

JUDGMENT OF THE COURT
9 November 1995 *

In Case C-465/93,

REFERENCE to the Court under Article 177 of the EC Treaty by the Verwaltungsgericht Frankfurt am Main, Germany, for a preliminary ruling in the proceedings pending before that court between

Atlanta Fruchthandelsgesellschaft mbH and Others

and

Bundesamt für Ernährung und Forstwirtschaft,

on the interpretation of Article 189 of the EC Treaty, and more particularly on the national court's power to order interim measures disapplying a regulation pending a preliminary ruling by the Court on its validity,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler (Rapporteur), J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann and H. Ragnemalm, Judges,

* Language of the case: German.

Advocate General: M. B. Elmer,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Atlanta Fruchthandelsgesellschaft mbH and Others, by E. A. Undritz and G. Schohe, Rechtsanwälte, Hamburg,
- the German Government, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and B. Kloke, Regierungsrat in that Ministry, acting as Agents,
- the Spanish Government, by A. Navarro González, Director-General of Community Legal and Institutional Coordination, and Rosario Silva de Lapuerta, Abogado del Estado, of the State Legal Service, acting as Agents,
- the French Government, by C. de Salins, Deputy Director in the Legal Affairs Department of the Ministry of Foreign Affairs, and N. Eybalin, Secretary for Foreign Affairs in that Department, acting as Agents,
- the Italian Government, by U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, and P. G. Ferri, Avvocato dello Stato, acting as Agents,
- the United Kingdom, by S. L. Hudson, Assistant Treasury Solicitor, acting as Agent, and E. Sharpston, Barrister,
- the Commission of the European Communities, by U. Wölker, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Atlanta Fruchthandelsgesellschaft mbH and Others, the German Government, the Spanish Government, the United Kingdom and the Commission at the hearing on 28 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 5 July 1995,

gives the following

Judgment

- 1 By order of 1 December 1993 received at the Court Registry on 14 December 1993, the Verwaltungsgericht (Administrative Court) Frankfurt am Main referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 189 of the EC Treaty, and more particularly on the national court's power to order interim measures disapplying a regulation pending a preliminary ruling by the Court on its validity.
- 2 Those questions arose in proceedings between Atlanta Fruchthandelsgesellschaft mbH and 17 other companies in the Atlanta group (hereinafter 'the Atlanta companies') and the Bundesamt für Ernährung und Forstwirtschaft (Federal Office of Food and Forestry, hereinafter 'the Bundesamt') on the allocation of import quotas for third-country bananas.
- 3 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') established from 1 July 1993 a common import regime replacing the various national arrangements.

- 4 Title IV of the Regulation, on trade with third countries, provides in Article 18 that a tariff quota of two million tonnes (net weight) is to be opened each year for imports of third-country bananas and non-traditional ACP bananas. Within the framework of that quota, imports of non-traditional ACP bananas are to be subject to a zero duty and imports of third-country bananas to a levy of ECU 100 per tonne. Outside that quota, imports of non-traditional ACP bananas are to be subject to a levy of ECU 750 per tonne and imports of third-country bananas to a levy of ECU 850 per tonne.
- 5 Article 19(1) subdivides the tariff quota: 66.5% is to be opened to the category of operators who have marketed third-country and/or non-traditional ACP bananas, 30% to the category of operators who have marketed Community and/or traditional ACP bananas, and 3.5% to the category of operators established in the Community who have started marketing bananas other than Community and/or traditional ACP bananas from 1992.
- 6 Article 21(2) of the Regulation discontinues the annual duty-free import quota for bananas enjoyed by the Federal Republic of Germany under the Protocol annexed to the Implementing Convention on the Association of the Overseas Countries and Territories with the Community provided for in Article 136 of the Treaty.
- 7 In accordance with the Community legislation, the Atlanta companies, which were traditional importers of third-country bananas, received from the Bundesamt provisional import quotas for third-country bananas for the period from 1 July to 30 September 1993.
- 8 Since they considered that the Regulation had limited their import possibilities, the Atlanta companies lodged complaints with the Bundesamt.

- 9 The Atlanta companies brought an action against the decisions rejecting those complaints before the Verwaltungsgericht Frankfurt am Main.
- 10 Since the Verwaltungsgericht shared the Atlanta companies' doubts as to the validity of the Regulation, by a first order, made on 1 December 1993, it stayed the proceedings pending a preliminary ruling by the Court of Justice on its validity (Case C-466/93).
- 11 The Atlanta companies sought interim relief from the Verwaltungsgericht in the form of an order that the Bundesamt grant additional import licences for third-country bananas for the second half of 1993, over and above the quantities already allocated, until the Court of Justice's decision in the proceedings for a preliminary ruling on the question of validity.
- 12 By a second order, which was also made on 1 December 1993 and is the origin of the present reference for a preliminary ruling, the Verwaltungsgericht asked the Court to rule on the following questions:
 - '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?

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?

- 13 In the same order the Verwaltungsgericht ordered the Bundesamt provisionally to grant the applicants additional import licences for November and December 1993 at a customs duty of ECU 100 per tonne.
- 14 The issue of the licences was made subject to the condition that the applicants would for the time being make no use of the import licences which had been allocated to them for 1994 for the importation of third-country bananas at a rate of duty of ECU 100 per tonne, to the extent that, in accordance with the order, they were provisionally granted additional import licences over and above the definitive quota. That condition was intended to ensure that if the applicants lost their case, the additional quotas allocated them for 1993 could be set off against the quotas they were entitled to for 1994.
- 15 In the order for reference the Verwaltungsgericht observes that in its judgment in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415 the Court held that the coherence of interim legal protection of individuals requires that a national court which has made a reference to the Court of Justice for a preliminary ruling on the validity of a regulation should be able to order suspension of enforcement of a national administrative measure based on that regulation. It notes that the Court has not yet ruled, however, on the power of a national court in such circumstances to order interim mea-

asures which create a new legal position for the benefit of the person seeking legal protection. The Verwaltungsgericht suggests that the grant of such interim relief may call into question the full effectiveness of the regulation in all the Member States.

- 16 The grant of interim relief in the present case is based on the consideration that a refusal would be contrary to the guarantee of legal protection enshrined in Article 19(4) of the Grundgesetz (Basic Law). If the Verwaltungsgericht did not have jurisdiction to grant interim protection against administrative measures of the national authorities which were based on Community law, it would have to refer to the Bundesverfassungsgericht (Federal Constitutional Court) the question of the compatibility with Article 19(4) of the Grundgesetz of the national law approving the EEC Treaty. With reference to the conditions for the grant of interim relief, the Verwaltungsgericht refers to Article 186 of the EC Treaty.
- 17 By order of 29 June 1993 (Case C-280/93 R *Germany v Council* [1993] ECR I-3667) the Court, holding that the conditions for the grant of interim measures sought were not met, dismissed an application for interim relief which would permit the Federal Republic of Germany to import the same annual quantities of third-country bananas free of customs duty as in 1992 until the Court's decision on the substance of the case.
- 18 By judgment of 5 October 1994 (Case C-280/93 *Germany v Council* [1994] ECR I-4973) the Court dismissed the application for annulment of the Regulation.

Question 1: The principle of the grant of interim relief

- 19 By its first question the Verwaltungsgericht essentially asks whether Article 189 of the Treaty is to be interpreted as precluding national courts from ordering interim

measures to settle or regulate contested legal positions or relationships with reference to a national administrative measure based on a Community regulation which is the subject of a reference for a preliminary ruling on its validity.

- 20 The Court held in *Zuckerfabrik* 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 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 request those courts to refer questions to the Court for a preliminary ruling (paragraph 16).
- 21 That right would be compromised if, pending delivery of a judgment of the Court, which alone has jurisdiction to declare a Community regulation invalid (see Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, paragraph 20), individuals were not in a position, where certain conditions are satisfied, to obtain a decision granting suspension of enforcement which would make it possible for the effects of the disputed regulation to be rendered inoperative as regards them (*Zuckerfabrik*, paragraph 17).
- 22 As the Court pointed out in *Foto-Frost* (paragraph 16), references for preliminary rulings on the validity of a measure, like actions for annulment, allow the legality of acts of the Community institutions to be reviewed. In the context of actions for annulment, Article 185 of the EC Treaty enables applicants to request enforcement of the contested act to be suspended 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 enforcement of a national administrative measure based on a Community regulation, the legality of which is contested (*Zuckerfabrik*, paragraph 18).

- 23 Furthermore, in its judgment in Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame and Others* [1990] ECR I-2433, delivered in a case concerning the compatibility of national legislation with Community law, the Court, referring to the effectiveness of Article 177, held that the national court which had referred questions of interpretation for a preliminary ruling in order to enable it to decide that issue of compatibility had to be able to grant interim relief and to suspend the application of the disputed national legislation until such time as it could deliver its judgment on the basis of the interpretation given in accordance with Article 177 (*Zuckerfabrik*, paragraph 19).
- 24 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 (*Zuckerfabrik*, paragraph 20).
- 25 The Court accordingly held in *Zuckerfabrik* that Article 189 is to be interpreted as not precluding national courts from suspending enforcement of a national administrative measure adopted on the basis of a Community regulation.
- 26 In the present proceedings for a preliminary ruling, the national court asks the Court for a ruling, not on the question of suspension of enforcement of a national measure adopted on the basis of a Community regulation, but on the making of a positive order provisionally disapplying that regulation.
- 27 In the context of an action for annulment, the Treaty not only, in Article 185, authorizes the Court to order application of the contested act to be suspended, but

also, in Article 186, confers on it the power to prescribe any necessary interim measures.

- 28 The interim legal protection which the national courts must afford to individuals under Community law must be the same, whether they seek suspension of enforcement of a national administrative measure adopted on the basis of a Community regulation or the grant of interim measures settling or regulating the disputed legal positions or relationships for their benefit.
- 29 Contrary to the submissions of the Spanish and Italian Governments, the grant of such interim relief does not as such have more radical consequences for the Community legal order than the mere suspension of enforcement of a national measure adopted on the basis of a regulation. The consequences of the interim measure, whatever it may be, for the Community legal order must be assessed as part of the balancing exercise between the Community interest and the interests of the individual which is the subject of the Verwaltungsgericht's second question.
- 30 In the light of the above considerations, the answer to the first question must therefore be that Article 189 of the Treaty is to be interpreted as not precluding national courts from granting interim relief to settle or regulate the disputed legal positions or relationships with reference to a national administrative measure based on a Community regulation which is the subject of a reference for a preliminary ruling on its validity.

Question 2: The conditions for the grant of interim relief

- 31 The Verwaltungsgericht goes on to ask under what conditions national courts can grant such interim relief.

- 32 The Court held in *Zuckerfabrik* that suspension of enforcement of a national administrative measure adopted in implementation of a Community regulation may be granted by a national court only if that court entertains serious doubts as to the validity of the Community act and, where the validity of the contested measure is not already in issue before the Court of Justice, itself refers that question to the Court; 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 interest.
- 33 Those conditions must be observed when a national court orders any interim relief, including a positive measure rendering the regulation whose validity is challenged provisionally inapplicable as regards the individual.
- 34 The present case affords the Court an opportunity to clarify those conditions.
- 35 In *Zuckerfabrik* (paragraph 23) the Court held that interim measures may be adopted only if the factual and legal circumstances relied on by the applicants 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 grant of interim relief.
- 36 That requirement means that the national court cannot restrict itself to referring the question of the validity of the regulation to the Court for a preliminary ruling, but must set out, when making the interim order, the reasons for which it considers that the Court should find the regulation to be invalid.

The national court must take into account here the extent of the discretion which, having regard to the Court's case-law, the Community institutions must be allowed in the sectors concerned.

- 38 The Court further held in *Zuckerfabrik* (paragraph 24) that the grant of relief must retain the character of an interim measure. The national court to which the application for interim relief is made may therefore order interim measures and maintain them only for so long as the Court has not ruled that consideration of the questions referred for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of the regulation in question.
- 39 Since the power of national courts to order interim relief corresponds to the jurisdiction reserved to the Court of Justice by Article 186 in the context of actions brought under Article 173 of the Treaty, those national courts may grant such relief only on the same conditions as apply when the Court of Justice is dealing with an application for interim measures (*Zuckerfabrik*, paragraph 27).
- 40 In that respect the Court held in *Zuckerfabrik* (paragraph 28), on the basis of settled case-law, that interim measures may be ordered only where they are urgent, that is to say, where it is necessary for them to be adopted and take effect before the decision on the substance of the case, in order to avoid serious and irreparable damage to the party seeking them.
- 41 As to urgency, the damage relied on by the applicant must be such as to materialize before the Court of Justice has been able to rule on the validity of the contested Community act. As 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 with respect

to which the application for interim relief is made 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 (*Zuckerfabrik*, paragraph 29).

- 42 Furthermore, 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 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 interest of the Community, namely that such regulations should not be set aside without proper guarantees (*Zuckerfabrik*, paragraph 30).
- 43 In order to comply with that obligation, the national court to which an application for interim relief has been made must first examine whether the Community act in question would be deprived of all effectiveness if not immediately implemented (*Zuckerfabrik*, paragraph 31).
- 44 In that respect the national court must take account of the damage which the interim measure may cause the legal regime established by that regulation for the Community as a whole. It must consider, on the one hand, the cumulative effect which would arise if a large number of courts were also to adopt interim measures for similar reasons and, on the other, those special features of the applicant's situation which distinguish him from the other operators concerned.
- 45 If the grant of interim relief represents 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 (*Zuckerfabrik*, paragraph 32).

- 46 When assessing the conditions for the grant of interim relief, the national court is obliged under Article 5 of the Treaty to respect what the Community court has decided on the questions at issue before it. Thus if the Court of Justice has dismissed on the merits an action for annulment of the regulation in question or has held, in the context of a reference for a preliminary ruling on validity, that the reference disclosed nothing to affect the validity of that regulation, the national court can no longer order interim measures or must revoke existing measures, unless the grounds of illegality put forward before it differ from the pleas in law or grounds of illegality rejected by the Court in its judgment. The same applies if the Court of First Instance, in a judgment which has become final and binding, has dismissed on the merits an action for annulment of the regulation or a plea of illegality.
- 47 In the present case the Court, adjudicating on the same factual situation as that which gave rise to the proceedings before the national court, has held that the Member States which bring an action for annulment of the regulation, being responsible for the interests, in particular those of an economic and social nature, which are regarded as general interests at national level, are entitled to take judicial proceedings to defend such interests. 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 (order in *Germany v Council*, cited above, paragraph 27).
- 48 The national court, when called upon to protect the rights of individuals, may indeed assess the extent to which refusal to order an interim measure may be liable to have a serious and irreparable effect on important individual interests.
- 49 However, if an applicant is unable to show a specific situation which distinguishes him from other operators in the relevant sector, the national court must accept any

findings already made by the Court of Justice concerning the serious and irreparable nature of the damage.

- 50 The national court's obligation to respect a decision of the Court of Justice applies in particular to the Court's assessment of the Community interest and the balance between that interest and that of the economic sector concerned.
- 51 Accordingly, the answer to the second question put to the Court by the Verwaltungsgericht Frankfurt am Main must be that interim relief, with respect to a national administrative measure adopted in implementation of a Community regulation, can be granted by a national court only if:
- (1) that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;
 - (2) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;
 - (3) the court takes due account of the Community interest; and
 - (4) in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at Community level.

Costs

- 52 The costs incurred by the French, German, Italian and Spanish Governments and the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Verwaltungsgericht Frankfurt am Main by order of 1 December 1993, hereby rules:

1. Article 189 of the Treaty is to be interpreted as not precluding national courts from granting interim relief to settle or regulate the disputed legal positions or relationships with reference to a national administrative measure based on a Community regulation which is the subject of a reference for a preliminary ruling on its validity.
2. Such interim relief can be ordered by the national court only if:

- (1) that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;
- (2) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;
- (3) the court takes due account of the Community interest; and
- (4) in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at Community level.

Rodríguez Iglesias

Kakouris

Edward

Puissochet

Hirsch

Mancini

Schockweiler

Moitinho de Almeida

Kapteyn

Gulmann

Murray

Jann

Ragnemalm

Delivered in open court in Luxembourg on 9 November 1995.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President