JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
10 April 2003 *

In Joined Cases T-93/00 and T-46/01,

Alessandrini Srl, established in Treviso (Italy),

Anello Gino di Anello Luigi & C. Snc, established in Brescia (Italy),

Arpigi Spa, established in Padua (Italy),

Bestefruit Srl, established in Milan (Italy),

Co-Frutta SpA, established in Padua,

Co-Frutta Soc.coop.arl, established in Padua,

Dal Bello SIFE Srl, established in Padua,

Frigofrutta Srl, established in Palermo (Italy),

Garletti Snc, established in Bergamo (Italy),

London Fruit Ltd, established in London (United Kingdom),

represented by W. Viscardini Donà and G. Donà, lawyers, with an address for service in Luxembourg,

applicants,

* Language of the case: Italian.

Commission of the European Communities, represented by L. Visaggio and C. Van der Hauwaert, acting as Agents, assisted by A. Dal Ferro and G. Braun, with an address for service in Luxembourg,

defendant,

APPLICATION, in Case T-93/00, for annulment of Commission letter No 02418 of 26 January 2000 and for compensation for damage allegedly suffered due to that act and, in Case T-46/01, for annulment of Commission letter No AGR 030905 of 8 December 2000 and for compensation for damage allegedly suffered due to that act,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: R. García-Valdecasas, President, P. Lindh and J.D. Cooke, Judges,

Registrar: B. Pastor, Deputy Registrar,

having regard to the written procedure and further to the hearing on 24 October 2002

gives the following

Judgment

Legal background

Regulation (EEC) No 404/93

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), implemented, in Title IV, with effect from 1 July 1993, a common arrangement for trade with third countries in place of the various national arrangements. A distinction was drawn between 'Community bananas' harvested in the Community, and 'third-country bananas' originating from third countries other than the African, Caribbean and Pacific (ACP) countries. The term 'traditional ACP bananas' referred to the quantities of bananas exported by the ACP countries which did not exceed the quantities laid down in the Annex to Regulation No 404/93, whilst 'non-traditional ACP bananas' referred to the quantities of bananas exported by the ACP countries which exceeded the quantities laid down in that annex.

2 Under the first paragraph of Article 17 of Regulation No 404/93, the importation of bananas into the Community is subject to the submission of an import licence issued by the Member States at the request of any party concerned, irrespective of

his place of establishment within the Community, without prejudice to the special provisions made for the implementation of Articles 18 and 19.

3 The original version of Article 18(1) of Regulation No 404/93 provided for an annual tariff quota of two million tonnes (net weight) for imports of third-country bananas and non-traditional ACP bananas. Within the framework of the tariff quota, imports of third-country bananas were subject to a duty of ECU 100 per tonne and imports of non-traditional ACP bananas were subject to a zero duty. The original version of Article 18(2) of that same regulation provided that imports of non-traditional ACP bananas and imports of third-country bananas imported apart from the tariff quota were subject to duties of ECU 750 per tonne and ECU 850 per tonne, respectively.

4 Article 19(1) of Regulation No 404/93 broke down the tariff quota, opening it as to 66.5% to the category of operators who had marketed third country and/or non-traditional ACP bananas (Category A); 30% to the category of operators who had marketed Community and/or traditional ACP bananas (Category B); and 3.5% to the category of operators established in the Community who had started marketing bananas other than Community and/or traditional ACP bananas from 1992 (Category C).

5 Article 19(2) of Regulation No 404/93 provides:

'On the basis of separate calculations for each of the categories of operators [A and B],... 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.'

Regulation (EEC) No 1442/93

6 On 10 June 1993, the Commission adopted 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 (OJ 1993 L 142, p. 6, 'the 1993 arrangement'). That arrangement remained in effect until 31 December 1998.

7 Under the terms of Article 5(1) of Regulation No 1442/93, the competent authorities were to establish each year for each Category A and Category B operator registered with them the average quantities marketed during the three years prior to the year preceding that for which the quota was opened, broken down by economic activity in accordance with Article 3(1) of that same regulation. That average was termed the 'reference quantity'.

8 Article 14(2) of Regulation No 1442/93, as amended by Commission Regulation (EC) No 2444/94 of 10 October 1994 (OJ 1994 L 261, p. 3), provides:

'Import licence applications shall be lodged with the competent authorities of any Member State during the first seven days of the last month of the quarter preceding that in respect of which the licences are issued.'

Regulation (EC) No 1637/98

9 Council Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation (EEC) No 404/93 (OJ 1998 L 210, p. 28) introduced, with effect from 1 January

1999, important amendments to the common organisation of the market in bananas. In particular, it introduced new provisions replacing Articles 16 to 20 of Title IV of Regulation No 404/93.

10 Article 18(1) of Regulation No 404/93, as amended by Regulation No 1637/98, provided for the opening of an annual tariff quota of 2 200 000 tonnes (net weight) for imports of third-country and non-traditional ACP bananas. Within the framework of the tariff quota, imports of third-country bananas under that tariff quota were subject to duty of ECU 75 per tonne, while imports of non-traditional ACP bananas were free of duty.

11 Article 18(2) of the same regulation, as amended by Regulation No 1637/98, provided for an additional annual tariff quota of 353 000 tonnes (net weight) to be opened each year for imports of third-country and of non-traditional ACP bananas. Within the framework of the tariff quota, imports of third-country bananas were also subject to duty of ECU 75 per tonne while imports of non-traditional ACP bananas were free of duty.

12 Under Article 20(d) of Regulation No 404/93, as amended by Regulation No 1637/98, the Commission was empowered to adopt provisions, in accordance with the Management Committee for Bananas system provided for in Article 27, for the management of the tariff quotas referred to in Article 18, which could include 'any specific provisions needed to facilitate the switch from the import arrangements applying on and after 1 July 1993 to the present arrangements of... Title IV [of Regulation No 404/93].'

Regulation (EC) No 2362/98

13 On 28 October 1998, the Commission adopted Commission Regulation (EC) No 2362/98 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32). Under Article 31 of Regulation No 2362/98, Regulation No 1442/93 was repealed as from 1 January 1999. The new provisions concerning the management of import licences within the framework of the tariff quotas are found in Titles I, II and IV of Regulation No 2362/98 ('the 1999 arrangement').

14 It is important to note the following differences between the 1993 arrangement and the 1999 arrangement:

— the 1999 arrangement no longer differentiates according to the functions carried out by the operators;

— the 1999 arrangement takes account of the quantities of imported bananas;

— the import licences under the 1999 arrangement are managed without reference to the origin (ACP or third countries) of the bananas;

— the tariff quotas and the portion attributed to new operators were increased under the 1999 arrangement.

15 Article 2 of Regulation No 2362/98 provides *inter alia* that the tariff quotas and the traditional ACP bananas referred to in Article 18(1) and (2) and Article 16, respectively, of Regulation No 404/93, as amended by Regulation No 1637/98, are opened for:

— 92% to 'traditional operators' as defined in Article 3;

— 8% to 'newcomers' as defined in Article 7.

16 Article 4(1) of Regulation No 2362/98 states that each traditional operator registered in a Member State is to receive, for each year and for all the origins listed in Annex I to that regulation, a single reference quantity based solely on the quantities of bananas actually imported during the reference period. According to Article 4(2) of Regulation 2362/98, for imports carried out in 1999, the reference period was to be made up of the years 1994, 1995 and 1996.

17 Article 6(1) of Regulation No 2362/98 provides that '[b]y 30 September at the latest each year, after making the necessary checks and verifications, the competent authorities shall determine, in accordance with Articles 3, 4 and 5, a single, provisional reference quantity for each traditional operator, on the basis of the average quantities of bananas actually imported by them from the origins listed in Annex I during the reference period'. The reference quantity is based on a

three-year average, even where the operator has not imported bananas for part of the reference period. According to Article 6(2) of Regulation No 2362/98, the competent authorities are to provide the Commission each year with a list of traditional operators they have registered and the total provisional reference quantities determined for the latter.

18 The rules for issuing import licences are governed by Articles 14 to 22 of Regulation No 2362/98.

19 Article 14(1) of that regulation provides that '[f]or the first three quarters of the year, an indicative quantity expressed as the same percentage of available quantities from each of the origins listed in Annex I may be fixed for the purposes of issuing import licences'.

20 Article 15(1) of that regulation provides that '[f]or each quarter of the year, applications for import licences shall be submitted to the competent authorities of the Member State in which operators are registered during the first seven days of the month preceding the quarter in respect of which the licences are being issued'.

21 Article 17 provides that where, for a given quarter and for any one or more of the origins listed in Annex I, the quantities applied for appreciably exceed any indicative quantity fixed under Article 14, or exceed the quantities available, a percentage reduction to be applied to the amounts requested is to be fixed.

22 Article 18 of Regulation No 2362/98 reads as follows:

'1. Where a percentage reduction has been fixed for one or more given origins under Article 17, operators who have applied for import licences for the origin(s) concerned may:

(a) either renounce their use of the licence by informing the relevant issuing authority accordingly within 10 working days of publication of the Regulation fixing the reduction percentage, whereupon the security lodged against the licence shall be released immediately; or

(b) submit one or more fresh licence applications for the origins for which available quantities have been published by the Commission, up to an amount equal to or smaller than the quantity applied for but not covered by the original licence issued. Such requests shall be submitted within the time-limit laid down in point (a) and shall be subject to all the conditions governing licence applications.

2. The Commission shall immediately determine the quantities for which licences can be issued for each of the origins concerned'.

23 Article 19(1) provides *inter alia* that '[t]he competent authorities shall issue import licences for the following quarter not later than the 23rd day of the last month of each quarter'.

24 Article 20(1) provides:

'1. Unused quantities covered by a given licence shall be re-allocated to the same operator — whether holder or transferee — upon application, for use in a subsequent quarter but still within the year of issue of the original licence. The security shall be retained in proportion to the quantities not used up.'

25 A certain number of transitional provisions for the year 1999 are reproduced under Title V of Regulation No 2362/98. Under Article 28(1) of that regulation, applications for registration for 1999 had to be submitted by 13 November 1998 at the latest. In the case of traditional operators, those applications had to include *inter alia* a figure for the total quantity of bananas actually imported in each of the years of the reference period 1994 to 1996 and the serial numbers of all the import licences and licence extracts used for those imports, and complete references with documentary evidence showing that duties had been paid.

26 Annex I to Regulation No 2362/98 fixes the distribution of the tariff quotas referred to in Article 18(1) and (2) of Regulation No 404/93 and the traditional ACP quantity (857 700 tonnes).

27 The Council adopted Council Regulation (EC) No 216/2001 of 29 January 2001 amending Regulation No 404/93 (OJ 2001 L 31, p. 2). Article 1 of Regulation No 216/2001 amended Articles 16 to 20 of Regulation No 404/93.

28 The rules for applying Title IV of Regulation No 404/93 thus amended were defined by Commission Regulation (EC) No 896/2001 of 7 May 2001 laying

down detailed rules for applying Council Regulation (EEC) No 404/93 as regards the arrangements for importing bananas into the Community (OJ 2001 L 126, p. 6). They applied as from 1 July 2001, in accordance with Article 32 of Regulation No 896/2001.

Facts

29 The applicants are importers of bananas originating in Latin America. They are registered as traditional operators with the competent national authorities (Italy and, for London Fruit Ltd, United Kingdom) and obtained from those authorities provisional individual reference quantities for the year 1999. They were thus able to obtain import licences for third-country bananas for the first three quarters of 1999.

30 The facts of Case T-93/00 relate to the fourth quarter of 1999. For that quarter, the applicants submitted applications for import licences for the balance of their provisional individual reference quantity to the competent national authorities. Their applications were granted up to the limits of the available quantities for imports of third-country bananas, published in the Annex to Commission Regulation (EC) No 1824/1999 of 20 August 1999 amending Regulation (EC) No 1623/1999 fixing quantities for imports of bananas into the Community for the fourth quarter of 1999 under the tariff quotas or as part of the quantity of traditional ACP bananas (OJ 1999 L 221, p. 6).

31 For the part of the applications which could not be granted, the applicants still had the possibility of applying for import licences for a quantity of 308 978.252 tonnes of traditional ACP bananas, a quantity fixed by Commission Regulation (EC) No 1998/1999 of 17 September 1999 on the issuing of import licences for bananas under the tariff quotas and the quantity of traditional ACP bananas for

the fourth quarter of 1999 and on the submission of new applications (OJ 1999 L 247, p. 10). They thus applied for import licences for ACP bananas within the limits of the remaining quantities at their disposal, in accordance with Article 18(1) of Regulation No 2362/98. The import licences for the remaining quantities of their respective reference quantities were broken down as follows:

Alessandrini Srl	KG	2 050
Anello Gino di Anello Luigi & C. Snc	KG	1 859
Arpigi Spa	KG	757
Bestefruit Srl	KG	2 637
Co-Frutta SpA	KG	209 392
Co-Frutta Soc.coop.arl	KG	30 207
Dal Bello SIFE Srl	KG	1 533
Frigofrutta Srl	KG	2 990
Garletti Snc	KG	4 419
London Fruit Ltd	KG	286 004

32 On 13 October 1999, the competent national authorities issued import licences for ACP bananas for the entire quantity for which the applicants had applied.

33 Despite repeated attempts, the applicants did not succeed in obtaining supplies of ACP bananas.

34 Faced with that situation, on 18 November 1999, the applicants, referring to Article 232 EC, requested the Commission to:

— take the necessary measures to enable them to use the fourth-quarter licences issued for imports from ACP countries to carry out imports of bananas from Latin American or other third countries;

— provide, in any event, for the securities for those licences to be released, since they were not being used and the non-use was not attributable to their holder.

35 Not having received a response to that request, the applicants, by fax of 22 December 1999, drew the Commission's attention to the fact that the licences were going to expire on 7 January 2000 and requested the Commission to make a ruling on their requests.

36 By letter No 02418 of 26 January 2000 ('the letter of 26 January 2000'), addressed to the applicants' counsel, the Commission replied as follows:

'In your letter of 22 December 1999, you referred to difficulties encountered by certain operators in using the banana import licences issued for the fourth quarter of 1999, in particular for the import of bananas originating from ACP countries.

First of all, the nature of those problems is essentially commercial and, therefore, may be attributed to the activities of economic operators. The problem raised concerns the search for commercial partners for the purchase and transport of certain products and, specifically in the present case, of bananas from ACP countries. Although it is regrettable, the fact that your clients were unable to conclude contracts for the supply of ACP bananas is part of the commercial risk which is normally assumed by operators.

Lastly, we note that those difficulties concern only certain operators not described in detail, and that intervention on the part of the Commission would risk favouring some operators to the detriment of others who have assumed the risks associated with the obligations they have taken on.'

37 The competent national authorities kept the security lodged by the applicants, after taking the view that the grounds relied on by the applicants to recover that security did not constitute force majeure, the only scenario which would allow for release.

38 The facts of Case T-46/01 relate to the fourth quarter of 2000. For that quarter, the remainder of the available individual reference quantity for each of the applicants was as follows:

Alessandrini Srl	KG	5 667
Anello Gino di Anello Luigi & C. Snc	KG	5 140
Arpigi Spa	KG	15 792
Bestefruit Srl	KG	7 290
Co-Frutta SpA	KG	236 746
Co-Frutta Soc.coop.arl	KG	80 301
Dal Bello SIFE Srl	KG	4 110
Frigofrutta Srl	KG	8 266
Garletti Snc	KG	7 329
London Fruit Ltd	KG	324 124

39 Since the licence applications for third-country bananas exceeded the available quantities, Commission Regulation (EC) No 1971/2000 of 18 September 2000 on

the issuing of import licences for bananas under the tariff quotas and for traditional ACP bananas for the fourth quarter of 2000 and on the submission of new applications (OJ 2000 L 235, p. 10) fixed the quantity of bananas still available for import for the fourth quarter of 2000. According to the Annex to that regulation, import licences could still be issued for traditional ACP bananas up to 329 787.675 tonnes.

40 The applicants did not apply for import licences for those ACP bananas.

41 On 10 October 2000, the applicants, referring to Article 232 EC, requested the Commission to take measures pursuant to Article 20(d) of Regulation No 404/93 which would enable them to obtain, for the fourth quarter of 2000, import licences for third-country bananas for the remainder of the individual reference quantities which had been allotted to them. In the alternative, they requested the Commission to compensate them for lost earnings due to the impossibility of importing and marketing those bananas.

42 By letter No AGR 030905 of 8 December 2000 ('the letter of 8 December 2000'), addressed to the applicants' counsel, the Commission refused to grant those requests in the following terms:

'In your letter of 10 October 2000, you informed the Commission of difficulties encountered by certain operators in obtaining bananas in order to make full use of the reference quantities granted to them for 2000, within the framework of the tariff import quotas arrangement.

The difficulties to which you refer are essentially commercial in nature. We regret to inform you that Community law does not confer any power in these matters on the Commission. You recognise this situation yourself when you state that operators who do not have regular contact with ACP banana producers encounter difficulties in obtaining the goods in question.

You also state that the operators you represent are not able to make full use of all the reference quantities allocated to them.

We must point out to you that, from a legal standpoint, the reference quantities merely open up opportunities for operators and are determined on the basis of their previous business, pursuant to Community regulations; they confer on the parties concerned no more than the right to submit applications for import licences with a view to carrying out commercial operations which they have agreed on with suppliers in producing countries.

Lastly, we must add that, on the basis of the information you have supplied to the Commission, it appears that the difficulties to which you refer are not "transitory in nature" in that they may be attributed to the transition from the arrangement which applied prior to 1999 to the one which applied as from then. Accordingly, the provision of Article 20(d) of Regulation... No 404/93 does not allow the Commission to adopt the specific measures which you request.'

Procedure and forms of order sought

43 By applications lodged at the Registry of the Court of First Instance on 19 April 2000 and 1 March 2001, the applicants brought the actions in Case T-93/00 and Case T-46/01, respectively.

44 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure in the two cases.

45 By order of 15 October 2002 of the President of the Fifth Chamber of the Court of First Instance, after the views of the parties were heard at the hearing, Cases T-93/00 and T-46/01 were joined for the purposes of the oral procedure and judgment on account of the connection between them, in accordance with Article 50 of the Rules of Procedure.

46 The parties presented oral argument and replied to the questions of the Court at the hearing on 24 October 2002.

47 In Case T-93/00, the applicants claim that the Court should:

— annul the letter of 26 January 2000;

— award them compensation for the damage caused by that act;

— order the Commission to pay the costs.

48 In Case T-46/01, the applicants claim that the Court should:

— annul the letter of 8 December 2000;

— award them compensation for the damage caused by that act;

— order the Commission to pay the costs.

49 In both cases, the Commission contends that the Court should:

— dismiss the actions for annulment as inadmissible or, in the alternative, as unfounded;

— dismiss the claims for compensation;

— order the applicants to pay the costs.

The actions for annulment

Admissibility

Arguments of the parties

50 In Case T-93/00, the Commission submits that the letter of 26 January 2000 produces no legal effects as regards the applicants and thus cannot be the subject of an action for annulment (Case C-395/95 P *Geotronics* v *Commission* [1997] ECR I-2271; and Case T-81/97 *Regione Toscana* v *Commission* [1998] ECR II-2889, paragraph 21).

51 The Commission observes that the letter of 26 January 2000 does not bring about a substantial change in the applicants' legal position. The letter of 26 January 2000 merely states that the difficulties encountered by the applicants are part of the commercial risk to which all operators are exposed. The Commission states that, if the letter of 26 January 2000 were to be interpreted as an implicit rejection of the applicants' requests, it has been held that a negative decision may be the subject of an action for annulment when the act which the institution has refused to adopt could have been challenged under Article 230 EC (see, for example, Case T-330/94 *Salt Union* v *Commission* [1996] ECR II-1475, paragraph 32).

52 The Commission contends that no other act on its part could have been challenged by the applicants. It argues that, if it had adopted a general provision allowing all interested parties to carry out new imports from third countries, such an act of general application would have encompassed the applicants by reason of their objective status as importers, without thereby conferring on them *locus*

standi to take action against that act (Case T-47/95 *Terres Rouges and Others* v *Commission* [1997] ECR II-481, paragraph 44 et seq.; Case T-168/95 *Eridania and Others* v *Council* [1999] ECR II-2245, paragraphs 39, 43, 46 and 51; Case T-194/95 *Area Cova and Others* v *Council* [1999] ECR II-2271, paragraph 36 et seq.; and Case T-11/99 *Van Parys and Others* v *Commission* [1999] ECR II-2653, paragraphs 44, 45, 50 and 51).

53 With respect to the request for release of the security lodged, the Commission contends that the Member States alone are competent to determine whether there is a case of force majeure and that the national courts seised of a case always have the possibility of referring questions to the Court of Justice for a preliminary ruling.

54 The applicants maintain that the letter of 26 January 2000 does produce binding legal effects. That act rejects their request that the Commission take the necessary measures to enable them to use the 1999 fourth-quarter licences issued for imports from ACP countries with a view to carrying out imports of bananas from Latin American or other third countries. That refusal deprived the applicants of the opportunity to use their import licences. The fact that other operators found themselves in the same situation does not preclude the applicants from being directly and individually concerned by the Commission's refusal (Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico* v *Commission and Council* [2000] ECR II-2193, paragraphs 94 to 97).

55 The applicants state that they asked the Commission about being able to use the licences issued for imports of bananas from ACP countries during the fourth quarter of 1999 with a view to carrying out imports of bananas from third countries. At the hearing, the applicants stated that they were thus seeking to obtain import licences for third-country bananas for up to their reference quantity or the release of the security lodged, while leaving the Commission the choice of measures to implement pursuant to Article 20(d) of Regulation No 404/93 to arrive at such a result.

56 In Case T-46/01, the Commission also contends that the action for annulment is inadmissible because the letter of 8 December 2000 does not produce any legal effects which bring about a change in the applicants' legal position, for the same reasons as put forward in Case T-93/00.

57 The applicants submit that their action for annulment is admissible, for the same reasons as put forward regarding admissibility in Case T-93/00.

Findings of the Court

58 In order to assess the admissibility of the actions for annulment, it is necessary first to determine whether the letters of 26 January 2000 and 8 December 2000 are measures adversely affecting the applicants and, next, whether they have standing to take action against those measures.

59 According to settled case-law, any measure the legal effects of which are binding on and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position is an act or a decision which may be the subject of an action under Article 230 EC for a declaration that it is void (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9).

60 By contrast, the mere fact that a letter is sent by a Community institution in response to a request made by the addressee is not enough for it to be treated as a decision within the meaning of the fourth paragraph of Article 230 EC, thereby entitling the addressee to bring an action for its annulment (order in Case

C-25/92 *Miethke* v *Parliament* [1993] ECR I-473, paragraph 10; see also Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169, paragraph 30; and Case T-277/94 *AITEC* v *Commission* [1996] ECR II-351, paragraph 50).

61 In particular, an act by which the Commission simply interprets a legislative provision cannot be held to be an act having adverse effects. A written expression of opinion emanating from a Community institution cannot constitute a decision in respect of which an action for annulment may be brought, since it is not capable of producing any legal effects nor is it intended to produce such effects (Case 133/79 *Sucrimex and Westzucker* v *Commission* [1980] ECR 1299; Case 114/86 *United Kingdom* v *Commission* [1988] ECR 5289; and Case 151/88 *Italy* v *Commission* [1989] ECR 1255). In such circumstances, it is not the interpretation of the regulation proposed by the Commission which is capable of producing legal effects but, rather, its application to a given situation (*Regione Toscana*, paragraph 23).

62 In Case T-93/00, the applicants stated in their request of 18 November 1999 that, faced with the impossibility of obtaining supplies of ACP bananas in the fourth quarter of 1999, they risked losing permanently their import licences for that period and being deprived of the corresponding individual reference quantities. Referring to Article 232 EC, they requested the Commission to take the necessary measures to enable them, first, to use their import licences for imports of third-country bananas in the fourth quarter of 1999 and, second, to release the security for the import licences for that quarter.

63 It is therefore necessary to interpret the request of 18 November 1999 as aimed principally at getting the Commission to adopt measures concerning the applicants pursuant to Article 20(d) of Regulation No 404/93.

64 The Commission's letter of 26 January 2000 rejected the request concerning the import licences on the grounds that the supply difficulties encountered by the applicants were essentially commercial in nature and concerned only certain operators, with the result that intervention by the Commission might favour certain operators to the detriment of others.

65 By that response, the Commission refused to exercise its power to adopt measures pursuant to Article 20(d) of Regulation No 404/93. The letter of 26 January 2000 definitively determined the Commission's position concerning the adoption of such measures. It thus produces legal effects which are binding on and capable of affecting the interests of the applicants by bringing about a distinct change in their legal position. Accordingly, it is an act having adverse effects which may be the subject of an action for annulment. By contrast, the letter of 26 January 2000 does not rule on the issue of the security. Consequently, the action for annulment on this point is devoid of purpose.

66 Since the applicants are directly and individually concerned by the letter of 26 January 2000 of which they are the addressees, they have the necessary standing to bring an action. It follows that the action for annulment in Case T-93/00 is admissible.

67 Turning to Case T-46/01, it should be noted that, in their letter of 10 October 2000, the applicants, referring to Article 232 EC, requested the Commission to grant them import licences for third-country bananas and to compensate them for the damage suffered by them, based 'if necessary' on Article 20(d) of Regulation No 404/93.

68 In its letter of 8 December 2000, the Commission refused that request. It stated, first, that it was not competent to resolve difficulties of a commercial nature; second, that the individual reference quantities did no more than entitle operators to apply for import licences; and third, that the difficulties referred to by the

applicants were not related to the transition from the 1993 arrangement to the 1999 arrangement, thereby precluding the Commission from applying Article 20(d) of Regulation No 404/93.

69 The letter of 8 December 2000 must be interpreted as a refusal to exercise the power to adopt measures pursuant to Article 20(d) of Regulation No 404/93. That letter definitively determined the Commission's position concerning the adoption of such measures. It thus produces legal effects which are binding on and capable of affecting the interests of the applicants by bringing about a distinct change in their legal position. Accordingly, it is an act having adverse effects which may be the subject of an action for annulment.

70 Since the applicants are directly and individually concerned by the letter of 8 December 2000 of which they are the addressees, they have the necessary standing to bring an action. It follows that the action for annulment in Case T-46/01 is also admissible.

Substance

71 In Cases T-93/00 and T-46/01, the applicants are applying for annulment of the letter of 26 January 2000 and the letter of 8 December 2000, respectively, putting forward three pleas relating to the illegality of Regulation No 2362/98. Those pleas are: infringement of Regulation No 404/93, infringement of the right of property and free enterprise, and infringement of the principle of non-discrimination.

72 In addition, in each of the cases, the applicants put forward a claim based on infringement of Article 20(d) of Regulation No 404/93.

Admissibility of the pleas relating to illegality

— Arguments of the parties

73 The Commission submits that the claim for annulment of Regulation No 2362/98 on grounds of illegality is inadmissible. It states that an action to have an act declared void is available only if the contested individual decision is based on the rules alleged to be illegal (Case 32/65 *Italy* v *Council and Commission* [1966] 389; Joined Cases T-164/96 to T-167/96, T-122/97 and T-130/97 *Moccia Irme and Others* v *Commission* [1999] ECR II-1477, paragraph 56).

74 The Commission submits that the letters of 26 January 2000 and 8 December 2000 are not based on the provisions of Regulation No 2362/98, challenged by the applicants, nor on the provisions of Regulation No 1637/98, of which they allege infringement. The Commission maintains essentially that, in its letters, it merely stated that the problems in obtaining supplies of ACP bananas referred to by the applicants are part of commercial risks and are unrelated to Regulation No 1637/98 and Regulation No 2362/98. Accordingly, the fixing of the reference period and the merging of tariff quotas has no bearing on the supply difficulties encountered by the applicants. Any importer of third-country bananas could have encountered similar difficulties, even under the previous rules.

75 The applicants maintain that it is obvious that the letters of 26 January 2000 and 8 December 2000 apply Regulation No 2362/98. In their request to the Commission, the applicants explicitly questioned the legality of Regulation No 2362/98 in so far as it provided for the merging of third-country and ACP tariff quotas. In stating in its letters of 26 January 2000 and 8 December 2000 that the difficulties encountered by the applicants were purely commercial, the Commission applied an overly strict interpretation of regulation No 2362/98.

— Findings of the Court

76 Article 241 EC gives expression to the general principle conferring on any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which, even if not in the form of a regulation, form the legal basis of the decision which is being attacked, if that party was not entitled under Article 230 EC to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void (Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 39).

77 Given that Article 241 EC is not intended to enable a party to contest the applicability of any measure of general application in support of any action whatsoever, the general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question (Case 21/64 *Macchiorlati Dalmas e Figli* v *High Authority* [1965] ECR 175, 188; *Italy* v *Council and Commission*, 409; Joined Cases T-6/92 and T-52/92 *Reinarz* v *Commission* [1993] ECR II-1047, paragraph 57).

78 In the present case, the pleas put forward in support of the claim of illegality are essentially seeking a declaration that, when it adopted Regulation No 2362/98, the Commission exceeded the limits of the powers conferred on it by the Council under Article 19 of Regulation No 404/93, as amended by Regulation 1637/98, in order to adopt the detailed rules for the latter regulation. More specifically, the applicants dispute the legality of the choices made by the Commission in Regulation No 2362/98 concerning the determination of the reference period and the method for managing the tariff quotas.

79 The letters of 26 January 2000 and 8 December 2000 do not have as their legal basis the contested provisions of Regulation No 2362/98 but, as held above, they must be interpreted as refusals to exercise the prerogatives conferred on the Commission by Article 20(d) of Regulation No 404/93. In Case T-93/00, this finding is not affected by the applicants' assertion that the difficulties they encountered in obtaining supplies of ACP bananas in the fourth quarter of 1999 were caused by the adoption of Regulation No 2362/98. Even if it were possible that such a circumstance might enable a causal link to be established between the damage alleged by the applicants and Regulation No 2362/98 in the context of an action for compensation, it does not lead to a finding of a direct legal link between that regulation and the letter of 26 January 2000, a decision based on Article 20(d) of Regulation No 404/93.

80 Moreover, as pointed out by the Commission, the letter of 26 January 2000 essentially relies on the fact that the damage alleged by the applicants was caused directly by their difficulty in obtaining supplies of ACP bananas in the fourth quarter of 1999. Likewise, in Case T-46/01, the letter of 8 December 2000 is based on similar considerations, since the Commission found that the applicants were faced with difficulties of a commercial nature.

81 Consequently, since the applicants have not established a direct legal link between the letters of 26 January 2000 and 8 December 2000, on the one hand,

and the provisions of Regulation No 2362/98 which they allege are illegal, on the other, the pleas of illegality must be dismissed as inadmissible in both Case T-93/00 and Case T-46/01.

The plea of infringement of Article 20(d) of Regulation No 404/93

— Arguments of the parties

82 The applicants submit that, under Article 20(d) of Regulation No 404/93, the Commission was required to take note of the practical impossibility of obtaining ACP bananas and to allow them to import third-country bananas up to their individual reference quantities.

83 In Case T-93/00, the Commission submits that this plea is inadmissible because the applicants did not expressly request application of Article 20(d) of Regulation No 404/93 and did not explain how they were penalised by the entry into force of Regulation No 2362/98.

84 On the substance, the Commission maintains in both cases that, on the basis of the information it had and in the absence of more comprehensive information supplied by the applicants, it was certainly not required to adopt specific measures under Article 20(d) of Regulation No 404/93.

— Findings of the Court

85 First, the Court does not accept the Commission's objections to the admissibility of the plea alleging infringement of Article 20(d) of Regulation No 404/93 in Case T-93/00. As has been held earlier, the letter of 26 January 2000 must, in the light of the applicants' request of 18 November 1999, be interpreted as a refusal by the Commission to exercise the prerogatives conferred on it by Article 20(d) of Regulation No 404/93.

86 Second, the Court recalls that Article 20(d) of Regulation No 404/93 allows the Commission to adopt 'specific provisions needed' to facilitate the transition from the 1993 arrangement to the 1999 arrangement. When assessing whether transitional measures are necessary under that provision, the Commission has a broad discretion, which is to be exercised in accordance with the procedure laid down in Article 27 of Regulation No 404/93. Thus, although it is for the Court of First Instance to review the lawfulness of the Commission's action or failure to act under that provision, the scope of that control is limited in particular to examining whether there has been a manifest error of assessment (see, regarding measures for the transition from national arrangements to the common organisation of the banana market provided for in Article 30 of Regulation No 404/93, Case C-68/95 *T. Port* [1996] ECR I-6065, paragraphs 38 and 39).

87 In Case T-93/00, it is appropriate to examine whether the Commission committed a manifest error of assessment in refusing, in the letter of 26 January 2000, to adopt necessary specific measures pursuant to Article 20(d) of Regulation No 404/93 to remedy the difficulties encountered by the applicants due to the change from the 1993 arrangement to the 1999 arrangement.

88 It should be noted, first, that Regulation No 2362/98, by which the Commission specified the detailed arrangements for the 1999 arrangement contains a Title V, which consists solely of transitional provisions. Thus Articles 28 to 30 of that regulation lay down several rules applicable for the year 1999 in order to facilitate the transition from the 1993 arrangement to the 1999 arrangement. In that respect, the present case is different from the ones dealing with the transition from the national arrangement to the common organisation of the banana market resulting from Regulation No 404/93, which contained no detailed transitional provisions (*T. Port* and the Opinion of Advocate General Elmer in that case, paragraph 26). Notwithstanding the provisions under Title V of Regulation No 2362/98, the temporary difficulties which can arise during the reform of the common banana market organisation may in principle be settled by applying the arrangements for hardship cases provided for in Article 20(d) of Regulation No 404/93 (Case T-18/99 *Cordis* v *Commission* [2001] ECR II-913, paragraph 78).

89 In addition, the very purpose of Article 20(d) of Regulation No 404/93 supposes that the difficulties alleged by the operators concerned are directly linked to the change from the 1993 arrangement to the 1999 arrangement and are not due to a lack of diligence on the part of those operators.

90 In the present case, it appears that the difficulties which, on 18 November 1999, led the applicants to request the Commission to act, are not a direct consequence of the change from the 1993 arrangement to the 1999 arrangement, but rather result from the applicants' inability to obtain supplies of ACP bananas in the fourth quarter of 1999. It is common ground that, despite the steps taken by some of the applicants, they were unable to find commercial partners who were willing to deliver ACP bananas to them.

91 In those circumstances, the Commission did not commit a manifest error of assessment when it found, in its letter of 26 January 2000, that that situation 'concerns the search for commercial partners for the purchase and transport of

certain products and, specifically in the present case, of bananas from ACP countries' and 'is part of the commercial risk which is normally assumed by operators'.

92 Although the applicants' line of argument could be construed as attributing the impossibility of finding commercial partners to the entry into force of the 1999 arrangement, the fact remains that the applicants have not demonstrated to the requisite legal standard that the Commission made a manifest error of assessment in refusing to grant their request for measures under Article 20(d) of Regulation No 404/93.

93 Accordingly, the plea alleging infringement of Article 20(d) of Regulation No 404/93 must be dismissed as unfounded. It follows that all the pleas and arguments put forward in support of the action for annulment of Case T-93/00 must be dismissed.

94 In Case T-46/01, it is appropriate to examine whether the Commission committed a manifest error of assessment in refusing, in the letter of 8 December 2000, to adopt necessary specific measures pursuant to Article 20(d) of Regulation No 404/93 to remedy the difficulties encountered by the applicants due to the change from the 1993 arrangement to the 1999 arrangement.

95 Unlike the circumstances giving rise to Case T-93/00, after the available quantities of third-country bananas had been exhausted and Regulation No 1971/2000 adopted, the applicants did not apply for import licences for ACP bananas for the fourth quarter of 2000, but on 10 October 2000 directly requested the Commission to act under Article 232 EC, so that they would be

permitted by the Commission to proceed with banana imports from third countries up to their reference quantity. It is also established that the applicants did not seek to foster commercial contacts with suppliers of ACP bananas so as to be able to obtain banana supplies in the fourth quarter of 2000.

96 In those circumstances, the Commission was able to find, without exceeding the limits of its discretion, that the difficulties referred to by the applicants were not attributable to the change from the 1993 arrangement to the 1999 arrangement, but that, rather, they were essentially commercial in nature, since the applicants had chosen not to act in the fourth quarter of 2000.

97 Accordingly, in Case T-46/01, the plea alleging infringement of Article 20(d) of Regulation No 404/93 is unfounded. It follows that all the pleas and arguments put forward in support of the action for annulment in Case T-46/01 must be dismissed.

The claims for compensation

Arguments of the parties

98 The applicants maintain that, by providing for the combined management of the third-country tariff quotas with the ACP tariff quota in Regulation No 2362/98

and, in particular, for the merging of the reference quantities, and by omitting to adopt Community measures for remedying the consequences flowing therefrom, the Commission's conduct was illegal and had detrimental effects. They submit that the conditions for the Community to incur non-contractual liability are met.

99 First, the applicants submit that, by adopting Regulation No 2362/98, the Commission infringed Regulation No 404/93 and infringed the fundamental right of property and free enterprise and the principle of non-discrimination.

100 Second, the applicants submit that they suffered damage because they were not able to make full use of their reference quantities and the import licences for the fourth quarters of 1999 and 2000. That damage consists of the lost earnings, which can be calculated on the basis of the commercial value of the import licences for third-country imports, that is, ITL 300 per kilo. When that amount is multiplied by the quantity listed in those import licences issued to the applicants but which could not be used, the damage totals ITL 162 554 400 in Case T-93/00 and, using the same method, ITL 208 429 500 in Case T-46/01.

101 Third, as regards the causal link, the applicants maintain that, had it not been for the illegal measures taken by the Commission under Regulation No 2362/98, they would have been able to obtain import licences for third-country bananas.

102 The Commission denies those allegations.

103 It states, first, that it cannot be accused of any illegal conduct.

104 Second, it disputes the existence of the damage alleged. The lost earnings can be established only if the applicants can show that the quantities of bananas in respect of which they applied for licences would have provided them with a gain equivalent to the amount of the import licences.

105 Third, there is no causal link between the difficulties in obtaining supplies of ACP bananas and the changes resulting from the adoption of Regulation No 2362/98. The applicants could very well have been confronted with the same types of difficulties under the 1993 arrangement.

Findings of the Court

106 It is settled case-law that, in order for the Community to incur non-contractual liability, a number of conditions must be satisfied concerning the illegality of the conduct alleged against the Community institutions, the fact of the damage and the existence of a causal link between that conduct and the damage complained of (Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 16; Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 68).

107 Since one of the conditions governing the Community's non-contractual liability is not satisfied, the application must be dismissed in its entirety without its being

necessary to examine the other preconditions for such liability (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 81).

108 In the present case, it is clear that the condition relating to the causal link is not satisfied. In Case T-93/00, the cause of the damage alleged relates to the fact that the applicants were unable to find suppliers willing to supply them with ACP bananas in the fourth quarter of 1999. In Case T-46/01, the lost earnings complained of by the applicants is directly attributable to their lack of diligence. They did not apply for import licences for ACP bananas for the fourth quarter of 2000 in conformity with Regulation No 1971/2000 once the quantity of third-country bananas was exhausted. In addition, despite the problems encountered during the fourth quarter of 1999, they did not seek to foster contacts with suppliers of ACP bananas in 2000 so as to be able to obtain banana supplies in the fourth quarter of that year.

109 Since one of the conditions for the Community to incur non-contractual liability has not been satisfied, the claims for compensation must be dismissed in Case T-93/00 and Case T-46/01.

Costs

110 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful in both cases and the Commission has applied for costs, the applicants must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

hereby:

1. **Dismisses the applications in Joined Cases T-93/00 and T-46/01;**

2. **Orders the applicants to pay their own costs and those of the Commission in Joined Cases T-93/00 and T-46/01.**

García-Valdecasas Lindh Cooke

Delivered in open court in Luxembourg on 10 April 2003.

H. Jung
Registrar

R. García-Valdecasas
President