

those of an economic and social nature, which are regarded as general interests at national level, and are therefore entitled to defend such interests before the courts. They may therefore invoke damage affecting a whole sector of their economy, in particular when the contested Community measure may entail unfavourable repercussions on the level of employment and the cost of living.

2. An application for interim measures made by a Member State with a view to obtaining, as far as it alone is concerned, a suspension of the implementation of an

important part of a new common organization of the market must be rejected where, on the one hand, the materialization of the risk invoked to an entire sector of the national economy depends upon the occurrence of a number of factors which do not appear to be predictable with a sufficient degree of probability and, on the other hand, the said common organization involves mechanisms allowing the Community authorities to react in the event of that risk materializing and where, moreover there is a serious risk of damage to other Member States if the mechanisms envisaged by the common organization were not brought into force in their entirety in the circumstances envisaged.

ORDER OF THE COURT
29 June 1993 *

In Case C-280/93 R,

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, Villemombler Srt. 76, D-5300 Bonn 1, and Jochim Sedemund, Rechtsanwalt, Cologne, Heumarkt 14, D-5000 Köln 1, acting as Agents,

applicant,

* Language of the case: German.

Council of the European Communities, represented by Jean-Paul Jacqué, Director in the Legal Department, Bernhard Schloh, Arthur Brautigam and Jürgen Huber, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Xavier Herlin, Director with the Directorate for Legal Affairs at the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Peter Gilsdorf, Principal Legal Adviser, Eugenio de March, Legal Adviser, and Ulrich Wölker, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Service, Wagner Centre, Kirchberg,

Hellenic Republic, represented by Vasileios Kontolaimos, Assessor at the State Legal Council, and Vasileia Pelekou, legal representative, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

Kingdom of Spain, represented by Alberto Navarro González, Director General for Community Legal and Institutional Co-ordination, and Rosario Silva de Lapuerta, Abogado del Estado, of the Legal Service for Representation of the Spanish Government before the Court of Justice, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6, Boulevard E. Servais,

French Republic, represented by Jean-Pierre Puissochet, Director for Legal Affairs at the Ministry of Foreign Affairs, Philippe Pouzoulet, Deputy Director with the Directorate for Legal Affairs, and by Catherine de Salins, Foreign Affairs Adviser at the said Ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9, Boulevard du Prince Henri,

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, assisted by Maurizio Greco, Avvocato dello Stato, acting as Agents, with an address for service in Luxembourg at the Italian Embassy, 5, Rue Marie-Adélaïde,

Portuguese Republic, represented by Luis Fernandes, Director of the Legal Department in the Directorate General for the European Communities, Maria Luisa Duarte, Legal Adviser, and José Santos Cardoso, Principal Assessor, both members of the Legal Department of the Directorate General for the European Communities, acting as Agents, with an address for service in Luxembourg at the Portuguese Embassy, 33, Allée Scheffer,

United Kingdom of Great Britain and Northern Ireland, represented by S. Lucinda Hudson, of the Treasury Solicitor's Department, acting as Agent, assisted by David Anderson, Barrister, with an address for service in Luxembourg at the Embassy of the United Kingdom, 14 Boulevard Roosevelt,

interveners,

APPLICATION for the adoption of interim measures permitting the Federal Republic of Germany to authorize, until the Court has given judgment in the main proceedings, the importation free of customs duty of bananas originating in third countries within the meaning 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) in the same annual quantities as in 1992,

THE COURT,

composed of: O. Due, President, C. N. Kakouris, G. C. Rodríguez Iglesias, M. Zuleeg and J. L. Murray (Presidents of Chambers), R. Joliet, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco and P. J. G. Kapteyn, Judges,

Advocate General: C. Gulmann,
Registrar: J.-G. Giraud,

after hearing the Opinion of the Advocate General,

makes the following

Order

- 1 By application lodged at the Court Registry on 14 May 1993, the Federal Republic of Germany, in pursuance of the first paragraph of Article 173 of the EEC Treaty, sought a declaration that Title IV and Article 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) (hereinafter 'the Regulation') were void.
- 2 By a separate document, lodged at the Court Registry on 19 May 1993, the Federal Republic of Germany, in pursuance of Articles 185 and 186 of the Treaty and Article 83 of the Rules of Procedure, asked the Court to permit it to authorize, until delivery of judgment in the main proceedings, the importation free of customs duties of bananas originating in third countries within the meaning of Article 15(3) of the Regulation, in the same annual quantities as in 1992.
- 3 By decision of 9 June 1993 the President of the Court, in pursuance of the first paragraph of Article 85 of the Rules of Procedure, referred to the Court the application for the adoption of interim measures.
- 4 By orders of 10 June 1993, the Commission of the European Communities, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Portuguese Republic and the United Kingdom were authorized to intervene in the proceedings concerning the adoption of interim measures in support of the form of order sought by the Council.
- 5 The Regulation lays down, in Title IV, the system of trade with third countries. In that respect it provides that traditional imports into the Community

of bananas from ACP States, the quantities of which are set out in the annex, may continue to be effected free of customs duties.

6 Under Article 18(1) of the Regulation,

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

Within the framework of the tariff quota, imports of third-country bananas shall be subject to a levy of ECU 100 per tonne and imports of non-traditional ACP bananas shall be subject to a zero duty ...’

Paragraph (2) of that article provides:

‘Apart from the quota referred to in paragraph 1:

- imports of non-traditional ACP bananas shall be subject to a levy of ECU 750 per tonne;
- imports of third-country bananas shall be subject to a levy of ECU 850 per tonne.’

Article 19(1) provides that:

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

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

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

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

7 Article 21(2) discontinues the tariff quota laid down in the Protocol on the tariff quota for import of bananas (hereinafter referred to as 'the Protocol') annexed to the Implementing Convention on the Association for the Overseas Countries and Territories provided for in Article 136 of the Treaty.

8 Under the terms of the Protocol, annexed to the aforesaid Implementing Convention, which has not been in force since 31 December 1962, the Federal Republic of Germany enjoyed an annual duty-free import quota of bananas. The basis for calculating the quota was, under paragraph 5 of the Protocol, the quantity imported in 1956, namely 290 000 tonnes. That quantity was to be increased, for each succeeding year of application of the Protocol, in accordance with the rules for calculation set out in paragraphs 3 and 4 thereof. If, during any given year, the quantity thus calculated was insufficient to cover consumer needs in the Federal Republic, the Member States, under paragraph 6 of the Protocol, declared their readiness to agree to a corresponding increase in the quota if the overseas countries and territories were unable to supply in full the extra quantities requested. Under the third subparagraph of paragraph 4 of the Protocol, the Council, acting by a qualified majority on a proposal from the Commission, might decide to abolish or amend the quota.

9 In 1992 the Federal Republic of Germany imported, duty-free under the Protocol, 1 371 000 tonnes of bananas, of which 721 000 tonnes were calculated under the Protocol, whilst an extra quantity of 650 000 tonnes was requested under paragraph 6 thereof.

10 The Federal Republic of Germany, the applicant, the Council, the defendant, and the interveners presented oral argument at the hearing of the Court on 18 June 1993.

11 During the hearing the Federal Republic of Germany varied its application inasmuch as it agreed, in the alternative, that any quantities of bananas which it was to be authorized to import might be subject, as a provisional measure, to a customs duty of ECU 100 per tonne.

12 The Council did not object to account being taken of that variation of the application, but stated that it was not such as to cause it to change its viewpoint.

13 At the end of the hearing the Federal Republic of Germany varied the actual subject of its application by requesting, in the further alternative, first, an increase in the tariff quota of 900 000 tonnes per annum and, secondly, the apportionment of the quota as to 90% to the traditional importers on the basis of the quantities of bananas imported in previous years and as to 10% to the new-comers.

14 The Council regarded the latter variation as a new application on which it could not express an opinion as it had not been able to consider what the consequences would be.

15 As regards the variation of the application put forward in the alternative during the hearing, it should be stated that it falls within the framework of the measure requested in the application for interim relief; it is in fact a reduction of the scope of such a measure as in reality it aims at diminishing its effects, at least as far as the Community's financial resources are concerned. There is therefore nothing to prevent this variation from being considered.

- 16 However, the position is different with regard to the variation in the application put forward in the further alternative at the end of the hearing. In fact it is substantially different in kind from the application lodged by the Federal Republic of Germany and fundamentally alters its subject-matter. It must therefore be regarded as a fresh application on which the other parties have not been able to define their position, and the Court can therefore only reject this application, put forward at the hearing, as inadmissible.
- 17 Under Article 185 of the Treaty, actions brought before the Court of Justice do not have suspensory effect. However, in pursuance of Articles 185 and 186 of the Treaty the Court may, if it considers that circumstances so require, order that the application of the contested act be suspended or prescribe any necessary interim measures.
- 18 Under Article 83(2) of the Rules of Procedure a decision ordering the suspension of the operation of a measure or the adoption of an interim measure is subject to the existence of circumstances giving rise to urgency and to pleas of fact and law establishing a *prima facie* case for the interim measures applied for.
- 19 As regards the pleas of fact and law establishing a *prima facie* case for the interim measure applied for, the Federal Republic of Germany states that Title IV and Article 21(2) of the Regulation are unlawful.
- 20 In that respect the Federal Republic of Germany puts forward a number of objections regarding essentially the lack of fresh consultation with the European Parliament as to the final version of the Regulation, infringement of the obligation to provide a statement of the reasons on which the Regulation was based, infringement of the Treaty provisions on the common agricultural policy, the rules of competition and the common commercial policy, breach of the principle of the prohibition of discrimination and of the principle of proportionality and of certain fundamental rights, and disregard of the provisions of the Fourth Lomé Convention and of the rules of GATT.

- 21 On this point, it is sufficient to state that the action raises complex questions of law which call for an in-depth consideration after discussion between the parties and that the application does not appear to be *prima facie* wholly unjustified. It cannot therefore be rejected on those grounds.
- 22 As regards the condition with regard to urgency, it must be recalled that, as the Court has consistently held, the urgency of an interim measure, referred to in Article 83(2) of the Rules of Procedure, must be assessed in relation to the necessity to give an interim judgment in order to prevent serious and irreparable damage being occasioned by the immediate application of the measure at issue in the main proceedings.
- 23 On this point the Federal Republic of Germany claims that the immediate application of the provisions of the Regulation at issue in the main proceedings risks causing it irreversible damage. It contends in that respect that the introduction of the tariff quota and the rules for the distribution of that quota will lead to a reduction of the volume of third-country bananas allowed to German operators. The consequence would be a substantial increase in the price of bananas on the German market to the detriment in particular of low-income households, a heavy loss of employment in the ports importing bananas, a perceptible reduction in rail freight and a reduction for the German operators concerned of at least a third in their market share which might entail bankruptcies.
- 24 The Federal Republic adds that even if it were to prevail in the main proceedings it would no longer be possible to reverse the alteration in market conditions brought about by the artificial reduction of supply and the transfer of market shares.
- 25 The Council contends first, as defendant, that the Federal Republic of Germany is not entitled to complain of damage to purely private interests, which are to be distinguished from the general interest represented by the government.

- 26 The Council, with the support of the interveners, disputes, moreover, that the Federal Republic of Germany is threatened with imminent, certain and irreparable damage. The only general interest which has been mentioned, namely the risk of an increase in the price of bananas to the detriment of the German consumer, is not established, since the effect of the new measures on the income of the average consumer is negligible. The introduction of a tariff quota and the rules for its apportionment are indispensable for ensuring the outlet for Community bananas and for realizing the conditions for a genuine internal market in place of the individual national markets subject to different systems.
- 27 As regards the nature of the damage which may be invoked by the Federal Republic of Germany, it must be pointed out that the Member States are responsible for interests, in particular those of an economic and social nature, which are regarded as general interests at national level and are therefore entitled to defend such interests before the courts. They may therefore invoke damage affecting a whole sector of their economy, in particular when the contested Community measure may entail unfavourable repercussions on the level of employment and the cost of living.
- 28 Since the damage referred to by the Federal Republic of Germany falls within that category, its entitlement to act in that capacity cannot be challenged.
- 29 In order to determine whether the applicant has proved the need for the adoption of the interim measure applied for, it is appropriate to analyse the alleged damage in the light of all the interests involved.
- 30 In that respect it must be noted that the purpose of the application of the Federal Republic of Germany is to obtain the grant to a single Member State, in the form of an interim measure, of a suspension of the operation of an important part of a new common organization of the market.

- 31 The purpose of the Regulation on the common organization of the market in bananas is in fact to guarantee a satisfactory income to Community producers, to facilitate the marketing of Community production, to ensure the free movement of bananas in the common market and to maintain a preferential system for the traditional importation of bananas from the ACP States. These objectives are achieved on the one hand by a system of aids intended to make up shortages in Community production and on the other hand by a common system of trade with third countries. That new organization is intended to take the place of the individual national markets, which were more or less partitioned, and thus to put an end to a system which was incompatible with the objectives of the Treaty.
- 32 The risk alleged by the applicant of an increase in prices to the consumer and its effect on the cost of living of the German population will depend on the occurrence of a number of factors including in particular a shortage, as predicted by the Federal Republic of Germany, in imports of bananas in relation to consumer demand.
- 33 The position is the same as regards the claims made by the Federal Republic of Germany to the effect that there will be losses in the spheres of utilization of infra-structural equipment and of employment.
- 34 It is therefore appropriate to consider whether it is foreseeable at this stage with a sufficient degree of probability that there will be a shortage of supply on the German market.
- 35 In that respect it must be stated that there is no agreement with regard to the reference figures for the consumption of bananas in 1992. On the one hand it appears that the data supplied by certain Member States were over-estimated and that as a result the figures used by Eurostat must be corrected downwards. On the other hand it is not established that all the bananas imported were actually consumed within the Community, since a more or less considerable part may have been re-exported to other States. Moreover the Council has contended that importers of

third-country bananas artificially inflated the volume of their imports in order to have the advantage of favourable reference quantities upon the introduction of the common organization of the market, which was already in prospect in 1992.

- 36 As regards the level of imports for the second half of 1993, the Council contends in addition that supply should still be sufficient even if the tariff quota was based on an under-estimate of foreseeable consumption. In that respect it states on the one hand that the quantity in stock on 1 July will make it possible to cover all consumer needs for July, so that for 1993 the quota actually applies only to five months, and on the other hand that third-country bananas loaded before 23 June will not be counted towards the tariff quota and will be subject only to the favourable customs duty of ECU 100 per tonne.
- 37 Since the actual market needs for the coming months cannot at present be established with sufficient probability it is not possible to assume already that there will be a shortage of supply.
- 38 If it should appear at a later date that the forecasts which the Council has taken as its basis are incorrect, any possible shortage of supply may be made good by recourse to the procedure under Article 16(3) of the Regulation, as will be described below.
- 39 Against the apportionment of the tariff quota the Federal Republic of Germany claims that its effect is to deprive those German operators who have hitherto imported third-country bananas of a considerable portion of their market share.
- 40 The Council, supported by the Commission, contends that that apportionment of the tariff is indispensable to bring about a genuine single market and a common organization of the market which must in particular ensure equal access to the market and effective competition, so that the duly acquired rights of operators

resulting from a special legal system applicable to a national market cannot, regard being had to the objectives of a common policy, take precedence over these requirements.

41 It is unnecessary to decide that question at this stage, but it must be stated that in present circumstances it is not sufficiently clear that the contested system of apportionment will deprive the German importers of a substantial portion of their market share, particularly as it is not evident why those importers should not succeed in supplying themselves with Community and ACP bananas, the marketing of which the common organization of the market is intended to promote. Should that subsequently prove impossible, the Federal Republic of Germany will be able at any time to set in motion the procedure under Article 16(3) or 30 of the Regulation.

42 As regards the first of those provisions, the Commission points out that if the Council's estimates as regards in particular demand and the apportionment of the quota should appear, in the light of experience, to be incorrect, it would be possible to meet any supply shortage by means of Article 16(3).

43 The Council admits that the forecasts which it used as its basis may be shown to be incorrect, since it has not sufficient experience in this field. As the Federal Republic of Germany claims, it is true that the Council envisages the possibility of a modification of the quotas laid down in Article 18 only in the event of a considerable change the current economic situation. It accepts, however, that the Community institutions are required to act if there should be a shortage to the extent alleged by the Federal Republic of Germany.

44 In that respect it should be pointed out that Article 16(3) of the Regulation requires the Community institutions to adjust the tariff quota if that proves necessary during the marketing year, to take account of exceptional circumstances affecting in particular import conditions. In such a case the adjustment is to be effected in accordance with the procedure laid down in Article 27, that is, it is for

the Commission to adopt measures in accordance with the opinion of the Management Committee for Bananas. If the measures adopted are not in accordance with the opinion of the Management Committee, the Council may take a different decision within one month.

- 45 If therefore the Commission were to come to the conclusion, on the basis of reliable objective data, that the quota was insufficient to satisfy demand appropriately and if the Council's earlier estimates were to prove incorrect, the Regulation obliges the Commission, and if necessary the Council, to make the necessary adjustments with the possibility for the Member States to make an application to the Court if those institutions were not to comply with their obligations.
- 46 It should be added that, as appears from the twenty-second recital in the preamble to the Regulation, it is intended that any disturbance in the internal market which the replacement of the various national arrangements by the common organization of the market threatens to bring about shall also be overcome by recourse to Article 30.
- 47 For that purpose Article 30 requires the Commission to take any transitional measures it judges necessary 'if specific measures are required after July 1993 to assist the transition from arrangements existing before the entry into force of this regulation to those laid down by this regulation, and in particular to overcome difficulties of a sensitive nature'.
- 48 In those circumstances it must be recognized that the application of the procedure of Article 16(3) or Article 30 provides an appropriate remedy should the situation apprehended by the Federal Republic of Germany arise.
- 49 Finally, as regards the possibility of striking a balance between the interests involved, the Council and, in particular, the French Republic, the Kingdom of

Spain, the Portuguese Republic and the United Kingdom have stated that the exclusion of the Federal Republic of Germany from the system of trade with third countries and Community preference would result immediately in irreparable damage to the marketing of Community bananas and in intolerable consequences for the economy of the banana-producing regions, which might lead to social unrest.

50 The Federal Republic of Germany does not contest the nature and importance of the damage referred to by the other Member States but contends that the adoption of the measure applied for would not have such consequences since Community producers are sufficiently protected by the system of aids, which would permit them to obtain compensation for all losses of income suffered in the marketing of their products. In the applicant's view that system ought to be able to operate normally even if no tariff quota were to be introduced.

51 On that point the Council contends that the internal system of aids and the external system of the tariff quota are intrinsically linked, inasmuch as the latter is designed not only to finance the former but above all to create favourable conditions for the marketing of Community production.

52 The Council states in addition that the system of aids can take effect only in the event of the actual sale of the bananas produced in the Community, since its function is to ensure compensation for the difference between the price in fact obtained on their sale and a reference price laid down for the period preceding the introduction of the common organization of the market. However, the consequence of the exclusion of the Federal Republic of Germany from the system of the tariff quota would be to impair the possibilities for marketing Community bananas.

53 In view of these arguments it cannot therefore be denied that there is a serious risk that, in the absence of the system of trade with third countries applicable to the

whole Community, the system of aids could not operate appropriately and would not therefore be capable of averting the damage apprehended by the Member States concerned.

- 54 Regard being had to the serious nature of that risk, to the fact that the damage alleged by the applicant has not been established with sufficient probability and to the obligation of the Community institutions to take the necessary measures to deal with any difficulties entailed by the introduction of the common organization of the market, it is not appropriate to adopt the interim measure applied for by the applicant, even in the form in which it was modified at the hearing.
- 55 The application must therefore be dismissed.

On those grounds,

THE COURT

hereby:

- 1. Dismisses the application;**
- 2. Reserves the costs, including those incurred by the interveners.**

Luxembourg, 29 June 1993.

J.-G. Giraud

Registrar

O. Due

President

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