OPINION OF ADVOCATE GENERAL ELMER

delivered on 5 July 1995 *

Introduction

1. In these cases the Verwaltungsgericht Frankfurt am Main has referred to the Court for a preliminary ruling a series of questions in the course of proceedings concerning the allocation of tariff quotas under Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas (hereinafter 'the Regulation'). [1] In the first place the court of reference asks the Court of Justice to clarify its case-law concerning the possibility of national courts' ordering interim measures in the course of proceedings involving Community law. Secondly the court of reference asks the Court of Justice to decide whether the Regulation, in particular Title IV and Article 21(2) thereof, is void.

2. In its judgment in Case C-280/93 *Germany* v *Council*, delivered on 5 October 1994, [2] the Court of Justice dismissed an application for a declaration that Title IV and Article 21(2) of the Regulation were void. The application of the Federal Republic of Germany in that case had been lodged at the Court Registry on 14 May 1993.

3. On the same day the applicants, Atlanta Fruchthandelsgesellschaft mbH and 17 other companies in the Atlanta group (hereinafter 'Atlanta') also made an application to the Court for a declaration *inter alia* that the Regulation was void. By an order in Case C-286/93, made on 21 June 1994, [3] the action brought by Atlanta was dismissed as inadmissible in so far as that head of claim was concerned on the ground that Atlanta had no capacity to bring proceedings under Article 173 of the Treaty. An application for the adoption of interim measures lodged separately by Atlanta against the Regulation was dismissed on the same grounds by an order in Case C-286/93 R, made on 6 July 1993. [4]

4. In Case C-280/93, previously cited, the Federal Republic of Germany had also made an application for the adoption of interim measures under Articles 185 and 186 of the Treaty requesting the Court to allow it to authorize the duty-free importation into Germany of the same quantity of bananas as in 1992. By an order of 29 June 1993 the Court took a decision on that request. The question of the validity of the Regulation as regards third country bananas raised, according to the order, complex legal questions. The request for interim measures was not *prima facie* devoid of justification and could not therefore be dismissed on that ground.

* Original language: Danish.

1 — OJ 1993 L 47, p. 1.

2 — [1994] ECR I-4973.

3 — *Atlanta* v *Council and Commission*, not published in the European Court Reports.

4 — *Atlanta* v *Council and Commission*, not published in the European Court Reports.

However, the Court found that it was not proved that it would be impossible for the German importers to obtain, in place of the third country bananas, which were now subject to a tariff quota, corresponding supplies of Community and ACP bananas. [5] Moreover the Regulation contains rules requiring the institutions to adapt the tariff quota where that becomes necessary as a result of exceptional circumstances. It was therefore not urgently necessary to order interim measures and the Court therefore dismissed the application.

5. In connection with the entry into force on 1 July 1993 of the common market in bananas, Atlanta applied for registration on the list of category A operators in accordance with Article 19(1)(a) of the Regulation. [6] The German competent authorities allocated to Atlanta a provisional tariff quota for the period 1 July to 30 September 1993, which was, however, substantially less than the quantity of bananas which Atlanta had previously been able to market. On those grounds Atlanta brought an action on 20 October 1993 before the Verwaltungsgericht Frankfurt am Main against the Federal Republic of Germany represented by the Bundesamt für Ernährung und Forstwirtschaft. Atlanta claimed principally that the decisions allocating the quota should be declared void in so far as they restricted Atlanta's opportunities for importing third country bananas. In the alternative Atlanta claimed that it should be allocated an unlimited or at any rate a larger quantity under the quota. Atlanta claims that the Regulation is void.

6. During the proceedings Atlanta requested the Verwaltungsgericht Frankfurt am Main on 8 November 1993 to order interim measures, principally in the form of a provisional suspension of the import restrictions resulting for Atlanta from the organization of the market, and in the alternative in the form of the issue of additional import licences.

7. On 1 December 1993 the Verwaltungsgericht Frankfurt am Main ordered the Bundesamt für Ernährung und Forstwirtschaft as an interim measure to issue to Atlanta additional import licences for a total of some 12 579 tonnes of bananas within the tariff quota for November and December 1993. At the same time the Verwaltungsgericht Frankfurt am Main referred to the Court of Justice for a preliminary ruling the questions previously mentioned, partly concerning national courts' jurisdiction to order interim measures and partly concerning the substance of the action, namely the claim that the Regulation was void. The orders for reference

5 — ACP bananas are defined as bananas originating in the 69 countries in Africa, the West Indies and the Pacific with which the Community has concluded the Lomé Conventions.

6 — As regards the implementing provisions, see Article 2(1) of Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6), as last amended by Commission Regulation (EEC) No 2444/94 (OJ 1994 L 261, p. 3) and 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 (OJ 1993 L 142, p. 16).

explain in detail why the Verwaltungsgericht Frankfurt am Main takes the view that there are justified doubts as to the validity of the Regulation. In addition the court of reference explains its own views on the question of the national courts' jurisdiction to order interim measures and it is also stated *inter alia* in that respect that such jurisdiction of the national courts corresponds to the jurisdiction of the Court of Justice under Article 186 of the Treaty in cases which come before it.

8. On the other hand it does not appear from the orders for reference to what extent the Verwaltungsgericht Frankfurt am Main was aware of, or in dealing with the question of interim measures gave consideration to, the fact that the Court of Justice in the said order in Case C-280/93 R had already, on 29 June 1993, dismissed the application of the Federal Republic of Germany for similar interim measures in the case then pending between Germany and the Council, in which the issue was, as in the case before the Verwaltungsgericht Frankfurt am Main, the validity of the Regulation. In addition the Court, as I have already stated, gave judgment on 5 October 1994 in favour of the Council as regards the claim of the Federal Republic of Germany that Title IV and Article 21(2) of the Regulation should be declared void.

9. In response to an enquiry from the Court the Verwaltungsgericht Frankfurt am Main stated on 5 December 1994 that, after discussing with the parties the need for a reply to the questions referred to the Court, it maintained its request for a preliminary ruling notwithstanding the judgment in Case C-280/93, delivered on 5 October 1994.

The questions referred to the Court

10. The questions referred to the Court by the Verwaltungsgericht Frankfurt am Main are as follows: [7]

'1. May a national court which entertains serious doubts as to the validity of a Community regulation, and has therefore referred the question of the validity of the Community regulation to the Court of Justice under the preliminary-ruling procedure, by making an interim order provisionally settle or regulate the disputed legal positions or relationships, with reference to an administrative act of a national authority based on the Community regulation in respect of which the reference has been made, for the period until the Court of Justice gives its ruling?

7 — The first two questions were raised in Case C-465/93 and the third and fourth (with different numbering) in Case C-466/93.

2. If Question 1 is answered in the affirmative:

Under what conditions is a national court empowered in such cases to make an interim order? Must a distinction be drawn, with respect to the conditions for making an interim order, between an interim order which is intended to preserve an already existing legal position and one which is intended to create a new legal position?

3. Are the provisions of Title IV, in particular Articles 17, 18, 19, 20 (second paragraph) and 21(2) of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas (OJ 1993 L 47, p. 1) invalid simply because the adoption of the Regulation involved breaches of essential procedural requirements, in that

(a) the Council, in breach of the third subparagraph of Article 43(2) and Article 149(1) of the EEC Treaty, adopted a version of Regulation (EEC) No 404/93 which was significantly different from the proposal from the Commission (OJ 1992 C 232, p. 3), or referred to an amended version of the Commission's proposal which had been adopted in a manner which did not comply with the Commission's rules of procedure;

(b) the Council, in breach of the third subparagraph of Article 43(2) of the EEC Treaty, adopted a version of Regulation (EEC) No 404/93 which was significantly different from the original proposal from the Commission, without again consulting the European Parliament;

(c) the Council, in breach of Article 190 of the EEC Treaty, did not state any appropriate legal basis for the levying of import duty on fresh bananas, did not state any reasons for levying the import duty and subdividing the tariff quota, and in addition did not refer to the relevant proposal from the Commission?

4. If the answer to Question 1 is that Regulation (EEC) No 404/93 was adopted without any procedural error

and accordingly is valid, the court seeks answers to the following questions:

(a) Could the tariff quota specified in the Protocol on the tariff quota for imports of bananas annexed to the Implementing Convention on the Association of the Overseas Countries and Territories with the Community provided for in Article 136 of the EEC Treaty be discontinued only under the conditions set out in Article 236 of the EEC Treaty, and is Article 21(2) of Regulation (EEC) No 404/93 consequently invalid?

(b) Are Articles 42, 43 and 39 of the EEC Treaty a sufficient legal basis for the provisions of Title IV of Council Regulation (EEC) No 404/93?

(c) Are the provisions of Title IV, in particular Articles 17 to 19 and the second paragraph of Article 20, of Council Regulation (EEC) No 404/93 invalid because

(aa) they infringe the principles of freedom of competition (Articles 38(2), 3(f) and 85 et seq. of the EEC Treaty),

(bb) they infringe the prohibition of discrimination (second subparagraph of Article 40(3) of the EEC Treaty),

(cc) they infringe the applicants' fundamental property rights,

(dd) they infringe the principle of protection of legitimate expectation recognized in Community law and

(ee) they infringe the principle of proportionality recognized in Community law?'

General observations on interim measures

11. Actions brought before the Court have, under Article 185 of the Treaty, no suspensory effect. The Court may, however, if it

considers that circumstances so require, order that the application of the contested act be suspended. Moreover, in any cases before it the Court may, under Article 186, prescribe any necessary interim measures.

The purpose of the application of interim measures under Articles 185 and 186 is to guarantee the legal interests of a party provisionally, that is to say until the decision in the main action and in so far as circumstances so require. Such measures must serve to maintain the *status quo* and ensure that the final decision is fully effective. The interim measures may not however go beyond the scope of the case in question. Suspension under Article 185 may be ordered only in relation to the contested measure. It is not possible for (other) interim measures under Article 186 to place any party provisionally in a legal position more favourable than that which he could obtain on the basis of a final judgment in his favour. [8]

As an example of the application of Article 185 one may refer to the order in Case T-21/93 R *Peixoto*, [9] in which the Court of First Instance suspended the application of a disciplinary measure against an official until it had been decided in the main proceedings whether the disciplinary measure was justified.

As examples of the application of Article 186 I may mention the order in Case 246/89 R *Commission* v *United Kingdom* [10] in which the Court required the United Kingdom to suspend the application of certain nationality requirements in a United Kingdom statute on fisheries until judgment had been given as to the compatibility of that statute with Community law, and the order in Case 194/88 R *Commission* v *Italy*, [11] in which the Court ordered the Italian Republic, in the course of proceedings for infringement of Directive 71/305 concerning the coordination of procedures for the award of public works contracts to take all necessary measures to suspend the operation of a public works contract by a consortium until the judgment determining the main action was delivered.

12. Interim measures under Articles 185 and 186 must moreover concern a case before the Court of Justice. For a case before a national court, it is for the national court to decide whether interim measures should be adopted irrespective of whether the national court is making a reference to the Court of Justice for a preliminary ruling on the validity of a

8 — See Henrik von Holstein in: *Festskrift til Ole Due*, p. 138 et seq.

9 — [1993] ECR II-463.

10 — [1989] ECR 3125.

11 — [1988] ECR 5647.

provision of Community law or on the interpretation of Community law. However, under Community law there is a requirement that it must be possible by means of an interim measure to protect a party's rights until it has been decided that they exist, in other words until the dispute has been finally brought to an end on the basis of the answer given by the Court of Justice to the national court's question. It is also a requirement that such provisional protection, at any rate in certain situations, should be granted in conditions corresponding to those applicable to the adoption by the Court of Justice of interim measures. [12]

13. That case-law was established by the Court of Justice in two preliminary rulings. In the first judgment, in Case C-213/89 *Factortame and Others*, [13] the Court was asked to decide to what extent national courts have jurisdiction to adopt interim measures in cases relating to the existence of rights claimed under Community law. The background to the case was that the United Kingdom had introduced legislation excluding foreign-owned vessels from registration in the British register of fishing vessels and hence from drawing upon the British fishing quotas. A number of owners of vessels which had been excluded regarded the legislation as contrary to the rules of Community law on freedom of movement. They therefore brought an action against the United Kingdom claiming that the statute in question be set aside and that the requirement in the statute that the vessel should be British-owned and managed from the United Kingdom should not apply to them before it had been decided whether the requirement was compatible with Community law. The problem raised in the case was therefore whether a right claimed under Community law should be given protection as against conflicting national legislation.

The Court introduced its judgment by stressing that directly applicable rules of Community law must be fully and uniformly applied in all the Member States. The effectiveness of Community law would however be impaired if a rule of national law could prevent a national court seised of a dispute governed by Community law from granting interim relief. In addition the effectiveness of the system established by Article 177 of the Treaty would be impaired if a national court were not able to grant interim relief until it delivered its judgment following the preliminary ruling made by the Court of Justice. On those grounds the Court concluded that Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must set that rule aside.

12 — See Henrik von Holstein in *Festskrift til Ole Due*, p. 143 et seq.

13 — [1990] ECR I-2433.

14. The second judgment was that in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*. [14] The case concerned a Council regulation requiring sugar manufacturers to pay a special levy. A German sugar manufacturer who had been required to pay a levy of some DM 2 million referred the demand to a national court claiming that the regulation was void and at the same time requested the suspension of the enforcement of the demand for the levy. The national court complied with the request and referred to the Court of Justice questions for a preliminary ruling on the one hand as to the validity of the regulation in question and on the other whether Article 189 of the Treaty precluded a national court from suspending the application of a national administrative measure based on a regulation and under what conditions such suspension might be granted.

The Court declared that 'the provisions of the second paragraph of Article 189 of the Treaty cannot constitute an obstacle to the legal protection which Community law confers on individuals. In cases where national authorities are responsible for the administrative implementation of Community regulations, the legal protection guaranteed by Community law includes the right of individuals to challenge, as a preliminary issue, the legality of such regulations before national courts and to induce those courts to refer questions to the Court of Justice for a preliminary ruling.

That right would be compromised if, pending delivery of a judgment of the Court, ... individuals were not in a position, where certain conditions are satisfied, to obtain a decision granting suspension of application which would make it possible for the effects of the disputed regulation to be rendered for the time being inoperative as regards them.

... In the context of actions for annulment, Article 185 of the EEC Treaty enables applicants to request suspension of the application of the contested act and empowers the Court to order such suspension. The coherence of the system of interim legal protection therefore requires that national courts should also be able to order suspension of application of a national administrative measure based on a Community regulation, the legality of which is contested.' [15]

The Court further referred to the judgment in Case C-213/89 *Factortame and Others*, previously cited, and declared:

'The interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself.' [16]

14 — [1991] ECR I-415.

15 — Paragraphs 16, 17 and 18.

16 — Paragraph 20.

On those grounds the Court declared that '... Article 189 of the Treaty has to be interpreted as meaning that it does not preclude the power of national courts to suspend the application of a national administrative measure adopted on the basis of a Community regulation'. [17]

'Since the power of national courts to grant such a suspension corresponds to the jurisdiction reserved to the Court of Justice by Article 185 in the context of actions brought under Article 173, those courts may grant such relief only on the conditions which must be satisfied for the Court of Justice to allow an application to it for interim measures.

With regard to the conditions for suspension of enforcement the Court declared that '... interim measures suspending enforcement of a contested measure may be adopted only if the factual and legal circumstances relied on by the applicant are such as to persuade the national court that serious doubts exist as to the validity of the Community regulation on which the contested administrative measure is based. Only the possibility of a finding of invalidity, a matter which is reserved to the Court, can justify the granting of suspensory measures.

In this regard, the Court has consistently held that measures suspending the operation of a contested act may be granted only in the event of urgency, in other words, if it is necessary for them to be adopted and to take effect before the decision on the substance of the case, in order to avoid serious and irreparable damage to the party seeking them.

It should next be pointed out that suspension of application must retain the character of an interim measure. The national court to which the application for interim relief is made may therefore grant a suspension only until such time as the Court has delivered its ruling on the question of validity. Consequently, it is for the national court, should the question not yet have been referred to the Court of Justice, to refer that question itself, setting out the reasons for which it believes that the regulation must be held to be invalid.' [18]

With regard to the question of urgency, it should be pointed out that damage invoked by the applicant must be liable to materialize before the Court of Justice has been able to rule on the validity of the contested Community measure. With regard to the nature of the damage, purely financial damage cannot, as the Court has held on numerous occasions, be regarded in principle as irreparable. However, it is for the national court hearing the application for interim relief to examine the circumstances particular to the case before it. It must in this connection consider whether immediate enforcement of the measure which is the subject of the application for interim relief would be likely to result in irreversible damage to the applicant which could not be made good if the Community act were to be declared invalid.

17 — Paragraph 21.

18 — Paragraphs 23 and 24.

It should also be added that a national court called upon to apply, within the limits of its jurisdiction, the provisions of Community law is under an obligation to ensure that the full effect is given to Community law and, consequently, where there is doubt as to the validity of Community regulations, to take account of the interests of the Community, namely that such regulations should not be set aside without proper guarantees.

In order to comply with that obligation, a national court seised of an application for suspension must first of all examine whether the Community measure in question would be deprived of all effectiveness if not immediately implemented.

If suspension of application is liable to involve a financial risk for the Community, the national court must also be in a position to require the applicant to provide adequate guarantees, such as the deposit of money or other security.' [19]

In the operative part of the judgment the Court accordingly stated that 'Article 189 of the EEC Treaty must be interpreted as meaning that it does not preclude the power of national courts to suspend the application of an administrative measure adopted on the basis of a Community regulation' and that 'Suspension of enforcement of a national measure adopted in implementation of a Community measure may be granted by a national court only if that court entertains serious doubts as to the validity of the Community measure and, should the question of the validity of the contested measure not already have been brought before the Court of Justice, itself refers that question to the Court of Justice, if there is urgency and a threat of serious and irreparable damage to the applicant and if the national court takes due account of the Community's interests'.

The first and second questions

15. As may be seen from the foregoing, a national court may suspend the enforcement of a national legal measure adopted on the basis of a Community regulation the validity of which is challenged before the national court in conjunction with the reference to the Court of Justice of questions for a preliminary ruling, and so by analogy with the Court's power under Article 185 of the Treaty to suspend the enforcement of a measure contested before it. By the first question the court of reference is in reality asking for the Court's view as to whether in a corresponding situation a national court may adopt interim measures other than the suspension of the application of a legal measure, that is, analogous to the interim measures which the Court may prescribe under Article 186 in cases before it. The second question must be understood as meaning that the court of reference is wishing to be informed in what conditions it may, where appropriate, prescribe such interim measures and in particular whether those conditions

19 — Paragraphs 27 to 32.

correspond to those applicable to the suspension of the application of a legal measure. In my view it is most appropriate to answer those questions together.

16. The Spanish Government suggests that the Court should answer the first question in the negative on the grounds *inter alia* that the national court might otherwise be assuming the role of the Community legislature.

17. Atlanta and the French, Italian and German Governments and the Commission think on the other hand that the Court should answer the first question in the affirmative. In their view the interests of the coherence of the rules on interim measures make it necessary to give the national courts the possibility of using the interim measures referred to in Article 186 in conjunction with requests for preliminary rulings. The conditions on which the national courts may prescribe interim measures must, moreover, be the same as the conditions laid down in case-law for the Court of Justice to prescribe interim measures under Articles 185 and 186 in a case brought under Article 173; see the judgment in the *Zuckerfabrik* case. The French and the Italian Governments have expressed the view *inter alia* in this connection that the national court must make a strict appreciation of the conditions and in this respect require the provision of security in cases in which an interim measure may involve a risk for the Community's financial interests. The Commission thinks that the Court, in addition to referring to the conditions laid down in the *Zuckerfabrik* judgment, must state that it is a condition for prescribing interim measures that the national court take due account of any decisions by the Court concerning the same Community legal measure. Atlanta states that the rules of Community law do not preclude the national court from prescribing interim measures under less strict conditions if national law so allows.

18. The United Kingdom expects the Court to give an affirmative reply to the first question but thinks that stricter requirements than those laid down in the *Zuckerfabrik* judgment should be imposed for national courts to be able to prescribe interim measures. If the doubt as to validity relates only to procedural rules, neglect of which cannot be regarded as having affected the content of the Community legal measure, it should not be possible to prescribe interim measures. There ought also to be a requirement *inter alia* for the national court to give a comprehensive statement of reasons as to why it regards it as highly probable that the Community legal measure will be regarded as void.

19. In my view it is difficult to draw any very clear dividing line between the suspension of application of a contested legal measure referred to in Article 185 of the Treaty

and the prescribing of (other) necessary interim measures referred to in Article 186. The cases of suspension mentioned in the second sentence of Article 185 may actually be regarded as a special subgroup of the interim measures referred to in Article 186.

20. In this case a suspension of the application of the national legal measure based on the regulation would presumably have meant that Atlanta would have been able, without any restrictions, to continue — and perhaps even to increase on the now regulated market — its importation of third country bananas until the question of the validity of the regulation had been settled. On the other hand the interim measure applied by the national court did contain a restriction, which meant that Atlanta was not in any case placed in a more favourable position than before. The interim measure applied may thus be said to be the better of two possible solutions, the worse being the suspension of the application of the regulation as far as Atlanta was concerned.

21. It would naturally be objectionable if the national courts' right to prescribe interim measures corresponding to those referred to in Article 186 of the Treaty could, in cases of a reference for a preliminary ruling under Article 177, be misused by the national court's assuming the role of the Community legislature. However, that is not the position. Just as with a decision of the Court of Justice regarding interim measures in pursuance of Articles 185 and 186 in cases brought under Article 173 of the Treaty, the facility for national courts to apply interim measures in cases under Article 177 must be restricted to ensuring provisionally, that is, until judgment has been given in the main proceedings and in so far as necessary, the legal position of a party by protecting the *status quo* and guaranteeing that the final decision is fully effective.

22. Individuals have only a limited scope for bringing an action under Article 173 of the Treaty for a review of the legality of Community legal measures, namely to the extent to which a measure is of direct and individual concern to them. On the other hand, in practice individuals are to a greater extent entitled to bring actions before the national courts against legal measures affecting them which the Member States have adopted in implementation of Community legal measures. The case now under consideration illustrates that, inasmuch as the Court, in its aforesaid orders in Case C-286/93 R, adopted on 21 June 1994 and 6 July 1993, dismissed as inadmissible Atlanta's application for annulment of the Regulation and Atlanta's application for the adoption of interim measures on the ground that Atlanta did not meet the conditions for bringing an action.

23. On that ground too there should be a parallelism between provisional protection of

rights which may be obtained in an action before the Court of Justice for a review of the legality of a Community legal measure under Article 173 of the Treaty and the provisional protection of rights which may be obtained in an action before a national court regarding the same questions as are referred to the Court of Justice for a preliminary ruling under Article 177. The rules on interim measures contained in Articles 185 and 186 constitute together [20] a logical and coherent system for ensuring that the Community legislature does not encroach upon the individual's legal rights. These rules provide an opportunity for selecting the measures which are best adapted in a specific situation for protecting the *status quo* for the individual concerned and at the same time safeguarding the Community's interests. The provisional protection of legal rights which may be ordered in connection with a reference for a preliminary ruling is thus in my view not restricted to a suspension of the application of measures, as referred to in Article 185 of the Treaty, but includes also any necessary interim measures mentioned in Article 186.

24. The interests of parallelism between the provisional protection of legal rights which may be obtained in an action before the Court of Justice for a review of the legality of a Community legal measure under Article 173 of the Treaty and the provisional protection of legal rights which may be obtained in an action before a national court relating to the same questions as are referred to the Court of Justice for a preliminary ruling under Article 177 also require in my view that the same conditions shall apply to the decisions to be adopted in that respect by the Court of Justice as to those of the national courts. The conditions described by the Court in the *Zuckerfabrik* judgment, which I have already reproduced in detail, should therefore be applied also with regard to (other) interim measures mentioned in Article 186 of the Treaty.

25. I cannot therefore agree with Atlanta that Community law does not preclude the national court from prescribing interim measures on less strict conditions if national law provides that possibility. A national court must *only* suspend a national administrative measure adopted in relation to a Community legal measure, or prescribe interim measures, in so far as the conditions referred to are met.

26. I therefore cannot agree either with the United Kingdom that stricter conditions than those laid down in the *Zuckerfabrik* judgment must be imposed for national courts to be able to prescribe interim measures. Nor can I see why it should be impossible to prescribe interim measures in the event of failure to observe procedural rules

20 — And in conjunction with the fourth paragraph of Article 192 — see Hans Krück in Groeben and Others: *Kommentar zum EWG-Vertrag*, p. 4674 et seq.

neglect of which cannot be assumed to have affected the content of the Community legal measure. The precise purpose of procedural rules is to guarantee a specific process of decision-making and accordingly the quality of the substance of the legal measures adopted. In relation, moreover, to the provisions on consultation with the Parliament in particular the Court has consistently held that Parliament's participation in the Community's legislative procedure constitutes an essential element in the institutional balance arising from the Treaty. The proper consultation with Parliament in the cases envisaged by the Treaty is therefore an essential procedural requirement infringement of which entails illegality. [21]

27. The national courts must therefore, in deciding whether interim measures are to be prescribed in conjunction with a reference of questions for a preliminary ruling as to the legality of a Community legal measure, follow the case-law of the Court of Justice on the application of Articles 185 and 186 of the Treaty and in so far as the Court's case-law evolves the national courts also must adapt their case-law accordingly.

28. In exercising their jurisdiction the national courts must pay particular attention to any decisions the Court of Justice may have taken, or may take, concerning the legality of the Community legal measure as to the validity of which they refer questions to the Court. A national court cannot — or can no longer — entertain reasonable doubts as to the validity of a Community legal measure if the Court has already given — or gives later — a ruling on essentially the same questions as those raised before the national court. Similarly the national courts must pay attention to the decisions the Court may have taken or may take concerning provisional measures with regard to the Community measure at issue. The Member States' general duty to act in good faith under Article 5 of the Treaty applies also to the national courts and implies in that connection that they, for their part, must of their own motion keep themselves informed of such decisions by the Court of Justice and take them duly into account even after they have prescribed interim measures. In appropriate cases the provisional measures must be rescinded. I do not think it is necessary to make additions in this respect, as proposed by the Commission, to the list of conditions in the *Zuckerfabrik* judgment.

29. The fact that the national court must set out its reasons for regarding the Community measure in question as invalid is already stated in paragraph 24 of the *Zuckerfabrik* judgment. I do not think it is necessary, as proposed by the United Kingdom, to make that requirement for a statement of the reasons more rigorous. Without stressing the advantages and disadvantages of the methods of formulating judgments and orders in the

21 — See most recently the judgment in Case C-65/93 *Parliament* v *Council* [1995] ECR I-643.

individual legal systems, I would emphasize that an obligation to provide a comprehensive statement of reasons would in my view constitute an inappropriate interference with the Member States' procedural rules. A long text is not necessarily better or more informative than a short one, perhaps even the reverse. In my view the Court of Justice was rightly reticent as regards laying down strict requirements for statements of reasons in the national courts' orders for reference.

30. As regards the detailed wording of the Court's answers to the first and second questions, I would emphasize that the wording of the operative part of the Court's judgment in the *Zuckerfabrik* case may *prima facie* give rise to doubts whether the rules on national courts' right to suspend the application of national legal measures adopted on the basis of a Community legal measure forms part of Community law or of national law. The Court used expressions to the effect that 'Article 189 ... does not preclude the power of national courts to suspend', and that 'suspension of enforcement of a national measure ... may be granted by a national court only if...'. It must however be noted that this wording corresponds to the questions raised by the relevant German court. The answer given by the Court was thus on the one hand that Article 189 does not preclude national courts from suspending a national administrative measure for the implementation of a Community measure but that on the other hand Community law lays down certain restrictions as to the conditions in which the national courts may so act.

31. In this case the Verwaltungsgericht Frankfurt am Main has worded its first question differently from that of the court of reference in the *Zuckerfabrik* case. The Verwaltungsgericht Frankfurt am Main does not ask whether the general application of regulations 'does not preclude' a national court from adopting interim measures but on the contrary whether a national court 'may' do so. In view of the fact that this case too involves a reference from a German court, it might be said that regard being had to the possibilities of ordering provisional protection of rights, contained in Article 19(4) of the German Grundgesetz, it is not necessary in this case for the Court to decide whether Community law as such authorizes national courts to prescribe interim measures against national administrative measures adopted on the basis of Community regulations. In doing so, however, the Court would be interpreting German law, which, according to the division of duties of which the procedure for collaboration in Article 177 of the Treaty is an expression, is a task for the German courts. Moreover there can in my view scarcely be any doubt that the right to order provisional protection of rights in a case such as this must (also) be a direct consequence of Community law, as appears from

the Court's declarations in the aforesaid *Factortame* judgment and paragraphs 16, 17, 18 and 20, already quoted, from the *Zuckerfabrik* judgment. I think therefore that the question referred to the Court may be answered in the affirmative.

32. Having regard to the foregoing considerations, I shall propose that the Court answer the first and second questions as follows:

(1) A national court may prescribe the necessary interim measures against an administrative measure adopted on the basis of a Community regulation.

(2) Such measures against an administrative measure adopted on the basis of a Community regulation may however be prescribed only in so far as the national court entertains serious doubt as to the validity of the Community regulation and, should the question not already have been brought before the Court of Justice, the national court itself refers that question to the Court of Justice, and on condition that there is urgency and a risk of serious and irreparable damage to the applicant and that the national court takes due account of the Community's interests.

The third and fourth questions

33. These questions and the arguments in relation thereto put forward by Atlanta and the German Government concern in their entirety problems already decided by the Court of Justice in the judgment in Case C-280/93 *Germany* v *Council*. Questions (3)(a) to (c) raised by the Verwaltungsgericht Frankfurt am Main are dealt with in paragraphs 32 to 42 of that judgment, Question (4)(a) in paragraphs 113 to 118 and Questions (4)(b) and (c) in paragraphs 53 to 80 and 88 to 92 of the judgment.

34. As regards the question of the validity of the Regulation no new facts have therefore come to light such as may give any grounds for reaching a conclusion other than that reached by the Court of Justice in its said judgment in Case C-280/93.

35. Atlanta and the German Government have requested the Court to lay down certain transitional arrangements for the application of the regulation. In support thereof they have referred to the principles of equal treatment, the protection of legitimate expectation and freedom to pursue an occupation. The orders for reference however contain no questions concerning transitional arrangements for the common organization of the market in bananas. In the case of a reference

for a preliminary ruling the court of reference alone is competent to assess which questions it regards it as necessary for the Court of Justice to answer. The parties to the case can neither restrict nor add to either the number or the nature of the questions raised by the national court. [22] There are therefore no grounds for considering the question of a transitional arrangement.

36. I therefore propose that the Court answer the third and fourth questions to the effect that consideration of the questions referred to the Court has disclosed no factor of such a kind as to affect the validity of Council Regulation No 404/93 of 13 February 1993 on the common organization of the market in bananas.

Conclusion

37. In view of the foregoing considerations I propose that the Court should answer the questions referred to it as follows:

(1) A national court may prescribe the necessary interim measures against an administrative measure adopted on the basis of a Community regulation.

(2) Such measures against an administrative measure adopted on the basis of a Community regulation may however be prescribed only in so far as the national court entertains serious doubt as to the validity of the Community regulation and, should the question not already have been brought before the Court of Justice, the national court itself refers that question to the Court of Justice, and on condition that there is urgency and a risk of serious and irrep-

22 — Cf. the judgments in Case 283/81 *CILFIT* [1982] ECR 3415, paragraph 9, and in Case 247/86 *ALSATEL* v *Novasam* [1988] ECR 5987, paragraphs 7 and 8.

arable damage to the applicant and that the national court takes due account of the Community's interests.

(3) Consideration of the questions referred to the Court has disclosed no factor of such a kind as to affect the validity of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas.