OPINION OF ADVOCATE GENERAL ELMER

delivered on 13 July 1995 *

Introduction

1. By application lodged at the Registry of the Court of Justice on 23 December 1993, the Kingdom of the Netherlands brought an action for the annulment of Commission Regulation (EEC) No 2920/93 of 22 October 1993 fixing the uniform reduction coefficient for determining the quantities of bananas to be allocated to each operator in categories A and B in the context of the tariff quota for the second half of 1993 [1] (hereinafter 'the coefficient regulation').

2. In support of its action, the Kingdom of the Netherlands submits in particular that the coefficient regulation is based on a misinterpretation 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] (hereinafter 'the implementing regulation'), that the Commission did not have the power to alter the quantities notified by the Netherlands authorities, that the Commission breached the principle of equal treatment, and, finally, that the regulation is inadequately reasoned.

3. The Commission argues that the action should be dismissed and the Kingdom of the Netherlands ordered to pay the costs.

The Council regulation

4. Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas [3] (hereinafter 'the Council regulation') established a common organization of the market in bananas to replace the various national organizations.

5. Article 18(1) of the Council regulation provides for a tariff quota of two million

* Original language: Danish.

1 — OJ 1993 L 264, p. 40.

2 — OJ 1993 L 142, p. 6.

3 — OJ 1993 L 47, p. 1.

tonnes to be opened each year for imports of third-country bananas and non-traditional ACP bananas. [4] For the second half of 1993, the quota was set at one million tonnes. Within the framework of the quota, third-country bananas were subject to a levy of ECU 100 per tonne, while imports of non-traditional ACP bananas were subject to zero duty. Outside the quota, imports of non-traditional ACP bananas were subject to a levy of ECU 750 per tonne, while the import levy for third-country bananas amounted to ECU 850 per tonne.

Under Article 19(1), the tariff quota is allocated among three categories of operators. Category A covers operators who marketed third-country and/or non-traditional ACP bananas, Category B covers operators who marketed Community and/or traditional ACP bananas, while Category C relates to operators who started marketing bananas other than Community and/or traditional ACP bananas from 1992.66.5% of the quota is allocated to Category A, 30% to Category B, and the remaining 3.5% to Category C.

In order not to disrupt existing commercial links, while at the same time allowing some development of marketing structures, the allocation from the quota for each category is to be made on the basis of the average quantity of bananas marketed by the operator over the three preceding years. [5]

6. The Commission was required under Article 20 to adopt detailed implementing rules covering the import system, including additional measures concerning the issue of licences.

According to the 15th recital in the preamble, the Commission must, in adopting additional criteria which operators should respect, be guided by the principle whereby 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. [6]

It follows from the 16th recital in the preamble that Member States must, on the basis of procedures and criteria adopted by the Commission, conduct a census of operators and

4 — 'Non-traditional ACP bananas' are defined in Article 15(2) as imports of bananas from ACP States which exceed a quantity defined in the Council regulation. The term 'ACP States' covers a range of countries in Africa, the Caribbean and the Pacific with which the Community has concluded the Lomé Conventions.

5 — See the 14th recital in the preamble to the Council regulation.

6 — Reference is also made to Article 19(1) of the Council regulation.

establish quantities marketed to be used as a reference for the issue of licences.

The implementing regulation

7. The Commission adopted the implementing regulation pursuant to Articles 19 and 20 of the Council regulation.

Article 3(1) of the implementing regulation provides that operators in Category A and/or Category B 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;

(b) as owners, the supply and release for free circulation of green bananas and sale with a view to their subsequent marketing in the Community; the risks of spoilage or loss of the product shall be equated with the risk taken on by the owner;

(c) as owners, the ripening of green bananas and their marketing within the Community.'

Article 4(5) requires the competent national authorities to forward to the Commission within specified time-limits the lists of Category A and B operators with the quantities marketed by each. On the basis of these reference quantities, the Commission is required under Article 6 to fix a single reduction coefficient for each category of operators. This coefficient is to be applied to each operator's reference quantity to determine the quantity from the quota to be allocated to him.

8. When processing applications for the second half of 1993, the Netherlands authorities interpreted Article 3(1)(b) of the implementing regulation as applying to operators who had purchased green bananas in third countries and subsequently shipped them to the Community, even though it was the German

purchasers who were responsible for arranging their release for free circulation. The Netherlands authorities explained their interpretation on the ground that the risk of spoilage or loss was borne in these cases by the Dutch operators.

9. In the opinion of the Commission, communicated to the Member States by way of an interpretative note of 9 September 1993, three conditions had to be satisfied before an operator could come within Article 3(1)(b): the operator had to own the bananas, arrange their release for free circulation and arrange their sale with a view to their subsequent marketing in the Community. The risk of spoilage or loss was a substitute only for the requirement that the operator should be the owner. According to the note, the requirement of title to the goods was designed to exclude agents and other middlemen acting on behalf of others. In practice, however, there were instances in which the operator who arranged the release into free circulation was not the owner but none the less bore the risk of spoilage or loss. In such a case, according to the Commission, it was this operator, and not the owner, who was engaged in the commercial activity. The derogation was designed to ensure that these operators were taken into account when the tariff quota was being allocated.

The coefficient regulation

10. After receiving the information supplied by the Member States, the Commission found that the total quantities notified exceeded the total quantity of imports registered by Eurostat. The Commission accordingly concluded that certain quantities must have been counted twice as a result of some Member States' misinterpretation of Article 3(1) of the implementing regulation.

11. On the basis of subsequent inspections and contacts with national authorities, the Commission reduced the reference quantities for the Netherlands, Italy and Belgium by 19.7%, 6.3% and 0.04% respectively.

After making this amendment, the Commission, pursuant to Article 20 of the Council regulation and having regard to the prescribed Management Committee procedure, adopted the coefficient regulation, which sets out the uniform reduction coefficient for determining the quantities of bananas to be allocated to each Category A and Category B operator for the second half of 1993.

The fifth recital in the preamble to the coefficient regulation states that '... the same quantities in respect of the same activity have been counted twice for different operators in several Member States; ... checks made with the competent authorities in several Member States have corroborated these findings and enabled a relatively precise assessment to be made of the quantities involved in this duplication, which arises from an incorrect application of the criteria for determining the activities giving right to an allocation from the tariff quota'.

According to the sixth recital in the preamble, the use of the information notified by certain Member States would lead to an excessively high single reduction coefficient to the disadvantage of Category A operators. In order to prevent a serious distortion, which would be very difficult to rectify and would also disadvantage certain operators and disrupt quota arrangements, the Commission reduced the quantities which the Member States had notified by estimated figures for amounts counted twice.

The interpretation of Article 3(1)(b) of the implementing regulation

12. The Netherlands Government submits that the Commission misinterpreted Article 3(1)(b) of the implementing regulation on the ground that it placed the emphasis on the arranging of the formal release for free circulation, and not on the assumption of the commercial risk.

13. The Commission points out that Article 3(1)(b) of the implementing regulation sets out three conditions, all of which must be satisfied. Assumption of the risk of spoilage or loss can replace the requirement of ownership, but not the other two conditions.

14. I agree with the Commission that Article 3(1)(b) of the implementing regulation imposes three conditions: first, that the operator must be the owner; second, that he must release the goods for free circulation on his own account; third, that he must sell them with a view to their subsequent marketing in the Community. The risk of spoilage or loss is equated with the risk taken on by the owner. This derogation thus relates only to one of those three conditions. It is therefore, in my opinion, clearly at variance with the substance of that provision to propose an interpretation under which this derogation replaces all three conditions and consequently also the commercial risks associated with payment of import duties and sale of

the goods with a view to their subsequent marketing within the Community. In the light of this interpretation of Article 3(1), the submission of the Netherlands Government must accordingly be rejected.

The powers of the Commission

15. The Netherlands Government contends that the Commission did not have power to amend the quantities notified by the Member States when it was fixing the reduction coefficient. The Member States compile the lists of operators and fix the reference quantities. Neither Article 155 of the Treaty nor Article 20 of the Council regulation, it claims, empowers the Commission unilaterally to alter that information when fixing the reduction coefficient.

16. The Commission refers, as the basis of its authorization, to Article 155 of the Treaty and Article 20 of the Council regulation, and submits, in support of its interpretation, that the list in Article 20 is not exhaustive and that it follows from the duty to fix a reduction coefficient that the Commission is under an obligation to ensure that the calculation of the coefficient is not incorrect by reason of the double counting of certain quantities. It was possible in the present case immediately to identify instances of double counting by comparing the information supplied by the Member States against the quantities registered by Eurostat on the basis of customs documentation. The reduction, which was made after contacts and discussions with certain Member States, including, in particular, the Netherlands, was necessary in order to ensure as wide an allocation as possible of the tariff quota in accordance with the Council regulation.

17. It is not possible, from the content of the Council regulation, to derive express authorization for the Commission's amendment. [7] It is for that reason necessary to examine what can be derived from the objectives and structure of the import system, including the context of the division of tasks between the Member States and the Commission.

18. In order to create the necessary referential framework, it is appropriate to consider

7 — Following a request for information concerning previous instances in which quantities notified by Member States had been amended, the Commission referred to the import system for beef, which was the subject of the *Emerald Meats* case, discussed below. This system has most recently been regulated by Council Regulation (EC) No 3072/94 of 12 December 1994 opening and providing for the administration of a Community tariff quota for frozen meat of bovine animals falling within CN code 0202 and products falling within CN code 0206 29 91 (first half of 1995) (OJ 1994 L 325, p. 3). Article 3 of this regulation authorizes the Commission to adopt implementing rules, in particular on the apportionment of the quantities available between operators and the conditions for the issue of import licences. The provision corresponds to those in previous similar regulations. Thus, there is also in this area no express authorization for the Commission to amend the quantities notified by the Member States.

the Court's views concerning the Commission's powers to adopt implementing measures. In the context of the common agricultural policy, the basic premiss is that the Commission's powers must be given a wide interpretation in this regard. [8] This is attributable to the fact that the Commission alone is in a position to keep track of agricultural market trends and to act quickly when necessary. [9] The limits on the Commission's powers must therefore primarily be determined on the basis of the fundamental general objectives pursued by the common organization of the market in question. [10] The Court has also held that the Commission is authorized to adopt all the measures which are necessary or appropriate for the implementation of a Council regulation, provided that they are not contrary to the Council regulation in question or to the implementing legislation adopted by the Council. [11]

19. In my opinion, the allocation of powers in the Council regulation represents a practical division of tasks rather than a desire on the part of the Community legislature to confer independent decision-making powers on the Member States. This may be inferred from the 16th recital, which requires Member States, on the basis of procedures and criteria adopted by the Commission, to conduct a census of operators and establish quantities marketed. The duty devolving on Member States in the allocation of the tariff quota is thus limited to a mechanical processing of applications on the basis of procedures and criteria adopted by the Commission in the implementing regulation.

20. In its judgment in *Emerald Meats*, [12] the Court had an opportunity to address a problem which in certain respects is analogous to that in the present case. The *Emerald Meats* case concerned the allocation of an import quota within the common organization of the market in beef. [13] As in the present case, the Commission allocated the quota on the basis of lists compiled by the Member States, which were required to indicate the operators and import quantities to be taken into account.

Over the reference period, the Emerald Meats company had acquired national quota percentages from processing undertakings and had effected imports. The Irish authorities' interpretation of the implementing regulation, however, had the result that these import quantities were allocated to the processing undertakings and not to Emerald

8 — See, for instance, the judgment in Case 22/88 *Vreugdenhil and Another* v *Minister van Landbouw en Visserij* [1989] ECR 2049, paragraph 16.

9 — See the judgment in *Vreugdenhil*, cited in the preceding footnote, and the judgments in Case 61/86 *United Kingdom* v *Commission* [1988] ECR 431, paragraph 7, and in Joined Cases 279/84, 280/84, 285/84 and 286/84 *Rau and Others* v *Commission* [1987] ECR 1069, paragraph 14.

10 — See the preceding footnote.

11 — Judgment in Case 121/83 *Zuckerfabrik Franken* v *Hauptzollamt Würzburg* [1984] ECR 2039, paragraph 13.

12 — Joined Cases C-106/90, C-317/90 and C-129/91 *Emerald Meats* v *Commission* [1993] ECR I-209.

13 — The basic rules on the allocation of the import quota in question were laid down in Council Regulation (EEC) No 3889/89 of 11 December 1989 (OJ 1989 L 378, p. 16).

Meats. The company brought proceedings before the Irish High Court and also before the Court of Justice. The following year, the company also applied for licences in the United Kingdom.

With a view to preventing any double counting of the same amounts on the basis of Emerald Meats' application in the United Kingdom and the application of the processing undertakings in Ireland, the Commission provided in its implementing regulation [14] that import licences could, in cases where two or more importers had submitted an application on the basis of the same import quantity, be issued only against lodgment of a guarantee. The Commission also required the Irish authorities to reassess the allocation for 1991. [15] Finally, it is evident from the Report for the Hearing that, in calculating the reduction coefficient, the Commission had included only once the double quantities notified by Emerald Meats and the processing undertakings. [16] The coefficient, as calculated, thus did not include any quantities which had been counted twice.

Emerald Meats argued before the Court, *inter alia*, that the Commission was under a duty to set aside the Irish authorities' allocation of import quantities to the processing undertakings.

The Court ruled in paragraph 40 of its judgment that 'nor do the requirements of Community management entail that the Commission ought necessarily to be able to correct wrong decisions taken in specific cases by the national authorities in connection with management of the quotas, since compliance with the common rules and their uniform application throughout the Member States of the Community can be secured either by proceedings under Article 169 of the Treaty for failure to fulfil obligations or in the course of judicial proceedings brought before national courts, which have available the procedure provided for in Article 177 of the Treaty'.

The Court further ruled in paragraph 50 that the Commission also could not 'substitute itself for the Member States' authorities and correct the lists which they had notified to it or admit the same reference quantities as they stood twice, for this would have unlawfully reduced the quantities available for allocation to other operators in the Community on the basis of the quantities which they had proved they had imported during the reference years'. In those circumstances, the

14 — Commission Regulation (EEC) No 519/91 of 1 March 1991 (OJ 1991 L 56, p. 12).

15 — See Commission Regulation (EEC) No 3021/91 of 16 October 1991 (OJ 1991 L 287, p. 11).

16 — See the Report for the Hearing in respect of Case C-129/91, [1993] ECR I-241, point 9.

Court held that the Commission had been reasonably entitled to require lodgment of a guarantee.

21. The facts in the *Emerald Meats* case differ in some respects from those of the present case. In *Emerald Meats*, the Commission had certainly calculated an allocation coefficient without omitting the quantities counted twice. In the exercise of its powers to set a key for allocation of the quota, the Commission had ensured that quantities counted twice would not be omitted. The problem in *Emerald Meats*, however, was not, as in the present case, that of the Commission's powers in the calculation of the general coefficient itself, but rather the actual allocation of a properly calculated quota amount among individual operators.

22. In my opinion, therefore, the judgment in *Emerald Meats* does not support the contention that the Commission, when fixing the general reduction coefficient, is precluded from amending the calculations of Member States unless the Council has expressly conferred such a power upon it.

23. An import system such as that provided for in the Council regulation is and must be based on the premiss that the allocation takes place in strict compliance with the principle of equal treatment. [17] If a Member State's general interpretation of the allocation criteria laid down by the Commission results in the same imported quantities being counted twice, this will distort the basis of the import system in a manner detrimental to operators and the common organization of the market as a whole. As the Court held in its judgment in *Emerald Meats*, such double counting reduces the quantity available for operators who meet the requirements imposed by Community law for participation in the import quota. [18]

24. It thus follows, in my opinion, from grounds of consideration for operators and the proper functioning of the market organization that the Commission, in its capacity as the authority which supervises the overall administration of the system, [19] must be entitled to act against such double counting when fixing the reduction coefficient, which, for practical and administrative reasons, must be centrally fixed.

25. It would be patently unsatisfactory if the Commission were to calculate a reduction coefficient based on quantities which had

17 — Reference is made to the 14th recital in the preamble to Regulation No 404/93.

18 — See paragraph 50 of the judgment in *Emerald Meats*, cited above in footnote 12, in which the Court, as stated above, used the term 'unlawfully' with regard to such a reduction.

19 — See the judgments cited in footnote 9.

been counted twice and were subsequently to bring Treaty-infringement proceedings against the Member State in question and/or advise operators to bring proceedings before national courts against the Member State or Member States responsible for the double counting. In such a case, the Commission would, on the one hand, be obliged to adopt a legal measure resting, in its view, on an incorrect basis, and, on the other, cause all the other operators to incur a loss which could only with difficulty be rectified.

26. A precondition of the actual allocation of the tariff quota is that the Commission should determine a reduction coefficient. For reasons of time, the Commission is therefore obliged to calculate and notify this coefficient to the Member States shortly after receiving the information from them. If the Commission were not recognized as being able to correct the calculations submitted by Member States in respect of double quantities, but on the contrary required to institute Article 169 proceedings, it would, in order to prevent the coefficient from being inaccurate, have to postpone fixing of the coefficient until the Court had given its decision in the case or issued an order for interim measures. Such a solution would, in my opinion, adversely affect both operators and the proper functioning of the market organization, since it would hardly be practically possible, within the available time, for the Commission to institute Article 169 proceedings or for the Court to issue an order for interim measures.

27. Nor would a system with lodgment of guarantees be a viable alternative to recognition that the Commission has the power to correct instances of double counting. Such a system, in my view, would be relevant only where, as in *Emerald Meats*, the Commission has already fixed a coefficient without discounting quantities which have been counted twice. In such a situation, a system requiring lodgment of a guarantee could ensure that a quota portion would be allocated only once to the applicant who subsequently adduces proof of entitlement.

28. It does not thus appear possible to find any practical alternatives to recognition that the Commission has the power, when fixing the reduction coefficient, to amend quantities which have been counted twice. In the present case, it also appears to be particularly clear that the Commission was entitled to do so. The Netherlands authorities' interpretation of the Council regulation must indeed

be regarded as patently incorrect. Moreover, it was practically possible for the Commission to carry out the necessary corrections within a reasonable period.

Infringement of the principle of equal treatment

29. The Government of the Netherlands claims that the Commission infringed the principle of equal treatment by failing to ensure that a stop was put to every form of double counting. It points out in this regard that even after the correction there is still a discrepancy between the figures notified and those registered by Eurostat.

30. The Commission has confirmed that there is still some degree of double counting. However, the Member States were able, on the basis of the customs documentation which they had submitted, to justify the quantities which they had notified, and it was for that reason not technically possible to identify the source of the double counting. Furthermore, the authorities in the Netherlands have failed to prove that the Commission favoured certain operators either intentionally or through negligence.

31. The Government of the Netherlands has not demonstrated that the Commission's conduct led to different treatment of operators who, to the Commission's knowledge, submitted applications on the same basis as the Dutch operators. The argument here put forward would have the result that the Commission would be precluded, to the detriment of operators, from rectifying identified instances of double counting simply because not all forms of double counting had been covered. Acceptance of such a view would in fact give rise to a legal position in which an authority would be precluded from acting against breaches in so far as the time available and other resources did not make it possible to expose every form of misapplication of the rules or every instance of abuse.

This plea must be rejected.

Failure to comply with the requirement to give reasons

32. The Government of the Netherlands claims that the coefficient regulation is inadequately reasoned since it does not make clear on what basis the reduction was made. This made it difficult for the Netherlands

authorities subsequently to allocate the import licences.

33. The Commission argues that a detailed statement of reasons in the regulation is unnecessary since the Member States were involved in the phase prior to its drafting. In the present case, the Commission had detailed discussions with the Netherlands authorities regarding the interpretation of Article 3(1) of the implementing regulation.

34. According to the Court's case-law, the statement of reasons required by Article 190 of the Treaty must show clearly and unequivocally the reasoning on which the measure in question is based, so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review. [20] It is not necessary, however, for details of all relevant factual and legal aspects to be given, since the matter must be assessed with regard to the context of the legal measure and the reasons weighed against practical realities and the time and technical facilities available for making the decision. [21]

35. In my opinion, the coefficient regulation satisfies those conditions. The fifth and sixth recitals in its preamble describe the established incidence of double counting and its causes, as well as the need to correct it prior to calculation of the reduction coefficient. So far as concerns in particular the practical problems of application alluded to by the Government of the Netherlands, it must be pointed out that the Commission's interpretation of Article 3(1)(b) of the implementing regulation was the subject of discussion with the Netherlands authorities. This interpretation was also set out in the Commission's interpretative note of 9 September 1993. The Netherlands authorities could not therefore have been in any reasonable doubt as to the Commission's interpretation or the nature of the problem associated with application of the rules, as referred to in the fifth recital in the preamble to the coefficient regulation.

Costs of the proceedings

36. The Commission has applied for costs to be awarded against the Kingdom of the Netherlands. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if applied for in the successful party's pleadings.

20 — See, for example, the judgments in Case C-353/92 *Greece* v *Commission* [1994] ECR I-3411, paragraph 19, and in Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15.

21 — See, for example, the judgments in *Delacre*, cited in the previous footnote, paragraph 16, in Case 125/77 *Koninklijke Scholten-Honig* v *Hoofdproduktschap voor Akkerbouwprodukten* [1978] ECR 1991, paragraphs 18 to 22, in Case 92/77 *An Bord Bainne* v *Minister for Agriculture* [1978] ECR 497, paragraphs 36 and 37, and in Case 16/65 *Schwarze* v *Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 877.

Conclusion

37. For the above reasons, I propose that the Court should:

(1) dismiss the application;

(2) order the Kingdom of the Netherlands to pay the costs.