JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

19 September 2000 *

In Case T-252/97,

Anton Dürbeck GmbH, established in Frankfurt am Main (Germany), represented by G. Meier, Rechtsanwalt, Cologne, Berrenrather Straße 313, Cologne (Germany),

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,

* Language of the case: German.

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 Emmanuel Servais,

and by

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate for Economic International Law and Community Law in the Legal Affairs Directorate, Ministry of Foreign Affairs, and C. Vasak, Deputy Foreign Affairs Secretary in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

interveners,

APPLICATION for partial annulment of the Commission decision of 10 July 1997 on the adoption of transitional measures in favour of the applicant 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: R. García-Valdecasas, President, P. Lindh and J.D. Cooke, Judges,

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 9 November 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), in Title IV, replaced the various national arrangements governing trade with third countries by a common system.

2 The first paragraph of Article 17 of Regulation No 404/93 provides:

'Any importation of bananas into the Community shall be subject to the submission of an import licence issued by the Member State at the request of any party concerned, irrespective of his place of establishment within the Community, without prejudice to the special provisions made for the implementation of Articles 18 and 19.'

3 Article 18(1) of Regulation No 404/93, 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) for 1994 and 2.2 million tonnes (net weight) for subsequent years was to be opened for imports of bananas from third countries other than African, Caribbean and

Pacific (ACP) States (hereinafter 'third-country bananas') and non-traditional imports of bananas from ACP States (hereinafter 'non-traditional ACP bananas'). Within that quota, imports of third-country bananas were to be subject to duty of ECU 75 per tonne and imports of non-traditional ACP bananas to zero duty.

4 Article 19(1) of Regulation No 404/93 divided the tariff quota, which was to be opened for 66.5% to the category of operators who had marketed third-country and/or non-traditional ACP bananas (category A), 30% to the category of operators who had marketed Community and/or traditional ACP bananas (category B) and 3.5% to the category of operators established in the Community who had started marketing bananas other than Community and/or traditional ACP bananas from 1992 (category C).

5 Article 19(2) of Regulation No 404/93 is worded as follows:

'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.'

6 Article 30 of Regulation No 404/93 is worded as follows:

'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.'

7 By judgment of 26 November 1996 in Case C-68/95 *T. Port* v *Bundesanstalt für Ernährung* [1996] ECR I-6065 (hereinafter 'the judgment in *T. Port*') the Court of Justice held, in particular, 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 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 that 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' (see paragraph 1 of the operative part of the judgment).

Facts and procedure

8 The applicant is an undertaking established in Germany and trading in fruit and vegetables. It began to market bananas at the end of 1992.

9 On 29 November 1991 the applicant concluded a contract governed by Netherlands law with the Ecuadorean company Consultban (hereinafter 'Con-

sultban'), under which it undertook to market between 100 000 and 150 000 tonnes of bananas per week (hereinafter 'the contract').

10 The contract provides that the applicant is entitled to commission of 6% of total sales volume. Under point 3 of Addendum B to the contract, however, the applicant is required to pay Consultban the difference between the net proceeds of sales and the official prices which Consultban pays to the Ecuadorean growers (hereinafter the 'price guarantee').

11 Clause 4.1. states that the contract is to be valid for seven years; it also provides that the contract is to be renewable for another period of seven years if not otherwise agreed. The contract was still in force when the present application was lodged.

12 Clause 4.1. also specifies that:

'... Both parties have the right to terminate this contract with 180 days' notice in five years from the date hereof, provided that the party terminating the contract withdraws irrevocably [from] the banana business in Europe from the date of termination either directly or indirectly or through any other person and/or affiliated company or any other third party whatsoever, for a period of five years from the date of termination.'

13 Moreover, Clause 6.3. of the contract provides:

'The parties agree and accord that they are aware that circumstances may arise which will render compliance with the terms and conditions of this contract

impossible. These vis major cases may include, but are not limited to, occurrences of internal commotion in the countries involved, war whether declared or not, act of God, strikes and the like which will render the normal evolution of trade activities impossible, plagues, meterological adverse conditions such as floods, droughts, etc., revolutions or insurrections, as well as the closure of the [Panama Canal]. In the event that any non-performance of this contract results from *Force Majeure*, both parties will negotiate in good faith to find a solution to the problem, failing which this contract may be cancelled by either party without any claim for damages provided that vessels loading or loaded at sea will remain subject to this contract.'

14 Last, point 2 of Addendum B to the contract provides:

'[Consultban] and [the applicant] agree that in the event [the applicant] requests the cancellation of this contract for reasons not covered as per the terms of the contract, and [Consultban] is obliged to indemnify owners as per the terms of COA [Contract of Affreightment] between the owners and [Consultban], then [the applicant] to indemnify [Consultban], upon first request in writing up to the amount of USD 1 000 000, provided adequate proofs are presented by [Consultban].'

15 The applicant began to market bananas under the contract at the end of 1992.

16 Regulation No 404/93 entered into force on 26 February 1993 and became applicable on 1 July 1993.

17 In accordance with Article 19(1) of that regulation, the applicant was classified as a category C trader. In 1996, after taking over an undertaking, the applicant acquired the status of a category A trader.

18 Since it only obtained a small number of import licences to import bananas into the Community, the applicant had to sell most of the bananas covered by the contract outside the Community, at a price which meant that the price guarantee became applicable. Under that guarantee the applicant had to pay Consultban USD 1 661 537 in 1994, USD 4 211 142 in 1995 and USD 1 457 549 in 1996.

19 On 24 December 1996, in consideration of the judgment in *T. Port*, the applicant requested the Commission to issue to it, as a transitional measure pursuant to Article 30 of Regulation No 404/93, additional licences to import third-country bananas at the reduced rate of ECU 75 per tonne, in the following amounts:

— 42 000 tonnes for 1997 as a category A trader;

— 48 000 tonnes for 1998 as a category A trader, or a total volume of 65 800 tonnes;

— 48 000 tonnes for 1999 as a category A trader, or a total volume of 65 800 tonnes.

20 By decision of 10 July 1997 (hereinafter 'the contested decision') the Commission granted that request in part.

21 Thus, under Article 1(3) of the contested decision, the applicant obtained additional import licences up to the amount of, first, the losses which it had incurred in 1994 as a result of performing the contract with Consultban and, second, USD 1 000 000. The applicant's request was rejected, in Article 2 of the contested decision, in so far as it related to 'licences over and above those allocated under Article 1'.

22 The second subparagraph of Article 1(4) of the contested decision provides that those import licences are to be counted against the specific reserves provided for cases of hardship in the tariff quota. Article 1(6) provides that the quantities of bananas imported into the Community by the applicant under those licences are not to be taken into account for the purpose of determining its total reference quantities for future years.

23 The contested decision states, in particular:

'... the contract... entered into force before [the applicant] was aware of the introduction of the common organisation of the market in bananas and its potential impact on the market;

consequently, [the applicant] could not know when it concluded the contract that an exceptionally low quota would be allocated to it on the basis of the reference years to be taken into consideration pursuant to Article 19(2) of... Regulation No 404/93; an exceptionally low quota was thus allocated to it in 1993, 1994 and 1995;

consequently, the intervention of the [price] guarantee was inherent in the transition which was to culminate in the abandonment of the national arrangements existing before that regulation entered into force; the payments made by [the applicant] to its suppliers under that guarantee may be regarded as inherent in that transition;

owing to their size, the payments declared by [the applicant] to have been made to its supplier under the [price] guarantee may reasonably be regarded as a source of difficulties threatening the company's survival;

evidence has been adduced that an expert in Netherlands law informed [the applicant] that it was highly unlikely that the entry into force of... Regulation No 404/93 could be regarded as a case of *force majeure* enabling it to cancel the contract; [the applicant] cannot therefore be regarded as having displayed a lack of care by not attempting to rely on that argument;

according to [the applicant], it had to pay the sum of USD 1 661 537 to its supplier under the [price] guarantee in 1994; that amount is greater than USD 1 000 000; in those circumstances, it would have been reasonable to conclude that an amount greater than USD 1 000 000 would be payable under the [price] guarantee in 1995;

if [the applicant] had displayed sufficient care it would have cancelled the contract for 1995 and thus limited the payments to its suppliers under the [price] guarantee to the sum of USD 1 000 000 for 1995 and subsequent years; consequently, all the losses declared by [the applicant] for 1995 and the subsequent years must be regarded as the consequence of negligence on its part;

in application of the criteria laid down by the Court of Justice, [the applicant's] case as set out above must be regarded as a case of hardship, and a special grant of import licences must be authorised;

since [the applicant] did not begin to import bananas into the Community before the end of 1992, it is not possible to allocate it a quota on the basis of reference years prior to those referred to in Article 19(2) of... Regulation No 404/93;

additional import licences should be allocated as compensation for the hardship which [the applicant] has suffered within the meaning of [the judgment in *T. Port*];

having regard to the foregoing, the hardship consists in the loss sustained by [the applicant] owing to the contract in 1994 and also the loss, up to a maximum of USD 1 000 000, for 1995 and subsequent years;

...

the competent authority should calculate the value of the licences to import bananas from third countries at a reduced duty of ECU 75 per tonne and then allocate to [the applicant] a sufficient number of additional licences to compensate for the hardship up to the level stated above;

... the licences to be allocated must be counted against the specific reserves provided for cases of hardship in the tariff quota and not be either subject to the provisions currently governing applications for licences, fixed by Article 9(2) and (3) of Regulation (EEC) No 1442/93, or conditional upon presentation of the special export licence referred to in Article 3(2) of Regulation (EC) No 478/95;

in order that [the applicant] can be compensated in full but not excessively, the licences should be non-transferable and the quantities of bananas imported by the company under the licences should not be taken into account for the purpose of calculating the company's total reference quantities for future years;

...'.

24 By application lodged at the Registry of the Court of First Instance on 16 September 1997 the applicant brought the present action.

25 The Kingdom of Spain and the French Republic applied, on 26 January and 17 February 1998 respectively, for leave to intervene in support of the form of order sought by the Commission. Those applications were granted by order of 16 September 1998 of the President of the Fourth Chamber of the Court of First Instance. By the same order the applicant's requests for confidential treatment were granted in part.

26 The Kingdom of Spain and the French Republic submitted their observations in documents lodged on 4 and 6 January 1999 respectively.

27 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided, first, to open the oral procedure and, second, within the context of the measures of organisation of procedure provided for in Article 64(3) of the Rules of Procedure, to invite the applicant and the Commission to reply in writing to a number of questions. The Commission and the applicant replied to those questions by letters lodged at the Registry on 11 and 22 October 1999 respectively.

28 The applicant and the Commission presented oral argument and answered the questions put by the Court at the hearing on 9 November 1999.

Forms of order sought by the parties

29 The applicant claims that the Court should:

— annul the contested decision in that, first, the quantities of bananas imported into the Community under the additional import licences allocated pursuant to that decision are not to be taken into account when determining its total reference quantities for future years and, second, the Commission refuses to issue additional import licences over and above those referred to in Article 1(3);

— order the Commission to pay the costs.

30 The Commission contends that the Court should;

— dismiss the application;

— order the applicant to pay the costs.

31 The Kingdom of Spain, intervener, claims that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

32 The French Republic, intervener, claims that the Court should dismiss the application.

Admissibility

Arguments of the parties

33 The Commission and the Kingdom of Spain claim that the applicant only put forward the plea alleging breach of the principle of equal treatment in its reply.

They contend that that plea must be rejected pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance, which prohibits the introduction of new pleas in law in the course of proceedings.

34 At the hearing the applicant replied that the Commission had first relied on that principle in its defence, so that the applicant was unable to comment on that principle before it lodged its reply.

35 Furthermore, the Commission submits that the applicant's argument that Article 1(6) of the contested decision is contrary to Commission Regulation (EC) No 2601/97 of 17 December 1997 establishing, pursuant to Article 30 of [Regulation (EEC) No 404/93], a reserve for 1998 to resolve cases of hardship (OJ 1997 L 351, p. 19) is also a new plea and inadmissible pursuant to Article 48(2) of the Rules of Procedure. Commission Regulation (EC) No 1154/97 of 25 June 1997 increasing the volume of the tariff quota for imports of bananas provided for in Article 18 of [Regulation No 404/93] for 1997 (OJ 1997 L 168, p. 65) has already established a reserve with a view to settling cases of hardship, so that the applicant could have relied on that regulation in its originating application.

36 The Commission also considers that the applicant's argument that Article 1(6) of the contested decision ignores the purpose of the tariff quota is a new plea in law and therefore inadmissible pursuant to Article 48(2) of the Rules of Procedure.

37 Finally, the Kingdom of Spain maintains that the applicant only challenged the lawfulness of that provision in its reply, so that that head of challenge must be declared inadmissible.

38 The applicant has not commented on the latter pleas of inadmissibility.

Findings of the Court

39 It follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the application initiating proceedings must contain, *inter alia*, a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a plea which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463, paragraph 38, and Case T-118/96 *Thai Bicycle* v *Council* [1998] ECR II-2991, paragraph 142).

40 In the present case it is made expressly clear in the application that the applicant is challenging the lawfulness of Article 1(6) of the contested decision. The Kingdom of Spain's objections to the admissibility of that head of challenge must therefore be rejected.

41 As regards the arguments based on Regulation No 2601/97, it must be held that they are closely linked with the plea alleging breach of Article 30 of Regulation No 404/93, as put forward by the applicant in support of the second part of its application, where it calls in question the lawfulness of Article 1(6) of the contested decision, and that it serves to amplify that plea. The arguments are therefore admissible.

42 On the other hand, it was only in its reply that the applicant first raised a plea alleging breach of the principle of equal treatment. While it is true that the Commission refers to that principle in certain passages of its defence, it does so only in passing and in a different context from that in which the applicant develops its plea. Thus, in paragraph 16 of its defence, the Commission merely observes, generally, that 'in the interest of equal treatment for all traders', who were also obliged to adapt to the new legal and economic conditions, it had to take account of the fact that the applicant had the opportunity to cancel the contract against payment of the sum of USD 1 000 000 'when determining the scope of the provisions regulating cases of hardship' (see, to the same effect, paragraph 33 of the defence). Likewise, in paragraphs 28 and 32 of its defence, the Commission merely states, generally, that to take into account, in determining the applicant's total reference quantities for future years, the quantities imported by the applicant under the additional licences would have the effect of granting the applicant excessive compensation and thereby treating it more favourably than other traders. In its reply and at the hearing, on the other hand, the applicant claims essentially that the principle of equal treatment obliged the Commission to treat the applicant in the same way as traders in category A who, like the applicant, had adopted certain commercial conduct before the publication of the draft organisation of the market in bananas in the *Official Journal of the European Communities* but who, unlike the applicant, were able to continue to market their bananas during the reference period; and the applicant concludes that it should have been treated as though it had imported, during the 1989 to 1991 reference period, the quantities which it actually imported between 1993 and 1995. As thus developed by the applicant, the plea alleging breach of the principle of equal treatment is manifestly unrelated to the Commission's observations referred to above and cannot therefore be regarded as based on matters or law or of fact which came to light in the course of the proceedings. It must therefore be declared inadmissible.

43 Likewise, the Court finds that the applicant first relied on the argument alleging failure to have regard for the purpose of the tariff quota only in its reply and that no new matter came to light in the course of the proceedings to justify its being put forward out of time. Nor can that argument be regarded as serving to amplify

a plea put forward previously in the application and closely connected therewith. It is therefore an inadmissible new plea.

Substance

44 The applicant puts forward in its application a single plea in support of its action, alleging infringement of Article 30 of Regulation No 404/93. The action comprises two parts. In the first part the applicant challenges the lawfulness of Article 2 of the contested decision. In the second part it calls in question the lawfulness of Article 1(6) of the contested decision.

First part of the application

Arguments of the parties

45 The applicant challenges the lawfulness of the contested decision in that, in Article 2, the applicant's request for additional import licences is rejected in so far as it exceeds the quantities of licences referred to in Article 1(3) of that decision.

46 It claims that it fulfilled all the conditions laid down by the Court of Justice in the judgment in *T. Port* for the purpose of establishing the existence of a case of hardship. That case of hardship should have been compensated in full by the grant of additional import licences up to the amount of the quantities specified in the contract which could not be marketed in the Community, for the entire duration of the contract. The applicant contends, in particular, that it was under

no obligation to cancel the contract, in order to avoid liability thereunder in 1995, by taking advantage of the clause in point 2 of Addendum B and that the Commission could not therefore merely issue, by way of compensation for the harm which the applicant sustained in 1995 and during subsequent years, additional import licences up to the amount of USD 1 000 000.

47 In support of its claims, the applicant states, first, that in the present case the Commission did not correctly apply the concept of difficulties as defined in the judgment in *T. Port*. It observes that in that judgment the Court of Justice associated that concept with the fact that 'an exceptionally low quota was allocated [to importers of third-country bananas or non-traditional ACP bananas] on the basis of the reference years to be taken into consideration under Article 19(2) of [Regulation No 404/93]'. The difficulties therefore consist in the fact that traders are not allocated licences allowing them to market in the Community products for which arrangements were made in good faith. In the present case the difficulties encountered consist precisely in the fact that, because the applicant was unable to obtain import licences following the entry into force of the common organisation of the market, it had to market outside the Community the quantities of bananas specified in the contract, thereby incurring significant losses.

48 The applicant then maintains that, in conformity with the condition laid down in the judgment in *T. Port*, those difficulties were 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. If the common organisation of the market had been established at a later date the applicant would, by virtue of its imports after 1993, have marketed in the Community a reference quantity sufficient for it to be allocated the number of licences indicated in its request of 24 December 1996.

49 Finally, the applicant claims that in the present case the Commission also misapplied the condition laid down in the judgment in *T. Port* that the difficulties encountered by the importers concerned must not be due to lack of care on their part.

50 First, the applicant cannot, it maintains, be accused of lack of care in relation to the fact that it had not obtained the import licences which would have allowed it to market in the Community the quantities of bananas specified in the contract. In particular, cancelling the contract would not have meant that additional licences would be issued or that it would no longer have been impossible to import those quantities.

51 Furthermore, if the applicant had cancelled the contract, not only would ten years' intensive and costly efforts have been reduced to nothing, but the applicant would also have been required to withdraw from the market in bananas for five years. It counted on acquiring the status of category A trader during the period of validity of the contract and on the common organisation of the market being amended on the ground that it was incompatible with the rules of the General Agreement on Tariffs and Trade (GATT), or on obtaining compensation in the form of additional import licences on the ground of hardship. As those three hypotheses subsequently proved correct, it cannot be disputed that the applicant took a sound business decision by not cancelling the contract.

52 Second, the applicant claims that, according to the judgment in *T. Port*, the obligation to display care must be assessed in the light of the prior national arrangements and the prospect of establishment of the common organisation of the market, in so far as the traders concerned could be aware of this. It contends, therefore, that it was only required to take account of those matters when the contract was concluded and that it was not subsequently required to alter the arrangements which it had then made in order to limit the Community's

obligation to make compensation. The Commission in fact made the settlement of cases of hardship subject to an additional condition, namely that it is for the trader concerned to limit the Community's loss.

53 The Commission submits that the existence of a case of hardship presumes that the following four conditions, laid down in the judgment in *T. Port*, are satisfied:

— the person concerned must have entered into legally relevant economic arrangements under the previous national system and must have displayed the customary care which is necessary in any business transaction;

— the value of those arrangements must have been reduced as a result of the entry into force of the common organisation of the market;

— the difficulties encountered must not have been foreseeable;

— it must be necessary to regulate cases of hardship, having regard, in particular, to the existence of difficulties threatening the survival of importers and the protection of fundamental Community rights.

54 The Commission then states that the measures capable of being adopted within the framework of the regulation of cases of hardship are intended to attenuate the particular difficulties encountered by traders owing to the transition from the national arrangements to the common organisation of the market, not to ensure

that those traders are able to perform in full the contracts concluded prior to the announcement of the establishment of that organisation by protecting those contracts against changes in the law.

55 The Commission contends that the case of hardship which the applicant faced consists in the fact that the applicant, before learning of the establishment of a common market in bananas, concluded a contract containing undertakings to purchase and a price guarantee which, after the applicant was classified as a category C trader, exposed it to significant losses likely to jeopardise its entire commercial activity. The hardship suffered by the applicant therefore did not consist in the fact that it was unable to market in the Community the quantities of bananas specified in the contract because it obtained an insufficient number of import licences.

56 The Commission maintains that the applicant's objection that the contested decision is based on an incorrect interpretation of the concept of difficulties as defined in the judgment in *T. Port* must be rejected. The passage from the judgment on which the applicant relies in that regard concerns only the case of traders who traditionally imported bananas and who, for reasons beyond their control, were unable, during the reference period referred to in Article 19(2) of Regulation No 404/93, to rely on a volume representative of their trade. During the 1989 to 1991 reference period the applicant was not yet trading in the banana sector and, accordingly, it was classified in category C. Since the quantities of bananas which the applicant imported under the contract never constituted reference quantities for the purposes of the common organisation of the market in bananas, 'an exceptionally low quota' in the sense contemplated in the passage referred to above cannot have been allocated to it.

57 Moreover, the Commission denies that it applied incorrectly the condition laid down in the judgment in *T. Port* that the importer concerned must not have displayed a lack of care.

58 First, the Commission never accused the applicant of displaying a lack of care in relation to the lack of import licences necessary to market in the Community the quantities of bananas specified in the contract. The difficulties experienced by the applicant are not due to that fact.

59 Second, the Commission states that when it was required, in the present case, to determine the extent of the measures to be taken to resolve the case of hardship, it was correct to take the view that the applicant, in continuing to perform the contract, did not act like a normally prudent trader.

60 In that regard, it observes that it is necessary to distinguish category C traders, who are newcomers to the banana market, from traders who traditionally import bananas. The former have not been present on that market sufficiently long to be guaranteed a permanent place there. On the contrary, those traders might be expected to adapt their activities to the new legal and economic conditions resulting from the entry into force of the common organisation of the market in bananas. Furthermore, the parties to a contract generally protect themselves against unexpected changes in the law by inserting a cancellation clause.

61 The Commission states that it thus took account of the fact that the applicant had the option of cancelling the contract under point 2 of Addendum B in order to adapt to the new legal and economic conditions. It observes, in that regard, that it is for every trader exercising due care to limit his losses. Furthermore, it contends that, contrary to what the applicant submits, such an anticipated cancellation of the contract would not have obliged the applicant to withdraw from the banana market for five years. If the applicant had taken advantage of the cancellation clause in point 2 of Addendum B all the contractual provisions, including the obligation to withdraw from the market, would have ceased to apply.

62 In the light of those considerations, the Commission contends that it was right in making good only the losses sustained by the applicant in 1994 as a result of performing the contract and the damage which would have resulted from the early cancellation of the contract in 1995, namely USD 1 000 000. That compensation enabled the applicant to overcome the difficulties which threatened its survival. Furthermore, the Commission even adopted a generous approach, since it might have taken the view that the contract could have been cancelled in 1994.

63 The Commission makes it clear that it was not forcing the applicant to cancel the contract before it had run its course: it merely considered that the fact that the applicant had the option to do so limited the scope of the measures which had to be taken to resolve the case of hardship. The decision whether or not to continue to perform the contract is a business decision which only the applicant can take. The applicant cannot therefore claim that the Commission made recognition of cases of hardship subject to an additional condition, namely that the importer must limit the Community's obligation to provide compensation.

64 Finally, the arguments on which the applicant relies to show that its difficulties were 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, in accordance with the condition laid down in the judgment in *T. Port*, are unreasonable. Since the applicant chose to continue to perform the contract in spite of the new legal and economic conditions, its subsequent losses must be regarded as the consequence of its own business decision; consequently, the abovementioned condition was no longer satisfied.

65 The Kingdom of Spain and the French Republic claim, essentially, that the Commission has a broad discretion in applying Article 30 of Regulation No 404/93 and that the contested decision is wholly consistent with that article.

Findings of the Court

66 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 resolve 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 judgment in *T. Port*, cited above, paragraphs 34 and 36; and the judgments of the Court of First Instance in Case T-254/97 *Fruchthandelsgesellschaft* v *Commission* [1999] ECR II-2743, paragraph 61, and Case T-612/97 *Cordis* v *Commission* [1999] ECR II-2771, paragraph 32).

67 The Court of Justice has stated that the Commission must in that regard also 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 (the judgment in *T. Port*, paragraph 37).

68 The Court of Justice has further stated, however, that '[w]hen the transitional difficulties are due to action taken by traders prior to the entry into force of... Regulation [No 404/93], that action must be capable of being seen as displaying ordinary care, with regard both to the prior national arrangements and to the prospect of establishment of the common organisation of the market, in so far as the traders concerned could have been aware of this' (the judgment in *T. Port*, paragraph 41).

69 Furthermore, it should be pointed out that the Commission has a broad discretion both when assessing whether transitional measures are necessary (the judgment in *T. Port*, paragraph 38, and the judgment in *Fruchthandelsgesellschaft* v *Commission*, cited above, paragraph 67) and when deciding the subject-matter of any transitional measures judged necessary (the judgment in *T. Port*, paragraph 42).

70 It should also be pointed out that Article 30 of Regulation No 404/93 must be interpreted restrictively, as a derogation from the general provisions applicable (judgment in *Cordis* v *Commission*, cited above, paragraph 39; and order of the President of the Court of First Instance in Case T-79/96 R *Camar* v *Commission* [1997] ECR II-403, paragraphs 46 and 47).

71 In the present case it is common ground that the applicant was faced with a case of hardship and that the Commission was required to adopt transitional measures in order to resolve it. However, the parties disagree as to, first, what constituted the case of hardship and, second, whether the transitional measures adopted by the Commission pursuant to Article 30 of Regulation No 404/93 were sufficient to enable the applicant to overcome the hardship.

72 As regards the first question, none of the arguments put forward by the applicant permits the conclusion that the Commission exceeded the limits of its broad discretion in taking the view that the case of hardship consisted in the fact that the applicant, before being informed of the creation of a common organisation of the market in bananas, concluded a contract containing purchasing commitments and a price guarantee which, following the applicant's classification as a category C trader, exposed it to significant losses capable of jeopardising its entire commercial activity.

73 First, the applicant's assertion that the difficulties which it encountered consisted in the fact that, for lack of import licences, it was unable to market in the

Community the quantities of bananas specified in the contract cannot be upheld. Such a broad interpretation of the concept of difficulties within the meaning of the judgment in *T. Port* would go far beyond the purpose of Article 30 of Regulation No 404/93, which is to facilitate the transition to the common organisation of the market in bananas for undertakings for which this has caused particular and unforeseeable problems (judgment in *Cordis* v *Commission*, cited above, paragraph 34), not to ensure that contracts for the supply of bananas concluded under the national arrangements prior to that organisation can be performed in full.

74 Next, the explanation given by the applicant to show that the difficulties which it thus encountered were due to the transition to the common organisation of the market, in accordance with the condition laid down in the judgment in *T. Port*, cannot be upheld. Article 30 of Regulation No 404/93 refers expressly to the date of entry into force of that regulation, which, by Article 33, was fixed at 26 February 1993. The applicant cannot rely on a purely hypothetical situation, namely the entry into force of the common organisation of the market at a later date, which ignores the clear wording of the provision the application of which it is claiming.

75 Finally, it is not established that the Commission incorrectly applied the condition that the importer concerned must have displayed the necessary care. It is true that, as the applicant observes, that condition must, according to paragraph 41 of the judgment in *T. Port*, be assessed in the light of the action taken by the trader prior to the entry into force of Regulation No 404/93, so that the Commission could not base a refusal to recognise the existence of a case of hardship on a lack of care on the importer's part after that regulation had entered into force. However, it is clear from the contested decision that the Commission in reality relied *vis-à-vis* the applicant on considerations based on due care displayed by traders only at the subsequent stage of determining the subject-matter of the transitional measures to be taken in order to resolve the particular difficulties encountered by the applicant (see paragraphs 76 to 83 below). For that reason the argument that the Commission made recognition of cases of hardship subject to a condition not laid down by the Court of Justice in the judgment in *T. Port* must be rejected.

76 As regards the second question, there is nothing to show that the Commission exceeded the limits of the broad discretion which it also enjoys in determining the subject-matter of the measures to be taken to enable the traders concerned to overcome cases of hardship by confining itself to granting the applicant additional import licences up to the amount of, first, the loss incurred by the applicant in 1994 as a result of performing the contract and, second, USD 1 000 000.

77 It should first be observed that the applicant does not challenge the lawfulness of Article 2 of the contested decision in so far as it compensates the loss which the applicant incurred in 1994. It disputes that provision only in so far as compensation for the loss which it incurred in 1995 and subsequent years is limited by that provision to the issue of additional import licences for the amount of USD 1 000 000 and claims, essentially, that it was under no obligation to cancel the contract, in order to avoid liability thereunder in 1995, by taking advantage of the clause in point 2 of Addendum B to the contract.

78 Next, the applicant's assertion that point 2 of Addendum B to the contract was intended only to cover, up to the amount mentioned above, a claim for compensation from Consultban by the shipowner for non-performance of the contract of affreightment must be rejected. It was only in its written answer to the questions put by the Court, and at the hearing, that the applicant put that argument forward. Until then it had never disputed that that clause allowed it to cancel the contract in any event against payment of a penalty of USD 1 000 000 to Consultban.

79 In the light of the purpose of Article 30 of Regulation No 404/93 and the fact that that article is to be interpreted restrictively as a derogation from the general provisions applicable, it must be held that the Commission applied that article reasonably in taking the view that it was only required to make compensation for the costs which the trader concerned had to incur to adapt to the new legal conditions.

80 In that context, the Commission was justified in taking account of the fact that point 2 of Addendum B to the contract allowed the applicant to cancel the contract before it had run its course against payment of the sum of USD 1 000 000 to Consultban. In that regard, contrary to what the applicant claims, if it had taken advantage of that cancellation clause it would not have had to withdraw from the banana market for five years: the obligation to withdraw from the market was stipulated only in the event of the contract being cancelled in accordance with Article 4.1. Furthermore, the applicant had not relied on that argument during the administrative procedure preceding the adoption of the contested decision and, accordingly, the lawfulness of that decision cannot be called in question on the basis of that argument.

81 The Commission was likewise justified in taking the view that if the applicant had acted as a trader exercising due care it would in fact have cancelled the contract in order to be released from it in 1995, in accordance with point 2 of Addendum B to the contract, for the purpose of limiting its own loss. It is common ground that the applicant had to pay the sum of USD 1 661 537 to Consultban in 1994 under the price guarantee, or a sum higher than the penalty of USD 1 000 000 provided for in point 2 of Addendum B, and it was very likely that a sum in excess of the latter amount would also have to be paid under that guarantee in the following years.

82 The Commission's approach was all the more reasonable because the applicant had been active on the banana market only for a short time and because it had a broad range of activities connected with other fruit and with vegetables.

83 Contrary to what the applicant claims, moreover, that approach cannot be interpreted as meaning that the Commission was forcing the applicant effectively to cancel the contract. The Commission's approach is based solely on the wholly justified consideration that it was not for the Community to bear the consequences of the applicant's business decision to continue to perform the contract in spite of the resulting losses.

84 It follows from the foregoing that the Commission correctly applied Article 30 of Regulation No 404/93 in adopting Article 2 of the contested decision.

85 The first part of the application must therefore be dismissed as unfounded.

Second part of the application

Arguments of the parties

86 The applicant disputes the lawfulness of the contested decision in that, according to Article 1(6), the quantities of bananas imported into the Community under the additional import licences are not to be taken into account for the purpose of determining its total reference quantities for future years.

87 The applicant claims that it was entitled to obtain compensation in full for the case of hardship with which it was faced and that taking those quantities into account would not have the effect of granting it excessive compensation.

88 The applicant also observes that the second subparagraph of Article 1(4) of the contested decision provides that the additional import licences are to be counted against the specific reserves provided for cases of hardship in the tariff quota. It points out that Regulation No 2601/97 established such a reserve, which amounts to 20 000 tonnes and is to be counted against the tariff quota for imports of third-country and non-traditional ACP bananas available pursuant to

Article 18 of Regulation No 404/93. That reserve is therefore subject to the general rules applicable to the tariff quota, including Article 19(2) of Regulation No 404/93.

89 At the hearing the applicant also relied on Article 5(3)(b) of Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of [Regulation No 404/93] regarding imports of bananas into the Community (OJ 1998 L 293, p. 32). The effect of that provision, according to the applicant, is that licences of any kind, including those issued in a case of hardship, are relevant to the establishment of reference quantities.

90 Finally, in its reply the applicant submitted that the Commission intends to allocate it the status of new trader again from 1999, which would have the consequence that the applicant would be excluded from the market in bananas.

91 The Commission refers again to what constituted the case of hardship facing the applicant, and reaffirms that the measures taken in the contested decision provide full compensation for the losses which the applicant suffered owing to the transition to the common organisation of the market. It also observes that licences granted to compensate a case of hardship are exceptional and for that reason fall outside the general rules applicable to licences which come within the general tariff quota. In that regard, it explains that Regulation No 2601/97 does not provide that the quantities imported under licences granted to compensate for a case of hardship can be taken into account for the purposes of establishing reference quantities. Last, it disputes the applicant's argument based on Regulation No 2362/98.

92 The Kingdom of Spain submits that the sole purpose of the specific reserve established by Regulation No 2601/97 is to ensure that the Commission has tonnages available in order to resolve cases of hardship.

Findings of the Court

93 It has been shown above, in the examination of the first part of the application, that the Commission did not exceed the limits of its broad discretion by taking the view that the grant to the applicant of additional import licences up to the amount of, first, the losses which it had incurred as a result of performing the contract in 1994 and, second, USD 1 000 000 made it possible to resolve the case of hardship facing the applicant.

94 In those circumstances, there would have been no justification for granting the applicant any further advantage under Article 30 of Regulation No 404/93, such as taking into account the quantities of bananas imported under the above-mentioned licences when determining the reference quantities by way of tariff quotas for future years.

95 At the hearing, moreover, the Commission and the applicant accepted that the hardship suffered by the applicant could have been compensated by the grant of a lump-sum payment rather than by the allocation of additional import licences.

96 Those conclusions cannot be invalidated by the arguments which the applicant bases on Regulation No 2601/97, which merely establishes a reserve of 20 000 tonnes to allow transitional measures to be adopted in order to resolve cases of hardship. The fact that Article 1 of that regulation provides that that reserve is to be counted against the tariff quota referred to in Article 18 of Regulation No 404/93 does not in any way mean that the quantities granted in the context of the reserve must necessarily be taken into account for the purpose of determining reference quantities for future years.

97 The arguments which, at the hearing, the applicant based on Regulation No 2362/98 cannot be accepted. That regulation was adopted after the contested decision. It is settled case-law that in the context of an action for annulment under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) the legality of a Community 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 (judgment of the Court of Justice in Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7; judgments of the Court of First Instance in Case T-77/95 *SFEI and Others* v *Commission* [1997] ECR II-1, paragraph 74, and Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 81).

98 As regards, last, the applicant's assertion that the Commission in reality intended to attribute to it the status of a new trader again from 1999, it is sufficient to observe that no evidence has been adduced to support that assertion.

99 It follows that the second part of the application is unfounded and that, accordingly, the application must be dismissed in its entirety.

Costs

100 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 costs incurred by the Commission. Under Article 87(4) of the Rules of Procedure, the Kingdom of Spain and the French Republic, which have intervened 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 and pay those incurred by the Commission;**

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

García-Valdecasas Lindh Cooke

Delivered in open court in Luxembourg on 19 September 2000.

H. Jung

Registrar

R. García-Valdecasas

President