JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
28 September 1999 *

In Case T-612/97,

Cordis Obst und Gemüse Großhandel GmbH, a company incorporated under German law, established in Ostrau (Germany), represented by Gert Meier, Rechtsanwalt, Cologne, Berrenrather Straße 313, Cologne (Germany),

applicant,

v

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

defendant,

supported by

French Republic, represented by Kareen Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate, Ministry of Foreign Affairs, and Christina Vasak,

* Language of the case: German.

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,

intervener,

APPLICATION for the annulment of Commission Decision K(97) 3274 final of 24 October 1997 rejecting the applicant's request for the special grant of import licences under the transitional measures provided for in Article 30 of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1),

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment

Relevant legislation

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

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

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

'.... the replacement of the various national arrangements in operation when this regulation comes into force by this common organisation of the market threatens

to disturb the internal market;.... the Commission, as of 1 July 1993, should be able to take any transitional measures required to overcome the difficulties of implementing the new arrangements'.

4 Article 30 of Regulation No 404/93 provides 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.'

Facts and procedure

5 The applicant company, Cordis Obst und Gemüse Großhandel GmbH ('Cordis'), was formed on 1 November 1990, that is to say after the reunification of Germany, and has its registered office in the former German Democratic Republic ('GDR'). Its business is wholesale fruit trading and, *inter alia*, the ripening and packaging of bananas.

6 Under the planned and centralised economy of the former GDR, the monopoly on banana imports was held by a State body and that on ripening by nationalised undertakings. Ripening plants in the former GDR were subsequently sold to branches of fruit companies from the Federal Republic of Germany.

7 At the time of the applicant's launch, the scope for obtaining supplies of bananas in its commercial catchment area was limited, and the demand for bananas was greater than both supply and its ripening capacity. In 1991 the applicant therefore decided to expand and built new ripening facilities. It received no subsidy from public funds for that purpose.

8 According to the applicant, its new facilities were being used below their capacity. It points out in this respect that, since the regulation requires licences to be obtained for the importation of green bananas, the fact that its suppliers reflected the licence costs in the price of the bananas curbed consumption. Consequently, since such licences are granted according to the quantities of bananas sold, the applicant itself was only able to obtain import licences for insufficient quantities.

9 Accordingly, on 7 April 1996, the applicant requested the Commission, under Article 30 of Regulation No 404/93, to grant it additional licences as soon as possible by way of a transitional measure intended to compensate for hardship due to the rules introduced by Regulation No 404/93.

10 By decision of 24 October 1997, the Commission rejected the applicant's request ('the contested decision') on, *inter alia*, the following grounds (seventh, eighth, ninth and eleventh recitals in the preamble):

'[...]

..... Cordis has not shown that it was unable to obtain sufficient quantities of bananas for ripening to enable the ripening plant to operate at full capacity from other traders or other sources rather than import them itself;..... the common

organisation of the market in bananas does not prevent it from doing so;..... Cordis has in fact obtained significant quantities of bananas for ripening from other traders or other sources without importing them itself;..... it has not therefore been shown that any alleged under-utilisation of the ripening plant and any alleged stagnation of turnover in the banana sector, loss of customers or staff lay-offs which ensued from this were due to the transition from the provisions existing prior to the entry into force of the regulation to the common organisation of the market;

..... Cordis has not shown that it had for certain a source for the supply of bananas for ripening before it invested in the ripening plant;..... Cordis accepted the risk that it might not be able to obtain sufficient bananas for ripening to enable the plant to operate at full capacity;..... consequently, notwithstanding the foregoing paragraphs, any inability on the part of Cordis to obtain sufficient bananas for ripening to enable the plant to operate at full capacity from other traders or other sources, without importing them itself, is due to a lack of care on Cordis' part in that it failed to secure the supplies before investing in the ripening plant;

..... Cordis obtained significant quantities of bananas for ripening from Dole;..... it obtained ripe bananas in quantities sufficient to meet its customers' requirements;..... banana ripening is only one of the many activities pursued by Cordis;..... Cordis has therefore not shown that any alleged reduction of its ripening activities constituted a difficulty threatening its existence;

[...]

..... Cordis has not shown that it took other steps, before the aforementioned dates, which have led to a case of hardship within the meaning of the judgment of

the Court of Justice in Case C-68/95 because of difficulties inherent in the transition from the national arrangements in existence before the entry into force of the regulation in question;

[...]'.

11 By application lodged on 29 December 1997, the applicant brought the present action.

12 By application lodged on 8 May 1998, the French Republic applied for leave to intervene in the case in support of the form of order sought by the Commission.

13 That application was granted by order of the President of the Fourth Chamber on 6 July 1998, and the French Republic lodged its observations on 4 September 1998.

14 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure without any preparatory inquiry.

15 The parties presented oral argument and answered questions from the Court at the hearing on 20 April 1999.

Form of order sought by the parties

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

— annul the contested decision;

— order the Commission to pay the costs.

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

— dismiss the application;

— order the applicant to pay the costs.

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

The claim for annulment

19 In support of its action, the applicant raises two pleas in law alleging, on the one hand, infringement of Article 30 of Regulation No 404/93 and misuse of powers, and on the other infringement of the obligation to state reasons.

The first plea, alleging infringement of Article 30 of Regulation No 404/93 and misuse of powers

Arguments of the parties

20 The applicant maintains that the scope of Article 30 of Regulation No 404/93 extends beyond the limits laid down by the Court of Justice in its judgment in Case C-68/95 *T. Port* [1996] ECR I-6065. Article 30, inasmuch as it refers to difficulties of a sensitive nature, should be capable of being applied to the structural problem encountered in the present case, even if the conditions for its application described in *T. Port* are not fulfilled.

21 The applicant states that, in its order in Case C-280/93 R *Germany* v *Council* [1993] ECR I-3667, the Court of Justice held that Article 30 of Regulation No 404/93 was intended to deal with any disturbance in the internal market which the replacement of the various national arrangements by the common organisation of the market threatens to bring about. The Commission should therefore take any transitional measures necessary and not, as stated in *T. Port*, cited above, act only in the event of hardship.

22 In the present case, action by the Commission is necessary, the applicant submits, in order to ensure that the principle of equal treatment is observed. Old undertakings from the Federal Republic of Germany are in a different situation from new undertakings established in the former GDR ('new undertakings'). The former have been able to conduct their activities according to their own economic plans, whereas the latter, because of the problems associated with German reunification, are faced with inevitable collective hardship. All new undertakings are therefore entitled to be granted additional import licences.

23 Furthermore, by its method of granting licences on the basis of the average quantity of bananas sold during the reference period, Regulation No 404/93 has frozen the original state of competition by preventing new undertakings from reducing their handicap. The Commission has an obligation, however, to restore the balance between undertakings. According to the judgment in *T. Port*, the Community institutions are required to act in particular when the transition to the common organisation of the market infringes the fundamental rights, which are protected by Community law, of certain traders.

24 Furthermore, there is no provision in Article 30 of Regulation No 404/93 which precludes its applicability to 'collective' cases of hardship, that is to say situations where several companies are all in the same position and are each entitled to individual compensation. The new undertakings, of which the applicant is one, are all affected by the structural problems in existence in the former GDR. They are, moreover, few in number. The grant of a special quota to those undertakings would not therefore call into question the common organisation of the market in bananas.

25 The Commission disputes the applicant's argument that the scope of Article 30 of Regulation No 404/93 extends beyond the limits set by the Court of Justice in *T.*

Port. Under that article, the Commission is required to act only when faced with a case of hardship, the existence of which is subject to fulfilment of the following four conditions, laid down in that judgment:

— legally relevant economic provisions must exist which were enacted under the former national arrangements;

— those provisions must have ceased to be effective by reason of the entry into force of the common organisation of the market;

— the difficulties must have been unforeseeable;

— there must be rules catering for cases of hardship, having regard, in particular, to the presence of difficulties threatening the existence of importers and the protection of fundamental Community rights.

26 In the present case, the applicant has not shown that it was unable to obtain supplies of bananas or that it has been faced with difficulties threatening its existence which are due to the transition from the national arrangements in existence before the entry into force of the common organisation of the market to the Community arrangements. It has not therefore shown that it is in a situation of hardship.

27 The Commission further contends that the other conditions for the application of Article 30 of Regulation No 404/93, as set out in *T. Port*, are not satisfied either

in the present case, since the structural disadvantages experienced by the new undertakings are not connected with the introduction of the common organisation of the market but existed beforehand. On the contrary, the introduction of the common organisation of the market improved the scope for development open to ripening plants such as the applicant's.

28 The Commission states that the alleged breach of the principle of equal treatment cannot give rise to a case of hardship. On the one hand, the 'collective' hardship pleaded by the applicant does not fall within the scope of Article 30 of Regulation No 404/93, since the conditions which the latter lays down can be assessed only on an individual basis. On the other hand, the activities of ripening plants as such are not restricted by the transition to the common organisation of the market. Only those that wish to import third-country bananas or non-traditional ACP bananas themselves need a licence. There is no restriction on the importation of foreign bananas, that is to say bananas imported by other importers.

29 Finally, in response to the submission that collective compensation is made possible by the small number of undertakings which would receive it, the Commission contends that any special quota granted for cases of hardship to certain traders is detrimental to the others. Accordingly, the grant of a special quota to all new undertakings, as sought by the applicant, would adversely affect the other traders. As the President of the Court of First Instance pointed out in his order in Case T-79/96 *Camar* v *Commission* [1997] ECR II-403, any derogations from the general system of allocating licences should not in any event alter the entire common system of imports.

30 As regards the contention that the scope of Article 30 of Regulation No 404/93 extends beyond the limits set in *T. Port*, the French Republic supports the Commission's position. It further submits that the applicant does not meet the

criteria laid down by case-law, in particular as regards the threat to the undertaking's existence. Likewise, it cannot claim that its difficulties are an inherent feature of transition to the common organisation of the market.

31 As for the application of Article 30 to 'collective' cases of hardship, the French Republic points out, on the basis of paragraph 37 of the judgment in *T. Port*, that it is not possible to assess the conduct of traders taken as a whole. Furthermore, such an interpretation is contrary to the very purpose of the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, Article 230(4) EC), which requires that proceedings relate to decisions either addressed or of direct and individual concern to the applicant.

Findings of the Court

32 Article 30 of Regulation No 404/93 confers on the Commission the power 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 in consequence of the replacement of the various national arrangements by the common organisation of the market and their purpose is to address difficulties encountered by traders after 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 in *Germany* v *Council*, cited above, paragraphs 46 and 47, the judgment in *T. Port*, cited above, paragraph 34, and Joined Cases C-9/95, C-23/95 and C-156/95 *Belgium and Germany* v *Commission* [1997] ECR I-645, paragraph 22, and the order in *Camar* v *Commission*, cited above, paragraph 42).

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

34 It follows that the purpose of Article 30 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.

35 It is therefore necessary to consider whether the problems encountered by the applicant are due to the transition to the common organisation of the market.

36 It should be noted in this respect that the applicant company was formed on 1 November 1990, that is to say after German reunification. It therefore took the decision in 1991 to expand by building new ripening facilities not unaware of the situation obtaining in Germany following reunification.

37 It has clearly not put forward any arguments capable of proving that the structural problems relating to German reunification have, as far as it is concerned, given rise to a particular and unforeseeable problem arising from the introduction of the common organisation of the market in bananas. Moreover, the parties confirmed at the hearing that, prior to the establishment of the common organisation of the market, ripening undertakings in the former GDR could not import bananas themselves. The Commission is therefore justified in stating that the introduction of the common organisation of the market did not add to the structural disadvantages cited by the applicant (see paragraph 27 above).

38 The applicant submits, however, that action by the Commission is necessary in order to ensure observance of the principle of equal treatment. By its method of granting import licences according to the volume of bananas sold during the reference period, Regulation No 404/93 is said to have frozen the original state of competition by preventing new undertakings from reducing their handicap.

39 That argument is unacceptable. Article 30 of Regulation No 404/93, which must be interpreted restrictively as a derogation from the general provisions applicable, cannot serve to offset the competitive disadvantage suffered by new undertakings in relation to the differences in opportunities available in Germany. That disadvantage is not, after all, due to the establishment of the common organisation of the market.

40 Furthermore, while it is true that not all undertakings are affected in the same way by Regulation No 404/93, the Court of Justice has already held in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraphs 73 and 74, that the difference in treatment appears to be inherent in the objective of integrating previously compartmentalised markets, bearing in mind the different situations of the various categories of traders before the establishment of the common organisation of the market.

41 Finally, the applicant is wrong to claim that the rejection of its request by the contested decision constitutes a misuse of powers. It need only be recalled in this regard that, in accordance with case-law, a decision amounts to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken to achieve an end other than that stated (see Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 68, and Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 69). The applicant has provided no evidence to that effect, however.

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

43 The first plea in law must therefore be rejected.

The second plea, alleging infringement of the obligation to state reasons

44 The applicant submits that the eleventh recital in the preamble to the contested decision, in which the Commission considers that the applicant has not proved that it took other steps, before 10 September 1992, which have given rise to a case of hardship within the meaning of the judgment in *T. Port,* is incomprehensible, and that the contested decision is therefore vitiated by a failure to state reasons.

45 That argument is unacceptable. The obligation to state the reasons on which an individual decision is based is intended to enable the Community judicature to exercise its power of review as to the legality of the decision and the person concerned to ascertain the matters justifying the measure adopted, so that he can defend his rights and verify whether or not the decision is well founded (see Case 8/83 *Bertoli* v *Commission* [1984] ECR 1649, paragraph 12, and Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 42, and Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 30).

46 The recital in dispute is preceded in the contested decision by a detailed statement of the grounds on which the Commission considered that the applicant was not eligible for exemption under Article 30 of Regulation No 404/93. It points out, *inter alia*, that the applicant has not shown that any alleged reduction of its

ripening activities constituted a difficulty threatening its existence. Moreover, in the recital in dispute, the Commission emphasised the fact that the applicant had not shown that it had taken other steps leading to a case of hardship 'because of difficulties inherent in the transition towards abandoning the national arrangements which existed prior to the entry into force of the regulation in question' (see paragraph 10 above).

47 The Commission was therefore merely reiterating that it was for the applicant to show that the criteria laid down in *T. Port* were satisfied.

48 The contested decision thus contains a sufficient statement of reasons to enable the Community judicature to exercise its power of review as to the legality of the decision and the person concerned to ascertain the matters justifying the measure adopted. It is not therefore vitiated by a failure to state reasons.

49 It follows that the second plea in law is unfounded and, therefore, that the application must be dismissed in its entirety.

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the application;**

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

3. **Orders the French Republic to bear its own costs.**

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 28 September 1999.

H. Jung J.D. Cooke

Registrar President