ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
10 December 1996 *

In Case T-18/95,

Atlanta Handelsgesellschaft Harder & Co. GmbH, a company governed by German law, established in Bremen (Germany),

Internationale Fruchtimport Gesellschaft Weichert & Co., a company governed by German law, established in Hamburg (Germany),

represented by Erik A. Undritz, Gerrit Schohe and Helge Schäfer, of the Hamburg Bar, with an address for service in Luxembourg at the Chambers of Marc Baden, 34 B Rue Philippe II,

applicants,

supported by

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat at the Federal Ministry of the Economy, and Bernd Kloke, Oberregierungsrat in the same ministry, acting as Agents,

intervener,

* Language of the case: German.

Commission of the European Communities, represented by Dierk Booß, Legal Adviser, and Klaus-Dieter Borchardt, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by Stephen Braviner, of the Treasury Solicitor's Department, acting as Agent, assisted by David Anderson, Barrister, of the Bar of England and Wales, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

and

French Republic, represented by Catherine de Salins, Deputy Head of Legal Affairs at the Ministry of Foreign Affairs, and by Gautier Mignot, Secretary for Legal Affairs, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

interveners,

APPLICATION for the partial annulment of Commission Regulation (EC) No 2791/94 of 16 November 1994 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas in 1994 as a result of tropical storm Debbie (OJ 1994 L 296, p. 33),

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

composed of: K. Lenaerts, President, P. Lindh and J. D. Cooke, Judges,

Registrar: H. Jung,

makes the following

Order

Relevant legislation

1 A common organization of the market in bananas was introduced by Council Regulation (EEC) No 404/93 of 13 February 1993 (OJ 1993 L 47, p. 1), last amended by Council Regulation (EC) No 3290/94 of 22 December 1994 on the

adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multi-lateral trade negotiations (OJ 1994 L 349, p. 105).

2 Under Regulation No 404/93 three different sets of rules apply to bananas depending on whether they were produced in the Community ('Community bananas'), in some of the States with which the Community has concluded the Lomé Convention ('ACP bananas') or in other States ('third-country bananas').

3 In the case of Community bananas, Article 12(2) of Regulation No 404/93 provides that 'the maximum quantity of bananas produced in the Community and marketed for which compensation may be paid shall be fixed at 854 000 tonnes' (per year).

4 Article 15(1) provides that traditional imports from ACP States ('traditional ACP bananas') are to correspond to the quantities of bananas set out in the annex to Regulation No 404/93 exported by each ACP State which has traditionally exported bananas to the Community. Bananas exported by ACP States in excess of those quantities ('non-traditional ACP bananas') are to be treated as third-country bananas save where they are subject to lower duties.

5 Article 18(1) of Regulation No 404/93 provides for the opening of a tariff quota of 2 million tonnes each year for imports of third-country bananas and non-traditional ACP bananas. The quota may be adjusted in certain circumstances.

6 The tariff quota was increased to 2 118 000 tonnes for 1994 by Commission Regulation (EC) No 2352/94 of 29 September 1994 increasing the tariff quota for 1994 and laying down an additional period during the fourth quarter for submitting applications for import licences for bananas in respect of that year (OJ 1994 L 254, p. 61).

7 Article 19 of Regulation No 404/93 provides that 66.5% of the tariff quota is open to the category of operators who marketed third-country and/or non-traditional ACP bananas (category A), 30% to the category of operators who marketed Community and/or traditional ACP bananas (category B) and 3.5% to the category of operators established in the Community who started marketing bananas other than Community and/or traditional ACP bananas from 1992 (category C).

8 On 10 September 1994 tropical storm Debbie caused damage to the banana plantations in the Community regions of Martinique and Guadeloupe and in the ACP States of Saint Lucia and Dominica.

9 The Commission thereupon adopted Regulation (EC) No 2791/94 of 16 November 1994 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas in 1994 as a result of tropical storm Debbie (OJ 1994 L 296, p. 33, hereinafter 'Regulation No 2791/94' or 'the contested regulation').

10 Article 1 of Regulation No 2791/94 provides as follows:

'1. The tariff quota of 2 118 000 tonnes (net weight) fixed for 1994 is hereby increased to 2 171 400 tonnes (net weight).

2. The additional quantity of 53 400 tonnes (net weight) shall be allocated to the operators determined in accordance with Article 2 below as follows:

(a) 30 000 tonnes for operators supplying the Community with bananas produced in Martinique;

(b) 5 900 tonnes for operators supplying the Community with bananas produced in Guadeloupe;

(c) 14 800 tonnes for operators supplying the Community with bananas produced in Saint Lucia;

(d) 2 700 tonnes for operators supplying the Community with bananas produced in Dominica.'

11 The additional 53 400 tonnes of bananas result from the Commission's revision of the forecast supply balance for 1994 following the storm, reducing Community production by 35 900 tonnes to 607 100 tonnes and imports from the ACP States by 17 500 tonnes to 648 500 tonnes. As a result, the Community banana market had a shortfall in supply of 53 400 tonnes.

12 According to the fourth recital in the preamble to Regulation No 2791/94 the adaptation of the tariff quota must permit 'adequate supplies to the Community market up to the end of 1994 and provide compensation to operators who include or directly represent banana producers who suffered damage and who ... risk losing their traditional outlets on the Community market on a long-term basis'.

13 Article 2 of Regulation No 2791/94 provides that the quantities referred to in Article 1(2) shall be allocated to the operators who represent banana producers affected by tropical storm Debbie and who were unable to supply the Community market with bananas on their own account owing to the damage caused by the storm. The competent authorities in the Member States are to determine which operators meet the requirements of Article 2 and make an allocation to each of them.

14 The applicants are importers into the Community of third-country bananas, that is to say, category A operators, who were not eligible for the increase in the tariff quota provided for by Regulation No 2791/94.

Procedure and forms of order sought

15 By application lodged at the Registry of the Court of First Instance on 7 February 1995 the applicants sought the annulment of Regulation No 2791/94, with the exception of Article 1(1) thereof. On 30 March 1995 the Commission lodged an objection of inadmissibility. On 12 June 1995 the applicants lodged their observations on that objection.

16 On 13 July 1995 the Federal Republic of Germany sought leave to intervene in support of the applicants.

17 On 19 and 27 July 1995 respectively the United Kingdom of Great Britain and Northern Ireland and the French Republic sought leave to intervene in support of the Commission.

18 By orders of the President of the Fourth Chamber of the Court of First Instance made on 7 November 1995 the Federal Republic of Germany was given leave to intervene in support of the applicants and the French Republic and the United Kingdom were given leave to intervene in support of the defendant.

19 The applicants claim that the Court of First Instance should:

— annul Regulation No 2791/94 with the exception of Article 1(1) thereof;

— order the defendant to pay the costs.

20 The Commission contends that the Court of First Instance should:

— dismiss the application as inadmissible;

— order the applicants to pay the costs.

21 The Federal Republic of Germany submits that the Court of First Instance should:

— dismiss the defendant's claim.

22 The French Republic contends that the Court of First Instance should:

— dismiss the application.

23 The United Kingdom submits that the Court of First Instance should:

— declare the action inadmissible.

Arguments of the parties

24 The Commission claims that the application is inadmissible because, first, the applicants are in no way affected by Regulation No 2791/94 and, secondly, because even if they were the regulation does not concern them either directly or individually.

25 The Commission argues, first, that Regulation No 2791/94 was adopted in order to assist operators affected by tropical storm Debbie. Since the applicants are not among those operators, their factual circumstances are not those objectively defined by Regulation No 2791/94.

26 Secondly, as regards the question whether the applicants are directly concerned by Regulation No 2791/94, the Commission points out that the way in which the additional quantity is allocated reflects the decision of economic policy on which the regulation is based, which was to provide compensation for operators who had suffered damage as a result of tropical storm Debbie. The regulation has no

influence whatsoever on the legal position of operators who, like the applicants, did not suffer damage in the storm.

27 As regards the question whether the applicants are individually concerned, the Commission recalls that there is a well-established line of decisions to the effect that 'the possibility of determining more or less precisely the number or even the identity of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them, so long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question' (orders of the Court of Justice in Case C-131/92 *Arnaud and Others* v *Council* [1993] ECR I-2573, paragraph 13, and Case C-276/93 *Chiquita Banana and Others* v *Council* [1993] ECR I-3345, paragraph 8). The Commission submits that Article 2(1) of Regulation No 2791/94 provides for the additional quota to be allocated on the basis of objective criteria and is therefore a general, abstract provision.

28 The Commission points out that the applicants' legal position must be affected because of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as a person to whom the measure is addressed (Case 26/86 *Deutz und Geldermann* v *Council* [1987] ECR 941, paragraph 9). The fact that the applicants are operators in category A cannot be regarded as a special factual situation within the meaning of that case-law. In any event, category A operators are not the only ones ineligible for the additional quota; category C operators are also excluded.

29 The applicants challenge, first, the Commission's argument that they are in no way affected by Regulation No 2791/94. They consider that the regulation has withdrawn from them the entitlement to allocation of an additional quota which was

guaranteed to them by the Council by Article 19(1) and (4) of Regulation No 404/93. They argue that the fact that they are adversely affected cannot deprive them of their right to take action under the fourth paragraph of Article 173 of the EC Treaty.

30 To show that they are directly concerned they observe that under the system of allocation laid down by Regulation No 2791/94 the national authorities must automatically refuse them 'tropical storm Debbie' import licences, having no discretion whatsoever in the matter.

31 In response to the Commission's argument that they are not directly concerned because Regulation No 2791/94 does not apply to them, they argue that the result of that analysis is to enable the Commission, by violating the law, in this case by excluding certain operators from the allocation of the additional quota, to avoid facing legal action by those operators.

32 Furthermore, the Commission's argument has the result of making actions brought by disadvantaged competitors automatically inadmissible; any competitor not eligible under the scheme established by the regulation is considered not to be directly concerned because the regulation is not applicable to him.

33 The applicants rely on three arguments to show that they are individually concerned by the regulation.

34 In the first place, they argue that the way in which the allocation is made excludes operators in category A, who constitute a closed circle to which the applicants belong, from access to the additional quantity. They note that category A is defined in Article 19(1) of Regulation No 404/93 as those who marketed before 1 July 1993 third-country and/or non-traditional ACP bananas and that after that date no-one could enter that category. They add that Article 4 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), by excluding the possibility of updating the lists of operators, confirms that category A has been a closed circle since 1 July 1993. That differentiates the operators who form part of it from all other persons and distinguishes them individually just as in the case of the person to whom a measure is addressed (Joined Cases 106/63 and 107/63 *Töpfer und Getreide-Import* v *Commission* [1965] ECR 405, at p. 412; Joined Cases 41/70 to 44/70 *International Fruit Company and Others* v *Commission* [1971] ECR 411, paragraphs 16 to 21; Case T-465/93 *Consorzio Gruppo di Azione Locale 'Murgia Messapica'* v *Commission* [1994] ECR II-361, paragraphs 25 and 26).

35 They also point out that Article 19 of Regulation No 404/93 provides that if the tariff quota is increased, 66.5% of the additional quantity is to be allocated to category A operators. They argue that Regulation No 2791/93 infringes the rights guaranteed by that article for a limited category of addressees each member of which is thus individually concerned (see, *inter alia*, Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 11, and Case 88/76 *Exportation des Sucres* v *Commission* [1977] ECR 709, paragraphs 9 to 11).

36 Secondly, they claim that Regulation No 2791/94 is not applicable on the basis of an objective situation of law or fact defined by the measure in question, because it applies in only one situation, the once-off allocation of an exceptional quota to certain operators. They add that in that regard the contested regulation differs from Regulation No 404/93.

37 Thirdly, they maintain that they will be deprived of effective legal protection if their action is declared inadmissible. It is not possible for them to challenge the 'tropical storm Debbie' import licences granted to certain operators in category B in the national courts because they are unable to obtain information as to the content of those licences. It is also impossible for them to seek such licences before the national courts since such proceedings would have to be based on the assumption that the contested regulation is valid, thereby excluding the issue of its validity from the dispute.

38 The Federal Republic of Germany considers that the applicants are individually concerned because they belong to a closed circle of operators, so that any intervention in that circle to the advantage of a certain group of operators automatically affects the others. Relying on the judgment in Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, it submits that in that case the Court found that the fact that the applicant would be excluded from the circle of addressees advantaged by the contested regulation was sufficient ground for declaring the action admissible. In this case, Regulation No 2791/94 withdraws from the applicants a right acknowledged by Article 19 of Regulation No 404/93.

39 The Federal Republic of Germany considers that the applicants are also directly concerned because they are *de jure* excluded from allocation of the import quota.

40 The United Kingdom argues that Regulation No 2791/94 does not discriminate by category of operators and that many traders hold both category A and category B licences. It is therefore misleading to think in terms of a group of 'category A operators' who are incapable of benefiting from Regulation No 2791/94. The assessment of the beneficiaries by the competent national authorities was made not on the basis of category of operator, but solely on the basis of the criteria set out

in Articles 1(2) and 2(1). By the same token, it is wrong to suggest that the regulation advantaged the holders of category B licences as a class.

41 The United Kingdom also observes that it is unrealistic to interpret the contested regulation as 'advantaging' the operators to whom the additional quantity of 53 400 tonnes was allocated. Its object was not to alter the balance between different types of trader but to safeguard supplies to the Community market and to compensate operators who had suffered damage as a result of a natural disaster.

42 The French Republic considers that Regulation No 2791/94 is undoubtedly a regulation of general economic scope since it seeks to remedy the consequences of a natural disaster which destroyed a large portion of the ACP and Community banana production. The measure reflects the aims of the common agricultural policy regarding stabilization of the market and supplies of bananas to Community consumers at reasonable prices. The way in which the import licences for the additional quantity introduced by Regulation No 2791/94 are allocated results from the purpose of the regulation, which is to assist Community and ACP operators, who alone suffered damage as a result of tropical storm Debbie. In the light of that aim it is therefore appropriate for operators not affected by the storm not to be able to take advantage of measures which do not apply to their situation. The allocation of the additional quantity of bananas between the operators who suffered damage and who are defined objectively does not therefore alter the general scope of the measure, even if that criterion would enable the beneficiaries of the measure to be identified.

43 The French Republic also considers that the judgment in *Codorniu* is not applicable in this instance. In the first place, the contested measure in no way affected the existing situation of importers of third-country bananas, including the applicants, as regards the quota provided for by Regulation No 404/93. In the second place, the fact that the applicants have not been able to benefit from the additional

quota is not sufficient to distinguish them from any other person because they are in the same situation as all other operators in categories A, B and C who were not affected by tropical storm Debbie. There is no special set of facts which identifies the applicants individually, since they suffered no adverse consequence by reason of the introduction of the measures seeking to remedy the damage done by the storm. They are not affected by Regulation No 2791/94 otherwise than as members of a general category of economic operators.

Findings of the Court

44 As a preliminary point the Court of First Instance notes that under Article 114(3) of the Rules of Procedure, where application is made to the Court by the defendant for a decision on admissibility the remainder of the proceedings is to be oral unless the Court decides otherwise; in this case the Court considers that it has sufficient information in the case-file and that it is not necessary to open the oral procedure.

45 The Commission's argument that the applicants are in no way affected by Regulation No 2791/94 cannot be upheld. The Court considers that since the introduction of the common organization of the markets in bananas any legislation adopted in that sector is liable to affect, or is, at least, capable of affecting, the legal position of traders in the sector. It is therefore necessary to consider whether in this case the applicants are directly and individually concerned by Regulation No 2791/94.

46 As regards, first, the question whether they are individually concerned, the Court notes that the purpose of Regulation No 2791/94 is to remedy the consequences of a natural disaster and that it conforms with the aims of the common agricultural policy regarding stabilization of the market and the maintenance of reasonable prices for banana supplies to Community consumers. The operators amongst

whom the additional quantity added to the general tariff quota is allocated are defined in an objective way in the light of the damage caused by tropical storm Debbie of which they were victims. It has consistently been held that the fact that it is possible to determine the number or even the identity of the persons to whom a measure applies in no way implies that those persons must be considered to be individually concerned, provided that implementation occurs on the basis of an objective legal or factual situation defined by the measure in question (Case T-472/93 *Campo Ebro and Others* v *Council* [1995] ECR II-421, paragraph 32, and Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 65). In this case, it is clear that Regulation No 2791/94 constitutes a legislative measure of general scope.

47 However, the fact that the contested measures are legislative in character does not prevent them from being potentially of individual concern to some of the traders concerned (Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 13; *Codorniu*, paragraph 19, and *Antillean Rice Mills*, paragraph 66). In order that a general measure adopted by a Community institution may be regarded as of individual concern to some traders, they must be shown to be affected in their legal position by reason of a factual situation which differentiates them from all other persons and which distinguishes them individually in a manner analogous to that of an addressee (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107, and *Antillean Rice Mills*, paragraph 66).

48 In this instance, the Court finds that even if the applicants could not be allocated additional quota, that is not sufficient to differentiate them from any other person since they are in the same situation as all other operators in categories A, B and C who were not affected by tropical storm Debbie. It should also be noted that, as the Commission and the United Kingdom have pointed out, the additional quantity which has been allocated is intended in principle for all operators, of whatever category, and that category A operators are therefore not automatically excluded from access to the additional quantity.

49 That situation differs from the one at issue in *Codorniu*, in which an undertaking had been prevented by the contested provision from using a trade mark which it had employed for many years and which distinguished it from other traders. In this case, the applicants are not in such a situation as regards Regulation No 2791/94 because they have suffered no damage from tropical storm Debbie and because Regulation No 2791/94 did not affect the quantities of bananas allocated to them, any more than it affected the specific rights vested in them (order of the Court of Justice in Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 43).

50 The Court also finds that the applicants' argument to the effect that they will be deprived of effective legal protection if their action is declared inadmissible is not a ground for the Court to exceed the limits of its jurisdiction under the fourth paragraph of Article 173 of the Treaty. In any event, the applicants have not clearly identified the obstacles which they claim prevent them from challenging before the national courts the decision of the competent authorities of the Member State to which they belong to the effect that they do not satisfy the conditions laid down in Article 2 of Regulation No 2791/94, and from challenging the validity of those conditions on the basis of the way in which they have been applied (see paragraph 13, above). Such a course of action would enable the national courts concerned to refer to the Court of Justice for a preliminary ruling under Article 177 of the Treaty the questions which they deem appropriate in the context of the dispute before them (Case T-330/94 *Salt Union* v *Commission* [1996] ECR II-1475, paragraph 39).

51 The considerations set out above indicate that Regulation No 2791/94 cannot be regarded as concerning the applicants individually. Consequently, the question whether they are directly concerned by the regulation becomes superfluous.

52 Accordingly, the objection as to admissibility raised by the Commission must be upheld and the action declared inadmissible.

Costs

53 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the applicants have been unsuccessful, they must, having regard to the form of order sought by the Commission, be ordered to pay the costs, together with those of the Commission. Under Article 87(4) of the Rules of Procedure, Member States which intervene in proceedings are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

1. **The action is dismissed as inadmissible.**

2. **The applicants shall bear the costs and shall jointly bear the costs of the Commission. The Federal Republic of Germany, the French Republic and the United Kingdom of Great Britain and Northern Ireland shall bear their own costs.**

Luxembourg, 10 December 1996.

H. Jung — Registrar

K. Lenaerts — President