JUDGMENT OF THE COURT (Sixth Chamber)
27 September 2001 *

In Case C-442/99 P,

Cordis Obst und Gemüse Großhandel GmbH, established in Ostrau (Germany), represented by G. Meier, Rechtsanwalt,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) in Case T-612/97 *Cordis* v *Commission* [1999] ECR II-2771, seeking to have that judgment set aside,

the other parties to the proceedings being:

Commission of the European Communities, represented by K.-D. Borchardt, acting as Agent, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: German.

and

French Republic, represented by K. Rispal-Bellanger and C. Vasak, acting as Agents, with an address for service in Luxembourg,

intervener at first instance,

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, J.-P. Puissochet, R. Schintgen, N. Colneric and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: J. Mischo,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 5 April 2001, at which Cordis Obst und Gemüse Großhandel GmbH was represented by G. Meier, and the Commission by K.-D. Borchardt,

after hearing the Opinion of the Advocate General at the sitting on 17 May 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 22 November 1999, Cordis Obst und Gemüse Großhandel GmbH ('Cordis') brought an appeal, pursuant to Article 49 of the EC Statute of the Court of Justice, against the judgment of the Court of First Instance in Case T-612/97 *Cordis* v *Commission* [1999] ECR II-2771 ('the contested judgment'), by which the Court of First Instance dismissed its 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).

Legal background

2 As regards the legal background to the dispute, the Court of First Instance stated:

'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

3 As regards the facts of the case, the Court of First Instance found:

'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;

...".'

The contested judgment

4 By application lodged at the Registry of the Court of First Instance on 29 December 1997, Cordis applied for the annulment of the contested decision.

5 In support of its application, Cordis relied on two pleas in law alleging, first, infringement of Article 30 of Regulation No 404/93 and misuse of powers and, second, infringement of the obligation to state reasons.

6 By the contested judgment, the Court of First Instance dismissed the application.

In its appeal, Cordis challenges the reasoning adopted by the Court of First Instance in rejecting its first plea, inasmuch as the Court held:

'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 [Case C-280/93 R] *Germany* v *Council* [[1993] ECR I-3667], paragraphs 46 and 47; the judgment[s] in [Case C-68/95] *T. Port* [[1996] ECR I-6065], 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 [Case T-79/96 R] *Camar* v *Commission* [[1997] ECR II-403], 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.'

The appeal

8 Cordis raises two grounds of appeal alleging failure to observe the conditions for the application of Article 30 of Regulation No 404/93 and breach of the principle of equal treatment.

The first ground of appeal

9 Cordis submits that the contested judgment fails to observe the conditions for the application of Article 30 of Regulation No 404/93, in that the Court of First Instance made the implementation of that provision conditional on the trader concerned having particular and unforeseeable problems connected with the introduction of the common organisation of the market in bananas. According to the appellant, recourse to that article is justified where Community measures are required to assist the transition from national arrangements for bananas to the

common organisation of the market, without its being necessary for the disturbances connected with such a transition to create particular and unforeseeable problems for the traders concerned.

10 The appellant claims that *T. Port*, on which the contested judgment is based, concerned a 'case of [extreme] hardship'. However, that is not the only case to which Article 30 of Regulation No 404/93 is applicable. That provision should also apply where, as in the present case, traders are faced with 'structural' difficulties which existed before the entry into force of the common organisation of the market and which were exacerbated as a result of it. According to Cordis, the Court of First Instance erred in considering, in paragraph 37 of the contested judgment, that since ripening undertakings in the former GDR could not themselves import bananas prior to the entry into force of the common organisation of the market, Cordis' disadvantages had not been compounded.

11 The appellant submits that, as an undertaking formed in a new Land, its disadvantage lay in not being able to engage in ripening activities during the reference period fixed by Regulation No 404/93 for 1993 and 1994, namely 1989 and 1990. Cordis claims in that regard that it was impossible to carry on a private business in wholesale trading and ripening in the former GDR, whereas State-owned undertakings ('Volkseigene Betriebe') established there, which could ripen bananas during the abovementioned reference period, were granted import licences for that purpose under indent (c) of the first subparagraph of Article 3(1) of 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). In the appellant's submission, the Court of First Instance perhaps overlooked that provision when, in paragraph 37 of the contested judgment, it based its findings on imports and not on the ripening of bananas by ripening plants.

12 It should be noted that, as is clear from the 22nd recital in the preamble to Regulation No 404/93, Article 30 of that regulation is intended to deal with any disturbance in the internal market which the replacement of the various national markets by the common organisation of the market threatened to bring about (see, *inter alia*, *Belgium and Germany* v *Commission*, paragraph 22, and the case-law cited). According to that recital, Article 30 gives the Commission the power to take any transitional measures required to overcome the difficulties of implementing the common organisation of the market. Furthermore, the Court has held that application of Article 30 is subject to the condition that the specific measures which the Commission must adopt are intended to assist transition from national arrangements to the common organisation of the market and that they are necessary for that purpose (see, *inter alia*, *T. Port*, paragraph 35).

13 It follows that only problems connected with the introduction of the common organisation of the market may be taken into account under Article 30 of Regulation No 404/93.

14 The Court of First Instance was therefore correct in deciding, in paragraph 35 of the contested judgment, to determine whether the problems encountered by Cordis were connected with the transition to the common organisation of the market.

15 In paragraph 37 of that judgment, the Court of First Instance stated in particular that the introduction of the common organisation of the market had not added to the structural disadvantages cited by Cordis in support of its claim for the annulment of the contested decision.

16 In order to reach that conclusion, the Court of First Instance undertook an appraisal of the facts which, unless it was distorted, cannot be discussed before the Court of Justice.

17 Under Article 225 EC and Article 51 of the EC Statute of the Court of Justice, an appeal lies on a point of law only. Therefore, the Court of First Instance has sole jurisdiction to find and appraise the facts, except in a case where the factual inaccuracy of its findings is demonstrated by the evidence adduced before it. The appraisal of the facts does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (see, *inter alia*, Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 78).

18 Although, in its appeal, Cordis continues to dispute the finding that the compounding of the structural problems cited in its application was not connected with the introduction of the common organisation of the market, it has not demonstrated either during the written procedure or at the hearing that the Court of First Instance distorted the facts in coming to that conclusion.

19 Since the Court of First Instance thus established that there was no connection between the structural difficulties cited by Cordis and the introduction of the common organisation of the market, one of the conditions for the application of Article 30 of Regulation No 404/93 was clearly not satisfied. As a consequence, it is no longer necessary to examine the appellant's argument that the Court of First Instance erred in considering, by reference to *T. Port*, that the application of Article 30 of Regulation No 404/93 requires in all cases that the undertakings concerned encounter, as a result of transition to the common organisation of the market, particular and unforeseeable problems.

20 The first ground of appeal must therefore be rejected.

The second ground of appeal

21 Cordis claims that the contested judgment is in breach of the principle of equal treatment which prohibits, in particular, different situations from being treated equally. According to the appellant, undertakings formed in the new Länder after the reunification of Germany, unlike other undertakings in the European Community, were not able to engage in ripening activities during 1989 and 1990, the reference years for the purpose of granting banana import licences. The principle of equal treatment required that the Community institutions take into account those exceptional circumstances. Since such circumstances were not taken into consideration by Regulation No 1442/93, the Commission was bound to do so under Article 30 of Regulation No 404/93. If that had been done, the transition of new undertakings to the situation resulting from the common organisation of the market would have been facilitated and the purpose of Article 30 would have been achieved.

22 In response to that ground of appeal, it should be recalled first of all that, according to the Court's case-law, the Community institutions are required to act under Article 30 of Regulation No 404/93 when, in particular, the transition to the common organisation of the market infringes certain traders' fundamental rights protected by Community law (see, *inter alia*, *T. Port*, paragraph 40). Those rights include the principle of equal treatment (see, *inter alia*, *Germany* v *Council*, paragraph 67).

23 It should be noted secondly that, in paragraph 39 of the contested judgment, the Court of First Instance held that the competitive disadvantage suffered by new undertakings and cited by the appellant was not due to the establishment of the common organisation of the market. Since that is an appraisal of the facts, it cannot, in accordance with the case-law recalled in paragraph 17 above, be discussed before the Court of Justice unless there is evidence that the clear sense of the evidence was distorted. Since one of the conditions for the application of Article 30 of Regulation No 404/93 is thus not satisfied, the Court of First Instance did not infringe the principle of equal treatment when it held, in paragraph 39 of the contested judgment, that that provision could not serve to offset such a disadvantage.

24 As a consequence, the second ground of appeal must also be rejected and, accordingly, the appeal in its entirety.

Costs

25 Under Article 69(2) of the Rules of Procedure, rendered applicable to appeal proceedings under Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for by the successful party. Since the Commission applied for an order against Cordis and the latter has been unsuccessful, it must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Member States and institutions which intervene in the proceedings are to bear their own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders Cordis Obst und Gemüse Großhandel to pay the costs;**

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

Gulmann Puissochet Schintgen

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 27 September 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber