JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

28 September 1999 *

In Case T-254/97,

Fruchthandelsgesellschaft mbH Chemnitz, a company incorporated under German law, established in Chemnitz (Germany), represented by Jürgen Mielke and Thorsten W. Albrecht, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the Chambers of Entringer and Niedner, 34A Rue Philippe II,

applicant,

v

Commission of the European Communities, represented by Klaus-Dieter Borchardt and Hubert van Vliet, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Kingdom of Spain, represented by Rosario Silva de Lapuerta, Abogado del Estado, of the Community Legal Affairs Department, acting as Agent, with an

* Language of the case: German.

address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

and

French Republic, represented by Kareen Rispal-Bellanger, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

interveners,

APPLICATION for the annulment of the Commission Decision (VI/6251/97/DE) of 9 July 1997 rejecting the applicant's request for the grant of import licences under the transitional measures provided for in Article 30 of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1),

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

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: J. Palacio González, Administrator

having regard to the written procedure and further to the hearing on 20 April 1999,

gives the following

Judgment

Relevant provisions

1 Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1, 'Regulation No 404/93') introduced a common system for the importation of bananas which replaced the various national arrangements. In order to ensure satisfactory marketing of bananas produced in the Community and of products originating in the African, Caribbean and Pacific (ACP) States and in other third countries, Regulation No 404/93 provides for the opening of an annual tariff quota for imports of 'third-country' bananas and 'non-traditional ACP' bananas. 'Non-traditional ACP bananas' means the quantities of bananas exported by the ACP States which exceed the quantities traditionally exported by each of those States as set out in the Annex to Regulation No 404/93.

2 Each year a forecast supply balance is to be drawn up on production and consumption in the Community and of imports and exports. The tariff quota determined on the basis of the forecast supply balance is to be allocated among operators established in the Community according to the origin and the average quantities of bananas that they have sold in the three most recent years for which figures are available. On the basis of that allocation, import licences are to be issued which enable operators to import bananas free of customs duties or at preferential rates of customs duty.

3 The 22nd recital in the preamble to Regulation No 404/93 is worded as follows:

'... the replacement of the various national arrangements in operation when this regulation comes into force by this common organisation of the market threatens to disturb the internal market;... the Commission, as of 1 July 1993, should be able to take any transitional measures required to overcome the difficulties of implementing the new arrangements'.

4 Article 30 of Regulation No 404/93 provides:

'If specific measures are required after July 1993 to assist the transition from arrangements existing before the entry into force of this Regulation to those laid down by this Regulation, and in particular to overcome difficulties of a sensitive nature, the Commission... shall take any transitional measures it judges necessary.'

Facts and procedure

5 The applicant, Fruchthandelsgesellschaft mbH Chemnitz ('Fruchthandelsgesellschaft'), is a fruit-trading company which was originally known as VEB Großhandelsgesellschaft OGS Karl-Marx-Stadt ('Großhandelsgesellschaft'), a previously State-owned undertaking in the former German Democratic Republic ('GDR'). Großhandelsgesellschaft was privatised under the name of 'Fruchthandelsgesellschaft mbH Chemnitz' and administered by the Treuhandanstalt, the body established under public law responsible for restructuring previously State-owned undertakings in the former GDR.

6 In 1990, the Treuhandanstalt arranged for the company's ripening facilities, which had become obsolete, to be renovated. However, the new facilities, which had an annual capacity of 14 750 tonnes, ripened only 5 000 tonnes of bananas between 1991 and 1993. In April 1993, the Treuhandanstalt decided to terminate the operation of the ripening plant.

7 By contract dated 17 December 1993, Fruchthandelsgesellschaft mbH Chemnitz was sold to Peter Vetter GmbH Fruchtimport + Agentur. Under the contract of sale, it was decided, *inter alia*, that the company's business name could be retained and that all the employees would be kept on. It was also agreed that, until 31 December 1996, the purchaser undertook not to dispose of any essential operational element of the part-undertaking without the prior consent of the Treuhandanstalt, and to continue to run it on the basis of the commercial objects as they then stood for a period of at least three years as from the day of the takeover. Finally, the purchaser undertook to make investments totalling DM 1 million.

8 The building of new facilities, including a ripening plant, began in 1995. It required an investment of approximately DM 8.5 million and made possible a production capacity of 10 500 tonnes of bananas per year.

9 Following completion of the new ripening facilities, the applicant submitted to the Commission, by letter of 18 December 1996, an application for the special grant of licences for the importation of bananas under the tariff quota, pursuant to Article 30 of Regulation No 404/93.

10 By decision (VI/6251/97/DE) of 9 July 1997, the Commission rejected that application ('the contested decision').

11 That decision stated *inter alia*:

'... Fruchthandelsgesellschaft has described the facts as follows: the undertaking was formed on 1 January 1994; it had previously been a Treuhand undertaking which was closed down in April 1993 following a decision of the Treuhandanstalt; its banana-ripening facilities were wound up by the Treuhandanstalt in 1994; in December 1994, the undertaking purchased from the Treuhandanstalt a plot of land on which it had a banana-ripening plant built; banana ripening in that plant began in July 1996; the undertaking has a capacity of 10 500 tonnes per year;

... Article 30 of Regulation (EEC) No 404/93 authorises and, depending on the circumstances, requires the Commission to lay down rules catering for cases of hardship arising from the fact that importers of third-country bananas or non-traditional ACP bananas meet difficulties threatening their existence when an exceptionally low quota has been allocated to them on the basis of the reference years to be taken into consideration under Article 19(2) of the regulation, where those difficulties are inherent in the transition from the national arrangements existing before the entry into force of the regulation to the common organisation of the market and are not caused by a lack of care on the part of the traders concerned;

...

... Regulation (EEC) No 404/93 was published in the *Official Journal of the European Communities* on 25 February 1993 and entered into force on 1 July 1993;... the proposal relating to the introduction of a common organisation of the market in bananas was published on 10 September 1992;

... Fruchthandelsgesellschaft was formed after the aforementioned dates;... Fruchthandelsgesellschaft cannot therefore have acted without being able to foresee the consequences of so acting once the common organisation of the market in bananas had been introduced;

... the steps taken by the Treuhandanstalt before the date on which Fruchthandelsgesellschaft was formed cannot be regarded as steps taken by Fruchthandelsgesellschaft;

... in accordance with the criteria laid down by the Court of Justice, it is not possible to regard the situation of [Fruchthandelsgesellschaft] as a case of hardship and... the application for the special grant of import licences must therefore be refused;

...'.

Procedure and forms of order sought by the parties

12 By application lodged on 17 September 1997, the applicant brought the present action.

13 On 16 January and 17 February 1998 respectively, the Kingdom of Spain and the French Republic applied for leave to intervene in the case in support of the form of order sought by the Commission. Those applications were granted by orders of

the President of the Fourth Chamber of 17 June 1998. By statements lodged on 30 July and 3 September 1998 respectively, the Kingdom of Spain and the French Republic submitted their observations.

14 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure. As a measure of organisation of procedure provided for in Article 64 of the Rules of Procedure, the Commission was requested to produce the report of 9 September 1997 drawn up by the Standing Appellate Body of the World Trade Organisation (WTO) on the common organisation of the market in bananas.

15 The parties and the Kingdom of Spain, intervening, presented oral argument and answered the questions put by the Court at the hearing on 20 April 1999.

16 Fruchthandelsgesellschaft, the applicant, claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

17 The Commission, the defendant, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

18 The Kingdom of Spain, intervening, contends that the Court should dismiss the application.

19 The French Republic, intervening, contends that the Court should dismiss the application.

The claim for annulment

20 The applicant raises a single plea in law in support of its action, alleging infringement of Article 30 of Regulation No 404/93 and misuse of powers. In its reply, the applicant stated that its action might have been rendered devoid of purpose by the effects of the report delivered by the WTO's Standing Appellate Body on 9 September 1997 and adopted by the WTO's Dispute Settlement Body on 25 September 1997. At the hearing, it claimed that it still had an interest in having the contested decision annulled and that such annulment might be based on the decision of the Dispute Settlement Body.

The effects of the Standing Appellate Body's report of 9 September 1997 and of the Dispute Settlement Body's decision adopting that report

Arguments of the parties

21 The applicant maintains that the report, delivered on 9 September 1997 by the Standing Appellate Body and adopted by the Dispute Settlement Body on 25 September 1997, declared that the system of licences for the importation of third-country bananas introduced by Regulation No 404/93 was contrary to the General Agreement on Tariffs and Trade ('GATT') in various respects and could not, in its present form, be implemented in a manner consistent therewith.

22 In the applicant's submission, the mandatory decisions of the Dispute Settlement Body might have direct effect in Community law.

23 The Commission considers that, even if the decision of the Dispute Settlement Body were recognised as having direct effect, it would have no effect on the applicant's situation. That decision does not in any way call into question the existence of the tariff quota for third-country bananas and non-traditional ACP bananas. In any event, even if the present import licence arrangements did not apply, it has not been established whether, and to what extent, the applicant could be granted import licences under the tariff quota as a banana-ripening company. The applicant is not therefore personally entitled to participate in the tariff quota by virtue of either the rules of GATT, the decision of the Dispute Settlement Body or the rules of Community law.

24 At the hearing, the Kingdom of Spain supported the Commission's position by stating, *inter alia*, that the only effect of a finding by the Standing Appellate Body

that a measure is incompatible with a WTO agreement is to recommend that the Member in question bring its legislation into compliance with the agreement. Such a finding would not require the Member concerned to amend its legislation because Article 22 of the Understanding on rules and procedures governing the settlement of disputes (OJ 1994 L 336, p. 234) also provides the possibility for the complaining party to obtain compensation and to secure the suspension of concessions.

25 Furthermore, the Court of Justice has held that GATT, by its very nature, cannot have direct effect and does not make it possible to call into question the validity of a Community rule. Such an effect would, moreover, be tantamount to an exception to the jurisdictional monopoly conferred on the Court of Justice by Article 164 of the EC Treaty (now Article 220 EC).

Findings of the Court

26 It must be made clear that the Standing Appellate Body's report of 9 September 1997, adopted by the Dispute Settlement Body on 25 September 1997, does not call into question the tariff quota system as such. That report concluded that there were certain discriminatory elements in the arrangements introduced by Regulation No 404/93, but did not find the arrangements as a whole to be incompatible with GATT or with the General Agreement on Trade in Services (GATS). The Commission accordingly adopted amendments to the arrangements introduced by Regulation No 404/93 with a view to bringing them into compliance with that report and with the decision of the Dispute Settlement Body [see Council Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation (EEC) No 404/93 (OJ 1998 L 210, p. 28)].

27 Consequently, the applicant cannot rely on the report and the decision in question in order to claim that the arrangements establishing a common organisation of the market in bananas no longer exist.

28 Furthermore, the applicant has not established a link in law between the decision of the Dispute Settlement Body and this action.

29 It is clear from the Community case-law that, in order for a provision in a decision to have direct effect on a person other than the addressee, that provision must impose on the addressee an unconditional and sufficiently clear and precise obligation vis-à-vis the person concerned (see the judgments of the Court of Justice in Case 9/70 *Grad* v *Finanzamt Traunstein* [1970] ECR 825, paragraph 9; Case 104/81 *Kupferberg* [1982] ECR 3641, paragraphs 22 and 23; and Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 110).

30 The applicant has not put forward any arguments to support the view that those criteria are met. Its argument concerning the effects of the Standing Appellate Body's report and the Dispute Settlement Body's decision must therefore be rejected as unfounded, without there being any need to consider whether the mandatory decisions of the Dispute Settlement Body have direct effect.

The plea in law alleging infringement of Article 30 of Regulation No 404/93 and misuse of powers

Arguments of the parties

31 The applicant argues that the contested decision infringes Regulation No 404/93, in particular Article 30 thereof, and that the Commission is guilty of misuse of powers.

32 The Commission is thus said to have disregarded the conditions laid down in the judgment of the Court of Justice in Case C-68/95 *T. Port* v *Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065 with regard to cases of hardship.

33 In the first place, the applicant maintains that the contested decision incorrectly assesses the facts in that it takes the view that its difficulties are attributable to its conduct. The decision of the Treuhandanstalt to suspend banana ripening in April 1993 was, it submits, an exceptional circumstance for which it is not responsible. That suspension should not be taken into account in determining its rights in respect of the grant of import licences inasmuch as it was the successor to Großhandelsgesellschaft. In the light of the special situation of the new *Länder*, its banana quota should be calculated on the basis of the capacity of that undertaking.

34 Moreover, the decision to close the banana-ripening plant in April 1993 was taken not in order to meet a long-term commercial objective but to attract potential investors. Since modernisation did not meet with the desired success, in January 1993, the applicant company was placed under the administration of the Treuhandanstalt's 'Liquidation' department, whose only task was to draw up a redundancy programme for the employees and to dispose of the undertaking's assets.

35 The applicant emphasises that it saw the building of the banana-ripening plant as an essential condition of its long-term continued presence on the market. It is the only wholesaler within a 100-km radius to have a full range of produce and has always maintained a basic supply of fruit and vegetables for the local population, as the evidence of one of its clients' employees confirms.

36 Against that background, the applicant maintains that all the major fruit traders and wholesalers in the former *Länder* who offer a full range of produce have their own banana-ripening plants. In so far as the Commission disputes this, the applicant requests that an expert's report be drawn up.

37 Finally, in taking as reference quantities for the purpose of granting import licences the quantities of bananas ripened in the former ripening plant during the years 1991, 1992 and 1993, the Commission recognised that there had been continuity in the ripening business after Großhandelsgesellschaft was privatised.

38 In those circumstances, the applicant submits that it cannot be pleaded that it was aware of Regulation No 404/93 at the time when its new banana-ripening plant was built in 1995. If application of that regulation were to force it to terminate its ripening business permanently, that would amount to a prohibition against pursuing a trade or business which would threaten its existence and lead to the redundancy of many workers who specialised primarily in banana-ripening operations. The effect of this, ultimately, would be to exclude from banana-ripening activities on a long-term basis all previously State-owned fruit-trading undertakings from the former GDR that were restructured and modernised between 1990 and 1995, which in turn would result in the emergence of protectionism within the Community.

39 Secondly, the applicant states that its difficulties are inherent in the implementation of the common organisation of the market in bananas. The reference period defined by that system is a discriminatory criterion in so far as, during the years taken into account, it stood no chance of achieving a satisfactory turnover. It is none the less treated in exactly the same way as all other fruit-trading undertakings in the Community.

40 In its reply, it goes on to say that, by the same token, previously State-owned undertakings in the former GDR cannot be treated in the same way as undertakings now establishing themselves in the new *Länder*. Contrary to the Commission's argument, a previously State-owned undertaking in the former GDR whose banana-ripening business is hampered by difficulties which have arisen since reunification and which is forced to suspend that activity temporarily is in a very different situation from that of a trader starting up from scratch. Unlike the latter, the applicant entered into long-term delivery obligations before the entry into force of the common organisation of the market in bananas and has retained a large staff. The new trader exposes himself to an incomparably smaller economic risk since he can adjust his staffing policy to the size of the import licences issued to him.

41 Thirdly, the applicant maintains that the contested decision adversely affects its property rights and the freedom to pursue a trade or business. The refusal to grant it additional licences jeopardises the pursuit of its business and, as a wholesaler offering a full range of produce, it has an indispensable need for banana-ripening facilities.

42 The Commission argues that the Treuhandanstalt's decision to close the ripening plant was taken as part of its administration of Fruchthandelsgesellschaft mbH Chemnitz. It was not taken in anticipation of the forthcoming entry into force of the common organisation of the market in bananas. It is therefore impossible to infer a case of hardship from the particular difficulties experienced by Fruchthandelsgesellschaft between 1989 and April 1993.

43 The only circumstance which the applicant might put forward as constituting a case of hardship is the fact that, in 1995 and 1996, it built, at considerable investment cost, a new banana-ripening plant with a capacity of 10 500 tonnes

per year which it is unable to operate at full strength and at a profit because it has not been awarded the import licences it needs by reason of the arrangements introduced by Regulation No 404/93.

44 However, the difficulties encountered by the applicant as a result of that situation are due to a lack of care on its part, since it built a new banana-ripening plant a year and a half after the entry into force of the common organisation of the market in bananas, without knowing how it would be able to operate the plant, notwithstanding that it was fully aware of the rules relating to the reference period.

45 In this connection, the Commission disputes the applicant's argument that it was entitled to expect that special rules to accommodate the specific situation of the new *Länder* would be adopted. It states that the applicant knew as early as December 1993, when it acquired Fruchthandelsgesellschaft mbH Chemnitz, then administered by the Treuhandanstalt, that the 'banana-ripening' sector had been abandoned and that, in 1996, it would not be able to argue that the opening of a new banana-ripening facility was the continuation of the ripening business carried on by Großhandelsgesellschaft or by Fruchthandelsgesellschaft mbH Chemnitz under the administration of the Treuhandanstalt.

46 It explains that the applicant did indeed obtain import licences on the basis of the quantities of bananas ripened in the former ripening plant during the years 1991, 1992 and 1993, before that plant was closed.

47 However, this does not mean that the applicant may rely on Großhandelsgesellschaft's former ripening activities. The rights transferred to it are confined to the reference period.

48 As regards the applicant's argument that, as a wholesaler offering a full range of produce, it had an indispensable need for banana-ripening facilities, the Commission submits that this fact does not put it in a special legal situation as regards the market. Moreover, the applicant is wrong when it says that banana ripening is an essential condition of its long-term continued presence on the market, because the rules of the common organisation of the market in bananas do not apply to the commercial activities of ripening plants. If the latter are not able to import and ripen third-country or non-traditional ACP bananas themselves, they can ripen 'foreign' bananas, that is to say bananas imported by other importers, without the slightest legal restriction.

49 With regard to the claim that the reference period is discriminatory, the Commission submits that the difficulties connected with the privatisation of Großhandelsgesellschaft do not put the applicant in a special situation entitling it to be treated differently from other undertakings trading in fruit. As far as the 'banana-ripening' sector is concerned, the applicant is in the same situation as any other fruit-trading undertaking which began that activity after the entry into force of the rules of the common organisation of the market in bananas.

50 Furthermore, the difficulties connected with the privatisation process which all undertakings in the former GDR encountered after reunification do not fall within the scope of Article 30 of Regulation No 404/93, in so far as the Court of Justice held in its judgment in *T. Port*, cited above, that the conditions required for the Commission to be able to lay down rules catering for cases of hardship under that article relate exclusively to individual cases. In this regard, the Commission also refers to the order of the President of the Court of First Instance in Case T-79/96 R *Camar* v *Commission* [1997] ECR II-403.

51 As regards the applicant's claim that the transition to the common organisation of the market in bananas infringes its fundamental right to pursue its trade freely,

the Commission points out that it is settled case-law that freedom to pursue an economic activity is one of the general principles of Community law, but is not an absolute prerogative and must be considered in relation to its social function (see Case T-521/93 *Atlanta and Others* v *European Community* [1996] ECR II-1707, paragraph 62). Moreover, the guarantees accorded to traders cannot in any event be extended to protect mere commercial interests or opportunities the uncertainties of which are part of the very essence of economic activity (see the judgment of the Court of Justice in Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 14). The import licences claimed by the applicant in order to ensure its volume of business are not therefore protected by the fundamental right freely to pursue an economic activity.

52 Finally, as regards the right to protection of property relied on by the applicant, the Commission submits that, while the application of the rules of the common organisation of the market in bananas may indeed place in jeopardy the existence of the entire undertaking, that risk is attributable to the decision taken by the applicant itself, which, although fully aware of the legal framework laid down by the common organisation of the market in bananas, none the less invested in the construction of a new ripening plant without any guarantee as to its profitablity.

53 The Kingdom of Spain, in support of the arguments put forward by the Commission, points out, *inter alia*, that the possibility of adopting the transitional measures provided for in Article 30 of Regulation No 404/93 is intended, according to the 22nd recital in the preamble to that regulation, to address the disturbances in the internal market which may arise as a result of the various national arrangements being replaced by the common organisation of the market. It is none the less not intended to solve the wide range of problems which may, for other reasons, be encountered by undertakings trading in the banana sector.

54 In particular, the difficulties which the applicant claims to have experienced are not due to the entry into force of the common organisation of the market in bananas and do not correspond to the objective pursued by the transitional measures provided for in Article 30 of Regulation No 404/93.

55 The Kingdom of Spain observes in this respect that failure to satisfy the requirements laid down by Article 30 of Regulation No 404/93 for granting transitional measures could have the effect of altering the entire system of banana imports into the Community, of prejudicing the rights of affected traders in the sector and consequently of upsetting the balance of interests established by the provisions of the common agricultural policy concerning the common organisation of the market in bananas (see the order in *Camar* v *Commission*, cited above, paragraph 47).

56 The Kingdom of Spain also disputes the applicant's claim relating to misuse of powers by submitting that, in the present case, the Commission did not adopt the contested decision in order to attain an objective other than that provided for, but merely applied Article 30 of Regulation No 404/93 as interpreted by the Court of Justice.

57 As regards the principle of equality, the Kingdom of Spain submits that the Commission acted correctly and in a manner consistent with that principle in treating the applicant in the same way as it treats all undertakings trading in third-country and non-traditional ACP bananas.

58 The French Republic points out, first of all, that it is clear from the terms used by the applicant in its application that its difficulties do not satisfy the conditions for giving effect to Article 30 of Regulation No 404/93, as defined by the Community judicature, but stem from a decision taken by the undertaking after the entry into force of the common organisation of the market.

59 The French Republic states, next, that the Commission was right to take the view that the applicant did not succeed to all of the rights enjoyed by Großhandelsgesellschaft. As the applicant acknowledges, the contract of sale concluded on 17 December 1993 with the Treuhandanstalt does not contain any clause relating to a ripening plant.

60 In other words, the applicant took the decision to build a new ripening plant after the entry into force of the common organisation of the market in bananas in full knowledge of the tariff quota arrangements laid down by that system.

Findings of the Court

61 Article 30 of Regulation No 404/93 empowers the Commission to take specific transitional measures 'to assist the transition from arrangements existing before the entry into force of [the] Regulation to those laid down by this Regulation, and in particular to overcome difficulties' caused by that transition. According to settled case-law, those transitional measures are intended to deal with disturbances in the internal market brought about by the replacement of the various national arrangements by the common organisation of the market and their purpose is to address difficulties encountered by traders following the establishment of the common organisation of the market but originating in the state of national markets prior to the entry into force of Regulation No 404/93 (see the order of the Court of Justice in Case C-280/93 R *Germany* v *Council* [1993] ECR I-3667, paragraphs 46 and 47; the judgments of the Court of Justice in *T. Port*, cited above, paragraph 34, and Joined Cases C-9/95, C-23/95 and C-156/95 *Belgium and Germany* v *Commission* [1997] ECR I-645, paragraph 22; and the order in *Camar* v *Commission*, cited above, paragraph 42).

62 The Court of Justice has held that the Commission must in this regard take into account the situation of traders who, under national legislation in force prior to Regulation No 404/93, took certain action without being able to foresee the consequences of such action after establishment of the common organisation of the market (see the judgment in *T. Port*, cited above, paragraph 37).

63 It is on the basis of that criterion that the Commission states in the contested decision (see paragraph 11 above) that the applicant undertaking was formed came after the proposal relating to the establishment of the common organisation of the market in bananas, which was published on 10 September 1992, and after the publication of Regulation No 404/93 in the *Official Journal of the European Communities* on 25 February 1993, and that the applicant cannot, therefore, have acted without being able to foresee the consequences which its action would have after the establishment of the common organisation of the market in bananas.

64 The applicant does not dispute that, in 1995, it built a new ripening plant in which it was possible to begin banana ripening in July 1996. In fact, it was the applicant who provided the Commission with that information in its request for additional licences on 18 December 1996.

65 The applicant stated at the hearing that the building of a new ripening plant had been planned for a long time and that the closure of the former ripening facility was merely a temporary suspension of the ripening business. Talks on the building of the new ripening plant are said to have started as early as 1990, even though the decision to close the former ripening plant was not taken until 1993.

66 The fact is, however, that that information, which was not forwarded to the Commission at the time of the contested decision, is not supported by any evidence. It should be pointed out in this respect that the contract of sale contained no provision relating to the building of a new ripening plant. Moreover, the cost of building the Fruchthandelsgesellschaft facility substantially exceeded the amount of the investment which the purchaser had undertaken to make.

67 The applicant was therefore able, when it took its decision to build a new ripening plant, to foresee the consequences that this would have within the

context of the common organisation of the market in bananas established by Regulation No 404/93. Consequently, the Commission, which, moreover, has a broad discretion in assessing the need for transitional measures, was justified in rejecting the applicant's request of 18 December 1996 for the grant of additional licences.

68 That conclusion cannot be invalidated by the other arguments put forward by the applicant in support of its action.

69 First of all, as regards the argument as to the applicant's need to have banana-ripening facilities, it should first be observed that this has not been proved. A wholesaler with a full range of fruit and vegetables is not, as the Commission has stated, a trader in a special legal situation as regards the market. Furthermore, the applicant does not dispute that a ripening plant can carry on its activities within the framework of the common organisation of the market in bananas, even without an import licence, by ripening bananas imported by other traders.

70 Moreover, even if a ripening plant was indispensable to the applicant, that did not relieve it of the need, before starting to build it, to assess its profitability taking into account the conditions laid down by the common organisation of the market in bananas.

71 Secondly, as regards the fact that the quantities of bananas ripened in the former ripening plant were attributed to the applicant for the purposes of calculating its import rights, it is appropriate to accept the explanation given by the Commission, *inter alia* at the hearing, to the effect that this was a transfer of proprietory rights confined to the ripening business during the years 1991, 1992 and 1993. That in no way implies that the applicant was justified in inferring from that transfer that there was continuity in the ripening business from the privatisation of Großhandelsgesellschaft to the opening of its new ripening plant.

72 Thirdly, as for the alleged breach of the principle of equal treatment by virtue of the particularly difficult situation of privatised undertakings from the former GDR, it need only be observed that those difficulties are not due to the establishment of the common organisation of the market (see the case-law cited in paragraph 61 above). They are therefore difficulties which do not fall within the scope of Article 30 of Regulation No 404/93.

73 Furthermore, the Court of Justice held in its judgment in *Germany* v *Council*, cited above (paragraphs 73 and 74), that, while it is true that not all undertakings are affected in the same way by Regulation No 404/93, the difference in treatment appears to be inherent in the objective of integrating previously compartmentalised markets, bearing in mind the different situations of the various categories of economic operators before the common organisation of the market.

74 Fourthly, with regard to the arguments concerning infringement of property rights and of the right freely to pursue a trade or business, it should be pointed out that the Court of Justice has held that no economic operator can claim a right to property in a market share which he held before the adoption of the common organisation of the market in bananas. Moreover, restrictions on the right to import third-country bananas resulting from the opening of the tariff quota and the machinery for its subdivision are inherent in the objectives of general Community interest pursued by the establishment of the common organisation of the market in bananas and therefore do not improperly impair the freedom of traditional traders in third-country bananas to pursue their trade or business (see the judgments of the Court of Justice in *Germany* v *Council*, cited above, paragraphs 79, 82 and 87, and in Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 77).

75 The applicant is not therefore justified in claiming that its right to property has been infringed. Similarly, the applicant, which is not, moreover, as a ripening

plant, directly subject to legal restrictions under the common organisation of the market, cannot plead infringement of the right freely to pursue a trade or business.

76 Finally, the applicant is not justified in claiming that the rejection of its request by the contested decision constitutes a misuse of powers. It need only be recalled in this regard that, in accordance with the case-law, a decision amounts to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken to achieve an end other than that stated (see the judgment of the Court of First Instance in Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 68, and the judgment of the Court of Justice in Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 69). The applicant has provided no evidence to this effect.

77 It follows from the foregoing that the Commission correctly applied Article 30 of Regulation 404/93 and that, in taking the contested decision, it did not pursue an objective other than that laid down in that article.

78 Accordingly, without there being any need to order the measures of inquiry proposed by the applicant (see paragraphs 35 and 36 above), the application must be dismissed in its entirety.

Costs

79 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, and the Commission has applied for costs, the applicant must be ordered to pay the latter's costs. In accordance with Article 87(4) of the Rules of Procedure, the Kingdom of Spain and the French Republic, interveners in the proceedings, are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs as well as the costs of the Commission;**

3. **Orders the Kingdom of Spain and the French Republic to bear their own costs.**

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 28 September 1999.

H. Jung J.D. Cooke

Registrar President