OPINION OF ADVOCATE GENERAL MISCHO

delivered on 17 May 2001 [1]

1. Cordis Obst und Gemüse Großhandel GmbH ('Cordis') has brought an appeal against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) in Case T-612/97 *Cordis* v *Commission* [1999] ECR II-2771 ('the contested judgment').

I — Legal background

2. As regards the legal background, the Court of First Instance stated:

'1 Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1, "Regulation No 404/93") introduced a common system for the importation of bananas which replaced the various national arrangements. In order to ensure satisfactory marketing of bananas produced in the Community and of products originating in the African, Caribbean and Pacific (ACP) States and in other third countries, Regulation No 404/93 provides for the opening of an annual tariff quota for imports of "third-country" bananas and "non-traditional ACP" bananas. "Non-traditional ACP" bananas means the quantities exported by the ACP States which exceed the quantities traditionally exported by each of those States as set out in the Annex to Regulation No 404/93.

2 Each year a forecast supply balance is to be drawn up on production and consumption in the Community and of imports and exports. The tariff quota determined on the basis of the forecast supply balance is to be allocated among operators established in the Community according to the origin and the average quantities of bananas they have sold in the three most recent years for which figures are available. On the basis of that allocation, import licences are to be issued which enable operators to import bananas free of customs duties or at preferential rates of customs duty.

1 — Original language: French.

3 The 22nd recital in the preamble to Regulation No 404/93 is worded as follows:

"... the replacement of the various national arrangements in operation when this regulation comes into force by this common organisation of the market threatens to disturb the internal market;... the Commission, as of 1 July 1993, should be able to take any transitional measures required to overcome the difficulties of implementing the new arrangements".

4 Article 30 of Regulation No 404/93 provides as follows:

"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... shall take any transitional measures it judges necessary."'

II — The facts

3. As regards the facts of the case, the Court of First Instance found:

'5 [Cordis] was formed on 1 November 1990, that is to say after the reunification of Germany, and has its registered office in the former German Democratic Republic ("GDR"). Its business is wholesale fruit trading and, *inter alia*, the ripening and packaging of bananas.

6 Under the planned and centralised economy of the former GDR, the monopoly on banana imports was held by a State body and that on ripening by nationalised undertakings. Ripening plants in the former GDR were subsequently sold to branches of fruit companies from the Federal Republic of Germany.

7 At the time of the applicant's launch, the scope for obtaining supplies of bananas in its commercial catchment area was limited, and the demand for bananas was greater than both supply and its ripening capacity. In 1991 the applicant therefore decided to expand and built new ripening facilities. It received no subsidy from public funds for that purpose.

8 According to the applicant, its new facilities were being used below their capacity. It points out in this respect that, since the regulation requires licences to be obtained for the importation of green bananas, the fact that its suppliers reflected the licence costs in the price of the bananas curbed consumption. Consequently, since such licences are granted according to the quantities of bananas sold, the applicant itself was only able to obtain import licences for insufficient quantities.

9 Accordingly, on 7 April 1996, the applicant requested the Commission, under Article 30 of Regulation No 404/93, to grant it additional licences as soon as possible by way of a transitional measure intended to compensate for hardship due to the rules introduced by Regulation No 404/93.

10 By decision of 24 October 1997, the Commission rejected the applicant's request ("the contested decision") on, *inter alia*, the following grounds (seventh, eighth, ninth and eleventh recitals in the preamble):

"...

... Cordis has not shown that it was unable to obtain sufficient quantities of bananas for ripening to enable the ripening plant to operate at full capacity from other traders or other sources rather than import them itself;... the common organisation of the market in bananas does not prevent it from doing so;... Cordis has in fact obtained significant quantities of bananas for ripening from other traders or other sources without importing them itself;... it has not therefore been shown that any alleged under-utilisation of the ripening plant and any alleged stagnation of turnover in the banana sector, loss of customers or staff lay-offs which ensued from this were due to the transition from the provisions existing prior to the entry into force of the regulation to the common organisation of the market;

... Cordis has not shown that it had for certain a source for the supply of bananas for ripening before it invested in the ripening plant;... Cordis accepted the risk that it might not be able to obtain sufficient bananas for ripening to enable the plant to operate at full capacity;... consequently, notwithstanding the foregoing paragraphs, any inability on the part of Cordis to obtain sufficient bananas for ripening to enable the plant to operate at full capacity from other traders or other sources, without importing them itself, is due to a lack of care on Cordis' part

in that it failed to secure the supplies before investing in the ripening plant;

... Cordis obtained significant quantities of bananas for ripening from Dole;... it obtained ripe bananas in quantities sufficient to meet its customers' requirements;... banana ripening is only one of the many activities pursued by Cordis;... Cordis has therefore not shown that any alleged reduction of its ripening activities constituted a difficulty threatening its existence;

...

... Cordis has not shown that it took other steps, before the aforementioned dates, which have led to a case of hardship within the meaning of the judgment of the Court of Justice in Case C-68/95 because of difficulties inherent in the transition from the national arrangements in existence before the entry into force of the regulation in question;

...".'

III — The contested judgment

4. It follows from the contested judgment that, by application lodged at the Registry of the Court of First Instance on 29 December 1997, Cordis applied for the annulment of the contested decision. By order of 6 July 1998, the French Republic was granted leave to intervene in support of the form of order sought by the Commission.

5. In support of its application before the Court of First Instance, Cordis relied on two pleas in law alleging, first, infringement of Article 30 of Regulation No 404/93 and misuse of powers and, second, infringement of the obligation to state reasons.

6. By the contested judgment, the Court of First Instance dismissed the application. The reasoning adopted by the Court of First Instance in response to Cordis' first plea — reasoning challenged by Cordis in this appeal — is as follows:

'32 Article 30 of Regulation No 404/93 confers on the Commission the power to take specific transitional measures "to assist the transition from arrangements existing before the entry into force of [the] regulation to those laid down by this regulation, and in particular to overcome difficulties" caused by that transition. According to settled case-law, those transitional measures are intended to deal with disturbances

in the internal market in consequence of the replacement of the various national arrangements by the common organisation of the market and their purpose is to address difficulties encountered by traders after establishment of the common organisation of the market but originating in the state of national markets prior to the entry into force of Regulation No 404/93 (see the order in [Case C-280/93 R] *Germany* v *Council* [[1993] ECR I-3667], paragraphs 46 and 47; the judgment[s] in [Case C-68/95] *T. Port* [[1996] ECR I-6065, paragraph 34; and Joined Cases C-9/95, C-23/95 and C-156/95 *Belgium and Germany* v *Commission* [1997] ECR I-645, paragraph 22; and the order in [Case T-79/96 R] *Camar* v *Commission* [[1977] ECR II-403], paragraph 42).

33 The Court of Justice has held that the Commission must in this regard take into account the situation of traders who, under national legislation in force prior to Regulation No 404/93, took certain action without being able to foresee the consequences of such action after establishment of the common organisation of the market (see *T. Port*, paragraph 37).

34 It follows that the purpose of Article 30 is to facilitate the transition to the common organisation of the market in bananas for undertakings for which this has caused particular and unforeseeable problems.

35 It is therefore necessary to consider whether the problems encountered by the applicant are due to the transition to the common organisation of the market.

36 It should be noted in this respect that the applicant company was formed on 1 November 1990, that is to say after German reunification. It therefore took the decision in 1991 to expand by building new ripening facilities not unaware of the situation obtaining in Germany following reunification.

37 It has clearly not put forward any arguments capable of proving that the structural problems relating to German reunification have, as far as it is concerned, given rise to a particular and unforeseeable problem arising from the introduction of the common organisation of the market in bananas. Moreover, the parties confirmed at the hearing that, prior to the establishment of the common organisation of the market, ripening undertakings in the former GDR could not import bananas themselves. The Commission is therefore justified in stating that the introduction of the common organisation of the market did not add to the structural disadvantages cited by the applicant (see paragraph 27 above).

38 The applicant submits, however, that action by the Commission is necessary in order to ensure observance of the principle of equal treatment. By its method of granting import licences according to the volume of bananas sold during the reference period, Regulation No 404/93 is said to have frozen the original state of competition by preventing new undertakings from reducing their handicap.

39 That argument is unacceptable. Article 30 of Regulation No 404/93, which must be interpreted restrictively as a derogation from the general provisions applicable, cannot serve to offset the competitive disadvantage suffered by new undertakings in relation to the differences in opportunities available in Germany. That disadvantage is not, after all, due to the establishment of the common organisation of the market.

40 Furthermore, while it is true that not all undertakings are affected in the same way by Regulation No 404/93, the Court of Justice has already held in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraphs 73 and 74, that the difference in treatment appears to be inherent in the objective of integrating previously compartmentalised markets, bearing in mind the different situations of the various categories of traders before the establishment of the common organisation of the market.'

IV — The appeal

7. By application lodged at the Court Registry on 22 November 1999, Cordis brought an appeal against the contested judgment.

8. Cordis raises two grounds of appeal alleging failure to observe the conditions for the application of Article 30 of Regulation No 404/93 and breach of the principle of equal treatment.

Failure to observe the conditions for the application of Article 30 of Regulation No 404/93

Arguments of the parties

9. *Cordis* submits that the contested judgment fails to observe the conditions for the application of Article 30 of Regulation No 404/93. In particular, paragraph 37 of the *T. Port* judgment [2] — which the Court of First Instance cites in paragraph 33 of the contested judgment — cannot be interpreted as meaning that the application of Article 30 of Regulation No 404/93 in favour of a trader is conditional on the trader in question having particular and

2 — Case C-68/95 *T. Port* [1996] ECR I-6065.

unforeseeable problems due to the introduction of the common organisation of the market in bananas.

10. According to the appellant, Article 30 of Regulation No 404/93 applies where Community measures are required to assist the transition from national arrangements for bananas to the common organisation of the market. The conditions are therefore that the measures assist the transition to the common organisation of the market and that it is necessary to assist that transition.

11. The appellant claims that Article 30 of Regulation No 404/93 does not lay down general criteria defining when it is necessary to assist the transition from national arrangements for bananas to the common organisation of the market. It does not therefore require that the disturbances create unforeseeable problems for traders. Cordis claims that in relying on *T. Port*, cited above, the Court of First Instance applied to it case-law of the Court of Justice concerning extreme hardship, although that is only one of the cases to which Article 30 is applicable, and Cordis was not in that situation.

12. Cordis considers, on the other hand, that paragraph 41 of the *T. Port* judgment provides more clarification as to the criteria which should be applied to the trader's conduct. Cordis states that 'in the present case, the transitional difficulties were not due to [its] conduct... — that analysis constitutes the fundamental error in the contested judgment — but consisted of structural difficulties which had arisen for new undertakings such as the appellant and which had been exacerbated by the establishment of the common organisation of the market in bananas. The appellant's conduct prior to the entry into force of Regulation No 404/93... has absolutely no part to play in this case'. Moreover, the appellant claims that the Court of First Instance erred in considering 'that the structural disadvantages cited by the appellant were not compounded because ripening undertakings in the former GDR could not themselves import bananas prior to the establishment of the common organisation of the market'.

13. The appellant submits that the structural disadvantage which it faced as a new undertaking of the new Länder — as did all the other new undertakings — lay in not being able to engage in ripening activities during the reference period fixed by Regulation No 404/93 for 1993 and 1994, namely during 1989 and 1990.

14. There were only State-owned undertakings ('Volkseigene Betriebe') in the former German Democratic Republic, which meant that a private business in wholesale trading and ripening, such as that carried on by the appellant since 1991, was impossible before 1990. As for ripening plants in the German Democratic Republic, there were approximately 40 wholesale trading undertakings which had ripening plants. To the extent that those wholesale undertakings ripened bananas during the reference period, those ripening activities served as a reference for granting individual

import licences under indent (c) of the first subparagraph of Article 3(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. [3]

15. Cordis dwells, in this respect, on the fact that ripening activities are separate from importing activities; the latter were pursued by the State monopoly in the external trade of the German Democratic Republic. The Court of First Instance probably did not consider indent (c) of Article 3(1) of Regulation No 1442/93 when it based its findings on imports and not on the ripening of bananas by ripening plants. While importing activities and banana ripening activities can be coterminous, it is not necessarily the case.

16. The *Commission* is of the opinion that the Court of First Instance correctly established the scope of application of Article 30 of Regulation No 404/93, having regard in particular to *T. Port* (paragraphs 35 to 41). Firstly, the measures adopted under Article 30 are intended solely to assist transition from national arrangements to the common organisation of the market and do no more than address the difficulties which were encountered after establishment of the common organisation of the market, but had originated in the state of the national markets prior to Regulation No 404/93 although they were unforeseeable for the traders in question. Secondly, the said measures must be necessary for the purpose of addressing such difficulties.

17. The Commission thus considers that the Court of First Instance correctly interpreted, in paragraph 34 of the contested judgment, the purpose of Article 30 of Regulation No 404/93.

18. As regards the appellant's argument that the structural disadvantages connected with reunification were exacerbated by the common organisation of the market, the Commission points out that the Court of First Instance correctly considered that argument in paragraphs 35 to 37 of the contested judgment.

19. The Commission considers that the first ground of appeal amounts to a simple re-examination of the application lodged at the Court of First Instance and must therefore be declared inadmissible.

20. In the alternative, the Commission puts forward the immaterial nature of the appellant's allegation that the Court of First Instance failed to have regard to the fact that the present case concerned not the import but the ripening of bananas. This point was correctly analysed in paragraph 37 of the contested judgment, which states that the common organisation of the market improved the scope for development open to ripening plants in the same situa-

3 — OJ 1993 L 142, p. 6.

tion as the appellant. The Commission points out, in this respect, that the common organisation of the market in no way hindered the business of ripening plants which were able to engage in ripening activities even without individual import licences. Only those that wish themselves to import bananas and then ripen them require licences. Cordis admits that it was impossible to import bananas prior to the introduction of the common organisation of the market, so that its position did not deteriorate thereafter. Furthermore, thanks to the common organisation of the market, ripening plants have been able to constitute their own reference quantities as regards third-country or non-traditional ACP bananas ripened in their facilities (indent (c) of the first subparagraph of Article 3(1) and the second subparagraph of Article 5(1) of Regulation No 1442/93).

21. The Commission proposes that the first ground of appeal be rejected either as unfounded or as inadmissible.

22. According to the *French Government*, the appeal is inadmissible inasmuch as it seeks to put in question the manner in which the Court of First Instance considered, in paragraph 35 et seq., the factual position of the appellant with respect to the common organisation of the market.

23. Furthermore, according to the French Government, Cordis is altering the subject-matter of the dispute in asserting that the problems of transition are not related to its attitude, but are structural.

24. In the alternative, the French Government points out that it is apparent from *T. Port* that the purpose of Article 30 of Regulation No 404/93 is not to solve all the problems with which undertakings trading in bananas may be faced. Article 30 deals with cases of extreme hardship threatening the foundation of the traders concerned, which stem from the entry into force of the common organisation of the market.

25. The French Government also observes that Article 30 of Regulation No 404/93 requires a case-by-case appraisal of the situation of those traders seeking its application, and cannot justify collective treatment of undertakings which have something in common, *inter alia* their geographical origin. Further, such a collective approach would be contrary to Article 230 EC which requires that the applicant be an addressee of the contested Community act or that he be directly and individually concerned by that act. Moreover, this approach would be harmful to legal certainty since it would affect Regulation No 404/93.

Analysis

26. It is apparent from the contested judgment that the Court of First Instance essentially considered 'whether the problems encountered by the applicant are due to the transition to the common organisation of the market'. [4]

4 — Paragraph 35 of the contested judgment.

27. In my view, the validity of such an examination cannot be disputed in the light of Article 30 of Regulation No 404/93. Indeed, as the Court of Justice pointed out in *T. Port*, '[a]pplication of Article 30 is subject to the condition that the specific measures which the Commission must adopt are intended to assist transition from national arrangements to the common organisation of the market and that they are necessary for that purpose'. [5] If the purpose of Article 30 is to 'assist transition', it is, in my opinion, implied that it applies where this transition creates difficulties. Consequently, both the wording of Article 30 and its rationale in the context of Regulation No 404/93 support the conclusion that that provision serves only to address problems due to transition to the common organisation of the market and not problems with a different cause.

28. As I pointed out above, the appellant considers that, in the context of its analysis of the causality between the problems cited and transition to the common organisation of the market, the Court of First Instance should have taken into account 'structural difficulties which had arisen for new undertakings such as the appellant and which had been exacerbated by the establishment of the common organisation of the market in bananas'.

29. It should however be noted that, in paragraph 37 of the contested judgment, the Court of First Instance took this argument into account, although it did not uphold it.

30. The appellant's argument thus amounts to disputing an appraisal of the facts by the Court of First Instance.

31. However, as the French Government points out, an appeal is limited to points of law. Thus, according to settled case-law, '[t]he Court of First Instance has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice'. [6]

32. It follows that, just as an assessment carried out by the Court of First Instance as to whether an institution's conduct caused the damage allegedly suffered by an applicant cannot be questioned before the Court of Justice, [7] it is not for the Court, in the context of this appeal, to rule on the assessment of the Court of First Instance that the difficulties encountered by Cordis were not due to the transition to the common organisation of the market.

33. In this context, it should be noted that the appellant has not put forward any

5 — *T. Port*, paragraph 35.

6 — See, in particular, Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 29.

7 — Case C-362/95 P *Blackspur DIY and Others* v *Council and Commission* [1997] ECR I-4775, paragraph 42.

evidence capable of demonstrating that the Court of First Instance distorted the facts. On the contrary, it must be considered that what the appellant describes as a difficulty has no connection with the transition to the common organisation of the market.

34. As I pointed out above, the appellant puts much emphasis on the fact that it is not citing a problem which is specific to itself, but a case of collective hardship. It is faced with a 'structural difficulty' common to all undertakings established in the new Länder, due to the fact that it was not able to engage in ripening activities during the reference period under Regulation No 404/93, namely during 1989 and 1990.

35. At the hearing, Cordis stated that the crux of the problem lay in the fact that it had been treated like any other new ripening undertaking which had commenced its activities, anywhere in Germany, on 1 November 1990.

36. There is however no doubt that Cordis is indeed in that situation.

37. First of all, Cordis is not the legal successor, by way of privatisation, of a former ripening plant in the German Democratic Republic which had the status of 'State-owned undertaking' ('Volkseigener Betrieb').

38. Secondly, nor has Cordis taken on the technical facilities of such a ripening plant. Indeed, it is apparent from its application before the Court of First Instance that it simply recruited some of the staff of a former agricultural production cooperative which had no activities in the banana sector.

39. In actual fact, the appellant's reasoning is as follows.

40. Had the Cordis company existed in 1989, it would have ripened bananas. Therefore, it could today refer to the quantities of bananas marketed in 1989 and in 1990 in order to request licenses. However, the political regime in the German Democratic Republic prevented the company from existing at that time. The Commission, consequently, should have started from the premiss that the company could have existed and it should have granted it a reference quantity of 5 000 tonnes of bananas.

41. To the objection that any new undertaking established in any one of the former Länder after November 1990 could also refer to what it would have done had it existed earlier, Cordis responded at the hearing that businessmen in the former

Länder had freely decided not to establish additional ripening plants earlier, whereas it had been prevented from doing so by the politico-social regime existing in the former German Democratic Republic.

42. This however in no way proves that in the absence of that regime, Cordis would have existed as such, that it would have already had its current ripening capacity and that it would have been in a position fully to exploit that capacity. Since the 'structural difficulty' cited by the appellant is thus not proved, it follows, a fortiori, that the exacerbation of that difficulty by the transition to the common organisation of the market is not proved either.

43. In conclusion, as regards the first ground of appeal, I consider therefore that the Court of First Instance correctly applied Article 30 of Regulation No 404/93 in examining whether the problems relied on by the appellant were due to the transition to the common organisation of the market. Furthermore, the conclusion of the Court of First Instance that those problems were not due to the transition to the common organisation of the market constitutes an appraisal of the facts which falls outside the context of this appeal. In any event, it has become clear that the appellant's entire reasoning based on so-called structural difficulties is not convincing.

44. I therefore suggest that the appellant's first ground of appeal be rejected.

Breach of the principle of equal treatment

Arguments of the parties

45. Under this second ground of appeal, *Cordis* puts forward essentially the same arguments as under the first. According to the appellant, the contested judgment is in breach of the principle of equal treatment, which prohibits not only similar situations from being treated differently, but also different situations from being treated equally. Cordis points out, in this respect, that the new undertakings established in the former German Democratic Republic were all in the same situation: because of the division of Germany and the political and legal situation in the German Democratic Republic during 1989 and 1990, they alone were not able to engage in the ripening activities which serve as a reference. The principle of equal treatment requires that the Community institutions take those exceptional circumstances into account. Even then, if the Commission did not wish to take this particular case into account in the context of Regulation No 1442/93, it was bound at least to adopt a transitional measure under Article 30 of Regulation No 404/93. If the Commission had adopted such a measure necessary to safeguard the fundamental rights of new undertakings, the transition of new undertakings to the situation resulting from the common organisation of the market would have been facilitated and the purpose of Article 30 achieved.

46. The *Commission* considers, contrary to the appellant's claims, that the Court of First Instance applied the principle of equal treatment as a principle prohibiting different situations from being treated equally, so that the second ground of appeal must be dismissed for that reason alone.

47. Similarly, contrary to the appellant's claims, nothing justifies the assertion that, on the basis of the principle of equal treatment, the exceptional situation of undertakings formed after reunification should be taken into account in the context of the common organisation of the market.

48. The *French Government* points out that, according to case-law, differences in treatment are inherent in the objective of integrating markets which were previously closed off. In the present case, not only has Cordis not been treated differently from undertakings trading in bananas, but also its situation has not worsened due to the establishment of the common organisation of the market, as the contested judgment correctly found.

Analysis

49. It should be recalled, as has Cordis, that the Court has held that '[t]he Community institutions are required to act in particular when the transition to the common organisation of the market infringes certain traders' fundamental rights protected by Community law, such as the right to property and the right to pursue a professional or trade activity'. [8]

50. Although one may conclude from this that a trader also has the right to have its fundamental right to equal treatment protected, it should however be noted, once again, that this protection is restricted to where *the transition to the common organisation of the market infringes* one of the fundamental rights.

51. Since the Court of First Instance stated, in paragraph 39 of the contested judgment, that the disadvantage cited by Cordis, and therefore its 'unequal' treatment, was not due to the transition to the common organisation of the market, the Court of First Instance did not infringe the principle of equal treatment when it held that Article 30 of Regulation No 404/93 could not serve to offset that disadvantage.

52. So far as may be relevant, I reiterate that the finding of the Court of First Instance that the disadvantage cited by

8 — *T. Port*, paragraph 40.

Cordis is not due to the transition to the common organisation of the market constitutes an appraisal of the facts which falls outside the context of this appeal.

53. I would point out, finally, and above all, that Cordis has not been treated in a less favourable manner than any other ripening undertaking established elsewhere in the Community at the same time.

54. I therefore suggest that the second ground of appeal be rejected.

V — Conclusion

55. I propose that the Court:

— dismiss the appeal;

— order Cordis Obst und Gemüse Großhandel GmbH to bear its own costs and to pay those of the Commission of the European Communities;

— declare that the French Republic is to bear its own costs.