reasonable prices to consumers. To continue permanently and beyond the transitional period a simple quota system cannot respond to these conditions.

Lecourt Ó Dálaigh Mackenzie Stuart Donner Monaco
Mertens de Wilmars Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 10 December 1974.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 12 NOVEMBER 1974

My Lords,

For many years, and certainly since before the EEC Treaty was signed, the French market has been supplied with bananas mainly from Guadeloupe, Martinique and the Ivory Coast. Guadeloupe and Martinique are now, as Your Lordships know, overseas départements of France, whilst the Ivory Coast is one of a number of former French dependencies, listed in Article 86 of an order dated 30 January 1967 of the French Directeur Général des douanes et droits indirects, that enjoy a privileged position as regards trade with France. The suppliers of bananas from these countries are protected in the French market by a system of quotas and also by customs duties.

The system of quotas, as I understand it, amounts to this. Bananas from the French overseas départements and from what I may perhaps call, for convenience, the 'Article 86 countries' have free access to the French market. Under a commercial agreement between France and Spain there is also allowed onto that market an annual quota of bananas from the Canaries. As and when it appears to the competent French Ministry, the Ministère de l'économie et des finances, that the supply from those sources needs to be supplemented, that Ministry declares open a quota for imports from other countries, excluding Rhodesia.

Your Lordships observe that that system does not differentiate in any way — as regards countries other than overseas départements of France, Article 86 countries and Spain — between those that are and those that are not signatories of the Yaoundé Conventions or 'countries and territories' to which

Article 131 of the Treaty applies. Therein lies the cause of this litigation.

Mr Charmasson is a French importer of bananas, mostly from Zaïre, Somaliland and Surinam. Of those countries the first two are signatories of the Yaoundé Conventions and the last is a country to which Article 131 applies. Mr Charmasson challenges before the French Conseil d'État the validity of a declaration published on 28 October 1969 by the Ministère de l'économie et des finances opening a quota for the import of bananas from foreign countries other than Article 86 countries, Spain and Rhodesia. His complaint, in a nutshell, is that that declaration contains no special provision in favour of countries associated with the EEC.

By Article 5 of the first Yaoundé Convention it was agreed that, with regard to the abolition of quantitative restrictions, the Member States of the EEC should apply to imports of goods originating in the Associated States the relevant provisions of the EEC Treaty which they applied in their relations with each other. By Article 4 of a Decision of the Council of Ministers dated 25 February 1964 (64/349/EEC) the same privilege was accorded to goods originating in countries and territories to which Article 131 applies. Both that Convention and that Decision were, by virtue of their terms, to expire on 31 May 1969, but they were continued in force after that date by decisions, each of them dated 28 May 1969, of the Association Council and of the Council of Ministers respectively.

The provisions of the EEC Treaty for the elimination of quantitative restrictions between Member States are, of course, contained in Articles 30 to 37 of that Treaty. Article 32 provided in particular that quotas existing at the date of the entry into force of the Treaty should be abolished by the end of the transitional period at the latest and that, during that period, they should be progressively abolished in accordance with the provisions of the following Articles. Article 33 provided for the progressive abolition of import quotas by (1) the conversion, within one year after the entry into force of the Treaty, of bilateral quotas open between Member States into global quotas open without discrimination to all Member States and (2) a gradual increase over the years in the global quotas so established. Article 33 (3) provided that, at the end of the tenth year, each quota should be equal to not less than 20 % of the national production of the Member State imposing it. It is of course the position between the end of the tenth year and the end of the transitional period that is (if any) relevant in this case.

The contention of Mr Charmasson is that, by virtue of Article 5 of the first Yaoundé Convention and of Article 4 of the Decision of 25 February 1964, France was bound to apply the provisions of Article 33 of the EEC Treaty in favour of the Associated States and of the countries to which Article 131 applies.

The contention of the French Government is that the combined effect of Articles 38 (2) and 45 of the Treaty is to render Article 33 inapplicable to a Member State in relation to any agricultural product for which there existed in that Member State, when the Treaty came into force, a national market organization; and that there did exist in France, when the Treaty came into force, a national organization of the banana market.

The Commission, I may say at once, supports the contention of the French Government. Indeed the Commission, in 1970, rejected a complaint made to it by Mr Charmasson, before he brought his proceedings in the Conseil d'État, in which he asked the Commission to act, if necessary under Article 169, so as to bring to an end what he alleged to be a failure by France to fulfil its Treaty obligations.

Such are the circumstances in which the Conseil d'État has referred to this Court for preliminary ruling two questions:

1. whether the existence in a Member State of a national market organization within the meaning of Articles 43, 45 and 46 of the EEC Treaty is such as to preclude the application of Article 33 of the Treaty in the case of the product concerned and
2. if yes, what are the distinguishing characteristics of such a national market organization.

The French Government and the Commission naturally submit that the first question should be answered 'Yes'.

No written observations were put in by Mr Charmasson. It was, however, argued on his behalf at the hearing that Articles 33 and 45 should be regarded as alternative, in the sense that a Member State had, under the Treaty, the option of developing trade with other Member States in a particular product by the method prescribed by Article 45 but that, if it failed to avail itself of that method, Article 33 applied. In fact — and this is common ground — the method prescribed by Article 45 has been very little used: only one long-term agreement or contract of the kind that it envisages has ever been concluded, namely an agreement between France and Germany relating to cereals. Accordingly, so runs the argument, Article 33 applies in a case such as the present.

My Lords, I would reject this argument. Articles 33 and 45 are both in mandatory terms, and neither the wording nor the structure of the Treaty suggests that a Member State can choose between them. In truth the key provision, as regards the relationship between them, is Article 38 (2) which says:

'Save as otherwise provided in Articles 39 to 46, the rules laid down for the establishment of the common market' — which of course include Articles 30 to 37 — 'shall apply to agricultural products.'

The English text of this provision, in using the expression 'Save as otherwise provided . . .', accords with the Danish, Dutch and German texts. The French and Italian texts ('Sauf dispositions contraires . . .', 'Salvo contrarie disposizioni . . .') might appear at first sight to require something stronger to exclude the application of the rules referred to. But it seems to me that, in the correct analysis, all the texts require the same thing, i.e. something in Articles 39 to 46 that is inconsistent with the application of those rules. Nor do I think that, in saying this, I am departing from what the Court has held in previous cases where it has had to consider the interpretation of Article 38 (2).

So, in my opinion, the real question is whether the provisions of Articles 39 to 46 dealing with the situation in which, at the time of the entry into force of the Treaty, a Member State had a national organization of the market for a particular agricultural product are inconsistent with the application, in that situation, of Article 33. My Lords, I have come to the clear conclusion that they are, but I do not rest that conclusion on the terms of Article 45 alone.

One starts with the fact that Article 38 (4) provides that —

'The operation and development of the common market for agricultural products must be accompanied by the establishment of a common agricultural policy among the Member States.'

Then come Article 39, which defines the objectives of the common agricultural policy, and Article 40 (2), which says that, in order to attain those objectives, there shall be established a common organization of agricultural markets, which may take one of the following forms, depending on the product concerned:

'(a) common rules on competition;

(b) compulsory coordination of the various national market organizations;

(c) a European market organization.'

Article 43 lays down the machinery 'for working out and implementing the common agricultural policy, including the replacement of the national organizations by one of the forms of common organization provided for in Article 40 (2)'.

Article 43 (3) provides in particular that —

'The Council may, acting by a qualified majority . . . replace the national market organizations by the common organization provided for in article 40 (2) if:

(a) the common organization offers Member States which are opposed to this measure and which have an organization of their own for the production in question equivalent safeguards for the employment and standard of living of the producers concerned, account being taken of the adjustments that will be possible and the specialization that will be needed with the passage of time;

(b) such an organization ensures conditions for trade within the Community similar to those existing in a national market.'

The exact scope of that provision has been a matter of debate between learned writers. But, whatever its scope, there can be not doubt that it confers on a Member State the right, in certain events, to veto the replacement of its national market organization by a common organization. It seems to me that it would be quite inconsistent with the existence of this right, that the Member State should at the same time be bound by Articles 32 and 33 to dismantle its national organization in so far as it rested on a system of quotas.

My Lords, I need not read the whole of Article 45, on which the argument in the case has centred. The principle of it is contained in paragraph (1), which is in these terms:

'Until national market organizations have been replaced by one of the forms of common organization referred to in Article 40 (2), trade in products in respect of which certain Member States:

— have arrangements designed to guarantee national producers a market for their products; and

— are in need of imports,

shall be developed by the conclusion of long-term agreements or contracts between importing and exporting Member States.

These agreements or contracts shall be directed towards the progressive abolition of any discrimination in the application of these arrangements to the various producers within the Community.

Such agreements or contracts shall be concluded during the first stage; account shall be taken of the principle of reciprocity.

It seems to me that that provision is directed to the specific case of a Member State which (a) has a national market organization for a particular product for which no common market organization has yet been established, but (b) needs to supplement its national output of that product with imports. The Article provides that, in that situation, the Member State in question shall develop its trade in that product with other Member States by the conclusion of long-term agreements or contracts designed progressively to abolish, on a reciprocal basis, any discrimination between its own national producers and other producers within the Community. This seems to me inconsistent with the concurrent application to the same Member State, in relation to the same product, of the almost automatic provisions of Articles 32 and 33. In saying that these provisions are almost automatic, I do not overlook what the Court said about them in Case 13/68, the *Salgoil* case (Recueil 1968 at pp. 673-674). They do of course leave to Member States an element of discretion.

May I say parenthetically that I am left wondering why the French Government

does not rely on that authority as affording a short answer to Mr Charmasson's contentions, because it seems to me to have been there held by the Court that Articles 32 and 33, owing to the element of discretion that they left to Member States, could not have direct effect in their legal systems so as to confer rights on private persons. This point, however, has not been taken and no question about it is posed to the Court by the Conseil d'État. I therefore say no more about it.

Returning to Article 45 I would add that, in my opinion, it is also implicit in that Article, when read in the light of the preceding Articles that I have referred to, that a Member State which has a national market organization for a product for which no common market organization has yet been established but which is self-sufficient in that product need do nothing until the replacement of national market organizations by a common organization.

I find it comforting that the conclusion I have reached accords with the view consistently adopted by the Commission and by the Governments of Member States; with the view expressed by at least two learned writers (see Ganshof van der Meersch's Droit des Communautés européennes, paras. 1778 et seq., and Mégret's Droit de la Communauté économique européenne, Vol, 2. pp. 57 et seq.); and with the view manifestly formed by the authors of the Act of Accession: see Article 60 (2) of that Act, which indeed would make nonsense on any other view.

I turn, therefore, to the second question posed by the Conseil d'État. This is at first sight a daunting one. We are all familiar with the kind of problem that arises for the Courts when the legislature has used, or even coined, an expression, obviously meaning it as a term of art, but has shrunk from defining it, preferring to leave its definition to them. In such a situation Judges normally tread warily and, rather than rush into territory that the legislature has itself eschewed, prefer to work out the definition, case by case, in the light of the facts of each. Here however the Court is categorically asked to say in general terms what are the distinguishing characteristics of a national market organization and, having regard to the provisions of Article 177 of the Treaty, the question cannot be evaded.

But the submissions made by Counsel for Mr Charmasson at the hearing seemed to me to shed a great deal of light on what lies behind the question. He drew attention to the findings of the Conseil d'État recorded in its Order for Reference that 'when the Treaty of Rome came into force, imports of bananas onto the French market were subject to a system of quotas and to a customs duty designed to protect producers in the overseas départements and territories' and 'that a banana trade committee of the French Union, composed of producers, transporters, ripeners and retailers, and attended by representatives of the Government, was set up by a joint ministerial order of 30 January 1951 and thereby given a fact-finding role and the task of concerting the interests of all concerned'. Counsel stated that the case for Mr Charmasson was that that was in fact all that existed in the way of an organization of the banana market in France at the time of the entry into force of the Treaty and that it was not enough to constitute a national market organization within the meaning of the Treaty.

Helpfully, Counsel summarized his submissions in five points.

The first was that the existence of a national market organization could not preclude the application of Article 33 unless that organization was in operation on the date of the entry into force of the Treaty. That, my Lords, seems to me quite obvious, as it did to Mr Advocate-General Roemer in Cases 90 and 91/63 *Commission* v *Luxembourg and Belgium* (Recueil 1964 at pp. 1252-1253). Nor do I think that

anyone in the present case disputes it. Indeed the Commission emphasizes it. But I think that, in so far as the point needs emphasis, it must form part of the answer to the first question posed by the Counseil d'État, rather than of the answer to the second.

Secondly, Counsel for Mr Charmasson submitted that the concept of a national market organization connoted resort to a complex of measures. This too seems to me clearly right. It accords with what the Court itself said in *Commission v Luxembourg and Belgium* (Recueil 1964 at p. 1236). Mere protection of home producers by means of quotas or of custom duties or of both cannot constitute a national market organization. There must be something more. As the Court pointed out in that case, albeit obiter, there has to be in a national market organization an element of control and regulation of the market.

Thirdly Counsel submitted that the measures in question must be taken by the State; that measures taken by the producers or traders concerned themselves, even with the acquiescence of the State, could not constitute a national market organization. My Lords, I was at first attracted by this submission, which was supported by the Commission in its observations, but I have come to the conclusion that it should be rejected. Article 42 of the Treaty provides, among other things:

'The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 43 (2) and (3) . . .'

Paragraphs (2) and (3) of Article 43 are, the former largely and the latter (which I have already read) entirely, about the replacement of national market organizations by common organizations. One thus deduces that the authors of the Treaty envisaged that the national market organizations in question might be of such a kind that, but for Article 42, 'the provisions of the Chapter relating to rules on competition' might apply to them. These provisions include in particular those of Article 85, which relate exclusively to agreements between undertakings. From this I conclude that the authors of the Treaty envisaged that a national market organization might have been set up by an agreement between undertakings and were concerned that Article 85 should not apply to that organization except to the extent determined by the Council within the framework of the provisions relating to the working out and implementing of the common agricultural policy and, in particular, to the replacement of national market organizations by common organizations. Perhaps the decisive consideration is this. Suppose that, in the case of a particular agricultural product, it were found that, in some Member States, the national markets were organized by means of State measures, whilst in others they were organized by means of agreements between, say, producers' cooperatives and trade associations. If the phrase 'national market organization' in the Treaty were to be interpreted as excluding any organization of the latter kind, the former group of Member States would, but the latter would not, be entitled under Article 43 (3) to require that a common organization to be instituted under that Article should offer to their producers equivalent safeguards for their employment and standard of living. I cannot think that the Treaty should be interpreted as envisaging such discrimination between Member States.

Fourthly, Counsel for Mr Charmasson submitted that it was an essential characteristic of a national market organization that it should have regard to the interests of consumers. He based his argument in this respect on Article 39 (1) (e) of the Treaty, which provides that one of the objectives of the common agricultural policy, shall be 'to ensure that supplies reach consumers at reasonable prices'. One of the objectives

of the common agricultural policy, this no doubt is, and it must accordingly be one of the objectives of any common market organization. But it does not, in my opinion, follow that it must have been, in the contemplation of the authors of the Treaty, one of the objectives of any and every national market organization. The provisions of the Treaty which I have read contain indications of the sort of thing that the authors of the Treaty had in mind when they referred to a common market organization — and there are others, for instance Article 40 (3) which provides, *inter alia:*

'The common organization established in accordance with paragraph 2 may include all measures required to attain the objectives set out in Article 39, in particular regulation of prices, aids for the production and marketing of the various products, storage and carryover arrangements and common machinery for stabilizing imports or exports.'

But there is nothing in the Treaty to suggest that its authors envisaged that a national market organization should not be recognized as such unless it had the characteristics required of a common organization. Articles 39 (2) (b) and 43 (3) (a) expressly refer to the 'adjustments' entailed in the transition from national market organizations to a common organization. These provisions, among others, seem to me to show that a common market organization need not necessarily mirror the national organizations that it replaces.

This is, perhaps, a convenient point at which to refer to the observations of the French Government on the second question posed by the Conseil d'État. The gist of these was that the concept of a market organization, whether national or common, was essentially the same, so that the indicia found in the Treaty as to what should be the characteristics of a common market organization, and in particular the objectives set out in Article 39, were equally relevant in ascertaining what the authors of the Treaty meant by a national market organization. My Lords, no doubt those indicia are of value in that process, but, for the reasons I have stated, I do not think they can be regarded as determinant.

I should, I think, add that the French Government set out, in its observations, a number of facts about the measures taken over the years to regulate the French banana market and about the effects of those measures. Those facts are largely contested by Mr Charmasson, or said on his behalf to be irrelevant because pertaining to times other than that of the entry into force of the Treaty. My Lords, I agree with Counsel for Mr Charmasson that it is not for this Court to resolve the issues thus raised.

The fifth and last point made on behalf of Mr Charmasson was that a national market organization must include safeguards for the employment and standard of living of the producers concerned. This, in my opinion, is manifestly right: it is implicit in Article 43 (3), as was pointed out by Mr Advocate-General Roemer in *Commission v Luxembourg and Belgium* (Recueil 1964, pp. 1250-51). It is also a point that was underlined by the Commission in its observations in the present case.

My Lords, I think that it would be supererogatory for me to rehearse the very thorough and helpful observations of the Commission on this part of the case. I have already in effect indicated, in what I have said, where I agree with them, and where I do not. In truth, the only important question on which I disagree with them is the question whether the measures constituting a national market organization must be State measures or may be measures instituted by the producers and traders concerned themselves.

In the result I am of the opinion that the questions referred to the Court by the Conseil d'État should be answered as follows:

1. the existence in a Member State, at the time of the entry into force of the EEC Treaty, of a national organization of the market for a particular agricultural product precluded, in the case of that product, the application, in that Member State, of Article 33 of the Treaty;

2. the distinguishing characteristics of such a national market organization were that it should comprise a complex of measures, whether instituted by the State or by the producers and traders concerned themselves, going beyond the mere imposition of quotas and of customs duties or of both, designed to control and regulate the market so as, in particular, to provide safeguards for the employment and standard of living of those producers.