JUDGMENT OF THE COURT
12 JULY 1973 [1]

Wünsche Handelsgesellschaft v Commission of the European Communities

'Tomato concentrates'

Case 59/72

Summary

EEC — Non-contractual liability — Legislative measure involving choices as to policy — Loss — Breach of a major rule of law
(EEC Treaty, Article 215)

Liability on the part of the Community in respect of detriment suffered by individuals as the result of a legislative measure involving choices as to economic policy could only be incurred as a result of a sufficiently serious breach of a major rule of law protecting individuals.

In Case 59/72

WÜNSCHE HANDELSGESELLSCHAFT, Hamburg, represented by its associate bearing personal liability, the management company Ludwig Wünche mbH, itself represented by its manager, Jan-Onne Bodenstab, assisted by Rechtsanwälte Modest, Heemann, Gündisch, Rauschning, Landry, Röll, Festge, and Heemann of the Hamburg Bar, with an address for service in Luxembourg at the office of Félicien Jansen and Mme Jeanne Jansen-Housse, huissiers de justice, 21 rue Aldringer,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its legal adviser, Dr Peter Gilsdorf, acting as agent, with an address for service in Luxembourg at the offices of the legal adviser of the Commission, Emile Reuter, 4 boulevard Royal,

defendant,

1 — Language of the Case: German.

Application for the payment of damages under the second paragraph of Article 215, of the EEC Treaty, as compensation for damage caused by Regulation EEC No 1643/71 of the Commission introducing a system of minimum prices for imports of tomato concentrates from Greece,

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore, (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, H. Kutscher, C. Ó Dálaigh, M. Sørensen (Rapporteur) and A. J. Mackenzie Stuart, Judges,

Advocate-General: M. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and Procedure

The facts and procedure may be summarized as follows:

1. (a) 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 153, 1. 7. 1968, p. 8).

In the absence of any co-ordination or unification of import regulations applied by each Member State vis-à-vis third countries, the Council felt it necessary to enact Regulation No 1427/71 of 2 July 1971, (OJ L 151, 7. 7. 1971, p. 5) to 'make it possible for the Community to deal with serious disturbances to which the market in these products could be exposed by reason of imports effected on terms, and in particular at prices which could endanger the objectives set out in Article 39 of the Treaty'.

The conditions for the application of 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 the Community may take are listed 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 subjected to the condition that they must be made at a price above the minimum fixed for the goods in question'.

Article 3 of Regulation No 1428/71 confirms that the Commission is bound to apply these measures 'while rejecting

the obligations flowing from agreements which bind the Community in the international sphere'.

On the basis of Regulation No 1427/71, and in the light of the principles laid down in Regulation No 1428/71, the Commission adopted two protective measures making the import of tomato concentrates subject to the issue of import licences.

The first measure, enacted by Regulation No 1558/71 (OJ L 164, 22. 7. 71, p. 14) applies to third countries excluding Greece, and establishes a system of quantitative restrictions; the second, enacted by Regulation No 1643/71, applies to Greece and provides for a system of minimum prices.

By Article 2 of the latter, the issue of an import licence is subject to a written undertaking from the importer to ensure:

'(aa) .....

(bb) this importation arises from a contract providing for sale and delivery free at Community frontier, or at a place situated outside the Community, at a price higher than that shown in the Annex to this Regulation for the quality in question, and

(cc) that this price will actually be paid'.

Regulation No 1643/71 was revoked by Regulation No 395/73 of 9 February 1973, (OJ L 43, p. 13) with effect from 16 February 1973.

(b) By letter dated 17 April 1972, the Wünsche Handelsgesellschaft claimed compensation from the Commission. In this letter the applicant claimed that, during October 1971, relying on the stability of the minimum price laid down in Regulation No 1643/71, it purchased a quantitiy of double-strength tomato concentrate from a Greek company, that it had to conclude the contract at the minimum price despite a more favourable offer made by the Greek vendor, that developments in the market showed that the minimum price had been fixed at too high a level, that the Italian tomato concentrate industry subsequently offered its produce on the German market at prices below the minima, that as a result of this economic situation, the applicant was obliged to sell part of the goods in question to the Bernhard Meinke Nachf. company in Berlin at a price below the purchase price, that in this way the applicant incurred loss, that this loss was caused by Regulation 1643/71, that this Regulation is illegal and that, therefore, by Article 215 of the EEC Treaty, the Commission is bound to pay compensation for the loss suffered.

By letter dated 28 June 1972, the Commission informed the applicant, that it was unable to meet this claim.

2. The validity of the Regulation was examined in the judgment given by the Court of Justice of the European Communities in case 40/72 on a request for a preliminary ruling in proceedings between I. Schroeder KG, Hamburg, and the Federal Republic of Germany. In this judgment the Court stated that 'The examination of the questions which have been put has shown nothing which could cast doubt on the validity of Article 2 of Regulation (EEC) No 1643/71'. In the same judgment on a question of interpretation, the Court stated that '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 EEC and Greece of 9 July creates an order of priority between the measures provided for therein'.

3. The present application was made on 24 July 1972. After the application and statement of defence had been lodged, the written procedure was suspended until judgement had been given in case 40/72. After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court of Justice decided to open the oral procedure without any preparatory inquiry.

The oral observations of the parties were made at the hearing on 19 June 1973.

The Advocate-General presented his opinion at the hearing on 4 July 1973. 1973.

II — Submissions of the parties

The *applicant* submits that the Court should:

— order the Defendant to pay DM 1 098 to the applicant,

— order the Defendant to pay the costs.

The *Commission* submits that the Court should:

— dismiss the action as unfounded and

— order the applicant to pay the costs of the action

— alternatively, by way of a provisional order, reserve a decision on the amount of the damages.

III — Pleas and arguments of the parties

The pleas and arguments of the parties may be summarized as follows:

As to the admissibility

The *Commission* states that it waives its right to raise the plea of inadmissibility, contrary to its previous actions in similar cases. The Commission points out, however, that in this case, the applicant's rights could have been legally protected, without running the risk of incurring so much greater loss, by an application to the national judicial and administrative authorities.

According to the *applicant,* the application is admissible as a claim based on administrative responsibility fulfilling the conditions referred to in the second paragraph of Article 215 of the EEC Treaty. The applicant maintains that it could not otherwise avoid the loss suffered, and, in particular, that such a result could not be achieved by bringing a domestic legal action.

As to the merits

1. The illegal nature of Regulation No 1643/71

A - (a) The applicant maintains in the application that the system of minimum prices laid down in Regulation No 1643/71 infringes the combined provisions of Article 40 (3), and Article 39 (1), of the EEC Treaty, in that it does not constitute a measure capable of achieving the objectives referred to in Article 39, in particular that of 'the stabalization of markets' referred to in subparagraph (1) (c). The applicant maintains that such a system of minimum prices offers many opportunities for misapplication, ranging from the conclusion of fictitious contracts for the recovery of payments made in excess either in cash or in kind, to the intervention of subsidiaries or affiliated branches having their registered office in the exporting country or in third countries; this action would be unassailable at law when carried out by enterprises of independent legal status. Companies effecting their imports in this way, while observing the laws of competition, could nevertheless dispose of their goods within the Community at a lower price than that prescribed. The system of minimum prices established by Article 2 of Regulation No 1643/71 would thus be infringed and incapable of attaining its objectives.

In this connection the applicant refers to the judgment given by the Court of Justice in case 6/71 (Rec. 1971 p. 8239) in which the Court took the view that any Regulation clearly encouraging wrongful behaviour was illegal.

According to the applicant, a statement of Italian prices for tomato concentrates free at the German frontier shows that such prices were roughly 10—24 % lower than the minimum prices, and that from its inception the system of minimum prices failed to work.

Furthermore, the applicant maintains that Regulation 1643/71 also infringes other basic legislation cited in the Preamble, namely Regulations Nos 1427 and 1428/71 of the Council. The Council expressly decided in these Regulations that only appropriate measures might be applied in order that the objectives of Article 39 of the EEC Treaty be not endangered.

As regards the question of the 'appropriate' nature of the measure in dispute, having regard to the opportunitites for fraud and misappropriation, the *Commission* replies that an identical system is provided for by Article 44 of the EEC Treaty.

In its decision of 4 April, 1962 (OJ No 30, 10. 4. 1962, p. 995), putting into operation the two minimum price systems referred to in Article 44, the Council of Ministers had even preferred the one which the applicant regarded as unsuitable, as against the system of total or partial abolition of imports at prices below the minimum level, precisely because it had a lesser effect on imports.

According to the Commission, therefore, it is necessary to quote specific circumstances establishing that the system in dispute is fundamentally unsuitable. The mere possibility that the legislation may be unlawfully manipulated is not sufficient. As regards the 'legal' possibilities of evasion, the Commission notes that they do not affect the efficiency of a system intended to restrict imports and stabilize markets. It would only be otherwise if an importing company used the profit made through the intervention of its subsidiary in order to sell goods on the import market at lower than the minimum price, but such an effect would not necessarily or automatically result. In fact, use of the advantage obtained in the exporting country to this end would depend on a great number of critieria and on considerations of profitability determined by the owner of the undertaking in each particular case.

The Commission states furthermore that imports of tomato concentrates from Greece suffered a considerable recession after the introduction of the protective measures.

(b) In its application, the *applicant* maintains that the system of minimum prices referred to in Article 2 of Regulation No 1643/71 is contrary to certain fundamentel principles of law. It infringes the principle of proportionality by worsening the conditions in which imports are made without offering any equivalent advantage. The system also infringes the principle of legal certainty in that the possibilities for manipulating it introduce an element of legal uncertainty into importing operations. Importers could no longer hope to conclude and settle their buying and selling transactions under normal conditions.

According to the *Commission*, the first ground for complaint regarding the principle of proportionality coincides with the complaint concerning the inappropriate nature of the measure. However, to the extent to which it contains an allusion to the relative necessity for the measure in relation to the quantitiative restrictions imposed, the Commission maintains that this complaint amounts to an examination of the order of priority of the protective measures.

The Commission submits that the second ground for complaint concerning the principle of legal certainty does not correspond with reality. The fact that certain products from Greece could be imported without applying the minimum price, does not render the importer unable to settle and conclude his business 'under normal conditions of competition' (that is, by relying on the normal functioning of the system of minimum prices as a whole). Moreover, the Commission questions whether in Community law, this principle has such a wide application as the applicant attributes to it in this case.

(c) The *applicant* states, moreover, that an order of priority exists in favour of

quantitative restrictions. Of the two measures provided for in Article 2 (1) of Regulation No 1428/71, an importer's liberty is restricted less by the total or partial abolition of imports than by the system of minimum prices. This order of priority also appears in Article 41 of the Association Agreement with Greece. The possibility of temporarily imposing a quantitive restriction on imports would, in this case, have sufficed to protect products processed from tomatoes originating in Community countries, and thus to attain the objectives laid down by Article 39 (1) (c) of the EEC Treaty.

The *Commission* considers that the question of the order of priority between the measures to be taken occurs in Regulation No 1428/71 in different terms from those in Article 41 of the Association Agreement with Greece. In the Regulation, the two possible measures are, first, the total or partial suspension of imports or exports and, secondly, a system of minimum prices. Provision is made in the Agreement, however, for two systems of minimum prices: one leading to a reduction or temporary suspension of imports, the other simply making imports subject to an undertaking to respect the minimum price.

The Commission which, when drawing up the protective measure in question, had to take account both of the Regulation and the Agreement, had every reason to give preference to the second system, as representing the most reasonable solution.

There are several justifications for this choice. Being more flexible, the system of minimum prices made it easier to take future developments into account. Moreover, the very reasons for such developments — namely competition between Greek producers in the field of costs — suggested the need for a price control measure. By acting as a valve allowing the continuous import into the Community of limited quantities, the minimum price system reduced the risk of flooding the market with considerable quantities of goods 'on the opening of the frontiers'. The main justification was the desire to avoid freezing trade relations with Greece and to leave a margin in which such relations might develop naturally, while having regard to the Community cost price.

Moreover, the Commission considers that as, in any case, Regulations Nos 1427 and 1428/71 had to be applied within the limits of the Association Agreement, if it had introduced a quantitive restriction on imports, it could only have done so in the context of a system of minimum prices below which imports could be temporarily suspended or reduced. According to the Commission, such a system is impracticable as being based not on import prices but on periodic quotations for the product in question on the EEC market; the theoretical possibility of formulating such a system would have involved such uncertainties and loss of time in its implementation that it could not have been envisaged as a means of applying a protective measure.

(d) The *applicant* maintains that the minimum prices were fixed at too high a level and thus had a prohibitive effect. Minimum prices should not exceed prices in force within the Community. In fact the minimum price exceeded by 24 % the offer price quoted by Italian manufacturers of tomato concentrates. The prohibitive effect of the minimum price was shown by the 50 % reduction in the import of Greek concentrates.

Moreover, the applicant maintains that the Commission ought to have adjusted the minimum prices according to prevailing market conditions. The market was subjected to fluctuations and ruling prices within the Community fell. Although the Commission was aware of market conditions it did not carry out the necessary adjustments.

The applicant maintains that the Commission was required to have regard to paragraph (3) of Article 41 of the Association Agreement with Greece from which it might be inferred that minimum

prices were to be fixed in such a way as to avoid adversely affecting trade with that country. It was, however, noticeable that the total volume of imports to Member States fell by approximately 50 %, principally as a result of a reduction in the volume of Italian imports.

The *Commission* replies that in establishing the relationship between Greek free-at-frontier offer prices and the Community cost price it took as its basis the official data of the Italian Ministry of Agriculture, since Italy was the principal Community producer of the product in question. The data had been checked by the relevant departments of the Commission, which had had no reason to question their accuracy. The applicant had brought no real evidence of the inaccuracy of the cost prices.

The Commission considers, moreover, that the applicant's submission that the prohibitive effect of the minimum price system was borne out by the reduction in imports, contradicts its submission that the system was inefficient.

The Commission does not dispute the accuracy of the figures showing that the offer price for Italian tomato concentrate in the period August 1971—February 1972 remained lower than the minimum price fixed. These prices, however, gave no indication of the cost prices for the industry within the Community, as they represented only individual offers, and even if they were symptomatic they would show simply that the effect of price stabilization had not yet made itself apparent during the first months after the adoption of the protective measure. The Commission finds it impossible to state confidently the reason for this phenomena but several possibilities are outlined.

The Commission agrees with the applicant that its task is to adjust minimum prices in accordance with market conditions. The Commission maintains, however, that cost prices, which are the only important factor in this case, remained more or less unchanged.

In the opinion of the Commission, the minimum price level does not amount to an infringement of Article 41 of the Agreement with Greece. It is clear from this provision that minimum prices were not to affect the trade in tomato concentrates as it existed at the entry into force of the Agreement with Greece (1962). This was clearly not the case as imports from Greece did not reach any considerable volume until after 1969.

B — (a) In its reply, the *applicant* states that it is pursuing this case despite the judgment given by the Court on 7 February 1973 in case 40/72 (hereinafter called the Schroeder case), because it is in a position to produce certain documents which at that time Schroeder KG, the plaintiff in the action referred for a preliminary ruling, case 40/72, did not yet possess and could not produce; moreover, the applicant wishes to raise again certain issues which were insufficiently emphasized by Schroeder in its observations and with which the Court accordingly could not deal.

In its rejoinder the *Commission* considers that the judgment given in the Schroeder case has deprived the action for damages of all foundation, since the reasons put forward in this case against the validity of Regulation No 1643/71 were examined also in the context of the Schroeder case and the Court did not deny its validity. The Commission considers that the applicant has shown no new reason for a revision of the foregoing judgment. The Commission refrains, therefore, from dealing in detail with the submission made by the applicant in its reply and limits itself to answering certain issues only.

(b) The *applicant* states that, in its judgment in the Schroeder case, the Court accepted the suitability of the measure adopted on the basis of the information from the Commission to the effect that prices for tomato concentrates had reached the minimum price level

from June 1972. In the opinion of the applicant, this information led the Court into error and in fact the increase in market prices was solely the result of the news that the whole of Southern Europe would have a bad tomato crop in the summer of 1972. But for this, the failure of the system of minimum prices would have been obvious.

The applicant maintains that the system was actually abused. It is impossible to explain otherwise the continued availability of Greek tomato concentrates in Germany at prices varying between 26·5 u.a. and 30 u.a. per 100 kg, namely much lower than the minimum price. As evidence of this the applicant quoted offers made by German importers of tomato concentrates for the period from January to September 1972. It is also impossible to explain otherwise the fact that large quantities of Greek tomato concentrates were still being imported into Member States other than Italy. After the introduction of the system of minimum prices, imports to these countries more than doubled as compared with imports made during the 1970 reference period.

According to the *Commission* the question of the development of the 1972 price levels must only have played a secondary rôle in the decision of the Court; in its judgment the Court explicitly stated 'that the legality of a Community act cannot depend on restrospective considerations of its efficacy'. Moreover, in reply to a question put by a Member of the Court during the oral procedure the Commission had stated it to be correct that during summer, 1972, world market prices had, generally speaking, reached minimum price levels. It was, therefore, impossible to say with certainty what developments would have taken place in the absence of this fact. According to the Commission, offer prices for Italian tomato concentrate during the first half of 1972 certainly showed a tendency to rise. Evidence of this tendency could be produced before the Court, but the Commission doubts the relevance of information produced by the applicant concerning offer prices for Greek tomato concentrate.

As regards information supplied by the applicant concerning imports into Member States other than Italy, the Commission observes that increases in imports must be measured in relation to the quantity imported; such imports represent relatively minor quantities as compared with Italian imports. The most important fact is that the volume of imports into Italy, the principal importing country, greatly decreased.

(c) According to the *applicant,* the Court did not rule in its judgment in the Schroeder case, as to the possible existence of methods of manipulating the system of minimum prices as it considered that Article 41 of the Association Agreement bound the Commission, as far as Greece was concerned, to apply one of the two minimum price systems referred to therein.

According to the applicant, at first sight the provisions of Article 41 of the Association Agreement and Article 2 of Regulation No 1428/71 seem to coincide only as regards the system of minimum prices which simply renders imports subject to the undertaking to observe these prices. The first impression is deceptive: the protective measures envisaged according to this first assumption by each of the two Articles also overlap. The suspension of imports, provision for which was made in Article 2 (1) (a), of Regulation No 1428/71 depends only on a finding that goods are being imported below a price limit fixed internally — in fact a minimum price. In the circumstances, therefore, the feature was merely a necessary and sufficient condition for the application of the quota system. This followed from Article 1 (d) of Regulation No 1428/71. A tendency towards an excessive decrease could only be recorded where a particular price is fixed internally as a price limit (minimum price).

As regards the finding of the Court in its judgment in the Schroeder case, that the order in which the protective measures are enumerated creates no order of priority, the applicant observes that an order of priority does, however, emerge if one takes the view that it is appropriate to adopt the less severe measure. It is desirable, in this connexion, to apply the principle that, where a choice exists between an appropriate and an inappropriate measure, it is always the less severe which should be selected.

The applicant maintains that recourse to the total or partial suspension of imports, for which provision was made in the Association Agreement, is not excluded either on the ground that this measure provides for a 'periodic quotation' of domestic prices — which is unattainable. In the absence of periodic quotations for domestic market prices it is necessary to obtain statements of prices by different means, which would equally be possible — in particular by employing brokers. The Commission had acted in a similar way in order to determine free-at-frontier prices in the context of Regulation No 19/62 at the rate of once a week or twice a month, according to the type of goods involved. Moreover, Article 4 of the Council's Decision of 4 April 1962, concerning minimum prices did not make the application of a system of minimum prices below which imports may be temporarily sespended or reduced subject to price 'quotations' alone.

(d) The *applicant* agrees with the principle involved in the reasoning of the Court in its judgment in the Schroeder case, that 'the legality of a Community act cannot depend on retrospective considerations of its efficacy' and that it 'suffices that at the moment of their adoption it does not appear that they are obviously inappropriate to contribute to the realization of the desired object'. In the opinion of the applicant, however, this principle could not be retained once an unfavourable movement of prices was clearly foreseeable. The simple logic according to which a tradesman is not expected to give his wares away, is sufficient to explain the manipulation to which the system of minimum prices was subject. When a tradesman must pay a higher price than that asked by the vendor, he will try at all costs to find a means — legal if possible — to avoid the obligation. The applicant also points out that in 1969, at the time when a minimum price system was already to be adopted for the preserved fruit and vegetable market, various instances had drawn the Commission's attention to the consequences and the possibilities of manipulation which would ensue.

(e) As far as the question of the amount of the fixed minimum prices is concerned, the *applicant* states that, in the judgment in the Schroeder case, the plaintiff in the main action, the Schroeder company, was criticized for failing to put forward concrete arguments showing the inaccuracy of the information supplied by the Italian Government and relied on by the Commission in that case. In this connection, the applicant asserts that minimum prices should only be applied and fixed at a level which was absolutely necessary to protect the Community's domestic market. The Community cost prices which were to serve the Commission as reference prices ought therefore to have been calculated precisely, and not at a flat rate. However, according to the Commission's information regarding the procedure used by the Italian Ministry of Agriculture to establish cost prices, it was clear that in doing this the Ministry was basing its calculations on flat-rate amounts. The fact that Italian tomato contrates were always offered at around 30 u.a. tends to show that the cost prices of Italian producers were still lower than this amount. The offer price on the German market includes the profit margin of the German importer, the transport costs et cetera, and if, for reasons of competition, the producer

may from time to time sell at a price lower than his cost price, he could not act in this way permanently.

As regards the method of calculation of the cost prices, as explained by the Commission, the applicant observes that offer prices for Italian tomatoes in 1970 and 1971 — the sole criterion which could be established by the Italian Ministry of Agriculture in the fixing of the cost prices — show that the amount representing the purchase price of the basic product was itself already fixed too high at 20 lire per kg of tomatoes. The purchase price of a kg of tomatoes in 1970 varied between 13 and 19 lire. The 1971 harvest was offered at a rate of 16 to 19 lire per kg.

Recalling the line of argument developed by the Commission in judgment 17/72 of 8 November 1972, the applicant maintains that the Commission should have made its own calculations on the basis of the statistical information which it had itself acquired from the producing companies.

The prohibitive effect of the minimum price was evident in Italy where no import transactions were concluded during September, October or November, 1971.

The *Commission* replies that the fixing of the price of the basic products at 20 lire per kg of tomatoes was fully justified economically. Even the evidence produced by the applicant shows the 1971 harvest to have been offered at a price of 16 to 19 lire per kg. As trade prices were depressed as a result of the over-abundant supply situation, a price of 20 lire per kg as a desirable but also realistic level for the price to the producer seems quite justifiable. This was confirmed by the level of the intervention prices for tomatoes which, in August 1971, varied more or less between 15 and 19 lire per kg, August being the month in which prices are at their lowest. The Commission considers that the prices to be paid by the industry must necessarily be higher than the level of intervention prices, as, if this were not the case, an even larger proportion of the crop would have been channelled through the intervention machinery. It claims that the Court, in its judgment in the Schroeder case had itself accepted it as fair that the cost price could be slightly higher than the intervention price.

2. On the existence of a breach of duty

The *applicant* maintains that the Commission has committed a breach of duty. The Commission is bound by the provisions of the EEC Treaty, and to the extent to which, for the enforcement of rules made by the Council it exercises powers conferred by the Council, it is bound by the same rules. The system of minimum prices infringes not only the provisions of the EEC Treaty but also the decisions taken by the Council empowering the Commission to adopt protective measures. Had the Commission made a thorough examination of the conditions required it must have been aware of the illegality vitiating the system of minimum prices, all the more so as it had been made clear to it on several occasions that the effects which the system produced were contrary to its objectives. The Commission should have recognized that the system of minimum prices was contrary to any commercial design or activity and for this very reason was an incitement to defraud.

The *Commission* denies that there was any breach of duty. If the Court considers cost prices in the Italian industry, recorded by the Commission to have been fixed at too high a level, the Commission emphasizes that these prices were notified to it by the Italian authorities and that the prices were a precise calculation of the average cost prices. The Commission's departments had for their part checked these figures and had found no reason to doubt their accuracy. If, nevertheless, these prices were now shown to be inaccurate after all, the Commission could in no way be held liable.

In its reply the *applicant* submits that the Commissions's breach of duty lies in its having manifestly forgotten the existence of a choice between two protective measures available, and that it ought to adopt only the less severe of the two, that is to say, the most suitbale. Moreover, the applicant states that, even if it is not admitted that the inappropriate nature of the system of minimum prices was foreseeable, the Commission was guilty of a breach of duty by failing to abrogate the measure at the latest two months after the adoption of Regulation No 1643/71. The Commission was bound to keep the state of the market under permanent observation and must have realized shortly after the entry into force of the system that imports of Greek tomato concentrates, apart form those intended for Italy, had not decreased and were still being offered at prices below the minimum. Had suitable measures been taken, positive results should have appeared about one month later. Further evidence of the Commissions's negligence in adopting the system of minimum prices is shown by the fact that Regulation No 1643/71 was only revoked by Regulation No 395/73 of 9 February 1973, although from autumn 1972, bad tomato crops had resulted in the offer price for Greek tomato concentrates rising above the minimum price.

3. On the alleged loss suffered

The *applicant* states that, on 6 October 1971, in performance of a contract made with Agend S.p.A., an associate of the Greek company, Greek Export, Athens, it bought 100 metric tons of double-strength tomato concentrate. Despite a more favourable offer of $US 270 cost and freight port of Hamburg made by the Greek vendor, it had to conclude the contract at the minimum price, namely $US 340. As the goods in question were to be imported, the applicant carried out the import transactions in the Federal Republic of Germany on 25 and 26 January and 15 February 1972. The purchase price amounted to DM 5·60 per tin, taking into account the rate of exchange. In order to be able to meet Italian competition, the applicant was obliged to sell the tomato concentrates in question at a price lower than the purchase price. By a contract concluded on 2 March 1972, the applicant sold part of the goods in question (200 cartons of six tins each) at a price of DM 5·30 per tin, delivered free at residence, to the company Bernhard Meinke and Successeurs whose registered office is in Berlin. After deduction of transport costs, commission paid to a brokerage firm, wharfage and financing expenses, this price represented DM 4·95 per tin. The total loss suffered on the sale to the Meinke company was DM 780. As regards his loss of profit, the applicant claims only the usual profit margin represented by 5 % of the selling price, that is to say, in this case, DM 318, bringing the total loss suffered to DM 1 098.

The applicant maintains that this loss was increased by other sales, as it was forced to carry out all the purchases which it had previously promised to make. However, the applicant is first making this claim only in respect of loss resulting from sales made to the Meinke company.

The Commission maintains that there are certain basic objctions and reservations with regard to the calculation of damages. Even supposing that the elements involved in the calculation were realistic, the following questions remain:

(a) Did the goods actually come from stocks bought at the minimum price?

(b) Was the applicant in reality under an obligation to purchase all the goods?

(c) According to the Commission it is quite conceivable that the applicant's purchasers were still holding stocks of tomato concentrates imported at a lower

price before the introduction of the protective measures. The Commission maintains that, if this were the case, one could seriously question the existence of the necessary causal link. In any case, if these were the circumstances, the applicant should have waited for general price levels to adjust themselves in order to prevent or avoid loss.

(d) The Commission states that the loss estimated by the applicant amounts to approximately $US 60 per metric ton. This amounts to saying that the minimum price was at least $US 60 per metric ton too high — that is to say, that it should have been at most $US 280 per metric ton. The applicant's calculation appears accurate if it is accepted that Greek concentrates had been offered to him at $US 270 per metric ton. However, in the opinion of the Commission, the basic fact is not that, but rather the loss which the applicant claims to have suffered as a result of the ruling prices being lower than the minimum prices. Since 1971, there had been a large number of cases in which the offer price bordered on, and sometimes exceeded $US 300 per metric ton. It was impossible, therefore, to say that after prices in Germany had generally become established at $US 280, with the result that the loss calculated by the applicant was in any case overestimated.

(e) The Commission points out that the result is the same if the calculation is based on the assumption that the system of minimum prices is only illegal because the price level was fixed too high. Assuming that Italian cost prices were overestimated and that the minimum-price should have been only $US 230, the loss which the applicant could claim would amount at most to $US 20 per metric ton.

The *applicant* replies that to appreciate the facts, it must be noted that on both 6 October and also on 29 December 1971, it purchased 100 metric tons of double-strength Greek tomato concentrates at the minimum price of $US 340 per metric ton. According to the applicant, two memoranda annexed to its reply make it clear that the delivery of the goods in question to the Meinke company on 7 March 1972 arose out of the contracts made on 6 October and 29 December 1971 with Greek Export. It was clear from these two contracts that the transactions were not subject to any conditions enabling the applicant to free himself from his obligations to purchase.

The applicant states that it could not have been expected to avoid or limit the loss by waiting until there was a rise in the general price level since, even after the adoption of the system of minimum prices, Greek tomato concentrates were stil available at lower prices. In the applicant's opinion, the amount of the loss must be estimated in terms of the prices at which Greek tomato concentrates were available. It states that, between September and October 1971 and April and May 1972 quotations made by Greek forwarding agents for double-strength concentrates varied between $US 260 and $US 265, cost and freight port of Hamburg. The applicant maintains that it was therefore compelled to bring the offers made to the Meinke company into line with general price levels for fear of being unable to conduct any business at all.

Grounds of judgment

1 By this application, made on 24 August 1972, Wünsche Handelsgesellschaft of Hamburg requests that the Commission be ordered to pay compensation for losses which it claims to have suffered following the introduction of a system

of minimum prices for tomato concentrates imported from Greece, adopted by Regulation No 1643/71 of the Commission of 28 July 1971, in particular Article 2;

2 The applicant further claims that this Regulation is illegal and that by its enactment, the Commission has made the Community liable under the second paragraph of Article 215, of the EEC Treaty;

Liability on the part of the Community in respect of detriment suffered by individuals as the result of a legislative measure involving choices as to economic policy could only be incurred as a result of a sufficiently serious breach of a major rule of law protecting individuals;

The validity of Article 2 of Regulation No 1643/71 has already been examined by the Court in case 40/72, on a request for a preliminary ruling from the administrative court (Verwaltungsgericht) of Frankfurt-am-Main, in proceedings between I. Schroeder KG, Hamburg, and the Federal Republic of Germany concerning the same pleas as in this case;

In its judgment of 7 February 1973 in the above case, the Court decided that examination of the questions put by the national court had shown nothing which could cast doubt on the validity of Article 2 of the above Regulation, and that 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 1961 creates an order of priority between the measures provided for therein;

3 In nevertheless pursuing this action the applicant wished to bring evidence in addition th that already produced in case 40/72 and to stress certain points which it claims had not been sufficiently emphasized in that case;

The applicant has thus alluded to the alleged inefficiency of the system of minimum prices adopted, the choice made by the Commission of this system in preference to other systems restricting imports, and the level of minimum prices fixed, which it alleges were too high;

4 Even if the additional evidence which the applicant in this case has produced or offered to produce were accepted, it would not be sufficient to establish the

existence of a sufficiently serious breach of a major rule of Community law protecting individuals;

5 It must be concluded, therefore, that the conditions in which the Community may incur liability under the second paragraph of Article 215 are not present, and that the application must be rejected;

Costs

6 By Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs;

The applicant has failed in his pleas;

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 39, 40, 44, 178 and the second paragraph of Article 215;
Having regard to Regulations Nos 1427/71 and 1428/71 of the Council of 28 July 1971;
Having regard to Regulations Nos 1558/71 of the Commission of 20 July 1971, and 1643/71 of the Commission of 28 July 1971;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby:

1. dismisses the action as unfounded;

2. orders the applicant to pay the costs.

Lecourt	Monaco	Pescatore
Donner	Mertens de Wilmars	Kutscher
Ó Dálaigh	Sørensen	Mackenzie Stuart

Delivered in open court in Luxembourg on 20 February 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 4 JULY 1973 [1]

Mr President,

Members of the Court

I — The Facts

Wünsche Handelsgesellschaft, a partnership with limited liability, whose registered office is at Hamburg, deals in the import of preserved fruit and vegetables, and in particular of tomato concentrates from Greece and Portugal.

Tomato concentrates, under Tariff Heading 20.02, are comprised in the common organization of the market in products processed from fruit and vegetables created by Regulation No 865/68 of the Council of 28 June 1968.

Imports of these products into the Common Market from third countries were originally liable only to the payment of Common Customs Tariff duty. Furthermore there was no co-ordination or unification of the import arrangements applied by Member States vis-à-vis third countries.

Because of disturbances which were threatening the relevant market as a result of extensive imports at prices likely to jeopardize the objectives set out in Article 39 of the Treaty, the Council found it necessary to introduce protective measures during the summer of 1971.

This was the objective of Regulation No 1427/71 of 2 July 1971, together with Regulation 1428/71 of the same date, which laid down the conditions for the application of those measures in the sector in question.

You have already had occasion to consider the provisions of these Regulations in the case of Schroeder, 40/72 (Judgment of 7 February 1973, not yet published).

1 — Translated from the French.