

ORDER OF THE PRESIDENT OF THE COURT
OF FIRST INSTANCE
10 December 1997 *

In Case T-260/97 R,

Camar Srl, a company incorporated under Italian law, having its registered office in Florence (Italy), represented by Wilma Viscardini Donà, assisted by Mariano Paolin and Simonetta Donà, of the Padua Bar, with an address for service in Luxembourg at the Chambers of Ernst Arendt, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Hubertus Van Vliet, of its Legal Service, acting as Agent, assisted by Alberto Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

and

Council of the European Union, represented by Jan-Peter Hix and Antonio Tanca, Legal Advisers, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, Boulevard Konrad Adenauer,

defendants,

supported by

French Republic, represented by Frédéric Pascal, acting as Agent, with an address for service in Luxembourg at the French Embassy, 8 Boulevard Joseph II,

intervener,

* Language of the case: Italian.

APPLICATION to the President of the Court of First Instance pursuant to Articles 185 and 186 of the EC Treaty for (a) an order suspending the Commission's decision of 17 July 1997 rejecting the application submitted by Camar seeking the adoption of specific measures within the meaning of Article 30 of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas and, furthermore, (b) an order requiring the Commission to calculate the number of Category B licences to which Camar is entitled in respect of 1998, by reference to the quantities of bananas imported in the three-year period from 1988 to 1991, and, in the alternative, to calculate the said licences by reference to the quantities of bananas imported in the three-year period from 1989 to 1991, or by applying the criteria set out by the European Parliament in its Amendment No 8 to the proposal of the Commission, submitted on 8 March 1996, to amend the abovementioned Regulation No 404/93 and, in the further alternative, to grant to Camar financial aid equal to the market value of the Category B licences to be calculated according to one of the criteria set out above.

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal framework

- 1 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, 'Regulation No 404/93') established, with effect from July 1993, a common system for imports which replaced the various national systems previously prevailing. Regulation No 404/93 was most recently amended by Council Regulation (EC) No 3290/94 of

22 December 1994 on the adjustments and transitional arrangements required in the agricultural sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105). The main provisions of Regulation No 404/93 which fall to be considered in the present dispute are Article 15a, Article 18(1) and (2), Article 19(1) and (2), Article 16(1) and (3) and Article 30.

2 Under the arrangements on trade with third countries, which are the subject of Title IV of Regulation No 404/93, a tariff quota is to be opened each year for imports of third-country bananas (from non-ACP third countries) and non-traditional ACP bananas. The terms 'traditional imports' and 'non-traditional imports' from ACP States are defined in Article 15a. 'Traditional imports from ACP States' means the quantities of bananas, specified in the annex to Regulation No 404/93, exported by those ACP States which have traditionally exported bananas to the Community. For Somalia, the quantity of 'traditional imports' was fixed at 60 000 tonnes. The quantities of bananas exported by the ACP States which exceed the quantity defined above are 'non-traditional imports from ACP States'.

3 As regards imports of third-country bananas and non-traditional ACP bananas, the first subparagraph of Article 18(1) provides for the opening each year of a tariff quota of 2.2 million tonnes/net weight and the second subparagraph thereof provides that, within the framework of that quota, third-country imports are to be subject to a levy of ECU 75 per tonne and those of non-traditional ACP bananas are subject to a zero duty. The second subparagraph of Article 18(2) further provides that bananas, whether they come from non-traditional ACP countries or from third countries, imported outside the tariff quota are subject to a customs duty calculated on the basis of the Common Customs Tariff.

4 Article 19(1) divides the tariff quota thus opened, allocating 66.5% to the category of operators who marketed third-country or non-traditional ACP bananas (subparagraph (a)), 30% to the category of operators who marketed Community or

traditional ACP bananas (subparagraph (b)) and 3.5% to the category of operators who started marketing bananas other than Community or traditional ACP bananas from 1992 (subparagraph (c)). In common parlance those various tariff quotas are usually referred to as Category A, B and C licences. Article 19(2) further provides that, on the basis of separate calculations for each of the categories of operators referred to in Article 19(1), 'each operator shall obtain import licences on the basis of the average quantities of bananas that he has sold in the three most recent years for which figures are available' and that, in particular in the case of operators referred to in paragraph 1(b), sales of traditional ACP and/or Community bananas are to be taken into consideration.

- 5 Article 16(1) requires a forecast supply balance to be prepared each year on production and consumption in the Community and of imports and exports.

- 6 Article 16(3) then provides: 'Where necessary, in particular to take account of the effects of exceptional circumstances affecting production or import conditions, the balance may be adjusted during the marketing year. In such a case, the tariff quota provided for in Article 18 shall be adapted in accordance with the procedure laid down in Article 27.'

- 7 Finally, Article 30 provides: '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, the Commission, acting in accordance with the procedure laid down in Article 27, shall take any transitional measures it judges necessary.'

Facts and procedure

- 8 The applicant, Camar, a limited liability company incorporated under Italian law, is, in the context of the common organization of the market described above, the only 'traditional importer' of bananas from Somalia.

- 9 It was acquired in 1983 by the De Nadai group which at present holds 50% of its capital. The De Nadai group owns, among others, the Tico company, which also imports bananas into Italy, and has moreover a majority holding in Somalfruit, an undertaking which is concerned with banana production in Somalia.

- 10 Between 1984 and 1990, Somali banana cultivation reached its zenith, attaining an annual production of 90 000 to 100 000 tonnes. At the time, Camar imported into Europe, and above all into Italy, a considerable part of that production (specifically, 47 491 tonnes in 1988, 37 086 tonnes in 1989 and 45 130 tonnes in 1990).

- 11 On 31 December 1990 civil war broke out in Somalia and the normal flow of Camar's imports was interrupted, but was subsequently partially restored in 1994.

- 12 Camar none the less continued supplying the Italian market with a quantity of bananas which was not noticeably lower than that imported from Somalia before the outbreak of the civil war, by buying bananas from two ACP countries, Cameroon and the Windward Islands, and from certain third countries, from which it had already begun to import in 1988.

- 13 From July 1993, when the common organization of the markets was established, and up to and including 1997, Camar was issued with Category A import licences (for 4 008.521 tonnes in 1993, 8 048.691 tonnes in 1994, 3 423.761 tonnes in 1995, 5 312.671 tonnes in 1996 and 7 545.823 tonnes in 1997) and also with Category B licences (for quantities of 5 622.938 tonnes in 1993, 10 739.088 in 1994, 6 075.934 tonnes in 1995, 2 948.596 tonnes in 1996 and 2 140.718 tonnes in 1997). The above-mentioned figures relating to the licences issued from 1993 to 1996 appear in the order of the President of the Court of First Instance of 21 March 1997 in Case T-79/96 R *Camar v Commission* [1997] ECR II-403, paragraph 13), whilst those relating to 1997 were provided by Camar in the present proceedings (see Annexes 6 and 8 to the application in the main proceedings).
- 14 During that period the quantities of bananas imported from Somalia, again by the applicant, amounted to approximately 482 tonnes in 1993, 1 321 tonnes in 1994, 14 140 tonnes in 1995 and 15 780 tonnes in 1996 (see the order of the President in *Camar v Commission*, cited above, paragraph 14). So far as concerns 1997, Camar reports 11 955.614 tonnes by way of imports of bananas from Somalia. Furthermore, as stated by the applicant at the hearing, Tico, a company in the De Nadai group, will have imported into Italy, in 1997, about 6 000 tonnes of Somalian bananas. It appears, moreover, from the 'Relazione sulla produzione ed esportazione di banane dalla Somalia dalla Baia di Merca' (The report on the production and export of bananas from Somalia through the Bay of Merca) produced by the applicant (Annex 4 to the application in the main proceedings) that the entire imports by the De Nadai group for 1997 cannot exceed 27 000 tonnes.
- 15 From the first years after the entry into force of the common organization of the markets, Camar repeatedly requested the Commission to increase its third-country banana quota by an amount equal to the difference between the traditional quantity of Somalian bananas provided for by Regulation No 404/93 (60 000 tonnes) and the quantities actually imported or which could be imported into the Community by Camar and to issue it with the licences corresponding to the difference between those quantities. The applicant therefore asked for the adoption of measures similar to those taken after cyclones Debbie, Iris, Luis and Marilyn in respect of imports of bananas from the Community regions of Martinique and Guadeloupe as well as from the ACP countries of Saint Lucia and Dominica.

- 16 On 24 January 1996, since the Commission had failed to take a position, the applicant sent to that institution a first letter of formal notice, as provided for in Article 175 of the EC Treaty, submitting the abovementioned requests for the marketing year 1996.
- 17 In view of the Commission's failure to respond, Camar brought an action on 28 May 1996 before the Court of First Instance under Article 175 of the EC Treaty, registered as Case T-79/96. In the context of those proceedings it made on 27 January 1997 an application for interim measures requesting the Court to order the Commission to issue Camar Srl with additional licences for 1997 for the import of bananas from non-member countries or non-traditional ACP States at the rate of duty applicable under the Common Customs Tariff in an amount equal to the difference between the quantity of Somalian bananas which Camar Srl was able to import in 1997 and the quantity actually imported by it during the years 1988, 1989 and 1990 and, in the alternative, for such other measures as the Court thought fit in order to prevent irreparable damage.
- 18 The President of the Court of First Instance dismissed that application by the abovementioned order in *Camar v Commission*.
- 19 Thus, on 27 January 1997, Camar submitted a further request to the Commission asking that, pursuant to Article 30 of Regulation No 404/93, the licences for the import of bananas from non-member countries or non-traditional ACP States to be issued to it as a Category B operator in 1997 and in subsequent years pending the restoration of its normal reference quantities be calculated on the basis of the quantities marketed by it in the years 1988, 1989 and 1990.
- 20 On 5 June 1997, before the Commission had taken a decision on the abovementioned request for urgent administrative measures, Camar brought another action under Article 175 of the EC Treaty, registered as Case T-172/97, together with an application for interim measures pursuant to Article 186 of the EC Treaty. Following the Commission's decision of 17 July 1997 rejecting the request for administrative measures, Camar withdrew its application brought under Article 186 and, by order of the President of the Court of First Instance of 8 October 1997, the case was removed from the register.

- 21 By another application lodged at the Court Registry on 25 September 1997, Camar sought the annulment of the Commission decision of 17 July 1997 and an order requiring the Community to pay compensation for the damage suffered by the applicant following the refusal by the Commission to take into account, in calculating Category B licences, its reference quantity prior to the outbreak of the war and, in the alternative, to order compensation to be paid to Camar for failure to adopt a specific provision within the framework of Regulation No 404/93 allowing situations 'such as that' of the applicant to be resolved.
- 22 By separate document, lodged at the Registry on 22 October 1997, Camar made an application for interim measures, pursuant to Articles 185 and 186 of the EC Treaty, for (a) an order suspending the Commission's decision of 17 July 1997 rejecting the application submitted by Camar seeking the adoption of specific measures within the meaning of Article 30 of Regulation No 404/93 and, furthermore, (b) an order requiring the Commission to calculate the number of Category B licences, to which Camar is entitled in respect of 1998, by reference to the quantities of bananas imported in the three-year period from 1988 to 1990, and, in the alternative, to calculate the said licences by reference to the quantities of bananas imported in the three-year period from 1989 to 1991, or by applying the criteria pointed out by the European Parliament in an amendment (OJ 1997 C 20, p. 395, amendment No 8) to the proposal of the Commission to amend Regulation No 404/93 (OJ 1996 C 121, p. 15) and, in the further alternative, to grant to Camar financial aid equal to the market value of the Category B licences to be calculated according to one of the criteria set out above.
- 23 The Commission and the Council submitted their written observations by documents lodged on 4 November 1997. The French Republic applied for leave to intervene on 14 November 1997.
- 24 The original parties to the main proceedings and the party applying for leave to intervene submitted their oral observations on 18 November 1997.

Law*The application for leave to intervene*

- 25 Since the application made by the French Government for leave to intervene was lodged in accordance with Article 115 of the Rules of Procedure of the Court of First Instance and pursuant to the first paragraph of Article 37 of the EC Statute of the Court of Justice, applicable to the procedure before the Court of First Instance by virtue of Article 46 thereof, the French Republic is granted leave to intervene in the present proceedings for interim relief in support of the form of order sought by the defendants.

The application for interim measures

- 26 Under Articles 185 and 186 of the Treaty in conjunction with Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision No 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), and by Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or may prescribe any necessary interim measures.
- 27 Article 104(2) of the Rules of Procedure provides that applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. The measures sought must be provisional in that they must not prejudge the decision on the substance (see, in particular, the order of the President of the Court of First Instance in *Camar v Commission*, cited above, paragraph 21).

Urgency

Arguments of the parties

- 28 In support of its application Camar states that, if the Commission refuses to issue the category B licences sought by means of the present application for interim measures, it will be forced to cease definitively its business of importing bananas into Italy.
- 29 Its current imports from Somalia are less than one-quarter of those effected prior to the outbreak of the civil war, whereas its imports from third countries are somewhat greater than one-third of those carried out before the establishment of the common organization of the markets.
- 30 The scarcity of Somalian imports is not due to the insufficiency of local production, which at present covers the entire quantity of traditional imports of 60 000 tonnes, laid down in the annex to Regulation No 404/93, but to the difficulties encountered when loading the bananas on merchant ships. The applicant complains that, following the closure of the port of Mogadishu, the only loading point which remained was the Bay of Merca where vessels cannot come alongside and where the crates of bananas are transported on barges towed by tugs to vessels anchored 1 500 metres off the coast, so that a loading operation which under normal conditions can be carried out in one day requires some seven days. Moreover, during the monsoon season, which coincides with the third quarter of every marketing year, loading operations in the Bay of Merca are rendered impracticable by the conditions at sea. Thus, the resumption of the Somalian banana production would not be sufficient to guarantee Camar's survival. Furthermore, according to the applicant, Somalian bananas, like all ACP bananas, are less in demand on the European market. For all those reasons, the importation of Somalian bananas would not be profitable in the present situation.

- 31 So far as concern imports from third countries, Camar points out that reduction of its activity (its imports decreased from 22 598 tonnes in 1991 to 7 545.823 tonnes in 1997) was due to the gradual decrease in Category B licences which, in accordance with Regulation No 404/93, were issued to it on the basis of the quantities of bananas imported from Somalia. It points out moreover that the reduction in imports of bananas originating in ACP countries during the war years and immediately thereafter caused a gradual reduction of the quota for imports from third countries.
- 32 The applicant assumes that, precisely because of the net reduction of its imports from Somalia and from third countries and of the consequent appreciable reduction of its activity, the De Nadai group, which until then had financed it on several occasions, could no longer bear its continuing losses. The applicant was thus forced to forego licences for imports from Somalia for the fourth quarter in 1997 since it no longer had the necessary liquidity to deal with the advances required for the purchase and transport of the bananas and to lodge the securities required by Community law. This decline was confirmed by Alessandro De Nadai (who introduced himself as co-owner, together with other members of his family, of the De Nadai group), who, in answer to a question put to him during the hearing, stated that Camar's sales dropped from LIT 100 billion in 1990 to LIT 45 billion in 1997.
- 33 The Commission, to whose observations the Council refers, contests all the applicant's conclusions and observes, first of all, that it has consistently been held that 'damage of a purely financial nature cannot in principle be regarded as irreparable, or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation' (see, in particular, the order of the President of the Court of First Instance in Case T-6/97 R *Comafrica v Commission* [1997] ECR II-291).

34 It points out, moreover, so far as the facts are concerned, that the difficulties claimed by the applicant, even if they were genuine, are the consequence of the strategies adopted by the De Nadai group which, on the one hand, through Somalfruit, in which it has a majority holding, continued to produce Somalian bananas despite the fact that such production is not nowadays very competitive on the Community market, and, on the other, entered into an agreement with a competing company belonging to the Dole group, which also imports Somalian bananas into Italy.

35 The Commission goes on to point out a number of facts which, it claims, show that Camar's economic situation is better than Camar itself alleges. The Commission states that not only do the documents produced by Camar concerning its activity not confirm the existence of considerable economic difficulties, but 'objective factors' demonstrate that the applicant was in a stable financial situation and is thus unlikely to leave the market.

36 First, the Commission states that, according to the information provided by the relevant Chamber of Commerce, Camar's turnover in 1993 was LIT 4.330 billion, in 1994 7 billion and in 1995 10 billion and that, although in 1993 there was a loss of 241 million, in 1994 Camar reported profits of 2 million and in 1995 profits of 160 million. However, according to the Commission, the fact that Camar's turnover is so considerable makes it 'at least unlikely that it does not have the necessary economic means to provide the securities for the licences for the fourth quarter of 1997 and even more unlikely that the cause of such economic difficulty is due to the COM' (common organization of the market).

37 Secondly, the Commission, basing itself on the fact that, as a holder of A and B licences, Camar imported in 1997 more than 36 000 tonnes of bananas of which 27 000 were from Somalia and 9 600 were from third countries, refuses to accept that Camar — which, as is common ground, was able to operate from 1981 to 1987 importing approximately 30 000 tonnes of bananas per year — cannot continue to

carry on its business any longer since it imports annually almost 7 000 tonnes of bananas more than the quantity imported in the aforementioned period.

38 According to the Commission, it may be concluded on the basis of the information provided by the applicant that Camar should obtain a far greater number of B licences for imports from third countries for 1998 than was issued to it for 1997, inasmuch as the reference years for calculating the quota for 1998 are 1994, 1995 and 1996, years in which Camar recorded an increase in its imports from Somalia; to these must then be added the Category A licences which should be maintained at the level of those of the current year, for the obvious reason that imports from third countries have not changed. The Commission observes that, in any event, in 1998 Camar will be the Category B operator who, of almost 150 registered in Italy, will receive the largest number of B licences. Camar could also import bananas from the Windward Islands using Tico's licences. Tico will receive in 1998 Category B licences in respect of 953 tonnes and category C licences (that is to say, licences which are issued to undertakings which have recently begun marketing bananas) in respect of a minimum quantity, which should help to increase the applicant's earnings, inasmuch as Tico belongs to the De Nadai group, which in turn has a majority holding in Camar.

39 The French Government contests the circumstances put forward by the applicant to establish the urgency of the interim measures sought. It submits that the quantity of bananas produced in Somalia exceeds, according to undisputed figures, the quantity of 'traditional' imports laid down in the annex to the regulation establishing the common organization of the markets and that Camar imported into Italy in the first quarter of 1997 70% of the entire quantity of bananas originating in that country. It further states that the De Nadai group occupies at present 10% of the Italian market, that is, the same share as it held before the establishment of the common organization.

40 Finally, the French Government points out that, notwithstanding the transport difficulties complained of by Camar, there are other undertakings interested in importing bananas from Somalia.

The findings of the President as to urgency

41 Article 104(2) of the Rules of Procedure provides that applicants must state, in applications for interim measures 'the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for'.

42 It is settled case-law that it is necessary to assess urgency by examining whether, pending the Court's decision on the substance, the applicant could suffer serious and irreversible harm which cannot be made good by the judgment in the main proceedings. Damage of a purely financial nature cannot in principle be regarded as irreparable, or reparable only with difficulty, if it can ultimately be the subject of financial compensation (see, most recently, Case T-230/97 R *Comafrika v Commission* [1997] ECR II-1589, paragraph 32). Damage can be considered irreparable when the undertaking's position on the market is at risk, in that the possible loss of the market cannot be made good even by receipt of financial compensation.

43 In support of its application for interim relief, Camar puts forward a whole range of circumstances. It claims, first of all, that: it was constrained to reduce to a considerable extent imports of bananas from Somalia because local production has decreased and, secondly, also because of the difficult conditions for loading the product on merchant ships caused by the port of Mogadishu being rendered unfit for use as a result of the fighting; it had at the same time to reduce also imports from other ACP countries on account of the fact that, after the establishment of the common organization, it became very difficult to gain access to those markets

because importers who had already been operating in them before the creation of the common organization had consolidated their positions; and that, finally, it was obliged also to reduce imports from third countries because the number of licences obtainable for that type of import decreased as a result of the reduction of imports from Somalia, the amount of those imports constituting the reference criterion for the issue of such licences. Camar claims, in the second place, that following that forced reduction in its activity it was constrained to incur debts within the De Nadai group (a group which, as has been stated above, holds 50% of its capital) and to dismiss its staff, decreasing its staff from 12 to only six. It states that if, in such circumstances, it does not obtain, through the grant of appropriate interim measures, additional licences for the import of bananas from non-member countries, it will have no choice but to close down its business.

- 44 The defendants and the French Government contest the facts asserted by the applicant. They state that the quantity of bananas imported by Camar in 1997 was 37 000 and was amply sufficient to enable it to survive. They state, furthermore, that, according to the information provided by the relevant Chamber of Commerce, Camar's finances are in perfect balance in the current year and it had, moreover, made some profit both in 1994 and 1995. They go on to add that it can take advantage of the import licences granted to Tico, the entirety of whose capital is held by the De Nadai group, and note that licences were issued to that company precisely for the fourth quarter of 1997, the period in respect of which Camar complains that it had not been able to request any licences since it did not have the necessary liquidity to lodge the requisite securities.

- 45 The applicant's assertions are not convincingly substantiated either by the turnover achieved in recent years or by the volume of imports within the same period. These two elements are intertwined but should be examined separately with a view to establishing some order in the numerous figures, not always clear and consistent, which the parties have put forward both in the pleadings and at the hearing.

- 46 It appears from the statements made at the hearing by Alessandro De Nadai that in the last two years (1995 and 1996) there has been an appreciable increase in Camar's turnover, which increased from LIT 45 billion in 1995 to 80 billion in 1996 and 1997. Moreover, according to the information provided during the hearing by the Commission and not disputed by the applicant, it appears that Camar made a profit of LIT 2 million in 1994 and of 160 million in 1995. According to the applicant, the achievement of such turnover is not sufficient to prove that its condition was fully stable: that is why the De Nadai group had intervened on several occasions to provide it with the financial means necessary to overcome its difficulties.
- 47 In this regard, it should be observed first that the existence of such financing was merely asserted, and, moreover, in the most general terms, although questions were put at the hearing to the applicant specifically in order to obtain precise information on that aspect. The amounts involved and the periods during which the various payments of funds were made were not mentioned; nor were the legal entities which allegedly carried out those operations adequately identified, and no corroborating accounting documents of any kind whatever were produced, despite the fact that the operations in question form an integral part of the life of legal entities required to draw up annual balance sheets and preserve documents pertaining to their activities. It should next be observed that, in any event, that aspect could not have a significant influence on the overall assessment of the applicant's economic circumstances and specific operational possibilities, since the De Nadai group owns 50% of that company's capital and, therefore, its assistance, even assuming it to have been given, would constitute a purely internal operation, as the applicant itself acknowledged at the hearing.
- 48 So far as concerns, next, the second aspect to be taken into consideration, that is the volume of banana imports effected by Camar, the figures provided by the parties show that, as from 1993, the year in which the common organization of the markets was established, that organization significantly reduced the quantity of bananas imported annually both from ACP countries and third countries. That quantity decreased from an average of approximately 53 000 tonnes during the last four years immediately prior to the establishment of the common organization to

an average of approximately 24 000 tonnes during the four years following the establishment of the common organization (see Annex 1 to the Commission's observations).

49 It cannot therefore be denied that Camar's business underwent a contraction from 1993. It is nevertheless true that, notwithstanding this, its imports in 1995 and 1996 showed a certain improvement, reaching 28 640 and 27 774 tonnes respectively. Furthermore, according to the applicant's statements, which were not contested by the Commission, its imports should be somewhere in the region of 20 000 tonnes in 1997, 11 995.614 tonnes coming from Somalia and approximately 7 000 tonnes from third countries. It should moreover be observed that those figures do not entirely coincide with those provided by the Commission. Referring to the 'Relazione sulla produzione ed esportazione di banane dalla Somalia dalla Baia di Merca' produced by the applicant (Annex 4 to the application in the main proceedings), the Commission states that imports by the De Nadai group from Somalia, namely Camar's imports added to those of Tico, should at least reach 27 000 tonnes in 1997.

50 It should be recalled once again in this regard that Tico belongs to the De Nadai group, which itself owns 50% of Camar's capital and carries on the same business as Camar. Thus, although it has the appearance of being a separate entity from Camar, Tico is linked to it because it belongs to the same group, so that Camar's position on the market must be assessed together with that of Tico. Taken together, the combined imports of bananas of the De Nadai group represents approximately 26 000 to 27 000 tonnes in 1997. In view of such a volume of trade, it would appear difficult to maintain that the system of imports introduced with effect from 1993 by the common organization of the markets is today the cause of irreparable damage to Camar.

51 That remains the case even if account is taken of other significant factors which the parties mentioned in their pleadings or which emerged at the hearing: the loss of competitiveness of Somalia bananas on the Italian market and the increase in transport costs as a result of the port of Mogadishu becoming impossible to use.

- 52 As regards the first factor, Camar itself admits that bananas coming from Somalia as well as, more generally, all those coming from ACP countries, have lost their competitiveness on the Italian market and that, for this reason too, the issue of additional licences for the importation from third countries of bananas of a different quality would secure for it significant advantages by enabling it to overcome the difficulties it is currently facing. That argument is not one that can lend support to the application for interim measures, that is to say the application for additional licences for imports from third countries. On the contrary, the reduction in demand for Somalia bananas on the Italian market, which may be attributed to a change in consumer trends, bears no causal relationship with the system under the common organization but is entailed rather by the uncertainties normally associated with the pursuit of any business activity.
- 53 So far as concerns, furthermore, the increase in transport costs due to the impossibility of using the port of Mogadishu, it must be acknowledged that this is a factor of an exceptional nature (a factor which the Commission probably could have taken into account, pursuant to Article 30 of Regulation No 404/93, when examining the repeated applications for licences submitted by Camar). The applicant has not, however, shown that that increase in costs is such as to render the pursuit of its activities impossible until judgment is given on the merits or, in any event, as to cause irreversible damage to its position on the market.
- 54 For all those reasons, it cannot be found that there exists an imminent risk of serious and irreparable damage to Camar. While Camar did, admittedly, experience a reduction in its turnover in the period immediately following the establishment of the common organization — in particular in 1993 and 1994 —, it is none the less also the case that, as from 1995, its activities resulted in an annual importation of approximately 27 000 tonnes of bananas. In view of this figure and, more generally,

of the applicant's overall situation as evidenced by the factors analysed above, it cannot be found that it is in danger of seeing its situation on the market, or even its survival, seriously jeopardized in the period of time which may be expected to elapse before judgment is delivered on the substance of the case.

55 It follows that the application for interim measures must be dismissed, without there being any need to consider whether the main action appears prima facie well founded.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim relief is dismissed.

2. Costs are reserved.

Luxembourg, 10 December 1997.

H. Jung

Registrar

A. Saggio

President

II - 2377