JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
28 March 2000 *

In Case T-251/97,

T. Port GmbH & Co., established in Hamburg (Germany), represented by G. Meier, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of M. Baden, 34B Rue Philippe II,

applicant,

v

Commission of the European Communities, represented by K.-D. Borchardt and H. van Vliet, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Kingdom of Spain, represented by R. Silva de Lapuerta, Abogado del Estado, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

* Language of the case: German.

and

French Republic, represented by K. Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs 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 annulment of the decision of the Commission of 9 July 1997 refusing to grant the applicant additional import licences as a transitional measure within the framework of the common organisation of the market in bananas,

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: H. Jung,

having regard to the written procedure and further to the hearing on 24 June 1999,

gives the following

Judgment

Legal background

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) established common arrangements for importing bananas in place of the various national arrangements.

2 Article 18(1) of Regulation No 404/93, in Title IV concerning trade with third countries, as amended by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105), provided that a tariff quota of 2.1 million tonnes (net weight) was to be opened for 1994 and of 2.2 million tonnes (net weight) for subsequent years for imports of bananas from third countries other than the ACP (African, Caribbean and Pacific) States (hereinafter 'third-country bananas') and non-traditional imports of bananas from ACP States (hereinafter 'non-traditional ACP bananas'). Under that quota, non-traditional ACP bananas were subject to a zero duty and imports of third-country bananas to a levy of ECU 75 per tonne. The subsequent changes made to the common organisation of the market in this sector are not relevant in the context of this action.

3 Article 19(1) divided the tariff quota as follows: 66.5% for the category of operators who marketed third-country and/or non-traditional ACP bananas (Category A), 30% for the category of operators who marketed Community bananas or traditional ACP bananas (Category B) and 3.5% for the category of operators established in the Community who started marketing bananas other than Community and/or traditional ACP bananas from 1992 (Category C).

4 Article 19(2) provided:

'On the basis of separate calculations for each of the categories of operators referred to in paragraph 1, each operator shall obtain import licences on the basis of the average quantities of bananas that he has sold in the three most recent years for which figures are available.

...

For the second half of 1993, each operator shall be issued licences on the basis of half of the annual average quantity marketed between 1989 and 1991.'

5 Article 30 provided:

'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

6 The applicant, a fruit importer established in Germany, has traded in third-country bananas since the beginning of the century.

7 In 1990 it concluded a provisional contract (described as 'carta de intención') for weekly supplies of bananas to be marketed in Germany with the Colombian company Proban (hereinafter 'Proban'). Any dispute concerning the performance of that agreement was to be referred to arbitrators appointed under the Hamburg arbitration rules ('Hamburger freundschaftliche Arbitrage'). Proban did not respect the terms of that provisional contract and chose to supply bananas to another firm, thus forcing the applicant to seek another supplier.

8 In 1991 the applicant therefore concluded a contract (variously described as 'agreement', 'draft contract', 'pre-contract' or 'preparatory contract') with the Paris company, McKenza Organisation (hereinafter 'McKenza'). That agreement was subject to German law and also provided for any dispute over its performance to be submitted to arbitrators appointed under the Hamburg arbitration rules. In November 1991 McKenza's main supplier, the Ecuadorian company, Sembriosa (hereinafter 'Sembriosa'), went into liquidation and its manager was assassinated.

9 On 7 November 1991 the applicant signed a provisional contract (also described as 'carta de intención') with the Ecuadorian company Carrión Internacional (hereinafter 'Carrión'), which was subsequently incorporated into the Ecuadorian group Bananor (hereinafter 'Bananor'). A distribution contract was concluded by the applicant with Carrión on 11 March 1993 and was replaced by another with the same terms concluded with Bananor on 1 June 1993.

10 Following the entry into force of the common organisation of the market in bananas on 1 July 1993, the applicant sought to have reference quantities allocated to it to ensure its economic survival as an importer of bananas.

11 By interim order of 9 February 1995 the Hessischer Verwaltungsgerichtshof (Germany) granted it additional import licences and, pursuant to Article 177 of the EC Treaty (now Article 234 EC), referred to the Court of Justice questions for a preliminary ruling on, *inter alia*, the interpretation of Article 30 of Regulation No 404/93.

12 In its judgment of 26 November 1996 in Case C-68/95 *T. Port* v *Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065, the Court of Justice ruled, *inter alia*, that 'Article 30 of Regulation 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 because 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 that regulation, provided 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.'

13 By registered letter dated 16 December 1996, received by the Commission on 23 December 1996, the applicant requested the Commission rapidly to adopt measures applicable to cases of hardship and, in particular, sought the allocation of additional import licences for third-country bananas under the tariff quota.

14 As the Commission did not define its position on that request within the two months following it, by application lodged at the Court Registry on 27 February 1997, the applicant brought an action for failure to act under Article 175 of the EC Treaty (now Article 232 EC) (Case T-39/97).

15 By separate document lodged at the Court Registry on the same day, the applicant also applied for interim measures pursuant to Articles 185 and 186 of the EC Treaty (now Articles 242 EC and 243 EC) (Case T-39/97 R). As the applicant subsequently withdrew its application for interim measures, that case was removed from the register by order of the President of 13 June 1997.

16 By decision of 9 July the Commission rejected the requests made by the applicant in its letter of 16 December 1996 (hereinafter 'the contested decision').

17 By application lodged at the Court Registry on 12 September 1997, the applicant brought this action.

18 By order dated 26 November 1997 (Case T-39/97 *T. Port* v *Commission* [1997] ECR II-2125), the Court of First Instance ruled that there was no need to adjudicate on the action for failure to act.

19 By orders of 17 June 1998 the President of the Fourth Chamber of the Court of First Instance granted the Kingdom of Spain and the French Republic leave to intervene in support of the form of order sought by the Commission in this case. The pleadings of the interveners were lodged on 30 July and 3 September 1998 respectively.

20 The parties presented oral argument and replied to the Court's questions at the hearing on 24 June 1999.

The contested decision

21 In the contested decision the Commission expressed the view, as regards the provisional contract concluded with Proban, that no binding contract had been concluded with that company and that the provisional contract was merely a letter of intent which was not legally binding. It pointed out, moreover, that to begin with the applicant had produced a version signed only by itself and subsequently produced another version bearing a second signature purportedly of a representative of Proban, and that essential terms such as the date of commencement of supplies and the ports of shipment and unloading were not included in either version. Under the circumstances it was not established that there was a contract breach of which could be considered to be a case of excessive hardship within the meaning of the *T. Port* judgment.

22 As regards the contract with McKenza, the Commission considered that the liquidation of Sembriosa on 4 November 1991 could not be regarded as a case of excessive hardship. The date of 22 October 1991 appearing on that contract, predating that liquidation by a few days could not be relied on as it had been inserted by hand and was not placed beside the signatures. Moreover, in its letter of 16 December 1996, the applicant had stated that this agreement was signed on 17 October 1991. Second, the duration of the contract could not be ascertained. Furthermore, the contract mentioned that producers other than Sembriosa were able to supply McKenza. The applicant had established neither that those suppliers were unable to supply the same quantity of bananas nor that it took any action vis-à-vis McKenza to secure the performance of the contract, even though there was provision for disputes to be referred to an arbitration tribunal in Hamburg. The applicant had therefore not shown the diligence required by the judgment in *T. Port*.

23 The Commission expressed the view that the contracts of 11 March and 1 June 1993 with Carrión and Bananor respectively could not be taken into consideration because they were concluded after Regulation No 404/93 had been

published in the *Official Journal of the European Communities*. The restrictions placed by that regulation on the importation of bananas from third countries at a reduced rate of duty were therefore known when the contracts were concluded. Moreover, the contract of 1 June 1993 expressly provided that problems over licences constituted a case of *force majeure* which could entail its cancellation. The applicant was therefore not obliged to market bananas supplied by Carrión and Bananor and to sell them at a loss.

24 The Commission expressed the view that the letter of intent of 7 November 1991 concluded with Carrión implied no binding legal obligation and did not provide for any compensation in the event of no contract being concluded. Moreover, the applicant had to accept the consequences of the fact that it could not begin importing bananas supplied by Carrión until the first quarter of 1993 because it had not taken the necessary measures in time.

25 In the light of all those considerations, the Commission refused to accept that the applicant faced excessive hardship and therefore refused its request for additional import licences.

Forms of order sought

26 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

27 The Commission, supported by the Kingdom of Spain and the French Republic, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

28 The applicant relies on two pleas in law in support of its application, alleging breach of Article 30 of Regulation No 404/93 and misuse of powers by the Commission. The defendant submits, as a preliminary point, that the documents attached as annexes K1 and K4 to the application cannot be taken into account in the present action. The French Republic raises the same objection in connection with the documents attached as annex K1 to the application. It is appropriate to examine, first of all, the contention by the defendant and the French Republic that certain documents should be excluded from consideration.

Exclusion of documents attached as annexes K1 to K4 to the application

Argument of the Commission and the French Republic

29 The Commission contends that the provisional contract attached as annex K1 to the application is not the same version as that sent with the request of 16 December 1996 nor as that produced in previous proceedings before the Court of First Instance (Cases T-39/97 and T-39/97 R).

30 Unlike the earlier versions, the version attached to the application contains terms relating to the date of commencement of supplies and ports of shipment and unloading. Those points are not without importance in relation to the Commission's submission in the contested decision that the provisional contract had no legal force.

31 According to consistent case-law, the legality of a contested measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted. In the present proceedings the version of the provisional contract with Proban attached as annex K1 constitutes, according to the Commission, a new element of fact and should therefore be excluded from the file. The French Republic supports the argument of the Commission on this point.

32 The solemn declaration of 11 July 1997 by Mr Nazzari, who represented McKenza in the negotiations with the applicant, attached as annex K4 to the application should, the Commission submits, also be excluded from the file. The date on which the contract with McKenza was concluded is uncertain as the date of 22 October 1991 was inserted by hand and was not placed beside the signatures and the applicant's lawyer stated that the contract was signed on 17 October 1991.

33 Similarly, there is doubt surrounding the essential terms of the contract. For instance, Mr Nazzari stated that the duration of the contract had been fixed at five years whereas Mr Port, in a solemn declaration of 14 March 1997, stated that it was for a minimum of three years. The contract, as forwarded to the Commission with the request of 16 December 1996, did not stipulate any duration.

34 As the Commission can only rely, when it considers a request for consideration as a case of excessive hardship, on the evidence furnished by the author of that request, any correction made to the contract during the proceedings is too late.

Argument of the applicant

35 The applicant admits that it produced two different versions of the provisional contract with Proban for the present proceedings. The version it had sent to the Commission in its letter of 16 December 1996 did not specify the date of commencement of supplies or the port of shipment. Subsequently it attached as annex K1 to the application a completed copy of the provisional contract which included those two terms. The presentation of the document at different stages was due to the fact that the applicant has a three-tier archiving system and different persons sent the documents to the Commission. It leaves it to the Court to assess whether a piece of evidence annexed to the application can only be considered in the version available to the Commission at the time when the contested decision was adopted.

36 The applicant submits that the contract with McKenza was concluded on the basis of the agreement reached by the parties on 17 October 1991, as is clear from the solemn declaration by Mr Nazzari attached as annex K4 to the application. The date on which the applicant received back the document signed by McKenza was 22 October 1991.

37 It adds that the parties agreed on a duration of five years for the contract, referring to the solemn declaration by Mr Nazzari. There was no contradiction between that declaration and that by Mr Port (see paragraph 33 above).

Findings of the Court

38 According to settled case-law, the legality of a contested measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, and Case 114/83 *Société d'Initiatives et de Coopération Agricoles and Société Interprofessionnelle des Producteurs et Expéditeurs de Fruits, Légumes, Bulbes et Fleurs d'Ille-et-Vilaine* v *Commission* [1984] ECR 2589, paragraph 22, and Joined Cases T-79/95 and T-80/95 *SNCF and British Railways* v *Commission* [1996] ECR II-1491, paragraph 48). In particular, it is clear from the case-law that the complex assessments made by the Commission must be considered in the light only of the evidence available to it at the time when it made them (Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33, and Joined Cases T-371/94 and T-394/94 *British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 81).

39 It follows that the applicant cannot rely on the version of the provisional contract with Proban which is attached to the application in support of its action but only on that available to the Commission when it considered the applicant's request of 16 December 1996.

40 Nor can the applicant rely on the declaration by Mr Nazarri to supplement the provisions of the contract concluded with McKenza, given that Mr Nazarri gives a different version of the terms of that agreement from that available to the Commission when it adopted the contested decision.

41 It follows that annexes K1 and K4 cannot be taken into account for the purposes of these proceedings.

The first plea — breach of Article 30 of Regulation No 404/93

Argument of the applicant

42 The Commission did not assess correctly the nature and the legal consequences of the provisional contract reached with Proban. A provisional contract constitutes a future commitment of the parties, where obstacles of fact or law prevent the conclusion of the contract proper for the time being.

43 Neither the name given to the agreement nor the assessment of declarations of intent in general is relevant. The only deciding factors are the intention of the parties and, in the absence of a declared intention, the practices in the place of performance, which was Hamburg in the present case. The provisional contract with Proban demonstrates the intention of the two parties to be bound and includes all the essential terms for that purpose. Contrary to the Commission's contention the date of commencement of supplies and the ports of shipment and unloading are not essential terms of a provisional contract. The only essential terms are the quantity and quality of the goods, their prices, the allocation of responsibility for marketing costs and the minimum duration of the agreement.

44 A 'carta de intención' such as the provisional contracts signed with Proban and Carrión (see paragraph 49 below), is a valid contract according to commercial practices in Hamburg, where it is sufficiently precise and detailed to be enforceable by the courts. Failure by a party to respect such an agreement also allows an injured contracting party to bring an action for damages for non-performance.

45 There is thus a marketing contact with Proban which is legally binding and in performance of which the applicant should have received supplies during the

reference period if its fellow contracting party had not been induced by a competitor to act in breach of its commitments.

46 Since legal proceedings would not have enabled it to secure supplies from Proban during the reference period, the applicant therefore decided to find another partner.

47 Under the contract with McKenza, its exclusive supplier was Sembriosa and its plantations. The latter were not legally able to supply McKenza directly in the absence of export licences. Since McKenza had not reached an agreement with another exporter in Ecuador and the other producers were not able to export, the agreement between McKenza and the applicant became void after the liquidation of Sembriosa. Proceedings against McKenza would have been pointless both from an economic and a legal point of view as it would not have enabled the applicant to import the quantities in question for the reference period.

48 The applicant states that it was informed at the end of October or the beginning of November 1991 by telephone, by Mr Nazzari, that Sembriosa had gone into liquidation, so that the contract with McKenza could not be performed.

49 The provisional contract of 7 November 1991 with Carrión was also legally binding. There is no doubt as to the parties' intention to be bound. They began to operate under that agreement and the first bananas were actually supplied in February 1993 as agreed. Moreover, all the essential terms of the contract were settled.

50 In any event, the provisional contract and the agreements concluded in 1993 with Carrión and Bananor must be considered as a whole because those agreements contain no provisions additional to those in the provisional contract, although they were concluded after the adoption of Regulation No 404/93.

51 It is true that the parties had the right to cancel those agreements but that right had nothing to do with the conditions attaching to the adoption by the Commission of transitional measures.

52 The allocation to the applicant of an exceptionally low quota for bananas puts its survival at risk. If the common organisation of the market had not come about, it would have marketed the quantities agreed in the provisional contract with Carrión in Germany and they would have been taken into account to its benefit as reference quantities. Its position therefore constitutes excessive hardship within the meaning of the *T. Port* judgment. The negligence of which the Commission accuses it did not in any way contribute to the difficulties which it faces. Nor is it realistic to argue that, if it had been diligent it would have taken the necessary measures to market bananas from Carrión in Germany.

Argument by the Commission and the interveners

53 As regards the provisional contract with Proban as forwarded with the request of 16 December 1996, the Commission rejects the applicant's argument that the

declared intention of its authors or, failing that, the practices in force in Hamburg allow the existence of a marketing contract binding the parties to be inferred.

54 First, it considers that neither the negotiations leading to the signature of the provisional contract, nor the intention expressed by the parties to establish long-term commercial relations are such as to make that document legally binding.

55 Second, according to the report of expert Walter Müller on commercial practices in Hamburg, on the question of the contractual and binding nature of a provisional contract:

'A "carta de intencion" is a binding contract breach of which allows the party which has honoured the contract to claim damages, if the provisions are sufficiently precise for an action for performance to be brought, applying the principles of ancillary interpretation of contracts.'

56 The provisional contract with Proban does not include all the essential terms of a contract and thus does not contain sufficiently precise provisions in the terms of Hamburg commercial practices. Contrary to the applicant's argument, the provisional contract gives no indication of the date of commencement of supply or of the ports of shipment and unloading.

57 Moreover, the applicant fails to have regard to the fundamental difference between the legal effects of a letter of intent and those of a contract. The Commission shares the view of Mr Müller that if the content of a letter of intent is sufficiently specific, failure to respect it may give rise to a right to damages. However, such damages would be limited to making good the loss to the other

party resulting from the failure to conclude the contract, in the light of the measures already taken by that party in order to conclude the agreement. On the other hand, a letter of intent cannot enable the performance of the contractual obligations it envisages to be demanded. The provisional contract thus does not give rise to a legally binding right to the performance of the supply of bananas envisaged, so that the entry into force of the common organisation of the market did not affect adversely a commercial relationship already sufficiently well established in law concerning the supply of third country bananas. The applicant is clearly aware of these facts since it suggests that the provisional contract, rather than being a letter of intent is already a legally valid contract, which is not the case.

58 The report by Mr Müller only gives a view on the minimum conditions which a letter of intent must fulfil in order to have legal effects giving rise to a right to damages and not on the rules for the formation and validity of a contract.

59 However this provisional contract is classified, the fact that Proban did not perform it cannot constitute a case of excessive hardship since, on the applicant's own admission, the document did not guarantee it any right to the supply of bananas.

60 The interpretation of the contract with McKenza to the effect that that company's sole partner in Ecuador was Sembriosa does not reflect either the wording of the agreement or the situation at the time of its signature. There is nothing in the contract to suggest that only supplies by Sembriosa were covered by the agreement concluded with the applicant. Moreover, the fairly limited supply capacity of Sembriosa explains the fact that the contract referred to other suppliers to ensure the dispatch by McKenza to the applicant of the quantities of bananas specified.

61 In any event, following the liquidation of Sembriosa, the bananas picked by its production firms must have been available on the market so that McKenza could

have fulfilled its supply obligations to the applicant, since the Ecuadorian market was clearly able to supply that supplier with bananas.

62 It follows that the applicant's argument that proceedings brought against McKenza would have been pointless is unfounded.

63 The Commission contends that the date on which the contract was concluded is relevant (see paragraph 32 above), since only an agreement concluded with McKenza before the liquidation of Sembriosa on 4 November 1991 could serve as a basis for a finding of excessive hardship. The contradictions between dates and the other inaccuracies described above seriously undermine the credibility of the applicant's case.

64 As regards the contracts and provisional contracts concluded with Carrión and Bananor, a distinction should be made between the provisions adopted by the applicant before it knew of the common organisation of the market and those it adopted thereafter. The provisional contract of 7 November 1991 is the only possible basis for an assessment as to whether the applicant faced excessive hardship. That provisional contract, the legal force of which was no greater than that of a letter of intent, is not a legally relevant economic measure which the common organisation of the market has deprived of effect. It is a necessary step in the formation of a supply contract, even in the light of the provisions of national law relied on by the applicant.

65 In that regard, the parties did not assume that the quantities of and conditions for supplies laid down in the provisional contract would be reproduced in the contract without alteration, but accepted that those terms would be examined again and, if necessary, readjusted when the agreement was concluded. Consequently, it cannot be inferred from the provisional contract that irrevocable provisions liable to become void as a result of the common organisation of the

market had been adopted. The inclusion of a cancellation clause in the 1993 contracts demonstrates, moreover, that the parties were fully aware of the difficulties which might arise as a result of the introduction of that common organisation.

66 Nor can the applicant derive support for its request from the supply contracts concluded on 11 March 1993 with Carrión and on 1 June 1993 with Bananor, since Regulation No 404/93 had already been published in the *Official Journal of the European Communities* on 25 February 1993. Thus, the problems posed by the performance of those agreements are not attributable to the common organisation of the market but to a commercial decision made by the applicant. In any event, the applicant could have escaped from those obligations by using its right to cancel.

67 The Kingdom of Spain contends that the facts relied on by the applicant cannot be regarded as constituting a case of excessive hardship requiring the Commission to adopt transitional measures. A letter of intent such as that signed by Proban is a preliminary stage in the drawing up of a preparatory contract, a stage during which the parties sketch out some of the terms of a future contractual relationship. Similarly, the document drawn up with McKenza is not a valid preparatory contract since essential terms such as the duration or the date of commencement of the agreement to be made are not specified. Before the entry into force of the common organisation of the market, the applicant thus had mere expectations but not any acquired right which the Commission should have taken into account in adopting transitional measures under Article 30 of Regulation No 404/93. Nor did the applicant act with the required diligence to ensure that all those agreements with suppliers produced their intended effects.

68 The French Republic shares the view of the Commission regarding the legal force of the letters of intent with Proban and Carrión. Such letters are not equivalent to a contract and do not entail the same consequences, otherwise it can be assumed that their authors would have concluded a contract in the proper form. The dates of the conclusion of the contracts with Carrión and Bananor were after the

publication of the proposal for the creation of a common organisation of the market by the Commission and the applicant was therefore aware of the tariff quota system set up by Regulation No 404/93. Moreover it did not show sufficient diligence. For instance, the applicant could have ensured performance of the contract with McKenza after the liquidation of Sembriosa by having recourse to the other producers mentioned in the agreement.

Findings of the Court

69 It is clear from the judgment in *T. Port* (see paragraph 12 above) that Article 30 of Regulation No 404/93 authorises and, depending on the circumstances, requires the Commission to lay down rules catering for cases of hardship when certain cumulative conditions are met. First, the importer of third-country bananas or non-traditional ACP bananas concerned must meet difficulties threatening its existence. Second, those difficulties must be inherent in the transition from the national arrangements existing before the entry into force of Regulation No 404/93 to the common organisation of the market. Third, an exceptionally low quota must have been allocated to it on the basis of the reference years to be taken into consideration under Article 19(2) of that regulation. Fourth, those difficulties must not be caused by a lack of diligence on the part of the importer concerned.

70 It is clear from the fact that the measures the Commission is empowered to adopt under Article 30 of Regulation No 404/93 are exceptional and by way of derogation from the general rules for the allocation of import licences provided for by that regulation, that it can only be required to take such measures if it is proven on the basis of sufficient evidence that all the above conditions are fulfilled. In that regard the burden of proof falls on the undertaking which requests the adoption of such measures.

71 In the contested decision, the Commission concluded that the circumstances relied on by the applicant in connection with the failure of the contracts concluded with Proban, McKenza and Carrión/Bananor did not constitute a case of excessive hardship within the meaning of the *T. Port* judgment.

72 It must be held that the Commission was right in considering that the applicant had not established that the provisional contract concluded with Proban was legally binding. The Commission was entitled to have doubts as to whether an agreement had effectively been concluded between the parties given the differences between the versions produced. It was also right to cast doubt on the definitive nature of the purported agreement given that it was described as a 'provisional contract' and that certain essential terms were not included. Finally, the legally binding nature of the agreement is all the more doubtful since the applicant failed to exercise the rights provided for by the agreement in the event of the failure by one of the contracting parties to perform its obligations, although Proban deliberately breached its obligations.

73 Moreover, the Commission was right to doubt the legally binding nature of the agreement concluded with McKenza in the light of questions surrounding the date of its conclusion and the absence of any provision relating to its duration. The Commission was also entitled to question why performance of the contract had failed or had been abandoned as a result of the liquidation of Sembriosa, given that McKenza itself made reference in the wording of the agreement to an agreement reached with a group of producers and shippers and that it is common ground that those other sources of supply could have provided at least part of the quantity expected from Sembriosa. The Commission was therefore right in considering that the applicant had not demonstrated the diligence required by the fourth condition identified by the Court in the judgment in *T. Port* in failing either to pursue performance of the contact by McKenza or to exercise the rights provided for by that agreement in the event of failure by one contracting party to perform its obligations.

74 The Commission was also right in considering that the contracts concluded with Carrión on 11 March 1993 and with Bananor on 1 June 1993 could not be taken

into account since they were concluded after Regulation No 404/93 had been published in the *Official Journal of the European Communities*.

75 Furthermore it must be observed that the importing obligations incumbent on the applicant in those contracts were accepted at a time when it was fully aware of the rules for the new common organisation of the market, as the terms of the agreements themselves show. Both provide for the possibility of terminating the contract in cases of *force majeure* 'where the state of international trade precludes the exportation of fruit... in the event of particular problems over quotas/licences'.

76 Difficulties deriving from contractual obligations concluded after the adoption of Regulation No 404/93 cannot, in any event, be deemed equivalent to difficulties inherent in the transition from the national arrangements existing before the entry into force of the regulation to the system set up by it. It follows that such difficulties cannot justify the granting of special measures by reason of excessive hardship. The fact that the applicant had already concluded a provisional contract with Carrión on 7 November 1991 cannot affect this assessment, since that provisional contract did not require the applicant to sign a marketing contract.

77 Similarly, it must be observed that, even if the agreements reached with Proban and McKenza had been legally binding, so that the applicant was in fact entitled to the supply of the quantities provided for in those agreements from 1991 to 1993, the difficulties it experienced as a result of the failure of those contracts could not have been considered to be inherent in the transition from the national arrangements existing before the entry into force of Regulation No 404/93 to the common organisation of the market.

78 The applicant has argued, first, that the provisional contract with Proban had not been respected because Proban had chosen not to honour its commitments and,

second, that the contract with McKenza became void following the liquidation of its main supplier. The non-performance of those two agreements was thus due to the materialisation of common commercial risks, which must be borne by the trader concerned. The fact that the applicant had already begun to deal with Carrión while negotiations were underway with McKenza shows, moreover, that it was aware of the risk it was taking. The Commission cannot be required to adopt special measures in order to resolve commercial difficulties encountered by an importer solely because the aspirations it entertained regarding the possibility of entering into a trading relationship with a supplier come to nothing.

79 Admittedly, special measures by reason of excessive hardship might prove necessary in the event that an importer bound himself to importing specific quantities of bananas before becoming aware of the rules regarding the new common organisation of the market and was then prevented from honouring his obligations because he could not obtain the necessary import licences. However, this was not the case here.

80 Finally, it must be added that the applicant has proved neither before the Commission nor before the Court that the circumstances arising from the fact that the above three contracts could not be performed before the entry into force of the new system in July 1993 were so serious as to threaten its survival and that, as a result, it faced excessive hardship.

81 In that regard, it is clear from the applicant's explanations at the hearing that, first, while imports of bananas account for more than 50% of its turnover in general, it also imports other fruits and vegetables. Second, it also concluded import contracts with suppliers other than Proban and McKenza so that it was able to import bananas during the reference period despite the absence of supplies from those two companies.

82 Furthermore, in reply to a question asked by the Court at the hearing, the applicant acknowledged that, in support of its request it had produced no document which would have enabled the Commission to assess its financial position. Similarly, whilst it is true that, in the course of the present proceedings it has supplied the Court with certain information on this point, that information in no way demonstrates that its survival was threatened.

83 It follows from the foregoing that the first plea must be declared unfounded.

The second plea — misuse of powers by the Commission

Argument of the applicant

84 The applicant refers generally to its pleadings in Case T-39/97. It considers that this reference should be sufficient to substantiate this plea in law.

85 However, in its reply it explains that the misuse of powers by the Commission lies in the fact that it should have taken account of its own liability. By its failure to act since 1 July 1993 the Commission committed a breach of the applicant's property rights and its fundamental right to exercise an economic activity.

86 A misuse of powers also lies in the Commission's refusal to hear the applicant during the procedure for consideration of its request. The Commission would not have misunderstood the significance in commercial law of the agreements

concluded by the applicant if it had heard its views before adopting the contested decision.

Argument of the Commission

87 This plea is inadmissible because the applicant does not substantiate it in any way.

88 Even if the Court were to take the view that the applicant's reference to its pleadings in the proceedings for failure to act in Case T-39/97 is sufficient to substantiate this plea, it would be unfounded.

89 The argument relating to failure to respect the right to be heard is out of time and therefore inadmissible, because it was raised for the first time in the reply and is not based on matters of fact or law which arose during the proceedings. In the alternative, the Commission contends that the right to be heard was respected since the applicant submitted a request to be treated as a case of excessive hardship and this was considered.

Findings of the Court

90 Article 44 of the Rules of Procedure of the Court of First Instance provides that an application must state *inter alia* a summary of the pleas in law on which the application is based. According to case-law, this means that the application must specify the grounds on which the action is based, with the result that a mere abstract statement of the grounds does not satisfy the requirements of those rules (Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417, paragraph 130).

91 Moreover, that summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to decide the case, if appropriate without other information in support. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is based must be apparent from the text of the application itself (Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 143).

92 As those conditions have not been fulfilled in this case, the second plea must be declared inadmissible. It must be added that the substantiation of the plea in the reply is of no relevance in that regard.

93 It follows that the application must be dismissed in its entirety.

Costs

94 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. As the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

95 Under Article 87(4) of those Rules, the Member States which intervened in the proceedings are to bear their own costs. Consequently, the Kingdom of Spain and the French Republic, which intervened in support of the forms of order sought by the Commission, should pay 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 costs and pay those 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 March 2000.

H. Jung R. García-Valdecasas

Registrar President