Citation: BVerfG, 2 BvL 1/97 of 06/07/2000, paragraphs No. (1 - 46),
http://www.bverfg.de/entscheidungen/ls20000607_2bvl000197en.html

H e a d n o t e s

to the order of the Second Senate

of 7 June 2000

- 2 BvL 1/97 -

1. Constitutional complaints and submissions by courts which assert that fundamental rights guaranteed in the Basic Law have been infringed by secondary European Community Law are inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has declined below the standard of fundamental rights required after the "Solange II" decision (BVerfGE 73, 339 <378 – 381>).

2. Therefore, the grounds for a submission or a constitutional complaint must state in detail that the protection of the fundamental rights unconditionally required by the Basic Law is not generally ensured in the respective case. This requires a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in the "Solange II" decision (BVerfGE 73, 339 <378 – 381>).

FEDERAL CONSTITUTIONAL COURT

- 2 BvL 1/97 -

IN THE NAME OF THE PEOPLE

**In the proceedings
on the constitutional review
of the issue whether**

a) it is compatible with the Basic Law (*the German constitution*) and especially

with its Articles 23 (1), 14 (1), 12 (1) and 3 (1) that Articles 17 - 19 and Article 21 (2) of Regulation (EEC) No 404/93 of the Council of the European Communities of 13 February 1993 on the common organisation of the market in bananas (Official Journal [OJ] 1993, L 47, p. 1 - 11) and Commission Regulation (EC) No 478/95 of 1 March 1995 on additional rules for the application of Council Regulation (EEC) No 404/93 as regards the tariff quota arrangement for imports of bananas into the Community and amending Regulation (EEC) No 1442/93 (OJ L 49 p. 13 - 17) are applied in Germany,

b) in the event that the submission under a) is inadmissible or in the case of an affirmative decision: whether the German laws ratifying the EC Treaty are compatible with the Basic Law, in so far as they have conferred to the Community as legislator the authority to enforce, in Germany, the regulations of Community law designated under a),

c) in the event that the submission under b) is also inadmissible or in the case of an affirmative answer to the question raised: whether the German laws ratifying the EC Treaty are to be interpreted pursuant to the Basic Law in such a way that they have not conferred to the Community as legislator the authority to enforce, in Germany, the regulations of Community law designated under a),

- Decision of the Administrative Court (*Verwaltungsgericht*) Frankfurt/Main of October 24, 1996 - 1 E 798/95 (V), 1 E 2949/93 (V) on the suspension of proceedings and on the submission of the case for constitutional review -

the Second Senate of the Federal Constitutional Court [...] unanimously decided on 7 June 2000, as follows:

The submission is inadmissible.

Extract from grounds:

A.

1

The judicial referral concerns the question whether the application of the common organisation of the market in bananas of the European Community in the Federal Republic of Germany is constitutional.

I.

2

1. Until 1993, the market for bananas in the European Community was organised differently in the individual member states. In some member states, e.g. in France, there were closed markets with

guaranteed prices. In others, e.g. in Germany, there were open markets without any quantitative restrictions. On account of the so-called Banana Protocol annexed to the EEC Treaty, the Federal Republic of Germany was allowed to import a specified quantity of bananas - lastly, 1.371 million tonnes in 1992 - free of customs duties (Protokoll über das Zollkontingent für die Einfuhr von Bananen [*Protocol on the tariff quota for imports of bananas*], BGBl [*Bundesgesetzblatt - Federal Law Gazette*] II 1957 p. 1008, cf. ECJ, Case C-280/93 R - *Germany* v *Council* - European Court Reports 1993 page I-3667, marginal numbers 8 - 9).

3

On 1 July 1993, the common organisation of the market in bananas (hereinafter: banana market organisation) entered into force pursuant to Article 33, sentence 2 of Council Regulation (EEC) No 404/93 of 13 February 1993 (OJ L 47, 25/02/1993, p. 1 - 11; hereinafter: Regulation 404/93), which, *inter alia*, discontinued the tariff quota granted in the Banana Protocol (Regulation 404/93, Article 21 [2]).

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The regulation differentiates bananas according to their origin: First, "Community bananas" are produced within the European Community. Second, "ACP bananas" come from certain African, Caribbean and Pacific countries, which, as the so-called ACP countries, have for a long time been linked to the European Community by special multilateral agreements (Lomé Conventions; as to the contents concerning bananas of the Fourth ACP-EC Convention, signed in Lomé on 15 December 1989: cf. Report of the Appellate Body, WT/DS27/AB/R, 9 September 1997, marginal numbers 169 et seq.; cf. Article 179 (3) of the Treaty establishing the European Community as amended at Amsterdam; a list of the ACP countries can be found e. g. in the Agreement amending the Lomé Convention signed in Mauritius on 4 November 1995, BGBl II 1997, p. 1615). In this context, a quota of bananas of a total weight of up to 857,000 tonnes is referred to as "traditional" ACP bananas (cf. Annex of Regulation 404/93), this quantity corresponding to the customary import quantity from ACP countries. Imports that exceed this quantity are referred to as "non-traditional" ACP bananas. Finally, "third country bananas" are neither from the Community nor from ACP countries.

5

As regards price and quality, neither Community bananas nor ACP bananas can compete with third country bananas. In Germany, the bananas that were best known and most sold used to be third country bananas (on the prevalence of third country bananas on open markets: see Report of the Panel, WT/DS27/R/USA, 22 May 1997, marginal number 3.5). The aim of the banana market organisation is to support the banana production within the Community and to ensure the duty-free sale of traditional ACP bananas without hindering the import of third country bananas and non-traditional ACP bananas (Regulation 404/93, recitals 2 et seq.).

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2. To achieve this, compensatory aid arrangements for Community bananas were created (Regulation 404/93, Art 10 et seq.). Traditional ACP bananas - as all bananas produced outside the European Community - require an import licence (Regulation 404/93, Article 17), but are duty-free (Regulation 404/93, recital 12).

7

Non-traditional ACP bananas and third country bananas may be imported, in the framework of a specified tariff quota, at low customs duty rates or duty-free. Beyond this quota, however, they are subject to high levies. Originally, the annual tariff quota under Article 18 of Regulation 404/93 was 2 million tonnes. In this framework, non-traditional ACP bananas could be imported free of customs duties, third country bananas at a customs duty rate of ECU 100 per tonne. Beyond the quota, ACP bananas were subject to a levy of ECU 750 per tonne, third country bananas were subject to a levy of ECU 850 per tonne.

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The tariff quota for non-traditional ACP bananas is divided according to categories of operators and according to the operators' economic activities. Pursuant to Article 19 of Regulation 404/93, the tariff quota is distributed among the operators as follows:

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- 66.5 per cent is to be opened to the category of operators who marketed third country and/or non-traditional ACP bananas;

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- 30 per cent to the category of operators who marketed Community and/or traditional ACP bananas;

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- 3.5 per cent to the category of operators established in the Community who started marketing bananas other than Community and/or traditional ACP bananas from 1992.

12

In the terminology of Commission Regulation (EEC) No 1442/93 of 10 June 1993, which laid down detailed rules for the application of the arrangements for importing bananas into the Community (OJ L 142, 12/06/1993 pp.6 - 14 - hereinafter: Regulation 1442/93 -, p. 6), these three categories are referred to, in the sequence mentioned above, as Categories A, B and C.

13

Moreover, import licences in Categories A and B are also allocated to the operators on account of their economic activities. In this context, three groups are distinguished, which engage in the following activities:

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- Initial importers: the purchase of green third-country and/or ACP bananas from the producers, or where applicable, the production, consignment and sale of such products in the Community;

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- Secondary importers: as owners of green bananas, their supply and release for free circulation and sale with a view to subsequent marketing in the Community. In this context, operators who bear the risk of spoilage or loss of the product are treated equally to the owners of the products;

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- Operators in the ripening industry; as owners, the ripening and marketing of green bananas within the Community (Article 3 of Commission Regulation 1442/93).

17

To ascertain the import quantities to which an operator is entitled, the banana quantities marketed by each operator in a three-year reference period are calculated. Depending on the operator's economic activity, a weighting coefficient is applied to this so-called reference quantity, *i.e.* 57 per cent for initial importers, 15 per cent for secondary importers and 28 per cent for operators in the ripening industry. In accordance with the annual tariff quota and the total volume of the reference quantities of the operators, the import quantities allocated to each operator are then determined on the basis of the figure calculated by this method (Regulation 1442/93, Articles 5 and 6).

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3. In the following period, the banana market organisation has been amended several times.

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[...]

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In the context of a dispute settlement procedure initiated in the framework of GATT (the so-called second Banana Panel), the European Community concluded a framework agreement on bananas with four Latin American countries (Colombia, Costa Rica, Venezuela, Nicaragua). As concerns Community law, the framework agreement was implemented by Commission Regulation (EC) No 478/95 of 1 March 1995, on additional rules for the application of Council Regulation (EEC) No 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation (EEC) No. 1442/93 (OJ L 49, 04/03/1995, p. 13 - hereinafter: Regulation 478/95 -). Pursuant to Article 1 (1) of Regulation 478/75, the tariff quota for the import of third country bananas and non-traditional ACP bananas, which had already been broken down according to operator and economic activity, was further subdivided according to individual export countries.

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[...]

II.

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1. The plaintiffs of both original proceedings are 19 companies of the so-called Atlanta group. As banana importers, they engage in all steps of transport, ripening and marketing. 30 per cent of their

sales are obtained from the marketing of bananas. Between 1989 and 1991, the Atlanta group imported an average of 410,000 tonnes of third country bananas per year.

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After the entry into force of the banana market organisation, the plaintiffs were classified as Category A operators and were allotted a provisional quota quantity for the third quarter of 1993. Objections raised against the limitation this allotment placed on the quantities of imports were dismissed. In the legal action they brought against this limitation, the plaintiffs put forward, at first, that Regulation 404/93 infringes Community law. The Administrative Court submitted the question to the Court of Justice of the European Communities. At the same time, it granted the plaintiffs, by means of temporary relief, further import licences for the months of November and December 1993, at a customs duty rate of 100 ECU per tonne, which were, in case of the plaintiffs losing the case on the merits, to be offset against the reference quantities to which the plaintiffs were entitled according to Community law.

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The second original proceedings concern the import licences granted to the plaintiffs for 1995.

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2. The Court of Justice of the European Communities held in its decision of 9 November 1995 (ECJ, Case C-466/93 - *Atlanta Fruchthandelsgesellschaft* v *Bundesamt für Ernährung und Forstwirtschaft* [*Federal Office for Food and Forestry*], European Court Reports 1995, p. I-3799), mainly referring to its decision of 5 October 1994 (ECJ, Case 280/93, *Federal Republic of Germany* v *Council of the European Union*, European Court Reports 1994 page I-4973), that there were no reservations concerning the validity of Regulation 404/93. After that, the plaintiffs filed an application in both original proceedings asking that it be held that the decisions given to them and the decisions on their objections were contrary to law in so far as they restricted the plaintiffs in importing bananas from third countries to the European Community. According to them, the application of the import arrangements pursuant to Regulations 404/93 and 478/95 were unconstitutional as they infringed Articles 2 (1), 14 (1), 12 (1) and 3 (1) GG (*Basic Law*).

III.

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The Administrative Court of Frankfurt/Main has, by its decision of 24 October 1996, suspended the proceedings and submitted to the Federal Constitutional Court the principal issue whether the application of Articles 17 - 19 and Article 21 (2) of Regulation No 404/93 and the application of Regulation No 478/95 in Germany are compatible with Articles 23 (1), sentence 1, 14 (1), 12 (1) and 3 (1) GG. Should the Federal Constitutional Court negate the admissibility of this submission or answer the question in the affirmative, this would, according to the plaintiffs, raise the question whether Germany's laws ratifying the EC treaties are compatible with the Basic Law in so far as they conferred to the Community as legislator the authority to enforce the above-mentioned regulations of Community law in Germany.

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[...]

IV.

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In a letter dated 26 March 1997, the Administrative Court was informed of the fact that the Court of Justice of the European Communities, in its decision of 26 November 1996 (Case C-68/95 - *T. Port GmbH & Co. KG* v *Bundesanstalt für Landwirtschaft und Ernährung* [*Federal Office for Agriculture and Food*], European Court Reports 1996 page I-6065), had taken a decision according to which Article 30 of Regulation 404/93 requires the Commission to take any transitional measures it deems necessary. Such transitional measures must serve, according to this judgement, to overcome the difficulties which occurred after the common organisation of the market came into force of but originated in the state of the national markets before the enactment of the Regulation. The Administrative Court was told that this decision could gain importance in the context of the lack of a transitional arrangement discussed in the decision of the case submitted for constitutional review.

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[...]

B.

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The submission is inadmissible.

I.

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Submissions of cases to the Federal Constitutional Court for constitutional review under Article 100(1) GG which refer to rules that are part of secondary European Community law are only admissible if their grounds show in detail that the present evolution of law concerning the protection of fundamental rights in European Community law, especially in case law of the Court of Justice of the European Communities, does not generally ensure the protection of fundamental rights required unconditionally in the respective case.

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Certainly the submitting court has, in a way which meets the requirements under Article 80 (2), sentence 1 of the BVerfGG [*Bundesverfassungsgerichtsgesetz - Federal Constitutional Court Act*] set forth its conviction that, and for what reasons, it regards the application of the submitted legal rules as unconstitutional (cf. BVerfGE [*Bundesverfassungsgerichtsentscheidungen - Decisions of the Federal Constitutional Court*] 37, 328 <333 et seq.>; 66, 265 <269 et seq.>; 84, 160 <165>; 86, 52 <57>). Its opinion that the decision it must take depends on the decision on the issue submitted is clearly stated in the decision for submission (cf. BVerfGE 97, 49 <60>, 98, 169 <199>). However, the submitting court's position that the rules of Articles 17 - 19 and Article 21 (2) of Regulation (EEC) No 404/93 as well as other secondary rules of Community law to which it objects may be submitted to the Federal Constitutional Court for constitutional review under Article 100(1) GG cannot be supported.

II.

33

1. In its decision of 29 May 1974 - 2 BvL 52/71 (BVerfGE 37, 271 - "As long as ... Decision" [*Solange I*]), the competent Senate of the Federal Constitutional Court had, with reference to actual jurisdiction, come to the result that the integration process of the Community had not progressed so far that Community law also contained a codified catalogue of fundamental rights decided on by a Parliament and of settled validity, which was adequate in comparison with the catalogue of fundamental rights contained in the Basic Law. For this reason, the Senate regarded the reference by a court of the Federal Republic of Germany to the Federal Constitutional Court in constitutional review proceedings, following the obtaining of a ruling of the Court of Justice of the European Communities under Article 177 of the EEC Treaty, which was required at that time, as admissible and necessary if the German court regards the rule of Community law that is relevant to its decision as inapplicable in the interpretation given by the Court of Justice of the European Communities because and in so far as it conflicts with one of the fundamental rights of the Basic Law (BVerfGE 37, 271 <285>).

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2 a) In its decision of 22 October 1986 - 2 BvR 197/83 (BVerfGE 73, 339 - [*Solange II*]), the Senate holds that a measure of protection of fundamental rights has been established in the meantime within the sovereign jurisdiction of the European Community which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided in the Basic Law, and that there are no decisive factors to lead one to conclude that the standard of fundamental rights which has been achieved under Community law is not adequately consolidated and only of a transitory nature (BVerfGE 73, 339 <378>).

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On the basis of individual decisions of the Court of Justice of the European Communities, the Senate made statements concerning the standard of fundamental rights, and holds that this standard, particularly through the decisions of the Court of Justice of the European Communities, has been formulated in content, consolidated and adequately guaranteed (BVerfGE 73, 339 <378 - 381>). In this context, the Senate commented on the decisions of the Court of Justice of the European Communities concerning the fundamental rights and freedoms relating to economic activities, such as the right to property and the freedom to pursue economic activities (above, p. 380), but also on the freedom of association, on the general principle of equal treatment and the prohibition of arbitrary acts, religious freedom and the protection of the family, as well as on the principles, which follow from the rule of law, of the prohibition of excessive action and of proportionality as general legal principles in achieving a balance between the common interest objectives of the Community legal system, and on the safeguarding of the essential content of fundamental rights (above, p. 380).

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In summary, the Senate made the following statement: As long as the European Communities, in particular European case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the

standard of fundamental rights contained in the Basic Law. References (of rules of secondary Community law to the Federal Constitutional Court) under Article 100(1) GG are therefore inadmissible (BVerfGE 73, 339 <387>).

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b) In its Maastricht Decision (BVerfGE 89, 155), the Senate maintained this view. In this decision, the Senate stressed that the Federal Constitutional Court, through its jurisdiction, guarantees, in co-operation with the Court of Justice of the European Communities, that effective protection of fundamental rights for the residents of Germany will also be secured against the sovereign powers of the Communities and is generally to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and that in particular the Court provides a general safeguard of the essential contents of the fundamental rights. The Federal Constitutional Court thus guarantees this essential content against the sovereign powers of the Community as well (BVerfGE 89, 155 <174 - 175>, with reference to BVerfGE 37, 271 <280 et seq.> and 73, 339 <376 - 377, 386>). Under the preconditions the Senate has formulated in BVerfGE 73, 339 - "Solange II" -, the Court of Justice of the European Communities is also competent for the protection of the fundamental rights of the citizens of the Federal Republic of Germany against acts done by the national (German) public authority on account of secondary Community law. The Federal Constitutional Court will only become active again in the framework of its jurisdiction should the Court of Justice of the European Communities depart from the standard of fundamental rights stated by the Senate in BVerfGE 73, 339 (378 - 381).

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c) Article 23 (1), sentence 1 GG (inserted pursuant to the Law amending the Basic Law of 21 December 1992 - BGBl I, p. 2086 -) confirms this ruling. Pursuant to this law, the Federal Republic of Germany shall participate, with a view to establishing a united Europe, in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of fundamental rights essentially comparable to that afforded by the Basic Law. An identical protection in the different areas of fundamental rights afforded by European Community law and by the rulings of the Court of Justice of the European Communities, which are based on Community law, is not called for. The constitutional requirements are satisfied in accordance with the preconditions mentioned in BVerfGE 73, 339 (340, 387) if the rulings of the Court of Justice of the European Communities generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights.

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d) Thus, constitutional complaints and submissions by courts are, also pursuant to the Senate decision in BVerfG 89, 155, inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has resulted in a decline below the required standard of fundamental rights after the "Solange II" decision (BVerfGE 73, 339 <378 - 381>). Therefore, the grounds for a submission by a national court of justice or of a constitutional complaint which puts forward an infringement by secondary European Community Law of the fundamental rights guaranteed in the Basic Law must state in detail that the protection of fundamental rights required unconditionally by the Basic Law is not generally assured in the respective case. This requires a comparison of the protection of

fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in BVerfGE 73, 339 (378 - 381).

III.

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Such a statement is lacking in this case.

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1. The grounds of this submission fail from the outset to satisfy the special requirement for admissibility, as they are based on a misunderstanding of the Maastricht decision. The submitting court is of the opinion that the Federal Constitutional Court, pursuant to the Maastricht decision, contrary to the Solange II decision, explicitly exercises its review authority again, albeit in co-operation with the Court of Justice of the European Communities.

42

This conclusion cannot be drawn from the Maastricht decision. In the passage to which the Administrative Court refers, the Senate of the Federal Constitutional Court explicitly quotes the statements of its "Solange II" decision that shows that it exercises its jurisdiction to a limited extent. The fact that the Senate in its Maastricht decision has neither in this passage nor elsewhere given up its opinion laid down in BVerfGE 73, 339, on the delimitation of the authority for jurisdiction of the Court of Justice of the European Communities vis-à-vis the Federal Constitutional Court and vice versa is also evident from the previous considerations (BVerfGE 89, 155, 174-175). Finally, the Senate discusses these questions in the passage on the admissibility of relief being sought with reference to the Constitution, not in the passage that deals with the question whether the submission is well-founded (BVerfGE 89, 155 <174>, beginning of 2.). Also under this aspect, the assumption of a contradiction between the Solange II and the Maastricht decisions lacks a sound basis.

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2. In the present case there was, beyond these requirements, a special cause for detailed statements concerning a negative evolution of the standard of fundamental rights in the jurisdiction of the Court of Justice of the European Communities, as the Court of Justice of the European Communities had, in its decision of 26 November 1996 (Case C-68/95 - *T. Port GmbH & Co. KG* v *Bundesanstalt für Landwirtschaft und Ernährung*, European Court Reports 1996, p. I-6065), which had been taken after the decision for submission had been issued, required the Commission pursuant to Article 30 of Regulation No 404/93 to take any transitional measures it judges necessary. Such transitional measures must serve, according to this judgement, to overcome the difficulties which occurred after the common organisation of the market came into but originated in the state of the national markets before the enactment of the Regulation. This decision and its possible consequences for the admissibility of the decision for submission had been specifically pointed out to the submitting court.

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At this point in time, the submitting court should have recognised the insufficiency of its submission and should have remedied it (cf. BVerfGE 51, 161 <163 et seq.>; 85, 191 <203>). For doing so, the reply, which was made by the presiding judge of the chamber alone, was already

insufficient for formal reasons because the presiding judge, as a member of a court composed of several judges, is not allowed to take the decision to submit the case on his own (in this context, cf. BVerfGE 1, 80 <81 - 82>; 21, 148 <149> already), it is quite out of the question for him alone to be in charge of and observe the admissibility of the submitted decision until the decision of the Federal Constitutional Court is taken. As to their contents, the statements made by the presiding judge also head into the wrong direction. There is a contradiction between them and the grounds of the decision for submission, which especially criticises the lack of transitional measures and derives the unconstitutionality of Regulation 404/93 from this fact. It would, however, not have been possible for the Administrative Court to infer a general decline of the standard of fundamental rights in the jurisdiction of the Court of Justice of the European Communities against the background of this decision of the Court of Justice of the European Communities.

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Moreover, the Administrative Court should have seen that the decision of the Court of Justice of the European Communities had been preceded by the decision of the First Chamber of the Second Senate of the Federal Constitutional Court of 25 November 1995 - 2 BvR 2689/94 and 2 BvR 52/95 - (EuZW [Europäische Zeitschrift für Wirtschaftsrecht] 1995, p. 126). The Court of Justice of the European Communities judged the necessity of a provisional hardship arrangement that follows from the guarantee of property in a similar manner as the Federal Court of Justice did. Thus, both decisions illustrate that the judicial protection of fundamental rights by national courts of justice and Community courts of justice interlock on the European level.

C.

46

This decision was taken unanimously.

Limbach	Sommer	Jentsch
Hasseme	Broß	Osterloh
	Di Fabio	