OPINION OF ADVOCATE GENERAL ELMER
delivered on 9 July 1996 *

Introduction

1. In this case the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hesse) has referred to the Court for a preliminary ruling questions on the interpretation and validity of certain provisions of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas [1] (hereinafter 'the Regulation') and on the national court's jurisdiction to grant interim relief in connection with disputes related to Community law.

Principal features of the organization of the market in bananas

2. The Regulation provides for the opening of a tariff quota each year for imports of third-country bananas and non-traditional ACP bananas. [2] Within the framework of that tariff quota, imports of third-country bananas are subject to a levy of ECU 75 per tonne whereas imports of non-traditional ACP bananas are subject to a zero duty. Apart from the tariff quota, third-country bananas and non-traditional ACP bananas are subject to a levy of ECU 850 and 750 per tonne respectively. Each year a forecast supply balance is prepared of production and consumption in the Community and of imports and exports. Where Community demand determined on the basis of that supply balance increases, the volume of the quota is correspondingly increased. The tariff quota is distributed among operators on the basis of the average quantities of bananas which the individual operator has sold in the three most recent years for which figures are available.

The relevant rules of the Regulation

3. The Regulation was issued in pursuance of Articles 42 and 43 of the Treaty. The ninth, tenth and twenty-second recitals in

* Original language: Danish.

1 — OJ 1993 L 47, p. 1, as last amended by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105).

2 — 'Non-traditional ACP bananas' are described in subparagraph (2) of the second paragraph of Article 15 as bananas imported from ACP States in quantities exceeding the quantity defined in the Regulation. The expression 'ACP States' covers a number of countries in Africa, the West Indies and the Pacific with which the Community has concluded the Lomé Convention.

the preamble to the Regulation are worded as follows:

'... a forecast supply balance drawn up each year should assess the prospects for production and consumption in the Community; ... it should be possible to revise that balance during the year in the light of circumstances, including specific climatic events;

... in order to ensure satisfactory marketing of bananas produced within the Community and of products originating in the ACP States within the framework of the Lomé Convention Agreements, while maintaining trade patterns as far as possible, provision should be made for the annual opening of a tariff quota; ... on the one hand imports of bananas from third countries would be subject to a tariff ... and, on the other hand, imports of non-traditional bananas from the ACP would be subject to zero duty in accordance with the abovementioned agreements; ... provision should be made in order to ensure the adaptation of the amount of the tariff quota based on changes in Community demand recorded in the forecast supply balance;

...

... the replacement of the various national arrangements in operation when this Regulation comes into force by this common organization of the market threatens to disturb the internal market; ... the Commission, as from 1 July 1993, should be able to take any transitional measures required to overcome the difficulties of implementing the new arrangements.'

4. The Regulation contains the following provisions pertinent to this case:

'TITLE IV

Trade with third countries

Article 16

1. Each year, a forecast supply balance shall be prepared of production and consumption in the Community and of imports and exports.

2. ...

3. Where necessary, in particular to take account of the effects of exceptional circumstances affecting production or import conditions, the balance may be adjusted during the marketing year. In such a case, the tariff quota provided for in Article 18 shall be adapted in accordance with the procedure laid down in Article 27.

...

Article 18

1. A tariff quota of 2.2 million tonnes (net weight) shall be opened each year for imports of third-country bananas and non-traditional ACP bananas.

...

Where Community demand determined on the basis of the forecast supply balance referred to in Article 16 increases, the volume of the quota shall be increased in consequence, in accordance with the procedure laid down in Article 27. Where necessary, that adjustment shall be carried out prior to the date of 30 November preceding the marketing year concerned.

...

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 non-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.

...

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

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

3. ...

4. If the tariff quota is increased, the additional available quantity shall be allocated to importers in the categories referred to in paragraph 1 in accordance with the preceding paragraphs.

...

TITLE V

General provisions

...

Article 26

1. A Management Committee for Bananas ... shall be established ...

2. ...

Article 27

1. Where reference is made to the procedure laid down in this article, the Chairman shall refer the matter to the Committee either on his own initiative or at the request of the representative of a Member State.

2. The representative of the Commission shall submit a draft of the measures to be taken. The Committee shall deliver its opinion on such measures ...

3. The Commission shall adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the Committee they shall forthwith be communicated by the Commission to the Council ...

The Council, acting by a qualified majority, may take a different decision within one month.

Article 28

The Committee may consider any other question referred to it by its Chairman either on his own initiative or at the request of a representative of a Member State.

...

Article 30

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, acting in accordance with the procedure laid down in Article 27, shall take any transitional measures it judges necessary.'

The case before the national court

5. T. Port GmbH & Co. KG (hereinafter 'T. Port'), which is an importer of third-country bananas, was granted import licences for 1993, 1994 and 1995 calculated on the basis of the company's average sales in the previous three years for which figures were available. The company brought an action against the Bundesanstalt für Landwirtschaft und Ernährung (Federal Office for Agriculture and Food), which administers the organization of the market in bananas in Germany, claiming the grant of additional import licences, arguing that the company was suffering exceptional hardship as a result of the Regulation, since owing to a Colombian supplier's breach of contract it was able to import only unusually small quantities of bananas in the reference period 1989, 1990 and 1991. Moreover, all its attempts to switch the business over to importing ACP and Community bananas had failed. The company is contractually bound to accept Ecuadorean bananas until 1996 and has made substantial advance payments and therefore runs the risk of losing a considerable sum if it cannot take the bananas. Since the accession of Finland, Sweden and Austria to the European Union it has no longer been possible to import third-country bananas into those countries, which the company had been doing on an increasing scale since the Regulation came into force.

6. An application from the company for further import licences for 1994 and for interim relief was dismissed by the Verwaltungsgericht (Administrative Court) Frankfurt am Main on 27 May 1994 and by the Hessischer Verwaltungsgerichtshof on 19 July 1994. A fresh application for further import licences for 1994 and 1995 and for interim relief was dismissed by the Verwaltungsgericht Frankfurt am Main on 8 December 1994 and by

the Hessischer Verwaltungsgerichtshof on 23 December 1994.

7. On 25 January 1995 the Hessischer Verwaltungsgerichtshof's order of 23 December 1994 was quashed by the Bundesverfassungsgericht (Federal Constitutional Court) by order of which the following is an extract:

'Thus where there is, unless the interim relief is granted, a risk of an essential breach of the plaintiff's fundamental rights which can no longer be eliminated by a decision upholding his claim in the main proceedings, then — if necessary following an exhaustive factual and legal examination of the claim put forward in the main proceedings — interim relief should be granted unless by way of exception there are other weighty and exceptionally important reasons to the contrary ...

2. The contested order of the Hessischer Verwaltungsgerichtshof does not meet the said requirements of constitutional law ...

The Hessischer Verwaltungsgerichtshof has not had regard to the fact that the judgment of the Court of Justice of the European Communities of 5 October 1994 (Case C-280/93) had regard only to the common organization of the market in bananas as such but not to its effects in a specific case of hardship. On the other hand, by an order of 29 June 1993 (Case C-280/93 R *Federal Republic of Germany* v *Council* [1993] ECR I-3667) the Court of Justice of the European Communities declared that the Commission was required to adjust the tariff quota if that proved necessary during the marketing year, to take account of exceptional circumstances affecting in particular import conditions and that the Federal Republic of Germany could at any time implement the procedure under Article 16(3) or 30 of the Regulation. Regulation (EEC) No 404/93 is thus — regardless of the question of its validity — so open as regards its content that it may be applied for dealing with cases of special hardship.

Since the Verwaltungsgerichtshof manifestly assumes that, unless the tariff quota is adjusted, T. Port faces an immediate threat of bankruptcy, it should also have considered as part of its examination whether T. Port's fundamental right under Article 14(1) of the Basic Law (protection of all property rights, see Bundesverfassungsgericht 83, 201, cf. 208 et seq.), is irretrievably prejudiced by such bankruptcy so that an interim decision to mitigate hardship should be adopted whilst the main proceedings are pending. The exceptional circumstances which were not taken into account in the quota decisions now applicable might — at the request of the Federal Government — give the Commission grounds for intervening by way of decisions for exceptionally difficult cases in pursuance of Article 16(3) or 30 of Regulation

(EEC) No 404/93, all the more so as special quotas have already been made available in another case of hardship.

In the decision on interim relief, therefore, the Verwaltungsgerichtshof, even if it comes to the conclusion that the organization of the market in bananas as such is valid, should have dealt with the question whether the Federal Republic of Germany's failure to act in spite of the provision for hardship cases, which is also laid down in the common organization of the market in bananas, conflicts with the guaranteed protection of fundamental rights which also applies in Community law.'

The questions referred to the Court

8. In those circumstances the Hessischer Verwaltungsgerichtshof, by order of 9 February 1995, ordered the Bundesanstalt für Landwirtschaft und Ernährung by way of interim measures to grant T. Port additional import licences for 1995. With a view to a final decision in the case the Hessischer Verwaltungsgerichtshof further decided to refer to the Court of Justice for a preliminary ruling questions which, following a redrafting of the third question by order of 10 January 1996, read as follows:

1. Does Article 16(3) or Article 30 of Regulation No 404/93 put the Commission under a duty to deal with cases of hardship arising because operators of category A have difficulties in continuing trading owing to the fact that, on the basis of the reference years to be taken into account under Article 19(2) of that regulation, they are allocated an exceptionally low quota and cannot switch to the market for ACP and Community bananas?

2. Is Article 19(2) of Regulation No 404/93 invalid in so far as it makes no provision for taking other reference years into account in cases of hardship in the transitional period?

3. If the first question is answered in the affirmative: on what conditions is the national court authorized to take provisional measures in proceedings for the grant of interim relief until such time as hardship arrangements are introduced in accordance with Article 16(3) or Article 30 of Regulation No 404/93?

First question: Interpretation of Articles 16(3) and 30 of the Regulation

9. By this question the national court is asking whether Article 16(3) or 30 requires the

Commission to lay down provisions to cater for cases of hardship arising from the fact that the existence of importers of third-country bananas and/or non-traditional ACP bananas is threatened because, by reason of the reference years to be taken into consideration in pursuance of Article 19(2), an unusually low quota is allocated to them.

10. It may at first sight seem hard to see what significance an answer to this question can have for the national court's judgment in the main proceedings. There is, however, a certain logic in the order of the three questions. If the answer to the first question is in the affirmative, so that one of the provisions mentioned requires the Commission to adopt certain measures, the national court then needs to know whether it can grant interim relief until such measures are prepared (see Question 3). On the other hand, if the answer to the first question is in the negative, the national court needs to have an answer to Question 2, which is whether Article 19(2) is therefore void. If the second question is answered in the affirmative, however, the national court has no need for an answer to the third question, since the Court of Justice has quite recently dealt with a quite similar situation in Cases C-465/93 and C-466/93 *Atlanta Fruchthandelsgesellschaft and Others I* and *Atlanta Fruchthandelsgesellschaft and Others II*. [3] In those circumstances I think the Court should answer the first question.

3 — [1995] ECR I-3761 and I-3799. See also my Opinion, delivered on 5 July 1995, in the same cases.

Article 16(3)

11. In the observations submitted to the Court there is unanimity that Article 16(3) cannot be used to resolve the cases of hardship described in the question. T. Port has stated in that connection than Article 16(3) can be used only in exceptional circumstances affecting production or import conditions. The provision therefore does not give the Commission the power to select other reference years in cases of unusually low sales in the reference period. The Commission, the German Government, the United Kingdom and the French Government have stated that individual economic difficulties do not constitute 'exceptional circumstances affecting production or import or export conditions' (see Article 16(3)). The Council has stated that a quota increase under Article 16(3) must, under Article 19(4), be allocated to importers according to the rules of Article 19(2) and (3) and that Article 16(3) does not therefore give the Commission power to remedy exceptional cases of hardship for individual importers.

12. I must stress that the ninth recital in the preamble to the Regulation states that a forecast supply balance for Community production and consumption should be drawn up each year and that it should be possible to revise that balance during the year in the

light of circumstances including specific climatic events. In those circumstances Article 16(3) provides that the forecast supply balance of production and consumption in the Community and of imports and exports may be adjusted during the marketing year where necessary, for example to take account of exceptional circumstances affecting production or import conditions. In so far as the balance is adjusted during the marketing year, the tariff quota for third-country bananas and non-traditional ACP bananas is to be adapted.

If therefore the Commission were to come to the conclusion, on the basis of reliable objective data, that the quota was insufficient to satisfy demand appropriately and if the Council's earlier estimates were to prove incorrect, the Regulation obliges the Commission, and if necessary the Council, to make the necessary adjustments with the possibility for the Member States to make an application to the Court if those institutions were not to comply with their obligations.'

13. In the order in Case C-280/93 R, at paragraphs 44 and 45, the Court declared as follows with regard to the interpretation of Article 16(3):

'In that respect it should be pointed out that Article 16(3) of the Regulation requires the Community institutions to adjust the tariff quota if that proves necessary during the marketing year, to take account of exceptional circumstances affecting in particular import conditions. In such a case the adjustment is to be effected in accordance with the procedure laid down in Article 27, that is, it is for the Commission to adopt measures in accordance with the opinion of the Management Committee for Bananas. If the measures adopted are not in accordance with the opinion of the Management Committee, the Council may take a different decision within one month.

14. Article 16(3) of the Regulation therefore requires the Commission to act in so far as it comes to the conclusion, on the basis of reliable objective data, that the tariff quota is insufficient to meet demand and the forecast balance therefore proves to be incorrect.

15. According to that provision, it is immaterial whether the relevant circumstances affect an individual or a larger group of operators as might, for example, be the case if a tropical storm affects a given group of islands and destroys a banana harvest. The decisive point, on the other hand, is whether it proves necessary to revise the forecast of production and consumption in the Community and of import and export of bananas so that the tariff quota must be adapted. So, exceptional circumstances affecting only a

single operator may be covered by the provision if the person concerned manages a sufficiently large proportion of the Community supply of bananas.

16. Article 16(3) may, however, according to its content, be regarded as relating only to exceptional circumstances affecting production or import conditions for Community and traditional ACP bananas. The tariff quota for third-country and non-traditional ACP bananas is, according to the scheme of the Regulation, a residual quantity, namely the difference between expected production and imports of Community and traditional ACP bananas on the one hand and the expected total consumption of bananas on the other. It is thus only exceptional circumstances, affecting production or import conditions for Community and traditional ACP bananas, which can be remedied by an adaptation of this residual quantity. Exceptional circumstances affecting production or import conditions for third-country and non-traditional ACP bananas cannot on the other hand be remedied under the provisions of Article 16(3).

17. It is unnecessary in this case to consider whether an adaptation of the tariff quota under Article 16(3) must in pursuance of Article 19(4) be allocated according to the rules of Article 19(2) and (3). The Court will have an opportunity to consider that question in Joined Cases C-9/95, C-23/95 and C-156/95 *Kingdom of Belgium* v *Commission* and *Federal Republic of Germany* v *Commission*.

18. Accordingly Article 16(3) must be interpreted as providing no legal basis for the adoption of measures in respect of the cases referred to in the question.

Article 30

19. The German Government has stated that Article 30 cannot be applied because this specific case concerns a phenomenon which might occur not only in the transitional period. Difficulties resulting from a supplier's breach of contract may also be expected to arise in the future. The reference period is such an essential feature of the market organization that it is impossible to deviate from it.

20. The Spanish Government has stated that Article 30 does not require the Commission to lay down rules for hardship cases. The three-year reference period is an objective and non-discriminatory criterion and is in addition a sufficiently broad basis to give a clear reflection of an importer's business.

21. The French Government has stated that the provisions of Article 30 do not require the Commission to lay down rules for importers who sold small quantities in the reference period. Moreover, T. Port has not shown how the company's situation constitutes 'exceptional circumstances'.

22. T. Port has stated that Article 30 empowers the Commission to take any 'transitional measures it considers necessary' and thus also to choose other reference years. The expression 'difficulties of a sensitive nature' is not defined in greater detail and must therefore also include exceptional difficulties for individual operators. In laying down reference years the Community legislature has a duty to observe the fundamental principles of the protection of the right to own property and freedom to pursue an economic activity as well as the principle of proportionality. The Council has done that by authorizing the Commission to take transitional measures and the Commission ought to have adopted such measures since without them the market organization will destroy the basis of existence for traditional importers who, for reasons beyond their control, sold only small quantities in the reference period.

23. The Commission has stated that Article 30 gives authority to lay down only rules of a provisional nature, taking account of difficulties of a sensitive nature in the form of *force majeure* or similar circumstances. Article 30 may authorize rules to the effect that the operator concerned may choose one or two years within the reference period as a basis for calculating import licences instead of the average of the whole three-year reference period. On the other hand, that provision does not permit rules to be laid down to the effect that the operator may choose reference years outside the reference period. The Commission has not received any official application to lay down rules for hardship cases of the kind to which this case relates.

24. The United Kingdom has stated that it cannot be excluded that Article 30 obliges the Commission in certain cases to lay down transitional rules drawn up in general terms, which may presumably also contain general rules for relief from the consequences of Article 19(2).

25. The Council has stated that Article 30 empowers the Commission to adopt measures taking account of exceptional cases of hardship which may arise from the application of the three-year reference period. The Commission is obliged to adopt such measures in so far as necessary to avoid breach of the right to own property or the right of freedom to pursue an economic activity. The three-year reference period is not so fundamental to the Regulation that the Commission is precluded from deviating from it.

26. I would emphasize that the Regulation itself does not contain any more explicit transitional rules. It may be thought that that is related to the fact that at the time the Regulation was adopted it was difficult for the Council to foresee what types of problems were likely to arise after the transition to the common organization of the market, so that it was most appropriate to provide authority, by means of the provisions of Article 30 of the Regulation, for such rules to be drawn up later by means of a management committee procedure.

27. In the first place, there is a time condition for the application of the provisions of Article 30 of the Regulation, since any measures must be such as to assist the transition. The article does not use the expression 'transitional provisions' but refers to the measures which may be taken if necessary as 'transitional measures'. It may be assumed that measures such as to assist the transition may, for example, and perhaps in particular, consist in rules which, after the new entry into force of the scheme, deal with phenomena which in one way or another are related to the time before the new rules took effect. It is therefore clear that transitional measures, within the meaning of Article 30, may be rules taking special account of traders who, before the new rules were adopted, took, or failed to take, certain actions where they could not, or should not, have foreseen what the consequences of such actions or omissions might be after the new rules came into force.

28. It might be said that the choice of words in Article 30 goes further and covers more than such transitional rules in the usual sense since the article mentions 'specific measures ... required after July 1993 to assist the transition'. However, the case before the Court concerns only the question how situations relating to the period before the rules were adopted and took effect are to be treated; the time criterion for the application of Article 30 may therefore be regarded as having been met in this case. It is therefore unnecessary to consider the extent to which the article might also be applied to a certain period after the rules took effect — for example up to the time when the European Parliament and the Council dealt with the report and the proposals referred to in the first and second paragraphs of Article 32 of the Regulation — to assist the transition in situations involving phenomena unrelated to the time before the rules were adopted and came into force.

29. The decisive condition for the application of Article 30 is that special measures are needed to assist the transition to the common organization of the market. It is difficult to define in greater detail what that requirement entails; to a considerable extent it must depend on a discretion which may best be exercised by persons or institutions with a thorough knowledge of the banana market and the multiplicity of cases covered by the organization of the market. That must also be why the Commission and in certain circumstances the Council have been entrusted with exercising that discretion in a management committee procedure, thus

ensuring that the discretion is exercised on the soundest technical basis and that the alleged factual circumstances can be checked.

30. I must stress that there is no question of an unfettered discretion, but of a discretion subject to review by the Court. In its review, the Court can determine whether a decision to apply, or not to apply, transitional measures is defective, just as it will also be able to consider whether the relevant Community institutions have wrongly failed to act. Such a failure to act could be deemed to exist, according to circumstances, if, after a request from a Member State under Article 27(1) or 28 of the Regulation, there is a failure to draw up the transitional measures legally required to prevent the transition to the new organization of the market causing such hardship in individual cases that the organization of the market breaches fundamental rights protected by Community law, such as the right to property and the right freely to choose and exercise one's trade or profession. [4] The provisions as to what is judged necessary in Article 30 of the Regulation must in fact be interpreted in the light of the Treaty [5] and of the fundamental rights protected by Community law.

31. Article 30 of the Regulation says nothing about certain types of measures having to be excluded in advance if the other conditions of the article are met. On the contrary, it appears from the twenty-second recital in the preamble to the Regulation that the Commission, as from 1 July 1993, should be able to take any transitional measures required to overcome the difficulties of implementing the new arrangements. On that basis, I think the possibility must be accepted that the transitional measures mentioned in Article 30 may also go so far as to allow, in cases where it is necessary, a choice between the three reference years or, where necessary, a choice of different reference years. There is therefore no basis for assuming that Article 30 does not make it possible to lay down provisions according to which, in exceptional cases, account may be taken of years outside the reference period if this is judged necessary, even though in order to preserve the legal certainty which such a reference period entails the need must be extremely pressing before such a departure may be considered necessary.

32. Considerations of equality also militate in favour of such a position. Certainly a three-year reference period is in general entirely sufficient for ensuring a fair and equitable distribution of a production quota or, as here, a tariff quota, especially if there is an opportunity to exclude years in which there have been exceptional circumstances. The Court has stated as much in a number of

4 — See the judgment in Case 4/73 *Nold* v *Commission* [1974] ECR 491.

5 — See, for example, the judgment in Case C-315/92 *Verband Sozialer Wettbewerb* v *Clinique Laboratories and Another* [1994] ECR I-317, at paragraph 12.

cases in other market sectors. [6] But if exceptional circumstances could really be deemed to have prevailed in all three years it might in certain circumstances be a breach of the principle of equality in Community law if it were decided that not only similar cases but also dissimilar cases were to be treated equally.

33. I can see no reason why Article 30 should not be used where necessary to assist the transition for individual operators. But it must also be borne in mind that the very fact that an individual trader suffers exceptional hardship can be considered to be the factor which, without specific transitional measures, would produce an unjustified encroachment on a fundamental right such as, for example, the right to property.

34. On the other hand, the provisions of Article 30, particularly in view of the requirement that specific measures must be necessary, must be interpreted as including a condition that a trader cannot claim special treatment where he himself is responsible for an exceptionally difficult situation in which he finds himself. The trader must be required to have shown due care. That is excellently expressed in the Commission proposal, [7] not yet adopted, for a new provision in Article 19(6) of the Regulation, which reads as follows:

'If, due to exceptional circumstances beyond the control of a diligent operator, the reference quantity used to determine the allocation of licences to a Category A or Category B operator for a particular year in accordance with paragraph 2, is significantly below his average reference quantity for the previous two years, the reference period used to calculate the reference quantity for the year in question shall be extended backwards by two years.'

35. The wording 'exceptional circumstances beyond the control of a diligent operator' seems highly appropriate when one thinks of the cases which the Commission proposal has in view, which are related to exceptional circumstances arising following the entry into force of the new organization of the market. In relation to the transitional situations I have already described in point 27, the decisive feature cannot, however, be whether it is ordinary or exceptional circumstances before the new rules are adopted which cause the new organization of the market to create exceptional problems for traders. The decisive point in such cases must rather be whether a trader who has shown

6 — See, for example, the judgment in Case 84/87 *Erpelding* [1988] ECR 2647.

7 — Proposal for a Council Regulation (EC) amending Regulation (EEC) No 404/93 on the common market in bananas (96/C 121/09) COM(96) 82 final — 96/080/(CNS), submitted by the Commission on 8 March 1996 (OJ 1996 C 121, p. 15).

due care is suffering exceptional hardship because in the reference years before the Regulation took effect he took, or omitted to take, certain actions when he could not, or should not, have foreseen the consequences which such acts or omissions would have after it came into force.

36. During the proceedings before the Court, moreover, some comment was made along these lines about the description by the court of reference of T. Port's situation: it was submitted by several of those represented that breach of contract by a supplier could not be regarded as circumstances which the plaintiff could not foresee and that T. Port had even brought its present situation on itself through its business transactions, by concluding long-term contracts and failing over the whole three years to effect covering purchases of bananas from other suppliers. I do not think, however, that in this case the Court of Justice can undertake any more detailed assessment of whether T. Port's actions or omissions are commercially responsible, because that question concerns actual subsumption under Article 30 as I have already interpreted it. On the other hand, I think it is appropriate for the Court to include in its abstract interpretation of Article 30 the abovementioned requirement that the trader must have shown due care.

37. The Court stated in its order in Case C-280/93 R, at paragraphs 46 and 47, that when the conditions of Article 30 are met there is not only a right but, according to the circumstances, also a duty to take the necessary transitional measures. As regards the interpretation of Article 30 the Court stated as follows:

'It should be added that, as appears from the twenty-second recital in the preamble to the Regulation, it is intended that any disturbance in the internal market which the replacement of the various national arrangements by the common organization of the market threatens to bring about shall also be overcome by recourse to Article 30.

For that purpose Article 30 requires the Commission to take any transitional measures it judges necessary "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 ... to overcome difficulties of a sensitive nature".'

38. I accordingly propose that the Court should answer the first question to the effect that Article 16(3) of the Regulation must be interpreted as conferring no authority to lay down provisions catering for cases of exceptional hardship arising from the fact that the existence of importers of third-country bananas and non-traditional ACP bananas is threatened because, on the basis of the reference years to be taken into account for the

purposes of Article 19(2), they have been allocated an exceptionally low quota.

On the other hand, Article 30 of the Regulation must be interpreted as meaning that, on the conditions set out in that article, it confers authority and, depending on the circumstances, also imposes a duty to lay down transitional measures for traders who, in spite of showing due care, suffer exceptional hardship because in the reference years before the Regulation came into force they took, or omitted to take, certain actions when they could not, or should not, have foreseen the consequences which such acts or omissions would have after the Regulation had come into force. It is for the Commission, at the request of a Member State, to decide whether the conditions mentioned are satisfied and which transitional measures may possibly be required. The Commission's action or inaction may be reviewed by the Court under the general rules of the Treaty.

Second question: Is Article 19(2) of the Regulation void?

39. With this question the court of reference is really asking whether Article 19(2) is void if the Regulation does not provide for the possibility of taking account of reference years other than those mentioned in Article 19(2) in the case of traders suffering exceptional hardship.

40. As may be seen from my answer to the first question, however, Article 30 does indeed provide authority, and to a certain extent also imposes a duty, to lay down transitional measures with regard to such cases. The assumption made in the order for reference that there might be some doubt as to the validity of Article 19(2) is therefore unfounded and the Court need not therefore answer the question.

41. However, even if that assumption had been well founded, it could not, in my view, have followed that Article 19(2) was void so that the whole basis of the market organization suddenly disappeared. If a single trader in the whole of the common market were in certain circumstances to suffer exceptional hardship as a result of a new organization of the market so that protection of his fundamental rights required special attention to be paid to his circumstances, this ought not to have general consequences for all other traders who are not in a comparable situation. There can therefore in my view be no question of a general annulment of the provision, even if the Court, in pursuance of an analogy with the second paragraph of Article 174 of the Treaty, had provisionally to maintain the effects of the provision thus declared void. In that connection, I would point out that, should such a case arise, it might be more appropriate to advise a person who thinks he has suffered injury as a result of breach of his

fundamental rights to seek compensation, rather than having the whole of the market organization paralysed by declaring a provision void.

42. I propose that the Court should regard the second question as nugatory and omit to answer it.

Third question: The question of interim measures

43. The third question is to be answered only in so far as the Court answers the first question to the effect that Article 16(3) or Article 30 must be interpreted as meaning that the Commission is required to lay down provisions for the cases of hardship described in the first question. On that assumption the national court wishes to be informed under what conditions national courts have jurisdiction to adopt interim measures for such cases of hardship until the Commission makes provision for them.

44. In connection with this question the observations submitted to the Court have mostly referred to the Court's judgments in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* [1991] ECR I-415, and in Case C-465/93 *Atlanta I*.

45. The French and Spanish Governments and the United Kingdom have stated that a national court has no jurisdiction to adopt interim measures in cases such as this. The third question concerns not only interim measures pending an answer to a reference for a preliminary ruling on the validity of a Community rule but also interim measures upholding the interests of the claimant until the Community rules are amended. Such interim measures would in reality mean that Community law could be set aside by a national court.

46. The Commission thinks that this case should be settled in the same way as Case C-465/93 *Atlanta I* and has particularly stressed the need for the relevant Community institutions to be heard in order that in cases involving interim measures proper consideration may be given to the Community's interests.

47. I must emphasize that the question whether it is possible to adopt interim measures has been put against the background of the specific case in which it is actually claimed that the Bundesanstalt für Landwirtschaft und Ernährung, which is the authority which administers the common organization of the market in bananas in the Federal Republic of Germany, should be ordered to allocate to T. Port import licences over and above those resulting from Article 19(2) of the Regulation.

48. Under Article 189 of the Treaty regulations have general application and are binding in their entirety and directly applicable in all Member States. In my view, it must accordingly follow that neither the Court of Justice nor any national court can, by final judgment, order the Commission or, as the case may be, the national authority administering a market organization introduced by a regulation to issue import licences over and above those resulting from the relevant regulation. In this connection it is irrelevant that the regulation in question also contains, apart from its general rules, a provision conferring on the Commission the power and, according to circumstances, the duty to lay down certain rules in derogation, since the power to do so is vested in the Commission and not in the Court of Justice or the national courts. As long as the Commission has not laid down rules in derogation, no such rules exist and both the Court of Justice and the national courts must follow the general rules in the relevant regulation and cannot usurp the Commission's role.

49. In Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* and in Case C-465/93 *Atlanta I*, the Court held that Article 189 of the Treaty did not preclude the power of national courts to suspend enforcement of, or to grant interim relief with reference to, an administrative measure adopted on the basis of a Community regulation, but subject to strict conditions, including the requirement that the national court must at the same time refer a question to the Court of Justice for a preliminary ruling on the validity of the contested measure if this has not already been done. The question is whether such interim measures are also compatible with Article 189 of the Treaty when the issue is not the validity of a regulation but, on the contrary, whether the Commission is obliged to lay down rules pursuant to a provision of a regulation.

50. The case-law laid down by the judgments referred to above involves drawing a parallel between, on the one hand, the provisional protection of rights which the Court may order under Articles 185 and 186 of the Treaty in an action before the Court concerning the legality of a Community legal act under Article 173 of the Treaty and, on the other hand, the provisional protection of rights which a national court may order in national proceedings in which questions arise as to the validity of a Community legal act and a question is referred to the Court for a preliminary ruling under Article 177. [8]

51. Drawing this parallel as regards the possibility of ordering provisional protection of rights means, *inter alia*, that it is ensured that the Court's final decision will take full effect whether the case is brought before the Court of Justice under Article 173 or brought before a national court and referred to the Court of Justice for a preliminary ruling under Article 177.

8 — See, in this connection, my Opinion in Cases C-465/93 and C-466/93 *Atlanta*, points 21 to 27.

52. Such concern to ensure that the final decision of the Court of Justice takes full effect is not vital in this case. Here, there is indeed no question of the Court's being able to take a decision which, should there be occasion, could authorize the grant to T. Port of import licences over and above those resulting from Article 19(2) of the Regulation. For power to lay down transitional measures is, under Article 30, vested in the Commission. The fact that the Commission's action or inaction may be reviewed by the Court makes no difference for the very reason that review by the Court must take place *ex post facto*. As already mentioned, the Court cannot substitute itself for the Commission and by final judgment issue transitional provisions. Nor can the Court, in an action for failure to act, order the Commission to adopt the provisions referred to in Article 30 of the Regulation: it can only, if occasion should arise, declare that by not adopting such provisions the Commission has infringed the Treaty. [9] As Articles 185 and 186 have *inter alia* the aim of ensuring that the Court's final judgment takes full effect, and as the Court cannot by its final judgment adopt such provisions, it must follow that the Court will likewise be unable, by way of interim relief, to lay down or to order the Commission to lay down such provisions. A national court must under Article 189 of the Treaty still more certainly be precluded from doing so.

53. In view of the foregoing considerations I shall recommend that the Court should answer the question by ruling that Article 189 of the Treaty must be interpreted as meaning that national courts cannot decide upon measures for interim relief with reference to a Community regulation on the ground that there is a question as to whether the regulation requires the Commission to lay down certain provisions.

Conclusion

54. On all those grounds I propose that the Court should answer the questions referred to it by the Hessischer Verwaltungsgerichtshof as follows:

(1) Article 16(3) of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas, as most recently amended by Council Regulation (EC) No 3290/94 of 22 December 1994, must be interpreted as conferring no authority to lay down provisions catering for cases of

9 — See Article 175.

exceptional hardship arising from the fact that the existence of importers of third-country bananas and non-traditional ACP bananas is threatened because, on the basis of the reference years to be taken into account for the purpose of Article 19(2), they have been allocated an exceptionally low quota.

On the other hand, Article 30 of the said Regulation must be interpreted as meaning that, on the conditions set out in the article, it confers authority and, depending on the circumstances, also imposes a duty to lay down transitional measures for traders who, in spite of showing due care, suffer exceptional hardship because in the reference years before the Regulation came into force they took, or omitted to take, certain actions when they could not, or should not, have foreseen the consequences which such acts or omissions might have after the Regulation had come into force. It is for the Commission, at the request of a Member State, to decide whether the conditions mentioned are satisfied and which transitional measures may possibly be required. The Commission's action or inaction may be reviewed by the Court under the general rules of the Treaty.

(2) Article 189 of the EC Treaty must be interpreted as meaning that national courts cannot decide upon measures for interim relief with reference to a Community regulation on the ground that there is a question as to whether the regulation requires the Commission to lay down certain provisions.