communities could represent a disturbance in the market and justify protective measures.

It rejects the argument that the import from Greece in 1970 has represented less than 10 % of the Community produce because that viewed the imports from Greece in isolation and took into consideration neither the further development which threatened nor the effects on the market of the basic produce.

Third question

The Commission is of the opinion that there is no concrete indication for the assertion that the minimum price has been set at too high a level and had therefore represented an excessive obstacle to imports from Greece.

To establish the relationship of the Greek prices of offer free-at-frontier *vis-à-vis* the cost prices of the Community (the Greek prices represent some 60 to 70 % of the aforesaid cost prices of the Community) the Commission has based itself on the official returns of the Italian Ministry of Agriculture, since Italy is the main producing country in the Community.

The officials of the Commission have examined these facts and found no reason to doubt their correctness. Costs moreover of the French tomato concentrates were even higher.

The Commission rejects the plaintiff's argument that the prohibitive effect of the disputed measure is seen from the recession of the Greek imports of concentrates from 12 947 tons in 1970 to 6 448 tons in 1971 and observes that this argument conflicts with the allegation

that the disputed measures have had no effect.

In the Commission's view the level of imports for the last five months of 1971 shows a return to a normal volume of imports (such as in 1968) after an excessive increase which is evidence that the level fixed by the Commission was proper, that is neither too high so as to be prohibitive nor too low so as to be without effect.

When the plaintiff further asserts that the prohibitive effect of the protective measure follows from the level of the prices of offer free-at-frontier for Italian tomato concentrates, which from August 1971 to January 1972 had been below the fixed minimum price, the Commission does not dispute the correctness of this observation. These prices however were no evidence of the costs of the Community industries: they are simply individual offers and even if they were symptomatic they only meant that the price stabilizing effect had not established itself in the first months after the protective measure was taken. The Commission could not with certainty give an explanation as to the reasons for this development. Several hypotheses are possible. Considerable quantities of tomatoes could have been imported from Greece and could have influenced the market prices after the protective measure was taken. They could possibly have been the produce of Greek origin mixed with that of Italian. It was also possible even that Italian producers had been compelled to offer the produce at uneconomic prices to be able to compete against the cheaper products from third countries which were available. They could have been in certain cases Greek products which had been imported in a manner circumventing the minimum price.

Fourth question

The Commission is of the opinion that this question concerning any priority between the measures to be taken arises differently in Regulation No 1428/71 of the Council (Article 2 (1)) and in Article 41 of the Agreement with Greece. Under Regulation No 1428/71 the two possible measures are, on the one hand, a complete or partial suspension of imports or exports and, on the other hand, a minimum price. On the other hand in Article 41 of the Agreement with Greece there are two kinds of minimum-price systems provided for: the one under which imports would be temporarily suspended or reduced (so-called German-Italian system) and the other used by the Commission in the present case which consists of making the imports simply dependent on the obligation to observe minimum prices.

The Commission, which had to observe in taking the protective measure in dispute both the regulation and the agreement had every reason to prefer the second system which represented if not a compelling at least the most appropriate and reasonable solution.

No inferences moreover can be drawn from the fact that Article 2 (1) names the suspension of imports first. With similar justification one could argue that the legislature has named the most drastic measure first.

With regard to the question, which of the two measures is most in accord with the principle of proportionality, one cannot generally say that the minimum-price system is more drastic in its effect than the reduction of imports.

With regard to the actual facts various reasons have justified the choice which was made. The more flexible minimum price system had permitted better account to be taken of further development. Moreover the cause of this development — the competitiveness of the Greek producers with regard to costs — likewise suggested a price regulating measure. By its effect as a filter which permitted a limited, it is true, but continuous import into the Community the minimum-price regulation had reduced the risk of the market collapsing as a result of considerable imports through 'an open frontier'.

The decisive reason for the choice made has been the desire not to 'freeze' trade relations with Greece by a limitation on quantity but rather to allow them a natural latitude, nevertheless, having regard to the cost price in the Community.

Even the consideration of Article 41 of the Association Agreement on its own provides no reason for giving a priority to the so-called German-Italian minimum-price system.

The Commission even inclines to accord the other system (used in regard to Greece) a priority, namely to the extent that one can attribute to the objective principles, which the Council laid down in its Decision of 4 April 1962 on minimum prices under Article 44 of the EEC Treaty a certain significance also for the application of Article 41 of the Agreement.

Since moreover the execution of Regulation No 1427 had in any case to be contained within the limits of the Association Agreement, in the Commission's view a quantitative restriction of imports could have been introduced only in the context of a system of minimum prices below which imports could temporarily be suspended or reduced. This would not have been practical to implement since such a system would not have related to the import price but periodical quotations of the product on the internal market of the Community. Even supposing that there were such a periodical quotation for the product in question on the EEC market and that it was, therefore, theoretically possible to construct such a system, it would have been accompanied by such factors of uncertainty and would have taken such a long time to introduce that it could not have been considered as a protective measure. The Commission draws from this the conclusion that its choosing the second alternative under Article 2 of Regulation No 1428/71 accorded not only with the nature of the matter but having regard to the international obligations of the Community, *vis-à-vis* Greece, was unavoidable.

The Commission proposes that the Court should answer the first three questions that the examination of these questions had given no ground for casting doubt on the validity of Article 2 of Regulation No 1643/71. With regard to the fourth question it takes the view that neither Article 2 (1) of Regulation No 1428/71 of the Council nor Article 41 of the Association Agreement with Greece are to be interpreted in such a way that between the measures named therein there is a priority, which, if not respected, brings the validity of Article 2 of Regulation No 1643/71 into question.

The *Council* limits its observations to the fourth question.

It observes that whilst Article 2 of Regulation No 1428/71 makes possible the introduction of quantitative restrictions or a system of minimum prices, Article 41 of the Agreement of Athens provides simply for the introduction of a system of minimum prices which could lead to the application of quota restrictions or the condition that minimum import prices were maintained.

The Council takes the view that Article 2 of Regulation No 1428/71 fixes no priority between the two protective measures. The literal interpretation of the text shows only that, on the enumeration of two elements, necessarily one must be named before the other.

On a systematic interpretation and having regard to the principle of proportionality it is seen that the Commission had taken the right decision, since at first sight the system of minimum prices could appear to be less drastic since it does not prohibit import but allows it only at a certain price level. The Council is of the opinion that in fact each of the two systems has its advantages and appears according to the circumstances more or less appropriate.

The Council queries whether perhaps the second system is not the only one compatible with Article 41 (1) of the Agreement of Athens. This Article provides for a minimum-price system

having two heads: in the first case (the so-called German-Italian system) minimum prices are fixed which serve as a standard against which to determine whether a critical situation exists. If prices fall below such a minimum price, imports could be temporarily suspended or reduced. Since this system has not been literally incorporated in Article 2 of Regulation No 1428/71 of the Council, doubts could arise on the basis of the applicable Community Regulation as to its applicability with regard to Greece.

To summarize, the Council is of the opinion that there is no priority between the two kinds of measures provided by Article 2 of Regulation No 1428/71 and that, moreover, the application of a minimum price regulation for the import of tomato concentrates from Greece is perhaps the only one that is compatible with Article 41 of the Agreement of Athens.

The Council draws the Court's attention to the fact that it is not clear from the order of reference whether the answer to the question put would suffice to decide the question of interpretation raised by the plaintiff before the administrative court. The plaintiff applied 'for a declaration that the refusal of the licence was unlawful and that the defendant was obliged to issue the import licence applied for Greek tomato concentrates'. The Council considers that it is probably not obvious that the answer to the fourth question — even if it were to confirm that Regulation No 1643/71 and with it the refusal of an import licence were invalid — necessarily entails the conclusion that the import licence had to be issued: indeed one could not anticipate the attitude which the Commission could or should have adopted if it had not issued the alleged unlawful regulation. On the contrary: if the illegality arose from the fact that instead of the system of minimum prices imports ought to have been suspended then no licence could have been issued.

At the sitting held 22 November 1972 the plaintiff and the Commission answered questions put by the Court.

To the question as to the proportion of tomato concentrates imported from third countries and in particular from Greece which served as basic material for the Italian industry and were not intended for direct consumption, the Commission replied, that in Italy the entire imports were used in the tomato concentrate industry itself and in industry processing it further. Since there was no important concentrate industry in Germany and the Benelux countries, all imports into these countries were used exclusively for direct consumption and further processing. In France the position was not very different.

To a second question as to whether in the estimate of the whole production of the Community and Italy tomato conserves were included which were not intended for direct consumption (Tariff No 07.03 Statistical Nomenclature No 07.03-75) the Commission explained that the protective measure related exclusively to tomato concentrates for direct consumption or further processing (Tariff No 20.02 Statistical Nomenclature No 20.02-30) that is neither tomato conserves which contained peeled tomatoes and as a rule were intended for direct consumption (likewise Tariff No 20.02) nor temporarily preserved (unpeeled) tomatoes which were intended only for further processing (Tariff No 07.03 Statistical Nomenclature No 07.03-75).

Against this the plaintiff took the view that the products of Tariff No 20.02 and 07.03 are to be taken together because tomato conserves could replace tomato concentrate in the manufacture of the end product.

To the question whether the protective measure could not be limited to a region the Commission replied that such a limitation would have two disadvantageous effects since it would have prejudiced the competitiveness of the Italian products in the other Member States in which the goods from third countries could have penetrated without limitation and further would have forced

the costs of the Italian industry higher, since it would not have been able to obtain cheaper third country goods any more. Questioned as to the reasons for a series of concerns disappearing from the market the Commission took the view that this is at least partly due to the fact that these concerns were not in a position to buy cheap provisions from third countries and thereby to lower their costs of production as did the large concerns.

With regard to the extent of the excesses of the Italian tomato production for the 1971 harvest estimated at 200 000 tons in the event of the protective measures not being taken the Commission explained that the excesses had in fact been only 3 100 tons from which it concluded that the measure taken had been effective.

In conclusion in answer to a final question concerning the prices of offer free-at-German frontier for tomato concentrates in the period after 15 January 1970 the Commission stated that these prices had varied until June 1972 between 310 and 340 units of account and since then they had run at from 360 to 371 units of account per ton and had thus reached the cost price stated by the Italian authorities.

Grounds of judgment

1 In accordance with Article 177 of the Treaty establishing the EEC the Verwaltungsgericht Frankfurt-on-Main, by order made 19 June 1972 has referred several questions as to the validity of Article 2 of Regulation (EEC) No 1643/71 of the Commission of 28 July 1971 on the introduction of a minimum-price system for the import of tomato concentrate from Greece (OJ L 171, 30. 7. 1978, p. 2) and the question as to the interpretation of Article 2 (1) of Regulation (EEC) No 1428/71 of the Council of 2 July 1971 establishing the conditions of application for the protective measures for products processed from fuit and vegetables (OJ L 151, 7. 7. 1971, p. 6) and likewise of Article 41 of the Agreement establishing an association between the European Economic Community and Greece of 9 July 1961 (OJ No 26, 18. 2. 1963, p. 294/63).

2 Regulation No 1427/71 of the Council of 2 July 1971 (OJ L 151, 7. 7. 1971, p. 5) provides for the introduction of protective measures for products processed from fruit and vegetables and permits in trade with third countries the application of appropriate measures, when the market in these products is subject to or threatened with serious disturbances by reason of imports, which could jeopardize the objects of the common agricultural policy set out in Article 39 of the Treaty. Regulation of the Council No 1428/71 (OJ L 151, p. 6) issued on the same day sets out in Article 1 the criteria for judging whether there is, or there is a threat of, a serious disturbance, and empowers the Commission in Article 2 either completely or partly to suspend imports

or to introduce a system of minimum prices, which make imports dependent on their being above a fixed minimum price.

3 In July 1971 the Commission was of the opinion that a serious disturbance threatened the market for tomato concentrates in the Community by reason of imports of these products from third countries. It therefore issued in Regulation 1558/71 of 20 July 1971 (OJ L 164, 22. 7. 1971, p. 14) protective measures in the form of restrictions applicable to imports from all third countries with the exception of Greece. In view of the special trade regulation of the Agreement of Association between the Community and Greece it provided in Regulation No 1643/71 of 28 July 1971 another protective measure for imports from Greece: the issue of an import licence depends under Article 2 of this Regulation on the written understanding of the importer to ensure 'that this import is pursuant to a contract which provides that the purchase and delivery free-at-frontier of the Community or at a place outside the Community is at a price above the price given in the annex to this regulation for the particular quality . . .'. The request for a preliminary ruling is concerned with the validity of this provision.

The validity of Article 2 of Regulation No 1643/71

A — On the necessity of the disputed measure and the characteristic of the threat of a serious disturbance as a consequence of imports (Third paragraph of the observations of the Frankfurt-on-Main court on the second paragraph)

4 The reasons given by the national court which could influence the validity of the disputed provision give rise first to an examination of the question as to whether the measure was necessary, because the market for tomato concentrates in the Community was subject to or threatened with a serious disturbance by reason of the imports.

5 As a justification of its measure the Commission referred to the continued increase of imports of tomato concentrate from Greece — in the course of the economic years 1968-1970 from 4 000 to 22 000 tons — at prices which represented from 60 to 70 % of the cost prices of the Community industry. The Commission observes that this difference in price has led to the closing of a great number of tomato processing concerns in Italy, which in turn has

diminished the possible outlets for fresh tomatoes produced in this part of the Common Market. Having regard to the fact that this position as far as could be seen would continue, the Commission came to the conclusion that serious disturbances threatened the market of the Community 'by imports originating from Greece' both for the processing industry as for the outlet of basic producers which could lead to prices on the internal market detrimental to the objects of Article 39 of the Treaty.

6 The administrative court observes that the figures mentioned in the recitals of the Regulation account for less than 10 % of the tomato concentrate production in the Community and it therefore queries whether such a volume of imports could disturb the internal market.

7 The necessity of the protective measures as the 7th and 8th recitals of the disputed Regulation made clear was to be judged not only by reason of the imports from Greece but also from those from other third countries since the effects on the internal market of the Community arose above all from the total volume. Moreover this was the object of the protective measures provided on the one hand in Regulation No 1558/71 and on the other in the disputed Regulation. The necessity of a regulation with special provisions for Greek imports arose only out of — confirmed by Article 3 of Regulation No 1423/71 — the obligation of the Commission to apply the measures provided for 'with due regard to the obligations arising out of agreements which bind the Community on an international level', here the Agreement of Association between the Community and Greece.

8 The entire imports from third countries between 1967 and 1970 increased from 18 000 to 70 000 tons and represented 36 % of the Community production of 1970 (194 000 tons). The fact that these imports to a large extent (29 000 tons of the in total 70 000 tons imported from third countries and 19 200 tons of the 23 400 tons imported from Greece) went to Italy, where most of the tomato processing undertakings are concentrated, confirms the observations of the Commission on the effects of these imports on the activities of numerous Italian undertakings.

9 The terms 'serious disturbance' or 'threat of serious disturbance' are to be considered in the light of the objects of the common agricultural policy referred to in Article 39 of the Treaty. The Commission has therefore rightly taken into consideration not only the object of stabilizing the market but also

the maintenance of a proper living standard for the agricultural population, and judged the question whether a disturbance threatened according to the possible effects of these imports on the outlet possibilities for the basic produce and on the processing industry. The 70 000 tons imported during the year represented a production of 420 000 tons of fresh tomatoes, whereas in Italy, the main producing country, only 1 000 000 tons were intended for processing: the Commission could therefore rightly deduce that these imports represented a serious threat for the outlet for the production of fresh tomatoes. It has had regard to the criteria upon which, according to Article 1 of Regulation No 1428/71, judgment of the question must be based, whether the market is subject to a serious disturbance or is threatened with such — namely (a) the extent of the imports effected or foreseen, (b) the disposable amounts of the produce on the market, (c) the prices of the domestic produce and (d) those of the imported produce — that is the criteria which enable the effects of the imports on the internal market of the Community to be measured.

10 The claim of the plaintiff in the main action that the disturbances in the Italian market for tomato concentrate are not due to imports but arise principally from structural difficulties inherent in the Italian economic system does not call in question the disputed protective measure.

According to the recitals in Regulation No 1428/71 the necessity of protective measures can arise by reason of special features of the internal market such as structural difficulties having as a result of imports developed so unfavourably that the recuperation of the market is made more difficult.

11 Thus the Commission, on observing that a serious disturbance threatened has neither exceeded its discretion nor infringed Article 40 (3) of the Treaty or Regulations Nos 1427/71 and 1428/71 from which it derives its relevant powers.

B — On the appropriateness of the disputed measure: infringement of the provisions of Article 39 (1) (c) in conjunction with Article 40 (3) of the Treaty and Article 1 (1) of Regulation No 1427/71 (first question)

12 The Administrative Court also poses the question whether the disputed provision is perhaps invalid because by reason of the possibilities that exist of circumventing it, it appears inappropriate for removing the threat of

disturbance. The national court bases its reservations on the fact that a minimum price system offers various 'even legal' possibilities of circumvention in its application. This fact ought to have caused the Commission, in the view of the plaintiff in the main action, to prefer establishing quotas to issuing minimum price regulations.

13 If the Commission in relation to Greece nevertheless preferred a minimum-price system it did so because — as already stated — it had to have regard to the obligations of the Association Agreement, which provides in Article 41 for two forms of a minimum-price system. The first alternative makes possible a quota system as soon as the prices in the internal market fall below a certain minimum level. The second form corresponds to a system used in the present case. This was chosen, because the other presupposed periodical quotations of the prices on the internal market, which, at the time that the protective measure had urgently to be issued, were not available.

14 With regard to the possibility of there existing opportunities of circumvention, it must be observed that the legality of a Community act cannot depend on retrospective considerations of its efficacy. Since in the present case it is a question of complex economic measures, which for the purpose of their efficacy necessarily require a wide discretion and moreover as regards their effects frequently present an uncertainty factor, the observation suffices that these measures do not appear on issue as obviously inappropriate for the realization of the desired object. This observation needed to be made both with regard to the costs of the alleged circumvention possibilities and the uncertain duration of the protective measure. Moreover the considerable recession in imports after the disputed measure came into force showed that it was not as ineffective as alleged.

C — *Infringement of general legal principles (first and second paragraph of the observations of the Court making the reference on the second question)*

15 The Court is further asked whether the validity of the disputed provision can be affected by reason of it infringing general legal principles in particular the principle of legal certainty and proportionality because it impedes import trade otiosely, contains no limitation on its duration and extends to the whole common market.

16 Each of these criticisms is to be examined severally with regard to the question of compatibility of the disputed provision of Community law.

17 The national court raises doubts whether there is not a ground of invalidity 'by reason of the possibilities of circumvention ... the danger (exists) that import trade is made difficult for law-abiding importers but on the other hand it does not have the desired effect of stabilizing the market'.

18 Since the Commission was bound under the Association Agreement to introduce with regard to imports from Greece import limitations which in any case contained minimum prices, it is not proper to reproach it on this account of acting contrary to the law because it fulfilled its obligation. On the other hand it would have been impossible for it to establish a system of import limitation with regard to third countries and to make an exception of one of the countries. Having regard to the various objects of Article 39 the Commission, in weighing the disadvantages of the minimum price system for the importer against the significance of all the measures taken with regard to third countries and then deciding for the system which has been applied, has not exceeded the limits of its discretion.

19 The administrative court also queries whether the disputed provision ought not to have been limited as to its duration to be valid. This applies all the more so since under Article 41 of the Association Agreement with Greece on the application of a minimum price system as a protective measure 'the principles contained in Article 44 (2) and (3) of the Treaty ... (must) be taken into consideration' and the Council when it applied Article 44 during the transitional period in its decision of 4 April 1962 (OJ No 30, 20. 4. 1962, p. 995) anticipated a limitation with regard duration.

20 The protective measures which the Regulations of the Council Nos 1427/71 and 1428/71 empower may under Article 2 (2) of the last named regulation 'be taken only to the extent of the period which are absolutely necessary'. This provision does not necessarily impose an obligation to fix in advance how long the measures shall remain in force. It may be consistent with the desired object to provide them for unlimited duration. Even the reference contained in Article 41 of the Association Agreement to Article 44 of the Treaty does not provide anything to support the opposite view; for a limitation on the duration of the measures provided for does not come under the

principles referred to in this provision of the Treaty. If the Council in other circumstances has provided such a limitation in an implementation provision that does not mean that this provision was required by Article 44 nor in consequence thereto by Article 41 of the Association Agreement.

21 In the view of the plaintiff in the main action, the protective measure ought to have been limited to imports intended for Italy and France since the disturbances were mainly in these two markets.

22 Such a limitation however would have jeopardized the effectiveness of the measure by reason of the free trade existing under the Treaty. A large part of the Italian production of tomato concentrate is namely intended to be sold in the other countries of the Common Market where it would have met the competition of the cheap imports from third countries. This criticism is thus not pertinent.

D — The prohibitive effect of the disputed measure (third question)

23 The third question is whether the validity of the disputed provision is not affected by reason that it has a prohibitive effect.

24 According to the eighth recital in Regulation No 1643/71 the protective measures must be so regulated that they do not adversly affect imports in conditions in which they do not prejudice the market situation by reason of their being admitted. Apparently the Commission fixed the minimum price too high in the Annex to Regulation No 1643/71 since it based it on a cost price supplied by the Italian Government and adopted without examination of 36 units of account per 100 kg at the factory.

25 The level of the minimum prices must, as the Court making reference rightly points out, relate to the desired price level within the Community. The Commission alleges that the computation factors of the cost price of 36 units of account which it sets out in its pleading were known to it and that it saw no reason to doubt its correctness. The plaintiff has adduced nothing concrete to permit conclusions as to the incorrectness of the data of the Italian Government. Since this cost price lay slightly above the intervention price it ought,

in spite of the uncertainty factor, which is inherent in such provisions directed to future development, to be accepted.

26 The Commission has rightly taken as a basis the Italian costs since Italy is by far the most important producer in the Community. Having regard on the one hand to the cost price and on the other to the offer price on the world market in the region of 25 u.a. per 100 kg it has fixed the minimum prices in respect of Greece at 34 u.a. and in respect of the other third countries at 30 u.a., which including customs duties corresponds to a price of 35·4 u.a. Thus it has assured for the benefit of Greece a preference foreseen in the Association Agreement. No conclusion as to the invalidity of the minimum price provision may be drawn only from the fact that the offer prices for tomato concentrate after the disputed measure was issued have apparently lain continually under the minimum price of 34 u.a. which has been reached only in June 1970. It is true that at internal market prices lay during the second half of 1971 with slight fluctuations at 30 u.a., nevertheless they showed subsequently a constant tendency to approach the minimum price.

27 In this connection the special condition of the relevant market has to be considered on which the imports aggravated the structural difficulties which already existed there.

28 If one takes into account the complex character of the economic forecast necessary for the issue of the disputed measure, it is not a apparent that the Commission on ascertaining the prices to be taken into consideration has gone farther than could be regarded as necessary for attaining the objects of stabilizing the market and assuring an appropriate standard of living for the agricultural producers.

29 Finally the fact that imports from Greece as a result of the protective measures have receded on average in the Community by half and in Italy by much more does not demonstrate a prohibitive effect of these measures. The stronger recession in the latter Member State is a normal development which arises from the fact that the production of tomato concentrate is mainly concentrated in this Member State.

On the question of interpretation

30 The question is put to the Court as to whether Article 2 (1) of Regulation No 1428/71 of the Council and Article 41 of the Association Agreement between the EEC and Greece are to be interpreted in such a way that there exists an order of priority in the measures referred to therein.

31 Under Article 2 of Regulation No 1428/71 there come into consideration as protective measures either the suspension of imports or a system of minimum prices whereby when they are not reached imports can be made dependent on the fact that they are conducted at a higher price than the fixed minimum price. Article 41 of the Association Agreement provides on the other hand as a protective measure, a system of minimum prices in two forms, whereby in the one when the minimum prices are not reached a temporary suspension or limitation of imports is possible whereas in the other imports can be made dependent on the fact that they are transacted at a higher price than the minimum price. Since the Commission was obliged on applying protective measures to respect the Treaty obligations which are internationally binding on the Community, it had with regard to Greece to have recourse to one of the two forms of minimum price systems.

32 Neither Article 2 of Regulation No 1428/71 nor Article 41 of the Association Agreement on enumerating the measures provided for there, establish an order of priority between them. It is in accordance with the object aimed at by these measures that the administration can decide according to the circumstances the measures which appear to it most suitable. Thus as regards Greece it had the choice between the two forms of the system of minimum prices provided in the Association Agreement, and the system which it ultimately chose appears less restrictive than the quota system likewise provided for in this Agreement on prices falling below the minimum. Moreover this latter system as already mentioned presupposed quotations on the internal market, which were not available for the products in question at the time when these measures had to be taken.

33 The question put must therefore be answered that neither Article 2 (1) of Regulation (EEC) No 1428/71 of the Council of 2 July 1971 nor Article 41 of the Association Agreement with Greece creates an order of priority between the measures provided for.

Costs

34 No order can be made in respect of the costs of the Council and the Commission of the European Communities which have submitted observations to the Court. As regards the parties in the main action the present proceedings are a step in the action pending before the Verwaltungsgericht Frankfurt-on-Main. The question of costs is therefore a matter for that court.

On those grounds,

Upon reading the pleadings,
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral arguments of the plaintiff in the main action, the Council and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community especially Articles 39, 40, 44 and 177;
Having regard to Regulations Nos 1427/71 and 1428/71 of the Council of 2 July 1971;
Having regard to Regulations Nos 1558/71 of 20 July 1971 and 1643/71 of 28 July 1971 of the Commission;
Having regard to the Decision of the Council of 4 April 1962;
Having regard to the Agreement establishing an association between the European Economic Community and Greece of 9 July 1961;
Having regard to the protocol on the Statute of the Court of Justice of the European Economic Community and especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in reply to the questions referred to it by the Verwaltungsgericht Frankfurt-on-Main by its order of 19 June 1972 hereby rules:

1. **The examination of the questions which have been put have shown nothing which could cast doubt on the validity of Article 2 of Regulation (EEC) No 1643/71 of 28 July 1971.**

2. **Neither Article 2 (1) of Regulation (EEC) No 1428/71 of the Council of 2 July 1971 nor Article 41 of the Agreement establishing an**

association between the European Economic Community and Greece of 9 July creates an order of priority between the measures provided for therein.

Lecourt Monaco Donner

Mertens de Wilmars Kutscher

Delivered in open court in Luxembourg on 7 February 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 10 JANUARY 1973 [1]

Mr President,
Members of the Court,

In this reference for a preliminary ruling by the Verwaltungsgericht (Administrative Court) Frankfurt which I deal with today, we are concerned with the validity of the Commission's Regulation No 1643/71 of 28 July 1971 having as its purpose 'introducing a system of minimum prices for imports of tomato concentrates from Greece' (OJ L 171, 30. 7. 1971).

In this connection, one might first of all mention the following.

Tomato concentrate under Tariff No 20.02 is within the ambit of the common organization of the market in products processed from fruit and vegetables, created by Council Regulation No 865/68 of 28 June 1968 (OJ L 154, 1. 7. 1968). This organization of the market provided the application of the common customs tariff in relation to third countries only, it did not however contain a protective clause, since it did not yet effect the 'coordination and unification of import regulations' which individual Member States applied towards third countries. This gap was filled by Council Regulation No 1427/71 of 2 July 1971 introducing protective measures for products processed from fruit and vegetables (OJ L 151, 7. 7. 1971). Article 1 provides *inter alia:* 'If by reason of imports the Community market in one or more of the products listed in Article 1 of Regulation (EEC) No 865/68 experiences or is threatened with serious disturbances which may endanger the objectives of Article 39 of the Treaty, appropriate measures may be applied in trade with third countries until such disturbances or threat of disturbance has ceased. In this respect, there was promulgated on the same day the Council Regulation No

1 — Translated from the German.