JUDGMENT OF THE COURT

5 October 1994 *

In Case C-280/93,

Federal Republic of Germany, represented by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, 76 Villemombler Straße, Bonn, and J. Sedemund, Rechtsanwalt, Cologne, acting as Agents,

applicant,

supported by

Kingdom of Belgium, represented by J. Devadder, Director of Administration in the Legal Service of the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

Kingdom of the Netherlands, represented by J. W. de Zwaan and T. Heukels, Assistant Legal Advisers in the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C. M. Spoo,

interveners,

* Language of the case: German.

Council of the European Union, represented by J.-P. Jacqué, Director in the Legal Service, B. Schloh, A. Brautigam and J. Huber, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of B. Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by P. Gilsdorf, Principal Legal Adviser, and U. Wölker, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

Hellenic Republic, represented by V. Kontolaimos, Adviser to the State Legal Service, and V. Pelekou, Legal Representative, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

Kingdom of Spain, represented by A. Navarro González, Director-General for Community Legal and Institutional Coordination, and Rosario Silva de Lapuerta, Abogado del Estado, in the Legal Department for Matters before the Court of Justice, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

French Republic, represented by J.-P. Puissochet, Director of Legal Affairs in the Ministry of Foreign Affairs, and C. de Salins, Adviser on Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

Italian Republic, represented by Professor L. Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

Portuguese Republic, represented by L. Fernandes, Director of the Legal Service of the Directorate-General of the European Communities of the Ministry of Foreign Affairs, M. L. Duarte and J. Santos Cardoso, respectively Legal Adviser and Principal Adviser in that service, acting as Agents, with an address for service in Luxembourg at the Portuguese Embassy, 33 Allée Scheffer,

United Kingdom of Great Britain and Northern Ireland, represented by S. L. Hudson, of the Treasury Solicitor's Department, acting as Agent, assisted by D. Anderson, Barrister, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

interveners,

APPLICATION for the annulment of Title IV and Article 21(2) of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas (OJ 1993 L 47, p. 1),

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida, M. Diez de Velasco and D. A. O. Edward (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler (Rapporteur), G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: C. Gulmann,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the German Government, represented by E. Röder and J. Sedemund, Rechtsanwalt, acting as Agents, the Belgian Government, represented by J. Devadder, acting as Agent, the Council, represented by J.-P. Jacqué, B. Schloh, A. Brautigam and J. Huber, acting as Agents, the Greek Government, represented by V. Kontolaimos and V. Pelekou, acting as Agents, the Spanish Government, represented by Rosario Silva de Lapuerta, acting as Agent, the French Government, represented by C. de Salins and N. Eybalin, Foreign Affairs Secretary in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agents, the Portuguese Government, represented by M. L. Duarte, acting as Agent, the United Kingdom, represented by S. L. Hudson, acting as Agent, and D. Anderson, Barrister, and the Commission, represented by P. Gilsdorf, Principal Legal Adviser, and E. de March, Legal Adviser, acting as Agents, at the hearing on 20 April 1994,

after hearing the Opinion of the Advocate General at the sitting on 8 June 1994,

gives the following

Judgment

1 By application lodged at the Court Registry on 14 May 1993, the Federal Republic of Germany brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that Title IV and Article 21(2) of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas (OJ 1993 L 47, p. 1, hereinafter 'the Regulation') were void.

2 Before considering the pleas in law put forward for annulment, it is appropriate to give a brief summary of the legal position before the Regulation was adopted and of the provisions which are relevant to an assessment of its lawfulness.

The position prior to the Regulation

3 As an explanation of the circumstances in which the Regulation was adopted, the second recital in the preamble states:

'there currently exist within the Member States of the Community producing bananas national market organizations which seek to ensure that producers can dispose of their products on the national market and receive an income in line with the costs of production; ... these national market organizations impose quantitative restrictions which hamper achievement of a single market for bananas; ... some of the Member States which do not produce bananas provide preferential outlets for bananas from the ACP States whilst others have liberal importation rules, which

even in one case include a privileged tariff situation; ... these different arrangements prevent the free movement of bananas within the Community and implementation of common arrangements for trade with third countries; ... for the purposes of achievement of the single market, a balanced and flexible common organization of the market for the banana sector must replace the various national arrangements'.

4 Before the Regulation was adopted, imports of bananas into the Benelux countries, Denmark and Ireland, essentially from Latin America, were subject only to a customs duty of 20% consolidated within the framework of GATT. In France, the United Kingdom, Italy, Spain, Portugal and Greece the national markets were protected and consumption was covered either by Community production or by imports from the ACP States.

5 Because of structural deficiencies which restrict the competitiveness of Community production, and also ACP production, the production costs and consumer prices for Community bananas and ACP bananas were appreciably higher than those for third-country bananas.

The Protocol on bananas

6 By virtue of the Protocol annexed to the Implementing Convention on the Association of the Overseas Countries and Territories with the Community, provided for in Article 136 of the Treaty (hereinafter 'the Banana Protocol') the Federal Republic of Germany enjoyed a special arrangement allowing it to import an

annual quota of bananas free of customs duty, determined by reference to the quantities imported in 1956. That base quota was to be progressively reduced as the realization of the common market progressed. The annual quotas were increased in accordance with the rules of calculation in paragraphs 3 and 4. In the event that the overseas countries and territories were unable to supply in full the quantities requested by the Federal Republic of Germany, the Member States concerned declared their readiness, in paragraph 6, to agree to a corresponding increase in the quota.

7 Under the third subparagraph of paragraph 4 of the Banana Protocol,

'Any decision to abolish or amend this quota shall be taken by the Council, acting by a qualified majority on a proposal from the Commission.'

8 On the basis of the Banana Protocol, which continued to be applied even though the Implementing Convention had expired on 31 December 1962, the Federal Republic of Germany in 1992 imported from non-member countries 1 371 000 tonnes of bananas free of customs duty, including a quantity of 721 000 tonnes calculated in accordance with paragraphs 3 and 4 and an additional 650 000 tonnes requested and agreed to under paragraph 6 of the Banana Protocol.

The Lomé Convention

9 The import of bananas from the ACP States is governed by the Fourth ACP-EEC Convention, signed in Lomé on 15 December 1989, approved by a decision of the Council and the Commission of 25 February 1991 (OJ 1991 L 229, p. 1, hereinafter 'the Lomé Convention').

10 Under Article 168 of the Lomé Convention,

'1. Products originating in the ACP States shall be imported into the Community free of customs duties and charges having equivalent effect.

2. (a) Products originating in the ACP States:

— listed in Annex II to the Treaty where they come under a common organization of the market within the meaning of Article 40 of the Treaty, or

— subject, on import into the Community, to specific rules introduced as a result of the implementation of the common agricultural policy

shall be imported into the Community, notwithstanding the general arrangements applied in respect of third countries, in accordance with the following provisions:

(i) those products shall be imported free of customs duties for which Community provisions in force at the time of import do not provide, apart from customs duties, for the application of any measure relating to their import;

(ii) for products other than those referred to in point (i), the Community shall take the necessary measures to ensure more favourable treatment than that granted to third countries benefiting from the most-favoured-nation clause for the same products.

...'.

Protocol 5 on bananas, annexed to the Lomé Convention (hereinafter 'Protocol 5'), states in Article 1 that:

'In respect of its banana exports to the Community markets, no ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present.'

12 The Joint declaration relating to Protocol 5, which forms Annex LXXIV, states:

'... Article 1 of Protocol 5 does not prevent the Community from establishing common rules for bananas, in full consultation with the ACP, as long as no ACP State, traditional supplier to the Community, is placed as regards access to, and advantages in, the Community, in a less favourable situation than in the past or at present'.

13 In a special declaration relating to Protocol 5, set out in Annex LXXV, the Community confirmed the special rights of the ACP States which are traditional suppliers.

The contested regulation

14 According to the third recital in the preamble to the Regulation,

'... so that the Community can respect Community preference and its various international obligations, [the] common organization of the market should permit bananas produced in the Community and those from the ACP States which are traditional suppliers to be disposed of on the Community market providing an adequate income for producers and at fair prices for consumers without undermining imports of bananas from other third countries suppliers'.

15 In Titles I and II, the Regulation lays down common quality and marketing standards in the Community and creates producers' organizations and concentration mechanisms.

16 Title III establishes a system of compensation for Community producers for any loss of income, up to a maximum quantity of 854 000 tonnes broken down for the various producer regions in the Community.

17 The rules on trade with third countries in Title IV provide that traditional imports of bananas from ACP States into the Community may continue, free of customs

duty. An annex to the Regulation sets the quantity in question at 857 700 tonnes divided up among the ACP States which are traditional suppliers.

18 Under Article 18 of the Regulation,

'1. A tariff quota of two million tonnes (net weight) shall be opened each year for imports of third-country bananas and non-traditional ACP bananas.

Within the framework of the tariff quota, imports of third-country bananas shall be subject to a levy of ECU 100 per tonne and imports of non-traditional ACP bananas shall be subject to a zero duty.

...

2. Apart from the quota referred to in paragraph 1,

— imports of non-traditional ACP bananas shall be subject to a levy of ECU 750 per tonne,

— imports of third-country bananas shall be subject to a levy of ECU 850 per tonne...'.

19 Under Article 19(1),

'The tariff quota shall be opened from 1 July 1993 for:

(a) 66.5% to the category of operators who marketed third-country and/or non-traditional ACP bananas;

(b) 30% to the category of operators who marketed Community and/or traditional ACP bananas;

(c) 3.5% to the category of operators established in the Community who started marketing bananas other than Community and/or traditional ACP bananas from 1992 ...'.

20 Pursuant to Article 16, a forecast supply balance is to be prepared each year of production and consumption in the Community and of exports and imports; that balance may be adjusted where necessary during the marketing year.

21 The fourth subparagraph of Article 18(1) provides for the volume of the annual quota to be increased on the basis of the forecast supply balance referred to in Article 16.

22 Article 20 establishes the principle that the import licences are transferable and empowers the Commission to determine the conditions under which they may be transferred.

23 Under Article 21(2) the tariff quota laid down in the Banana Protocol is discontinued.

24 By order of 29 June 1993 in Case C-280/93 R *Federal Republic of Germany* v *Council* [1993] ECR I-3667, the Court dismissed the application by the Federal Republic of Germany for interim measures to permit that State to import free of customs duty the same annual quantities as in 1992 of bananas originating in third countries until the Court's decision on the substance of the case.

25 By orders of 13 July 1993 the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Portuguese Republic, the United Kingdom and the Commission were granted leave to intervene in support of the form of order sought by the Council; by orders of the same date the Kingdom of Belgium and the Kingdom of the Netherlands were granted leave to intervene in support of the form of order sought by the Federal Republic of Germany.

26 In support of its application, the Federal Republic of Germany puts forward a number of pleas in law alleging breaches of essential procedural requirements, substantive rules and fundamental principles of Community law, the Lomé Convention, the General Agreement on Tariffs and Trade (GATT) and the Banana Protocol.

Breach of essential procedural requirements

27 The Federal Republic of Germany puts forward three arguments in support of this plea in law.

28 It argues firstly that the procedure whereby the Regulation was adopted was irregular, in that the text of the Regulation diverges from the Commission's initial proposal, without there having been a new proposal formally adopted by the college of Commissioners. The right of proposal referred to in Article 43 of the Treaty is a right for the Commission itself to take part in the shaping of Council measures and it is not permissible for the member of the Commission in charge of a matter simply to approve in the name of the Commission an agreement drawn up within the Council. Article 27 of the Rules of Procedure of the Commission (OJ, English Special Edition, Second Series VII, p. 9) does not permit members of the Commission, by derogation from the principle of collegiality, to be empowered to take measures other than clearly defined measures of management or administration.

29 The Federal Republic of Germany argues secondly that the Regulation is vitiated by a defective statement of reasons, in that it refers only to the first proposal from the Commission.

30 It argues thirdly that in view of the substantial nature of the changes made in the second proposal from the Commission, the European Parliament should have been consulted again. In this respect the applicant refers to two substantial changes. The 20% ad valorem customs duty, consolidated in GATT, which was maintained in the first proposal, was replaced by a specific duty of ECU 100 per tonne. The tariff quota share of 30% of third-country bananas was open in the first proposal to importers of third-country bananas who undertook to market a specific quantity of Community and/or traditional ACP bananas; also under the original scheme new importers could have taken part in that partnership arrangement, whereas their quota share is now limited to 3.5% of the tariff quota.

31 The Council, supported in particular by the Commission, maintains that the procedure for adopting the Regulation was regular and that the Council had before it an amended proposal from the Commission; it argues that the Regulation does not have to refer both to the original proposal from the Commission and the subsequent amendments, and that the amendments made did not render it necessary for the Parliament to be consulted again.

32 In order to examine whether the procedure for adopting the Regulation was regular, it is appropriate to summarize its course as set out in the written pleadings and oral observations of the Council and Commission. According to the statements of the Commission, which have not been contested by the applicant, the college of Commissioners mandated the Member responsible for agriculture to conduct the negotiations on bananas at the Council of Ministers of 14-17 December 1992, in the context of an overall agreement. Following the session of the Council the Member of the Commission responsible informed the college of Commissioners of the outcome of the session, including the banana agreement, without the college expressing any objection either as to the procedure followed or as to the outcome of the negotiations.

33 On 12 February 1993 the competent Member of the Commission declared to the Council:

The Commission confirms that the text before us reflects the Commission's proposal as amended in the political agreement of December, as that political agreement has been transposed into legal provisions in the text which the Council will vote on.

34 On 13 February 1993 the Council adopted the Regulation by a qualified majority vote.

35 It follows from the course of the procedure, having regard in particular to the declaration made before the Council on 12 February 1993 by the competent Member of the Commission, that when it made its final decision, on 13 February, the Council had before it a proposal from the Commission amended in accordance with the political agreement accepted by the competent Member on behalf of the Commission at the Council session in December 1992 and approved by the college of Commissioners.

36 The fact that that amended proposal was not in writing is of no consequence. Article 149(3) of the Treaty states that as long as the Council has not acted, the Commission may alter its proposal at any time during the procedures mentioned in paragraphs 1 and 2, and it does not require those amended proposals necessarily to be in writing. Such amended proposals are part of the Community legislative process, which is characterized by a certain flexibility, necessary for achieving a convergence of views between the institutions. They are fundamentally different from the acts which are adopted by the Commission and are of direct concern to individuals. In those circumstances strict compliance with the formalities prescribed for the adoption of acts of direct concern to individuals cannot be required for the adoption of such proposals (see the judgment of 15 June 1994 in Case C-137/92 P *BASF* [1994] ECR I-2555).

37 As to the lack of a citation referring to the alleged second proposal, the Court finds that there was no new proposal, but merely an amendment to the original proposal. Although under Article 190 of the Treaty the proposal from the Commission must be referred to in acts which can be adopted only on a proposal from the Commission, that article does not require citation of any amendment which may subsequently have been made to that proposal. The position would be different only if the Commission had withdrawn its proposal and replaced it by a fresh proposal.

38 In assessing the cogency of the argument that the European Parliament was not consulted a second time, it should be noted that a fresh consultation of the European Parliament is required whenever the text finally adopted, taken as a whole,

differs in essence from the text on which the Parliament has already been consulted, except in cases where the amendments substantially correspond to the wishes of the Parliament itself (judgments in Case C-65/90 *Parliament* v *Council* [1992] ECR I-4593, paragraph 16, and Joined Cases C-13/92 to C-16/92 *Driessen and Others* v *Minister van Verkeer en Waterstaat* [1993] ECR I-4751, paragraph 23).

39 The Court must therefore examine whether the amendments referred to by the applicant relate to the very essence of the text taken as a whole.

40 In this respect the Commission's original proposal, like the amended proposal, provided for a quota of two million tonnes for third-country bananas and non-traditional ACP bananas in order to curb imports. The substitution of the specific customs duty for the *ad valorem* duty, while constituting a legal amendment, is in pursuit of that objective. It has not been shown that the introduction of the specific duty was meant to have the effect of increasing the restrictions on the import into the Community of third-country bananas given that the specific duty did not represent a greater financial burden for importers than the 20% *ad valorem* duty. It may be added that the *ad valorem* duty, although consolidated in GATT, was applicable only in certain Member States of the Community, while most States other than the applicant had more restrictive rules on imports.

41 The subdivision of the import quota, both in the original proposal and in the amended proposal, is intended, as the thirteenth recital in the preamble to the Regulation states, to make a distinction between operators who have previously marketed third-country bananas and non-traditional ACP bananas and operators who have previously marketed bananas produced in the Community and ACP bananas, while leaving a quantity available for new operators. The creation of subquotas for

the various categories of operators, in preference to the partnership arrangements originally proposed, only relates to a technical means of implementing that distinction, which the Council was able to regard as essential for ensuring sales of Community and ACP bananas and which does not affect the basic structure of the regulation.

42 The Commission's amendments to its proposal thus did not affect the very essence of the Regulation taken as a whole, and therefore did not make it necessary for the Parliament to be consulted anew.

43 Consequently, the first plea in law, alleging a breach of essential procedural requirements, must be rejected.

Breach of substantive rules of Community law

44 The Federal Republic of Germany argues that Title IV of the Regulation infringes Article 39 et seq. of the Treaty on the common agricultural policy, the competition rules, certain fundamental rights and the principle of proportionality.

45 The Council considers that the Regulation is consistent with the objectives of the common agricultural policy and with the rules of Community law.

Infringement of Article 39 of the Treaty

46 The Federal Republic of Germany submits that the objectives of the Regulation, namely safeguarding Community production and maintaining the income of Community producers, do not come under Article 39 of the Treaty. Guaranteeing the income of the agricultural population can be ensured only by increasing productivity. The imbalance between supply and demand and the considerable rise in banana prices, in particular on the German market, clearly show that the Regulation, contrary to Article 39, does not stabilize markets, assure the availability of supplies, or ensure that supplies reach consumers at reasonable prices.

47 In assessing whether those complaints are well founded, it should first be noted that the Court has held that in pursuing the objectives of the common agricultural policy the Community institutions must secure the permanent harmonization made necessary by any conflicts between those objectives taken individually and, where necessary, give any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made (Case C-311/90 *Hierl* v *Hauptzollamt Regensburg* [1992] ECR I-2061, paragraph 13). The Court has also held that, in matters concerning the common agricultural policy, the Community legislature has a broad discretion which corresponds to the political responsibilities imposed on it by Articles 40 and 43 (see Joined Cases C-267/88 to C-285/88 *Wuidart and Others* v *Laiterie Coopérative Eupenoise* [1990] ECR I-435, paragraph 14, and *Hierl*, cited above, paragraph 13).

48 Moreover, Article 39(1) of the Treaty expressly refers in subparagraph (a) to increasing productivity and in subparagraph (b) to ensuring a fair standard of living for the agricultural community, and Article 40(3) provides for various means to ensure that those objectives are attained, including aids for production or marketing and common machinery for stabilizing imports of the type introduced by the Regulation.

49 Consequently, the Council could, without infringing Article 39 of the Treaty, seek to safeguard the income of the agricultural community concerned by guaranteeing the existing level of Community production and providing for suitable machinery for increasing the productivity of Community producers, including common quality standards and producers' organizations.

50 Nor can the applicant argue that the Regulation conflicts with the objectives of the common agricultural policy set out in subparagraphs (c) and (d) of Article 39(1) of the Treaty, since its intention is precisely to stabilize the market by safeguarding Community production and by regulating imports and since, by that machinery supplemented by the mechanism for increasing the import quota if necessary, it assures the availability of supplies.

51 As regards the complaint that the Regulation has had the effect, especially on the German market, of increasing prices, contrary to Article 39(1)(e), it must be noted that the creation of a common organization of the market, taking the place of national arrangements characterized by considerable price differences, inevitably results in an adjustment of prices throughout the Community and that the objective of ensuring reasonable prices for consumers must be considered not on each national market but in the common market as a whole. Moreover, in accordance with what has been stated in paragraph 47, the Community institutions may, in the exercise of the discretion they enjoy in implementing a common organization of the market, temporarily give some of the objectives of Article 39 priority over others.

52 Accordingly, the submission that there was an infringement of Article 39 is unfounded.

Exceeding the limits of Articles 39, 42 and 43 of the Treaty

53 The Federal Republic of Germany argues that a development policy in favour of the ACP States, as pursued by the Regulation, cannot be based on the provisions on the common agricultural policy but at most on Articles 235 or 238 of the Treaty.

54 In this respect it should be noted, firstly, that Article 43 of the Treaty is the appropriate legal basis for any legislation concerning the production and marketing of agricultural products listed in Annex II to the Treaty which contributes to the achievement of one or more of the objectives of the common agricultural policy set out in Article 39 of the Treaty. Consequently, even where that legislation is directed both to objectives of agricultural policy and to other objectives pursued on the basis of other Treaty provisions, the existence of those provisions cannot be relied on as a ground for restricting the field of application of Article 43 of the Treaty (see the judgments in Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraphs 14 and 16, and Case C-131/87 *Commission* v *Council* [1989] ECR 3743, paragraphs 10 and 11).

55 Secondly, the creation of a common organization of the market requires, alongside the regulation of Community production, the establishment of an import regime to stabilize the markets and ensure sales of Community production if, as in the present case, the internal and external aspects of the common policy cannot be separated.

56 Thirdly, in the context of the implementation of internal policies, in particular in agriculture, the Community institutions cannot disregard the international obligations entered into by the Community under the Lomé Convention.

57 Consequently, the argument that the limits of Articles 39, 42 and 43 of the Treaty were exceeded with respect to the regime for imports from the ACP States is unfounded.

Breach of the principle of undistorted competition

58 The Federal Republic of Germany submits that the way the tariff quota is allocated conflicts with the objective of undistorted competition laid down in Article 3(f) of the Treaty, in that it effects, by an act of the public authorities, a redistribution of market shares and income to the detriment of traditional importers of third-country bananas. Since those importers cannot obtain supplies on the Community and ACP markets and are obliged to buy import licences for third-country bananas from Community and ACP banana traders, the latter enjoy gratuitous financial advantages.

59 It should be noted that the institution of a system of undistorted competition is not the only objective mentioned in Article 3 of the Treaty, which also provides *inter alia* for the establishment of a common agricultural policy.

10 The authors of the Treaty were aware that the simultaneous pursuit of those two objectives might, at certain times and in certain circumstances, prove difficult and in the first paragraph of Article 42 of the Treaty they provided that:

'The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 43(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39'.

11 Recognition is thus given to both the priority of the agricultural policy over the objectives of the Treaty in the field of competition and the power of the Council to decide to what extent the competition rules are to be applied in the agricultural sector.

12 In those circumstances the complaint of an infringement of the principle of undistorted competition cannot be upheld.

13 The arguments in support of this complaint relating to the damage caused to importers of third-country bananas will be examined below in the context of the analysis of the plea in law alleging breach of fundamental rights and general principles of law.

Breach of fundamental rights and general principles of law

14 The Federal Republic of Germany argues that the subdivision of the tariff quota constitutes unjustified discrimination against traders in third-country bananas. The

loss of market shares suffered by those operators constitutes an infringement of their right to property, their freedom to pursue their trade or business and their acquired rights. The introduction of the tariff quota is contrary to the principle of proportionality, both as regards the formula for allocating the quota and the prohibitive rate for imports over and above the quota, given that a system of direct aid to producers would have sufficed to ensure the disposal of Community and ACP production.

65 With respect to the complaint of breach of the principle of non-discrimination, the applicant argues that the subdivision of the tariff quota in favour of importers of Community and/or traditional ACP bananas is in fact tantamount to a transfer to them of a 30% market share by an act of the public authorities. It argues that that subdivision to the detriment of the class of operators trading in third-country bananas, without any justification, constitutes discrimination contrary to the Treaty.

66 The Court notes that under the second subparagraph of Article 40(3) of the Treaty the common organization of agricultural markets to be established within the framework of the common agricultural policy must 'exclude any discrimination between producers or consumers within the Community'.

67 It is settled law that the prohibition of discrimination laid down in that provision is only a specific expression of the general principle of equality which is one of the fundamental principles of Community law (see Case C-177/90 *Kühn* v *Landwirtschaftskammer Weser-Ems* [1992] ECR I-35, paragraph 18, and Case C-98/91 *Herbrink* v *Minister van Landbouw, Natuurbeheer en Visserij* [1994] ECR I-223, paragraph 27) and which requires that comparable situations are not treated in a different manner unless the difference in treatment is objectively justified (see Joined Cases 201/85 and 202/85 *Klensch and Others* v *Secrétaire d'Etat* [1986] ECR 3477, paragraph 9, and *Wuidart and Others*, cited above, paragraph 13).

68 The common organization of the market for the banana sector covers economic operators who are neither producers nor consumers. However, because of the general nature of the principle of non-discrimination, the prohibition of discrimination also applies to other categories of economic operators who are subject to a common organization of a market.

69 To find whether there is discrimination, the contested regulation must therefore be examined to see whether it treats comparable situations differently.

70 It is clear that before the Regulation was adopted, the banana sector at Community level was characterized by the coexistence of open national markets, which were themselves moreover governed by different regimes, and protected national markets. The legal regimes governing imports of bananas in the various Member States were largely the same as those existing in those States before the Community was created or before they acceded to it.

71 On the open national markets economic operators were able to obtain supplies of third-country bananas without quantitative restrictions. On the German market importers were even exempt from customs duties within a quota which was adjusted regularly on the basis of the Banana Protocol. On the protected national markets, by contrast, economic operators marketing Community and traditional ACP bananas were ensured the possibility of disposing of their products without being exposed to competition from suppliers of more competitive third-country bananas. For the reasons set out in paragraph 5 above, the selling price of Community and ACP bananas was in fact appreciably higher than that of third-country bananas.

72 It is therefore clear that before the Regulation was adopted the situations of the categories of economic operators among whom the tariff quota was subdivided were not comparable.

73 It is true that since the Regulation came into force those categories of economic operators have been affected differently by the measures adopted. Operators traditionally essentially supplied by third-country bananas now find their import possibilities restricted, whereas those formerly obliged to market essentially Community and ACP bananas may now import specified quantities of third-country bananas.

74 However, such a difference in treatment appears to be inherent in the objective of integrating previously compartmentalized markets, bearing in mind the different situations of the various categories of economic operators before the establishment of the common organization of the market. The Regulation is intended to ensure the disposal of Community production and traditional ACP production, which entails the striking of a balance between the two categories of economic operators in question.

75 Consequently, the complaint of breach of the principle of non-discrimination must be rejected as unfounded.

76 The lawfulness of the measures taken as regards the various categories of economic operators must therefore be examined with respect to the applicant's other complaints.

77 With reference to infringement of the right to property, the applicant submits that by depriving operators who traditionally marketed third-country bananas of market shares for a long period of time, the Regulation breached those operators' right to property and infringed their freedom to pursue their trade or business.

78 Both the right to property and the freedom to pursue a trade or business form part of the general principles of Community law. However, those principles are not absolute, but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraph 15, Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 18, and *Kühn*, cited above, paragraph 16).

79 The right to property of traders in third-country bananas is not called into question by the introduction of the Community quota and the rules for its subdivision. No economic operator can claim a right to property in a market share which he held at a time before the establishment of a common organization of a market, since such a market share constitutes only a momentary economic position exposed to the risks of changing circumstances.

80 Nor can an economic operator claim an acquired right or even a legitimate expectation that an existing situation which is capable of being altered by decisions taken by the Community institutions within the limits of their discretionary

power will be maintained (Case 52/81 *Faust* v *Commission* [1982] ECR 3745, paragraph 27), especially if the existing situation is contrary to the rules of the common market.

81 With reference to the alleged infringement of the freedom to pursue a trade or business, it must be stated that the introduction of the tariff quota and the machinery for subdividing it does indeed alter the competitive position of economic operators on the German market in particular, who were previously the only ones able to import third-country bananas free of any tariff restriction, within a quota which was adjusted annually to the needs of the market. It must still be examined whether the restrictions introduced by the Regulation correspond to objectives of general Community interest and do not impair the very substance of that right.

82 The restriction of the right to import third-country bananas imposed on the economic operators on the German market is inherent in the establishment of a common organization of the market designed to ensure that the objectives of Article 39 of the Treaty are safeguarded and that the Community's international obligations under the Lomé Convention are complied with. The abolition of the differing national systems, in particular the exceptional arrangements still enjoyed by operators on the German market and the protective regimes enjoyed by those trading in Community and traditional ACP bananas on other markets, made it necessary to limit the volume of imports of third-country bananas into the Community. A common organization of the market had to be implemented while Community and ACP bananas were not displaced from the entire common market following the disappearance of the protective barriers enabling them to be disposed of with protection from competition from third-country bananas.

83 The differing situations of banana traders in the various Member States made it necessary, in view of the objective of integrating the various national markets, to

establish machinery for dividing the tariff quota among the different categories of traders concerned. That machinery is intended both to encourage operators dealing in Community and traditional ACP bananas to obtain supplies of third-country bananas and to encourage importers of third-country bananas to distribute Community and ACP bananas. It should also in the long term allow economic operators who have traditionally marketed third-country bananas to participate, at the level of the overall Community quota, in the two sub-quotas introduced.

84 With respect in particular to the applicant's criticism that the application of the Regulation has given rise to trading in import licences between traders in Community and traditional ACP bananas and traditional importers of third-country bananas, to the detriment of the latter, it must be noted that Article 20 of the Regulation accepts the principle that licences are transferable. The practical consequence of that principle is that the holder of a licence, instead of himself importing and selling third-country bananas, may assign his import rights to another economic operator who himself wishes to import.

85 The principle of transferability, regulated in Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6), adopted after the present application was brought, is not peculiar to the common organization of the market in bananas, but exists in other sectors of agricultural policy, in particular with respect to trade relations with non-member countries.

86 Moreover, the transfer of import licences is an option which the Regulation allows the various categories of economic operators to exercise according to their commercial interests. The financial advantage which such a transfer may in some cases give traders in Community and traditional ACP bananas is a necessary conse-

quence of the principle of transferability of licences and must be assessed in the more general framework of all the measures adopted by the Council to ensure the disposal of Community and traditional ACP products. In that context it must be regarded as a means intended to contribute to the competitiveness of operators marketing Community and ACP bananas and to facilitate the integration of the Member States' markets.

87 Accordingly, the restriction imposed by the Regulation on the freedom of traditional traders in third-country bananas to pursue their trade or business corresponds to objectives of general Community interest and does not impair the very substance of that right.

88 The applicant also argues that the arrangements for trade with third countries are in breach of the principle of proportionality, in that the objectives of supporting ACP producers and guaranteeing the income of Community producers could have been achieved by measures having less effect on competition and on the interests of certain categories of economic operators.

89 It should be pointed out in this respect that in matters concerning the common agricultural policy the Community legislature has a broad discretion which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty.

90 The Court has held that the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. More specifically, where the Community legislature is obliged, in connection with the adoption of rules, to assess their future effects, which cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question (*Wuidart*,

cited above, paragraph 14, and Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 14).

91 The Court's review must be limited in that way in particular if, in establishing a common organization of the market, the Council has to reconcile divergent interests and thus select options within the context of the policy choices which are its own responsibility.

92 In the present case, it became apparent from the oral argument presented to the Court that the Council *inter alia* had to reconcile the conflicting interests of some Member States which produce bananas and were concerned that their agricultural population living in economically less-favoured regions should be able to dispose of produce of vital importance for them and thus avoid social problems and of other Member States which do not produce bananas and were primarily concerned to ensure that their consumers were supplied with bananas on the best price terms and had unlimited access to third-country production.

93 The Federal Republic of Germany submits that less onerous measures, namely a more extensive system of aid for Community and ACP producers coupled with a system of levies on imports of third-country bananas serving to finance that system of aids, would have made it possible to achieve the objective pursued.

94 While other means for achieving the desired result were indeed conceivable, the Court cannot substitute its assessment for that of the Council as to the appropriateness or otherwise of the measures adopted by the Community legislature if those measures have not been proved to be manifestly inappropriate for achieving the objective pursued.

95 The applicant has not shown that the Council adopted measures which were manifestly inappropriate or that it carried out a manifestly erroneous assessment of the information available to it at the time when the Regulation was adopted.

96 Moreover, the system of trade with third countries, in particular the introduction of a tariff quota and machinery for subdividing it, is but one of the instruments provided for by the Regulation, alongside the introduction of common quality and marketing standards and rules on assistance, to ensure in particular that Community production can be disposed of.

97 Nor is it clear that the alternative measures suggested by the applicant are suitable for achieving the objective of the integration of markets, which is the basis of any common organization of a market.

98 It follows that the complaints of breach of the right to property, disregard of acquired rights, infringement of the freedom to pursue a trade or business and failure to comply with the principle of proportionality must likewise be rejected as unfounded.

99 For all those reasons the plea in law alleging breach of substantive rules of Community law must be rejected.

Infringement of Article 168 of the Lomé Convention

100 The Federal Republic of Germany submits that Article 168(1) of the Lomé Convention exempts imports of ACP products from all customs duties, and that the

Council cannot rely on Article 168(2)(a) to apply different treatment to traditional and non-traditional imports of ACP bananas.

101 It suffices to note that with respect to the establishment of a tariff quota, the import of bananas from ACP States falls under Article 168(2)(a)(ii) of the Lomé Convention, quoted in paragraph 10 above. In accordance with Protocol 5, the Community is obliged to permit the access, free of customs duty, only of the quantities of bananas actually imported 'at zero duty' in the best year before 1991 from each ACP State which is a traditional supplier. Moreover, Annexes LXXIV and LXXV relating to that Protocol confirm that the Community's only obligation is to maintain the advantages, with respect to access of ACP bananas to the Community market, which the ACP States had before the Lomé Convention.

102 In those circumstances the plea in law alleging a breach of Article 168 of the Lomé Convention must be rejected.

Infringement of GATT rules

103 The Federal Republic of Germany submits that compliance with GATT rules is a condition of the lawfulness of Community acts, regardless of any question as to the direct effect of GATT, and that the Regulation infringes certain basic provisions of GATT.

104 The Council, supported in particular by the Commission, argues that in view of its particular nature, GATT cannot be relied on to challenge the lawfulness of a Com-

munity act, except in the special case where the Community provisions were adopted to implement obligations entered into within the framework of GATT.

105 In deciding whether the applicant can rely on certain provisions of GATT to challenge the lawfulness of the Regulation, it should be noted that the Court has held that the provisions of GATT have the effect of binding the Community. However, it has also held that in assessing the scope of GATT in the Community legal system, the spirit, the general scheme and the terms of GATT must be considered.

106 It is settled law that GATT, which according to its preamble is based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements', is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.

107 The Court has recognized that those measures include, for the settlement of conflicts, depending on the case, written recommendations or proposals which are to be 'given sympathetic consideration', investigations possibly followed by recommendations, consultations between or decisions of the *contracting parties*, including that of authorizing certain contracting parties to suspend the application to any others of any obligations or concessions under GATT and, finally, in the event of such suspension, the power of the party concerned to withdraw from that agreement.

108 It has noted that where, by reason of an obligation assumed under GATT or of a concession relating to a preference, some producers suffer or are threatened with

serious damage, Article XIX gives a contracting party power unilaterally to suspend the obligation and to withdraw or modify the concession, either after consulting the contracting parties jointly and failing agreement between the contracting parties concerned, or even, if the matter is urgent and on a temporary basis, without prior consultation (see Joined Cases 21 to 24/72 *International Fruit Company* v *Produktschap voor Groenten en Fruit* [1972] ECR 1219, paragraphs 21, 25 and 26; Case 9/73 *Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135, paragraph 29; Case 266/81 *SIOT* v *Ministero delle Finanze* [1983] ECR 731, paragraph 28; and Joined Cases 267 to 269/91 *Amministrazione delle Finanze dello Stato* v *SPI and SAMI* [1983] ECR 801, paragraph 23).

109 Those features of GATT, from which the Court concluded that an individual within the Community cannot invoke it in a court to challenge the lawfulness of a Community act, also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State under the first paragraph of Article 173 of the Treaty.

110 The special features noted above show that the GATT rules are not unconditional and that an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT.

111 In the absence of such an obligation following from GATT itself, it is only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT, that the Court can review the lawfulness of the Community act in

question from the point of view of the GATT rules (see Case 70/87 *Fediol* v *Commission* [1989] ECR 1781 and Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069).

112 Accordingly, the Federal Republic of Germany cannot invoke the provisions of GATT to challenge the lawfulness of certain provisions of the Regulation.

Infringement of the Banana Protocol

113 The Federal Republic of Germany submits that the Banana Protocol is an integral part of the Treaty and that any amendment of that protocol should have been done in accordance with the conditions under Article 236 of the Treaty. The derogation, in paragraph 4 of the Banana Protocol, from the rule of unanimity relates only to the possibility of amending an annual quota and does not permit the abolition of the Protocol as such.

114 It must be acknowledged that the Banana Protocol is indeed an integral part of the Treaty since it is annexed to the Implementing Convention on the Association of the Overseas Countries and Territories with the Community, even though that convention expired on 31 December 1962.

115 However, the Banana Protocol was adopted as a transitional measure pending standardization of the conditions for importing bananas into the common market. Its transitional nature is clearly demonstrated by the reference to successive stages

in the establishment of the common market, each of which entails a reduction of the quota compared with imports in the base year 1956.

116 As part of that system the third subparagraph of paragraph 4 of the Banana Protocol provides that, on a proposal from the Commission, the Council acting by a qualified majority may abolish or amend that quota, with no reservations as to the temporal extent of a decision to abolish it.

117 Moreover, to accept the applicant's point of view would effectively make it impossible to set up a common organization of the market in bananas under the conditions set out in Article 43(2) of the Treaty. The Banana Protocol cannot have the effect of derogating from a basic provision of the Treaty.

118 Consequently, the plea in law alleging an infringement of the Banana Protocol must be rejected.

119 Since none of the pleas in law in support of the claim for annulment can be upheld, the application of the Federal Republic of Germany must be dismissed in its entirety.

Costs

120 Under Article 69(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 Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs, including those of the proceedings for interim relief.

In accordance with Article 69(4) of the Rules of Procedure, the Member States and the Commission, which have intervened in the case, must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs, including those of the proceedings for interim relief;

3. Orders the interveners to bear their own costs.

Due Mancini Moitinho de Almeida

Diez de Velasco Edward Kakouris

Joliet Schockweiler Rodríguez Iglesias

Grévisse Zuleeg Kapteyn Murray

Delivered in open court in Luxembourg on 5 October 1994.

R. Grass O. Due

Registrar President