OPINION OF ADVOCATE GENERAL ELMER
delivered on 23 March 1995 *

Introduction

1. In its judgment of 5 October 1994 in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, the Court addressed the issue of the validity of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas, [1] which became applicable as from 1 July 1993.

The request for a preliminary ruling before the Court in the present case raises a number of questions concerning the interpretation 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. [2] The questions centre in particular on how Article 2(c) of Regulation No 1442/93 ('operators who commenced marketing bananas ... as from 1992 or thereafter') is specifically to be interpreted.

The rules on the tariff quota for bananas

2. As is clear from the tenth recital in the preamble to Council Regulation No 404/93, one of the objectives of the common organization of the market in bananas is to ensure satisfactory marketing of bananas produced within the Community and of products originating in the ACP States, that is to say, the 69 countries in Africa, the Caribbean and the Pacific Ocean with which the EC has concluded the Lomé Conventions.

With this objective in view, Title IV of the regulation (Articles 15 to 20) sets out arrangements for trade with third countries. Under Article 18, a tariff quota is to be opened each year for imports of third-country bananas and 'non-traditional ACP bananas', that is to say, bananas imported from ACP States in excess of the quantities listed in an annex to the regulation which have traditionally been exported by each of those States. [3] The tariff quota is fixed each

* Original language: Danish.

1 — OJ 1993 L 47, p. 1.

2 — OJ 1993 L 142, p. 6.

3 — See Article 15(1) and (2) of the regulation.

year at 2 million tonnes net weight and was set for the second half of 1993 at 1 million tonnes net weight. Within the tariff quota, a levy of ECU 100 per tonne is imposed on imports of bananas from third countries, while imports of non-traditional ACP bananas are subject to a zero duty. Bananas imported outside the tariff quota are subject to a levy of ECU 750 per tonne (in the case of imports from ACP States) or ECU 850 per tonne (in the case of imports from third countries).

3. The first subparagraph of Article 19(1) of the regulation provides as follows:

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

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

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

(c) 3.5% to the category of operators established in the Community who started [4] marketing bananas other than Community and/or traditional ACP bananas from 1992'.

Article 15(5) of the Council regulation defines the verb 'market' as follows:

'"market" and "marketing" mean placing on the market, not including making the product available to the final consumer'.

4. With regard to operators coming under Article 19(1)(a) and (b), the second subparagraph of Article 19(1) provides as follows:

'The import opportunities pursuant to (a) and (b) shall be available to operators established in the Community who marketed on their own account a minimum quantity of bananas of the above origins, to be determined.'

4 — The German version of the regulation differs from the other language versions in using the phrase 'die ab 1992 mit der Vermarktung ... *beginnen*' (emphasis added).

Under Article 19(2) of the regulation, the size of each import licence for operators coming under Article 19(1)(a) and (b) is determined on the basis of the average quantities of bananas sold by the operator in question in the three most recent years for which figures are available. For the second half of 1993, each operator was issued licences on the basis of half of the annual average quantity marketed between 1989 and 1991.

5. With regard to operators coming under Article 19(1)(c), Council Regulation No 404/93 does not — as in the case of operators coming under Article 19(1)(a) and (b) — contain any provisions to the effect that the import opportunities under this category are available only to operators who had previously marketed bananas under certain conditions.

The size of each import licence for operators coming under Article 19(1)(c), in contrast, is determined solely on the basis of the volume of applications. In this connection, Article 19(3) provides as follows:

'If the volume of applications from new operators exceeds the quantities fixed pursuant to paragraph 1(c), each application shall be reduced by an equal percentage.

...'

The use of the term 'new operators' in Article 19(3) as synonymous with operators coming under Article 19(1)(c) must be considered in the light of the thirteenth recital in the preamble to the regulation, in which the Council stresses that the tariff quota must make a quantity available for '... new operators who have recently embarked on commercial activity or are about to embark on commercial activity in this sector'.

6. The third subparagraph of Article 19(1) contains the following provision:

'Supplementary criteria to be met by operators shall be laid down in accordance with the procedure provided for in Article 27. The Member States shall draw up the list of importers and the average quantity per operator referred to in paragraph 2'.

The fifteenth recital in the preamble to the regulation states that '... in adopting addi-

tional criteria which operators should respect, the Commission is guided by the principle whereby the licences must be granted to natural or legal persons who have undertaken the commercial risk of marketing bananas and by the necessity of avoiding disturbing normal trading relations between persons occupying different points in the marketing chain'.

7. The provisions cited must also be considered in conjunction with the fourteenth recital in the preamble, where the Council states that '... in order not to disrupt existing commercial links, while at the same time allowing some development of marketing structures, the issue to each operator of separate import licences for each of the categories defined above must be on the basis of the average quantity of bananas marketed by the operator over the three preceding years for which statistical data are available'.

8. The Commission was required under the second paragraph of Article 20 of the regulation to adopt detailed rules for implementing Title IV in accordance with the procedure laid down in Article 27. Those provisions were set out in Commission Regulation No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community ('the implementing regulation').

Article 2 of the implementing regulation provides as follows:

'The following tariff quota is hereby opened for the second half of 1993:

(a) 665 000 tonnes for the category of operators who prior to 1992 marketed third-country bananas and/or non-traditional ACP bananas ..., hereinafter referred to as "Category A";

(b) 300 000 tonnes for the category of operators who have marketed Community bananas and/or traditional ACP bananas, hereinafter referred to as "Category B";

(c) 35 000 tonnes for the category of operators who commenced [5] marketing bananas other than Community bananas and/or traditional ACP bananas as from 1992 or thereafter, hereinafter referred to as "Category C".'

5 — The German version of the implementing regulation uses the phrase 'die 1992 oder später mit der Vermarktung ... *begonnen haben* ...' (emphasis added).

Article 3 of the implementing regulation provides as follows: [6]

'1. Economic agents ... shall be deemed "operators" in Category A and/or Category B for the purposes of Articles 18 and 19 of Regulation (EEC) No 404/93 and may hold import licences where they have engaged in one or more of the following activities on their own account:

(a) the purchase of green third-country and/or ACP bananas from the producers, or where applicable, the production, consignment and sale of such products in the Community;

...

2. Wholesalers and retailers shall not be considered operators by virtue solely of such activities.

3. The minimum quantity referred to in the second subparagraph of Article [19] (1) of Regulation (EEC) No 404/93 ... shall be 250 tonnes ...'

With regard to the possibility for operators to transfer rights under import licences within the tariff quota, Article 13(1) and (2) of the implementing regulation contains the following rules:

'Rights accruing from import licences ... may be transferred by the holder ... in accordance with the conditions set out below.

1. Rights may be transferred:

(a) between operators belonging to the same category;

(b) from Category A operators to Category B operators and *vice versa*;

(c) from operators in Category A or B to the new operators in Category C.

6 — Commission Regulation (EC) No 2444/94 of 10 October 1994 amending and derogating from Regulation (EEC) No 1442/93 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1994 L 261, p. 3) applies only to the allocation of import licences with effect from 1995 and has therefore no bearing on the decision in the present case.

2. Transfers of rights by Category C operators to operators in Categories A and/or B shall not be permitted.'

9. The Commission's implementing Regulation No 1442/93 was supplemented by Commission Regulation (EEC) No 1443/93 of 10 June 1993 on transitional measures for the application of the arrangements for importing bananas into the Community in 1993 ('the transitional regulation'), [7] Article 2 of which is couched in the following terms:

'1. Category A and Category B operators, as defined in Regulation (EEC) No 1442/93, shall make their applications for registration and the competent authorities of the Member States shall establish lists of operators in the manner described in Article 4, paragraphs 1, 2 and 3 of the said Regulation, by 7 July 1993. Operators shall provide information on the volume of bananas they marketed in the years 1989, 1990 and 1991.

2. Category C operators, as defined in Regulation (EEC) No 1442/93, shall register with the competent authorities in a Member State of their choice by 24 June 1993. The competent authorities of the Member States shall inform the Commission of the number of Category C operators registered with them by 25 June 1993.'

The provisions which follow in the transitional regulation deal with, *inter alia*, the verification of the reference quantities submitted by Category A and B operators and the procedure for calculating their provisional import quotas on the basis of the reference quantities. The transitional regulation does not contain any corresponding rules on the verification and application of reference quantities in calculating provisional import quotas for Category C operators.

The facts of the case

10. Anton Dürbeck GmbH is a wholesale trader in, and importer of, fruit, vegetables and tropical and subtropical fruits. From 1992 to June 1993 it imported approximately 40 000 tonnes of third-country bananas and non-traditional ACP bananas. After the importation of such bananas had been made subject to tariff quotas by way of Council Regulation No 404/93, cited above, Anton Dürbeck GmbH applied in June 1993 for registration as a Category C operator within the meaning of Article 2(c) of Regulation No 1442/93. The number of applications for registration as Category C operators was

7 — OJ 1993 L 142, p. 16.

extremely high; in Germany alone, 335 such applications were received by the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry). Anton Dürbeck GmbH was granted a licence to import 48 270 kg of bananas during the second half of 1993.

11. Anton Dürbeck GmbH considered that it was entitled to allocation of a larger quantity on the ground that Category C import licences had improperly been allocated to persons who previously had neither marketed bananas nor had had any intention of doing so. The company accordingly lodged an objection against the decision of the Bundesamt für Ernährung und Forstwirtschaft with the Verwaltungsgericht (Administrative Court) Frankfurt am Main in which it sought the annulment of all licences which had been allocated.

Against this, the Bundesamt für Ernährung und Forstwirtschaft has argued that the Community-law rules at the material time did not impose any requirements for the allocation of licences to import bananas under Category C other than proof by the undertaking in question, by its application for registration as a Category C operator, of its intention to operate as a banana importer.

The order making the reference

12. In order to resolve this dispute, the Verwaltungsgericht Frankfurt am Main submitted the following questions to the Court on 5 August 1993:

'How are the provisions of Article 2(c) of Commission Regulation (EEC) No 1442/93, whereby a tariff quota amounting to 35 000 tonnes is opened for the category of operators who "commenced" marketing bananas other than Community bananas and/or traditional ACP bananas as from 1992 or thereafter, to be interpreted? In this connection, the following questions arise in particular:

1. Is there any technical difference between the definition of Category C operators contained in Article 2(c) of Commission Regulation (EEC) No 1442/93 and the definition contained in Article [19(1)(c)] of Regulation (EEC) No 404/93, which defines Category C operators as those who "started" marketing bananas other than Community bananas and/or traditional ACP bananas from 1992, and wherein does such difference, if any, lie?

2. Is it also possible to regard as operators within the meaning of Article 2(c) of Regulation (EEC) No 1442/93 and/or Article 19(1)(c) of Regulation (EEC) No 404/93 those applicants who

— apply for registration pursuant to Article 2(2) of Regulation (EEC) No 1443/93 with a view to transferring the licences to other Category C operators;

— apply as aforesaid with a view to enabling Category A and B operators or third parties to use those licences;

— apply as aforesaid without having already developed a commercial activity aimed at marketing — for the first time — the bananas specified in Article 2(c) of Regulation (EEC) No 1442/93?

3. What requirements, if any, are to be imposed on a commercial activity in order that the applicant may be said to have started marketing bananas?

4. May economic operators who entered into business prior to 1992 with a view to the importation of the bananas specified in Article 2(c) of Regulation (EEC) No 1442/93 and imported those bananas in 1992 or later be registered as Category C operators?

5. Is Article 3(2) of Regulation (EEC) No 1442/93 applicable to Article 2(c) of Regulation (EEC) No 1442/93?'

13. The national court's first question appears to be attributable to the fact that the two regulations are formulated differently in German. The German version of Council Regulation No 404/93 — but not the other language versions — thus refers to operators '... die ab 1992 mit der Vermarktung ... *beginnen*' (emphasis added), whereas the German version of the Commission's implementing Regulation No 1442/93 — in line with the other language versions — uses the expression '... die 1992 oder später mit der Vermarktung ... *begonnen haben* ...' (emphasis added).

The first question submitted by the national court therefore appears to be seeking clarification as to whether the implementing regulation, Regulation No 1442/93, limits the number of operators who may come within Category C to those who have previously

marketed third-country bananas and/or non-traditional ACP bananas.

This question is thus connected to the third indent of the second question and to the third question, in which the national court is in particular asking the Court whether and, if so, to what extent operators who wish to obtain import licences under Category C must previously have been involved commercially in the marketing of bananas.

For that reason I consider it appropriate to address these questions together.

Question 1, Question 2, third indent, and Question 3

14. Referring to the expression 'commenced marketing' in Article 2(c) of the Commission's implementing Regulation No 1442/93, Anton Dürbeck GmbH argues that the tariff quota for the second half of 1993 was open only to operators who had already previously imported bananas. It takes the view that this restriction applies not only with regard to Categories A and B but also with regard to Category C in so far as the fifteenth recital in the preamble to Council Regulation No 404/93 states that Category C operators must also, prior to their application, have undertaken a commercial risk in marketing bananas. If new operators and persons without any connection whatever to the banana market were also to obtain import licences within the framework of the tariff quota, the size of individual licences would be so limited as to render impossible any commercially viable importation of bananas.

15. The Commission, along with the German and Spanish Governments, argues that neither the Council regulation nor the implementing regulation imposes any requirements on persons applying for a Category C import licence other than that they have marketed bananas or have indicated, by submitting their application for an import licence, their intention to market bananas.

16. While not entirely clear in meaning, the expression 'operators ... who started marketing ... from 1992' in Article 19(1)(c) of the Council regulation does, however, provide certain indicia as to its interpretation. It indicates a point in time after which the operators in question must have started marketing, namely through use of the expression 'from 1992', which, in the light of the context, must be understood as meaning 'after 31 December 1991'. On the other hand, the

provision does not indicate any point in time prior to which such marketing must have been commenced. That, however, is also not necessary. In the case where a condition is imposed for the granting of permission (in this case, the condition that an operator must have 'started marketing'), the responsible authority must of course ensure that this condition has been satisfied when the decision is taken. [8]

However, despite the fact that it is thus possible to infer some temporal limits as to when the condition must have been satisfied, there still remains a problem of interpretation concerning the specific content of the condition, namely the specific meaning of the phrase 'started marketing'. In particular, it is necessary to consider whether particular requirements are imposed in that regard, as argued by Anton Dürbeck GmbH, or whether it is sufficient, as submitted by the Commission and the German and Spanish Governments, that the operator in question has, by submitting his application for an import licence, indicated his intention to market bananas.

In order to examine this issue it is necessary, in keeping with the Court's settled case-law, [9] to consider the purpose and general scheme of the regulation.

In my view, conclusive weight ought to be attached to the purpose behind Article 19(1)(c), as stated in the thirteenth recital in the preamble to the regulation. This states that the tariff quota must leave a quantity for 'new operators who have recently embarked on commercial activity or are about to embark on commercial activity in this sector'. The fact that this statement of purpose refers to Article 19(1)(c) emerges clearly from its use of the term 'new operators', which is used in Article 19(3) as a synonym for the operators coming under Article 19(1)(c).

In line with this, the fourteenth recital in the preamble states that the organization of the market must not only counteract disruption to existing commercial links but must also allow some development of marketing structures. No such development would be possible if only operators already established in the sector were entitled to a share of the tariff quota under Category C.

8 — Since the condition must therefore be satisfied when the decision is taken, it is irrelevant whether the condition in the various language versions of the Council regulation is described by use of a past tense ('started') or a present tense, as in the German version ('beginnen').

9 — See, for example, the judgment in Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 14.

It is entirely consistent with this line of reasoning that the size of every import licence for operators coming under Article 19(1)(c) should be determined in accordance with Article 19(3) of the Council regulation on the basis of the number of applications for licences, resulting, if necessary, in a proportionate reduction in the quantity for which import licences may be issued. In this regard, the scheme of Category C departs appreciably from that of Category A and B operators, which is designed to counteract disruption to existing commercial links. In the case of Categories A and B, import licences are issued pursuant to Article 19(2) on the basis of the average quantities of bananas which an operator has sold in the three most recent years for which figures are available, and in these categories it is even required that a certain minimum quantity be marketed (second subparagraph of Article 19(1)).

In my opinion, it must be assumed, in the light of the purpose and general scheme of the regulation, that no requirement is imposed on new operators coming under Article 19(1)(c) of the regulation other than that they must, in 1992 or later, have embarked on commercial activity or be about to embark on commercial activity within the sector in question.

The fifteenth recital in the preamble to the regulation cannot, in my view, be cited in support of any different conclusion. That recital, which through the use of the expression 'adopting additional criteria' points to the similar expression in the first sentence of the third subparagraph of Article 19(1), merely states that the Commission must take account of the principles set out in the recital when adopting additional criteria. So long as such additional criteria have not been adopted, the recital does not therefore have any separate significance.

17. There is, in my view, no basis for assuming that the implementing regulation was designed to impose additional requirements on Category C operators. [10] Article 2(c) of that regulation uses an expression corresponding to the expression 'started marketing', which Article 19(1)(c) uses in all versions of the Council regulation other than the German. I refer to my previous comments on the interpretation of the corresponding expression in the Council regulation. The implementing regulation also contains special requirements only in respect of Categories A and B, but not Category C, concerning the extent of previous marketing. The same holds true of the transitional regulation. [11]

18. In the light of the foregoing and in the absence of specific rules to the contrary, I

10 — On this point, see footnote 6 above.

11 — There may also be grounds for assuming that a provision in an implementing regulation has the same scope as, and must be interpreted in accordance with, the regulation for the implementation of which it was adopted.

share the view taken by the Commission and the Governments which have submitted observations in this case that the lodging of the application for a Category C import licence constitutes sufficient proof that the applicant intends to engage in marketing within the banana sector.

19. The reply to Question 1, Question 2, third indent, and Question 3 should on this basis be that Article 19(1)(c) of Council Regulation No 404/93 on the common organization of the market in bananas and Article 2(c) of Commission Regulation No 1442/93 laying down detailed rules for the application of the arrangements for importing bananas into the Community are to be understood as meaning that an operator coming under those provisions must, in 1992 or later, have embarked on commercial activity or have indicated, by submitting his application for an import licence, his intention to embark on commercial activity within the banana sector.

Question 2, first and second indents

20. In Question 2, first and second indents, the national court requests the Court to determine whether an application for a Category C import licence must be rejected if the application has been submitted with the sole purpose of transferring the licence to another party.

21. Anton Dürbeck GmbH has submitted that an operator who applies for an import licence solely in order to transfer it to another party fails to satisfy the requirements which the above provisions impose on operators.

22. Against this, the Commission, along with the German and Spanish Governments, contends that the rules governing transfer of import licences, contained in Article 13 of the implementing regulation, exhaustively cover the question of licence transfer, with the result that an import licence cannot be refused even if it transpires that the applicant intends to transfer it to a third party.

23. As already stated, an operator must, in order to obtain an import licence as a Category C operator, have embarked, in 1992 or later, on commercial activity or have indi-

cated, by submitting an application for an import licence, his intention to embark on commercial activity within the banana sector.

It can be argued that this concept will be given a very broad interpretation if it also includes persons applying for an import licence with the sole purpose of transferring it to a third party.

Against this, however, it must be stressed that the transfer of licences is regulated in detail by Article 13 of the implementing regulation. Article 13 permits certain forms of transfers, including transfers between operators within the same category, but prohibits certain others, including transfers of rights by Category C operators to operators in Categories A and B. Where the provision states that certain rights cannot be transferred, it would appear logical to assume that this means that the sanction for breach of the prohibition is that the acquiring party (transferee) cannot use the licence and thus cannot gain access to the tariff quota.

At the time material to this case neither the Council regulation nor the implementing regulation [12] contained any other provisions governing the transfer of import licences. Thus, there were no provisions requiring applicants to explain what they intended to do with their licences or enabling the authorities to verify information. Under such conditions, it was entirely fortuitous if the authorities obtained information on whether applicants intended to use an import licence themselves or transfer it to another party. If such information was available, the regulations contained no further provisions on control, just as there were no provisions in the regulations empowering the authorities to refuse licences in such cases.

In view of this, I agree with the Commission and with the German and Spanish Governments that Article 13 of the implementing regulation deals exhaustively with the question of the transfer of import licences.

24. The answer to Question 2, first and second indents, must therefore be that an application for an import licence cannot be refused on the ground that the applicant has

12 — See footnote 6.

submitted his application with the sole purpose of transferring the licence to another party.

operator has, prior to 1992, 'marketed' bananas as specified in the rules of the regulations concerning Category A and must therefore, if appropriate, be registered in that category.

Question 4

25. In Question 4 the national court seeks clarification as to whether operators who entered into business prior to 1992 with a view to importing the bananas specified in Article 2(c) of Regulation No 1442/93 and imported those bananas in 1992 or later may be registered as Category C operators.

27. There is, on this point, agreement among those who have submitted observations to the Court that simply entering into business with a view to importing bananas is insufficient to justify a finding that an operator has 'marketed' bananas within the meaning attached to that expression by the above-mentioned regulations.

26. As has already been mentioned, the rules in the regulations relating to Category C must be given a broad interpretation. Thus, the requirement of previous marketing is not imposed for this category and the decisive factor is that the operator in question has embarked in 1992 or later on commercial activity or is about to embark on such activity in the banana sector. The question submitted by the national court therefore concerns in fact the dividing line between Category C and Category A. The problem is whether an operator's entry into business prior to 1992 with a view to importing third-country bananas and/or non-traditional ACP bananas in 1992 or later means that that

28. That is a view which I share. In replying to the question, it must be assumed that both Article 19(1)(a) and (b) of the Council regulation and Article 2(a) and (b) of the implementing regulation define operators in Categories A and B by the fact that the operators in question 'marketed' specified bananas in the period from 1989 to 1991. Those provisions are supplemented in both regulations by rules requiring calculation for each of those years of the average quantity of bananas marketed by the operator in question. The expression 'marketed' in the above provisions concerning Category A and B operators must therefore be much more restrictively construed than the expression 'started marketing' relating to Category C operators (see above).

29. For those reasons I propose that the Court's reply to Question 4 should be that an operator's entry into business prior to 1992 with a view to importing bananas in 1992 or later is not in itself sufficient to justify a finding that the operator in question, prior to 1992, 'marketed' bananas within the meaning attached to that expression by the above regulations so far as concerns Category A and B operators, and that the operator in question can if appropriate be registered in Category C, provided that the other relevant conditions have been satisfied.

Question 5

30. By Question 5 the national court seeks a ruling by the Court as to whether Article 3(2) of the implementing regulation — which provides that wholesalers and retailers are not to be considered as operators by virtue solely of such activities — has any bearing on the definition of the concept of operator in Article 2(c) of the regulation.

31. Anton Dürbeck GmbH and the German Government take the view that the question submitted should be answered in the affirmative. They argue that Article 3(2), in contrast to Article 3(1) and (3), is not, according to its wording, restricted to operators in Categories A and B, and point out that Article 3(2) features in Title I of the implementing regulation concerning detailed rules for the application of the tariff quota arrangements which cover all three categories of operators.

32. The Commission and the Spanish Government take the view that Question 5 should be answered in the negative in so far as Article 3(2), by virtue of its position and wording, can relate only to operators in Categories A and B.

33. It is, admittedly, correct that Article 3(2), according to its wording, is not restricted to operators in Categories A and B, but rather appears generally to mention a number of forms of undertaking which are not to be regarded as 'operators', an expression used in both the Council regulation and the implementing regulation to apply also to Category C.

On the other hand, it must be pointed out that the central feature of Article 3(2) is that it states that 'virksomheder' ['wholesalers and retailers'] in certain instances cannot be regarded as operators, and thereby Article 3(2) must be taken as referring to the same [Danish] word in Article 3(1), which imposes certain conditions in order for 'virksomhed-

er' ['economic agents'] to be deemed to be '"operators" in Category A and/or Category B'. Significance might also be attached to the fact that Article 3(2) is included between two provisions (in Article 3(1) and (3)), both of which are clearly limited to regulating matters in respect of Categories A and B.

On the basis of a purely linguistic analysis of the provision it is, for the above reasons, most reasonable to assume that Article 3(2) relates only to Categories A and B.

34. It may also be appropriate to bear in mind that it has been assumed in the replies to the above questions that Categories A and B are to be narrowly defined, in contrast to Category C, in which it may be sufficient that the operators in question intend to embark on commercial activity within the banana sector.

An interpretation under which Article 3(2) imposes certain restrictions as to who may be deemed to be Category A or B operators, but does not do so with regard to Category C operators, will be most consistent with this assumption regarding demarcation of the categories.

35. In addition, it would be totally at variance with the above interpretation regarding Category C operators, who must simply intend to embark on commercial activity within the banana sector, if one were to apply Article 3(2) to restrict that category, given that Article 3(2) focuses on the activities actually carried out by the traders concerned, which may be completely different from those on which they intend to embark.

36. I am aware that Article 15(5) of the Council regulation defines the terms 'market' and 'marketing' as meaning 'placing on the market, not including making the product available to the final consumer'. When Article 19(1)(c) of the Council regulation defines operators for whom Category C is open as those who 'started marketing' certain types of banana from 1992, it might be argued that it must follow from this that undertakings involved in retail business alone are not covered by Article 19(1)(c) of the regulation, which after all refers to 'operators ... who started marketing ... from 1992'.

As stated above, however, it is, in relation to Category C, not only of importance what marketing the operator in question has been engaged in, but also whether that operator is about to embark on commercial activity in the banana sector. Submission of an application for an import licence under Category C may also in my opinion — as the rule provided at the period material to this case — [13] be regarded as sufficient to establish this (see point 18 above). The definition in Article 15(5) does not therefore — for the same reason as set out in point 35 — acquire any separate significance for operators who submit an application for an import licence under Category C.

37. I propose that the Court's reply to Question 5 should be that Article 3(2) of Commission Regulation No 1442/93 is not applicable to operators coming under Article 2(c) of that regulation.

Conclusion

38. On the basis of the foregoing, I propose that the Court reply to the questions submitted to it as follows:

— Article 19(1)(c) of Council Regulation (EEC) No 404/93 on the common organization of the market in bananas and Article 2(c) of Commission Regulation (EEC) No 1442/93 laying down detailed rules for the application of the arrangements for importing bananas into the Community are to be understood as meaning that an operator coming under those provisions must, in 1992 or later, have embarked on commercial activity or have indicated, by submitting his application for an import licence, his intention to embark on commercial activity within the banana sector.

— An application for an import licence cannot be refused on the ground that the applicant has submitted his application with the sole purpose of transferring the licence to another party.

13 — See footnote 6 above.

— An operator's entry into business prior to 1992 with a view to importing bananas in 1992 or later is not in itself sufficient to justify a finding that the operator in question, prior to 1992, 'marketed' bananas within the meaning attached to that expression by the above regulations so far as concerns Category A and B operators, and the operator in question can if appropriate be registered in Category C, provided that the other relevant conditions have been satisfied.

— Article 3(2) of Commission Regulation (EEC) No 1442/93 is not applicable to operators coming under Article 2(c) of that regulation.