JUDGMENT OF THE COURT (Sixth Chamber)
21 January 1999 *

In Case C-73/97 P,

French Republic, represented initially by Catherine de Salins, Assistant Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, subsequently by Kareen Rispal-Bellanger, Assistant Director in the same directorate, and Frédéric Pascal, Administrative Attaché in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 11 December 1996 in Case T-70/94 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [1996] ECR II-1741, seeking to have that judgment partially set aside in so far as it rejected the plea of inadmissibility raised by the Commission,

the other parties to the proceedings being:

Comafrica SpA, a company governed by Italian law, established in Genoa (Italy),

Dole Fresh Fruit Europe Ltd & Co., a company governed by German law, established in Hamburg (Germany),

* Language of the case: English.

represented by Bernard O'Connor, Solicitor, with an address for service in Luxembourg at the Chambers of Arsène Kronshagen, 22 Rue Marie-Adelaïde,

applicants at first instance,

Commission of the European Communities, represented by Xavier Lewis, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant at first instance,

United Kingdom of Great Britain and Northern Ireland,

intervener at first instance,

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn (Rapporteur), President of the Chamber, G. F. Mancini, J. L. Murray, H. Ragnemalm and K. M. Ioannou, Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 25 June 1998,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 20 February 1997, the French Republic brought an appeal pursuant to the third paragraph of Article 49 of the EC Statute of the Court of Justice against the judgment given on 11 December 1996 in Case T-70/94 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [1996] ECR II-1741 (hereinafter 'the contested judgment') in which the Court of First Instance rejected the plea of inadmissibility raised by the Commission.

2 In the contested judgment, the Court of First Instance dismissed as unfounded the application for annulment of Commission Regulation (EC) No 3190/93 of 19 November 1993 fixing the uniform reduction coefficient for determining the quantities of bananas to be allocated to each operator in categories A and B in the context of the tariff quota 1994 (OJ 1993 L 285, p. 28) and the claim for compensation submitted by Comafrica SpA and Dole Fresh Fruit Europe Ltd & Co. (hereinafter 'Comafrica and Dole').

3 As regards the factual background to the dispute and the Community legislation at issue, reference is made to paragraphs 1 to 21 of the contested judgment.

The action before the Court of First Instance

4 By application lodged at the Registry of the Court of First Instance on 11 February 1994, Comafrica and Dole brought an action under the fourth paragraph of Article 173 of the EC Treaty for annulment of Article 1 of Regulation No 3190/93 and, under the second paragraph of Article 215 of the Treaty, for compensation for the damage which they consider they suffered as a result of the allegedly unlawful decisions of the Commission contained in Article 1 of Commission Regulation (EEC)

No 2920/93 of 22 October 1993 fixing the uniform reduction coefficient for determining the quantities of bananas to be allocated to each operator in categories A and B in the context of the tariff quota for the second half of 1993 (OJ 1993 L 264, p. 40) and in Article 1 of Regulation No 3190/93.

5 On 29 April 1994 the Commission raised a plea of inadmissibility in relation to the application in so far as it sought annulment of Article 1 of Regulation No 3190/93. By order of 2 May 1995, the Court of First Instance decided to join the plea of inadmissibility to the substance of the case.

6 In that respect, the Court of First Instance considered:

'38 The fourth paragraph of Article 173 of the Treaty entitles individuals to contest a decision which, although adopted in the form of a regulation, is shown to be of direct and individual concern to them. As the Court of Justice and the Court of First Instance have consistently held, one of the main purposes of that provision is to prevent the Community institutions, by mere choice of the form of a regulation, from depriving an individual of a right of action against a measure which is in reality a decision having a direct and distinct impact on his particular situation. It is therefore clear that the choice of form cannot of itself determine the legislative character of a measure (see judgment of the Court of Justice in Joined Cases 789/79 and 790/79 *Calpak and Società Emiliana Lavorazione Frutta* v *Commission* [1980] ECR 1949, paragraph 7, and order of the Court of First Instance in Case T-476/93 *FRSEA and FNSEA* v *Council* [1993] ECR II-1187, paragraph 19).

39 The Court of Justice and the Court of First Instance have also held that, in order for economic operators to be regarded as being individually concerned by the measure they seek to have annulled, their legal position must be affected by reason of circumstances which differentiate them from all other persons and distinguish them individually in the same way as an addressee of a decision (see, for example, the judgment of the Court of Justice in Case C-131/92 *Arnaud* v *Council* [1993] ECR I-2573).

40 Furthermore, in the particular context of the management of a tariff quota opened in the beef and veal market, the Court of Justice has held that a Commission regulation specifying the extent to which the competent authorities of the Member States should satisfy applications for import licences was of individual concern to those operators who had already applied for import licences at the time of its adoption (Case C-354/87 *Weddel* v *Commission*, cited above, paragraphs 19 to 23). In finding that the operators in question were individually concerned, the Court took account of the fact that, in determining the extent to which the applications were to be satisfied, on the basis of the total quantities applied for and in circumstances in which no new applications could be added, the Commission had, in fact, decided on the treatment to be accorded to each application. Consequently, the Court of Justice considered that the regulation in question was to be regarded as a collection of individual decisions and not as a measure of general application within the meaning of Article 189 of the Treaty.

41 The Court notes that in this case Regulation No 3190/93 is of relevance only to those operators who had applied for and obtained reference quantities for imports of Category A or Category B bananas for the year 1994. It informs each operator concerned that the quantity of bananas it was entitled to import under the tariff quota for the year 1994 may be determined by applying the stated uniform reduction coefficient to its reference quantity. Inasmuch as the only legislative function of the regulation is to fix and publish this reduction coefficient figure, it has the immediate and direct effect of enabling each operator to ascertain his own precise entitlement by applying that coefficient to the reference quantity already allocated to him. As such, it is properly construed as a collection of individual decisions addressed to each operator effectively informing him of the precise quantities which he will be entitled to import in 1994.

42 The Court also notes that the Commission has not contested the applicants' assertion that they are also directly concerned by Regulation No 3190/93 because it does not allow Member States any margin of discretion in relation to the licence applications made.

43 In these circumstances, the action for annulment of Regulation No 3190/93 must be declared admissible.'

The appeal

7 In its appeal, the French Republic requests the Court to set aside the contested judgment in part in so far as the Court of First Instance dismissed the plea of inadmissibility raised by the Commission.

8 Comafrica and Dole claim that the Court should:

— dismiss the appeal;

— order the French Government and the Commission to pay the costs.

9 The Commission claims that the Court should:

— set aside the contested judgment in part in so far as it dismissed the plea of inadmissibility which it had raised;

— order Comafrica and Dole to pay the costs.

10 In support of its appeal, the French Government claims that the Court of First Instance failed to take account of the general scope and the legislative character of Regulation No 3190/93, which produces legal effects *vis-à-vis* all Category A and B operators and of the fact that Comafrica and Dole failed to demonstrate the exist-

ence of a particular factual situation characterising them more particularly than any other operator marketing bananas covered by the tariff quota.

11 The Commission, which supports the appeal lodged by the French Government, points out first of all that the sole purpose of Regulation No 3190/93 is to bring the total amount of the reference quantities allocated to operators in Categories A and/or B into line with the volume of quota available by fixing a reduction coefficient, without taking into account any particular circumstances of a given operator. Next, the Commission recalls that, according to Article 6 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 (OJ 1993 L 142, p. 6), Member States are to notify operators of their individual reference quantities after the Commission has fixed any reduction coefficient. It states that it is only upon that communication that operators can be said to have some form of definitive entitlement to a given reference quantity. Finally, the Commission observes that the Court of First Instance was wrong to base its decision on the judgment in Case C-354/87 *Weddel* v *Commission* [1990] ECR I-3847 in ruling on the admissibility of the application made in respect of Regulation No 3190/93.

12 On the ground that they disagreed with the Opinion of the Advocate General, in particular as regards the various steps in the licensing allocation procedure under Regulation No 1442/93, by letter lodged at the Registry of the Court on 3 September 1998, Comafrica and Dole requested the Court either to order a factual measure of inquiry pursuant to Article 60 of the Rules of Procedure of the Court into the actual operation of that procedure or to order the reopening of the oral procedure pursuant to Article 61 of those Rules.

13 As regards the request for a measure of inquiry, the Court considers that it must be rejected. It was made at a time when, in accordance with Article 59(2) of the Rules of Procedure, the oral procedure was closed. The Court has held (see, in particular, Case C-415/93 *Union Royale Belge des Sociétés de Football Association* v *Bosman* [1995] ECR I-4921, paragraph 53) that such a request can be accepted

only if it relates to facts which may have a decisive influence and which the party concerned could not put forward before the close of the oral procedure.

14 In the present case, it is sufficient to note that Comafrica and Dole could have submitted their request before the close of the oral procedure. The matter of the operation of the licensing allocation procedure under Regulation No 1442/93 was raised by them in their rejoinder lodged pursuant to Article 117 of the Rules of Procedure. Furthermore, by letter lodged at the Registry of the Court on 8 October 1997, they stated that the written procedure had enabled them sufficiently to defend their position and that they did not object to the Court dispensing with the oral part of the procedure in accordance with Article 120 of the Rules of Procedure.

15 As regards the request for the the oral procedure to be reopened, the Court, in accordance with Article 61 of its Rules of Procedure, considers that this is not necessary in the present case.

Findings of the Court

16 At paragraph 41 of the contested judgment, the Court of First Instance considered that, since Regulation No 3190/93 has the immediate and direct effect of enabling each operator to ascertain his own precise entitlement by applying the reduction coefficient to the reference quantity already allocated to him, it is properly construed as a collection of individual decisions addressed to each operator effectively informing him of the precise quantities which he will be entitled to import in 1994.

17 It is therefore necessary to consider whether the Court of First Instance was right in holding that operators had been allocated a reference quantity before the adoption of Regulation No 3190/93 and that after the adoption of that regulation each

operator was therefore in a position to ascertain the definitive quantity which he would be entitled to import in 1994 by multiplying the reference quantity by the reduction coefficient.

18 The detailed rules for the application of Title IV of 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) were laid down in Regulation No 1442/93.

19 As regards the issue of import licences to the various categories of operator, Regulation No 1442/93 prescribes a procedure consisting of several stages.

20 First, pursuant to Article 4(1) of Regulation No 1442/93, the competent authorities of the Member States are to draw up separate lists of operators in Categories A and B and the quantities which each operator has marketed in each of the three years prior to that preceding the year for which the tariff quota is opened, broken down according to economic activity as described in Article 3(1) of the regulation.

21 In that respect, Article 4(2) of Regulation No 1442/93 provides that the operators concerned are to notify the competent authorities at the latest by 1 September 1993 as regards 1994, by 1 April each year thereafter of the overall quantities of bananas marketed in each of the years referred to in paragraph 1 of that provision, breaking them down clearly according to the origin of the bananas and according to economic activity as described in Article 3(1) of the regulation.

22 Next, pursuant to Article 5 of Regulation No 1442/93, at the latest by 1 October 1993 as regards 1994 and by 1 July each year thereafter, the competent authorities

are to establish 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 is opened, broken down by economic activity in accordance with Article 3(1) of the regulation. That average is termed the operator's 'reference quantity'.

23 It clear from Article 5(2) of Regulation No 1442/93 that the reference quantity is determined by the competent authority by multiplying the quantities marketed by weighting coefficients depending on the economic activity as referred to in Article 3(1) of the regulation.

24 As regards the figures to be determined by the competent authorities, Article 8 of Regulation No 1442/93 provides that the latter are to conduct all necessary checks to verify the validity of applications and supporting documents submitted by operators in accordance with Article 7 of the regulation. To that end, they may in particular take account of expert opinions and reports drawn up by internal and independent auditors.

25 Finally, Article 5(3) of Regulation No 1442/93 provides that the competent authorities are to notify the Commission at the latest by 15 October 1993 as regards 1994 and by 15 July each year thereafter of the total reference quantities weighted pursuant to Article 5(2) and the total quantities of bananas marketed in respect of each activity by operators registered with them.

26 It should be noted that Regulation No 1442/93 does not require the competent authorities to inform operators of the reference quantities or weighted reference quantities determined by them.

27 In the last stage, pursuant to the first paragraph of Article 6 of Regulation No 1442/93, the Commission is to fix, where appropriate, a single reduction coefficient for each category of operators to be applied to operators' reference quantities to determine the quantity to be allocated to each. According to the second paragraph of that article, the Member States are to determine the quantities for each operator in Categories A and/or B registered with them and to notify the latter thereof individually at the latest by 1 November 1993 as regards 1994 and by 1 August each year thereafter.

28 As regards the reduction coefficient fixed by Regulation No 3190/93, the Commission stated before the Court of First Instance that that coefficient was applied to reference quantities which had been corrected by its services or at their instigation (paragraph 64 of the contested judgment).

29 It is apparent from the fifth and sixth recitals in the preamble to Regulation No 3190/93 that the notifications made by the Member States pursuant to Article 5(3) of Regulation No 1442/93 reveal that the same quantities in respect of the same activity were counted twice for different operators in several Member States and that the reduction coefficient was determined on the basis of the notifications from the Member States after the quantities counted twice had been estimated by the Commission and the figures corrected accordingly.

30 It follows that the figures notified by the operators to the competent authorities may be altered several times in the course of the procedure before the reduction coefficient is fixed, without the alterations made by the competent authorities or the Commission being brought to the attention of the operators concerned.

31 Consequently, an operator is not able to ascertain, on the basis of either the figures notified by it to the national competent authority or the provisions of Regulation No 3190/93, the reference quantity to which the reduction coefficient is to be applied.

32 The Court of First Instance therefore erred in finding, at paragraph 41 of the contested judgment, that Regulation No 3190/93 'informs each operator concerned that the quantity of bananas it was entitled to import under the tariff quota for the year 1994 may be determined by applying the stated uniform reduction coefficient to its reference quantity' and that the regulation had the immediate and direct effect 'of enabling each operator to ascertain his own precise entitlement by applying that coefficient to the reference quantity already allocated to him'.

33 At paragraph 40 of the contested judgment, the Court of First Instance drew an analogy between the situation of Comafrica and Dole and that of the applicant in *Weddel* v *Commission* and concluded, at paragraph 41, that Regulation No 3190/93, properly construed, was a collection of individual decisions addressed to each operator effectively informing him of the precise quantities he would be entitled to import in 1994.

34 In that regard, it should be recalled that, at paragraph 20 of the judgment in *Weddel* v *Commission*, the Court stated that Commission Regulation (EEC) No 2806/87 of 18 September 1987 on the issue of import licences for high-quality fresh, chilled or frozen beef and veal (OJ 1987 L 268, p. 59) was adopted in view of the quantities of beef and veal in respect of which individual applications for import licences had been lodged in the first 10 days of the month of September 1987.

35 When adopting Regulation No 2806/87, the Commission availed itself of the possibility provided for in Article 15(6)(d) of Regulation (EEC) No 2377/80 of 4 September 1980 on special detailed rules for the application of the system of import and export licences in the beef and veal sector (OJ 1980 L 241, p. 5), as inserted by Commission Regulation (EEC) No 3578/82 of 23 December 1982 (OJ 1982 L 373, p. 59), according to which the Commission is to decide to what extent applications for licences can be accepted and to reduce the amounts requested by a fixed percentage if the quantities for which licences have been requested exceed the quantities available.

36 It follows, as the Advocate General points out at point 53 of his Opinion, that the role of the competent authorities of the Member States was limited to the issue of import licences by carrying out, on the basis of the Commission regulation, a simple multiplication which each operator was capable of performing himself.

37 By contrast, it is clear from paragraphs 20 to 31 above that the operators did not obtain a reference quantity before the adoption of Regulation No 3190/93, nor were they able to ascertain the definitive quantity they would be entitled to import in 1994 by carrying out a simple multiplication of a quantity known to them by the reduction coefficient determined by the regulation.

38 The Court of First Instance was therefore also wrong to conclude, at paragraph 41 of the contested judgment, on the basis of the judgment in *Weddel* v *Commission*, that Regulation No 3190/93, properly construed, was a collection of individual decisions addressed to each operator effectively informing him of the precise quantities which he would be entitled to import in 1994.

39 As regards the case-law of the Court relied on by Comafrica and Dole in support of their argument that they are individually concerned by Regulation No 3190/93, it should be noted, as the Advocate General points out at points 67 to 71 of his Opinion, that that case-law relates to circumstances different from those in the present case.

40 Finally, as regards Comafrica's and Dole's plea in law that, if they were denied the right to challenge Regulation No 3190/93 before the Court of First Instance, they would have no effective legal remedy in respect of measures which determined their rights, it is sufficient to observe, as does the Advocate General at point 82 of his Opinion, that an operator who considers his rights to have been infringed on the allocation of the reference quantity may bring an action before a national court

against the measure whereby the competent authorities of the Member State concerned determined, pursuant to the second paragraph of Article 6 of Regulation No 1442/93, the quantity allocated to him. In the context of such an action, there is nothing to prevent him from challenging the validity of the Community regulation on which that measure was based.

41 It follows from the foregoing that the contested judgment must be annulled.

42 Under the second sentence of the first paragraph of Article 54 of the EC Statute of the Court of Justice, if the decision of the Court of First Instance is quashed, the Court of Justice may give final judgment in the matter where the state of the proceedings so permits. The Court considers that to be the case here.

43 It is sufficient to hold in that regard that the application for annulment of Regulation No 3190/93 submitted by Comafrica and Dole must be dismissed as inadmissible.

Costs

44 According to the fourth paragraph of Article 122 of the Rules of Procedure of the Court of Justice, when an appeal brought by a Member State or an institution which did not intervene in the proceedings before the Court of First Instance is well founded, the Court of Justice may order that the parties share the costs or that the successful appellant pay the costs which the appeal has caused an unsuccessful party to incur. Each party must therefore be ordered to bear its own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Annuls the judgment of the Court of First Instance of 11 December 1996 in Case T-70/94 Comafrica and Dole Fresh Fruit Europe v Commission;**

2. **Dismisses the application for annulment lodged by Comafrica SpA and Dole Fresh Fruit Europe Ltd & Co. as inadmissible;**

3. **Orders each party to bear its own costs.**

Kapteyn Mancini Murray

Ragnemalm Iannou

Delivered in open court in Luxembourg on 21 January 1999.

R. Grass P. J. G. Kapteyn

Registrar President of the Sixth Chamber