JUDGMENT OF THE COURT (Second Chamber)

15 July 2004 *

In Joined Cases C-37/02 and C-38/02,

REFERENCE to the Court under Article 234 EC by the Tribunale amministrativo regionale per il Veneto (Italy) for a preliminary ruling in the proceedings pending before that court between

Di Lenardo Adriano Srl (C-37/02),

Dilexport Srl (C-38/02)

and

Ministero del Commercio con l'Estero,

on the validity of Articles 1, 3, 4, 5, 6 and 31 of 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),

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet and R. Schintgen (Rapporteur), F. Macken and N. Colneric, Judges,

Advocate General: C. Stix-Hackl,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— Di Lenardo Adriano Srl and Dilexport Srl, by A. Bozzi, C. Gatti, B. Telchini and S. Sacchetto, avvocati,

— the Commission of the European Communities, by M. Niejahr and A. Aresu, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Di Lenardo Adriano Srl and Dilexport Srl, represented by A. Bozzi, C. Gatti and B. Telchini, and of the Commission, represented by L. Visaggio, acting as Agent, at the hearing on 20 November 2003,

after hearing the Opinion of the Advocate General at the sitting on 20 January 2004,

gives the following

Judgment

1 By orders of 16 January 2002, received at the Court Registry on 13 February 2002, the Tribunale amministrativo regionale per il Veneto (Regional Administrative Court for Veneto) referred to the Court for a preliminary ruling under Article 234 EC four questions on the validity of Articles 1, 3, 4, 5, 6 and 31 of 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).

2 Those questions were raised in actions brought, respectively, by Di Lenardo Adriano Srl and Dilexport Srl ('the importers') against the Ministero del Commercio con l'Estero (Ministry of Foreign Trade; 'the Ministry') regarding the Ministry's refusal to allocate them a tariff quota in the banana sector.

Legal background

The original version of Regulation No 404/93

3 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) established, with

effect from 1 July 1993, a common system to govern imports of bananas which replaced the various national systems. It made a distinction between 'Community bananas' produced within the Community, 'third-country bananas' from third countries other than the African, Caribbean and Pacific countries ('ACP countries') and bananas originating in ACP countries. As regards ACP bananas, a further distinction was made between 'non-traditional ACP bananas' and 'traditional ACP bananas' according to whether they exceeded the quantities traditionally exported by each ACP country, as laid down in the Annex to Regulation No 404/93.

4 Article 18 of Regulation No 404/93 provided for the opening of a tariff quota for imports of bananas each year to be allocated, in accordance with Article 19(1) of the regulation, for 66.5 %, 30 % and 3.5 % respectively, between operators who had marketed third-country and/or non-traditional ACP bananas (Category A), operators who had marketed Community and/or traditional ACP bananas (Category B), and operators who had started to market bananas other than Community bananas and/or traditional ACP bananas as from 1992 (Category C).

5 The first sentence of Article 19(2) of Regulation 404/93 was worded as follows:

'On the basis of separate calculations for each of the categories of operators referred to in paragraph 1 ... , 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.'

6 The 13th, 14th, 15th and 16th recitals in the preamble to Regulation No 404/93 state:

'... in order to comply with the aims stated above, while taking into account the special features of marketing bananas, a distinction must be made when administering the tariff quota between, on the one hand, operators who have previously marketed third country bananas and non-traditional ACP bananas and, on the other, operators who have previously marketed bananas produced in the Community [and traditional ACP bananas] while leaving a quantity available for new operators who have recently embarked on commercial activity or are about to embark on commercial activity in this sector;

... in order not to disrupt existing commercial links, while at the same time allowing some development of marketing structures, the issue to each operator of separate import licences for each of the categories defined above must be on the basis of the average quantity of bananas marketed by the operator over the three preceding years for which statistical data are available;

... in adopting additional criteria which operators should respect, the Commission is guided by the principle whereby the licences must be granted to natural or legal persons who have undertaken the commercial risk of marketing bananas and by the necessity of avoiding disturbing normal trading relations between persons occupying different points in the marketing chain;

... taking into account marketing structures, Member States must, on the basis of procedures and criteria adopted by the Commission, conduct a census of operators and establish quantities marketed to be used as a reference for the issue of certificates'.

7 Commission Regulation 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), adopted on the basis of, inter alia, Article 20 of Regulation No 404/93, established the criteria for the determination of Category A and Category B operators who could apply for import licences depending on the activity engaged in by those operators during the reference period.

Regulation No 404/93, as amended by Regulation No 1637/98

8 The Council adopted Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation No 404/93 (OJ 1998 L 210, p. 28) which, in accordance with the second paragraph of Article 2, applied from 1 January 1999. The Commission subsequently adopted Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Regulation No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32) which, as stated in Article 31, repealed Regulation No 1442/93 as from 1 January 1999.

9 The arrangements for importing bananas, as amended by those regulations, retained the distinction between traditional and non-traditional ACP bananas and third-country bananas. The second paragraph of Article 16 of Regulation No 404/93, as amended by Regulation No 1637/98, provided:

'...

For the purposes of this Title:

1. "traditional imports from ACP States" means imports into the Community of bananas originating in the States listed in the Annex hereto up to a limit of 857 700 tonnes (net weight) per year; these are termed "traditional ACP bananas";

2. "non-traditional imports from ACP States" means imports into the Community of bananas originating in ACP States but not covered by definition 1; these are termed "non-traditional ACP bananas";

3. "imports from non-ACP third States" means bananas imported into the Community originating in third States other than the ACP States; these are termed "third State bananas".'

10 However, under the arrangements for importing bananas, as amended by those regulations, the distribution of the quota between three different operator categories was abolished. Regulation No 2362/98 provided for a simple distribution between 'traditional operators' and 'newcomers' as defined in Articles 3 and 7 of that regulation. The subdivision into Category A, B and C operators depending on the type of activities they engaged in on the market was also abolished.

11 As regards 'traditional operators', Articles 3 and 4 of Regulation No 2362/98 provided:

'Article 3

For the purposes of this Regulation, "traditional operators" shall mean economic agents established in the European Community during the period for determining their reference quantities, and also at the time of their registration under Article 5 below, who have actually imported a minimum quantity of third-country and/or ACP-country bananas on their own account for subsequent marketing in the Community during a set reference period.

The minimum quantity referred to in the first paragraph shall be 100 tonnes imported in any one year of the reference period. This minimum quantity shall be 20 tonnes where the imports consist entirely of bananas with a length of 10 centimetres or less.

Article 4

1. Each traditional operator registered in a Member State in accordance with Article 5 shall receive, for each year and for all the origins listed in Annex I, a single reference quantity based on the quantities of bananas actually imported during the reference period.

2. For imports carried out in 1999 under the tariff quotas or as traditional ACP bananas, the reference period shall be made up of the years 1994, 1995 and 1996.'

12 Article 7 of Regulation No 2362/98 defined 'newcomers' in the following way:

'For the purposes of this Regulation and as regards imports under the tariff quotas and as traditional ACP bananas, "newcomers" shall mean economic agents established in the European Community who, at the time of registration:

(a) have been engaged independently and on their own account in the commercial activity of importing fresh fruit and vegetables falling within Chapters 7 and 8 of the Tariff and Statistical Nomenclature and the Common Customs Tariff, or products under Chapter 9 thereof if they have also imported products falling within Chapters 7 and 8 in one of the three years immediately preceding the year in respect of which registration is sought; and

(b) by virtue of this activity, have undertaken imports to a declared customs value of ECU 400 000 or more during the period referred to in point (a).'

13 On request and against lodgement of a security, 'newcomers' received an annual allocation for a specified quantity of banana imports, determined by the

Commission on the basis of all the individual requests made and in the light of the total quantity allocated annually to the 'newcomers'.

14 Article 11(1) of Regulation No 2362/98, which applies to 'newcomers', provided:

'1. The Member States shall be responsible for ensuring compliance with this Section [entitled "Newcomers"].

In particular, they shall check that the operators concerned are commercially active for their own account as importers into the Community in the sector referred to in Article 7 and as independent economic units in terms of management, staffing and operations. Where there are grounds for suspecting that these conditions are not met, applications for registration and requests for annual allocations shall be accepted only subject to the operator's providing evidence of compliance which is considered satisfactory by the national competent authorities.'

Regulation No 404/93, as amended by Regulation No 216/2001

15 Article 1 of Regulation (EC) No 216/2001 of 29 January 2001 amending Regulation No 404/93 (OJ 2001 L 31, p. 2) replaced Articles 16 to 20 of Regulation No 404/93. In accordance with the combined provisions of the second paragraph of Article 2 of Regulation No 216/2001 and Article 1 of Commission Regulation (EC) No 395/2001 of 27 February 2001 fixing certain indicative quantities and individual ceilings for the issuing of Community import licences for bananas for the second quarter of

2001 under the tariff quotas or as part of the quantity of traditional ACP bananas (OJ 2001 L 58, p. 11), Article 1 of Regulation (EC) No 216/2001 is applicable from 1 July 2001.

16 Article 18(1) of Regulation No 404/93, as amended by Regulation No 216/2001, provides for the opening of annual tariff quotas (quotas A, B and C). The third paragraph provides:

'The Commission may, on the basis of an agreement with World Trade Organisation contracting parties with a substantial interest in the supply of bananas, allocate tariff quotas "A" and "B" among supplier countries.'

17 Article 19 of Regulation No 404/93, as amended by Regulation No 216/2001, provides:

'1. The tariff quotas may be managed in accordance with the method based on taking account of traditional trade flows ("traditionals/newcomers") and/or other methods.

2. The method adopted shall take account as appropriate of the need to maintain the equilibrium of supply to the Community market.'

18 Under Article 20(a) of Regulation No 216/2001, as amended, the Commission is empowered to adopt 'rules on the management of the tariff quotas referred to in Article 18' under the procedure set out in Article 27 of the regulation.

19 Those management rules are defined in Regulation No 896/2001. Under Article 32 thereof that regulation entered into force on the day following its publication in the *Official Journal of the European Communities*, that is to say 9 May 2001, but applied only from 1 July 2001.

20 As provided in Article 1 of Regulation No 896/2001:

'This Regulation lays down detailed rules for applying the arrangements for importing bananas under the tariff quotas provided for in Article 18(1) of Regulation (EEC) No 404/93 and also outside those quotas.'

21 Article 2 of Regulation No 896/2001 provides that 83 % of the tariff quotas referred to in Article 1 are to be made available to '"traditional operators" as defined in Article 3(1)' and the remaining 17 % to '"non-traditional operators" as defined in Article 6'.

22 Title II of that regulation, containing Articles 3 to 21, relates to the 'management of tariff quotas'.

23 Articles 3 to 6 of Regulation No 896/2001 provide:

'Article 3

For the purposes of this Regulation:

1. "traditional operators" means economic agents, whether natural persons or entities having legal personality, individual agents or groups, established in the Community during the period for determining their reference quantities, who have, for their own account, purchased a minimum quantity of bananas originating in third countries from the producers or, where applicable, produced, consigned and sold such products in the Community.

   Operations as defined in the previous subparagraph shall hereinafter be called "primary imports".

   The minimum quantity referred to in the first subparagraph shall be 250 tonnes imported in any one year of the reference period. This minimum quantity shall be 20 tonnes where marketing or import concerns only bananas with a length of 10 centimetres or less;

2. "traditional operators A/B" means traditional operators who have carried out the minimum quantity of primary imports of "third-country bananas" and/or

"non-traditional ACP" bananas in accordance with the definitions in Article 16 of Regulation (EEC) No 404/93, as amended by Regulation (EC) No 1637/98 ...;

3. "traditional operators C" means traditional operators who have carried out the minimum quantity of primary imports of "traditional ACP bananas" in accordance with the definitions in the abovementioned Article 16, as amended by Regulation (EC) No 1637/98.

Article 4

1. The reference quantity for each traditional operator A/B who submits a written application no later than 11 May 2001 shall be established on the basis of the average of primary imports of third-country bananas and/or non-traditional ACP bananas during 1994, 1995 and 1996 taken into account for 1998 for the purposes of administering the tariff quota for imports of third-country bananas and non-traditional ACP bananas, in accordance with the provisions of Article 19(2) of Regulation (EEC) No 404/93 applicable in 1998 to the category of operators referred to in paragraph 1(a) of that Article.

2. The reference quantity for each traditional importer C who submits a written application no later than 11 May 2001 shall be established on the basis of the average of primary imports of traditional ACP bananas during 1994, 1995 and 1996 carried out for 1998 as traditional quantities of ACP bananas.

3. Operators resulting from a merger of other traditional operators, each with their own rights under this Regulation, shall enjoy the same rights as those former operators.

Article 5

1. The Member States shall notify the Commission of the sum of the reference quantities referred to in Article 4(1) and (2) no later than 15 May 2001.

2. Using the information received under paragraph 1, and in light of the total quantities available under tariff quotas A/B and C, the Commission shall, where appropriate, set a single adjustment coefficient to be applied to each operator's reference quantity.

3. Where paragraph 2 applies, the competent authorities shall notify each operator of their reference quantity as adjusted by the adjustment coefficient not later than 7 June 2001.

4. The competent authorities in each Member State shall be as listed in the Annex. That list shall be amended by the Commission at the request of the Member States concerned.

...

Article 6

For the purposes of this Regulation, "non-traditional operators" means economic agents established in the Community at the time of their registration who:

(a) have been engaged independently and on their own account in the commercial activity of importing into the Community fresh bananas falling within CN code 0803 00 19 in the two years immediately preceding the year in respect of which registration is sought;

(b) by virtue of this activity, have imported produce to a declared customs value of EUR 1 200 000 or more during the period referred to in point (a); and

(c) do not have a reference quantity as a traditional operator under the tariff quota for which they are applying for registration under Article 7 and who are not a natural person or entity having legal personality related, within the meaning of Article 143 of Commission Regulation (EEC) No 2454/93 [of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1)], to a traditional operator.'

24 On that last point, Article 143 of Regulation No 2454/1993, as amended by Commission Regulation (EC) No 46/1999 of 8 January 1999 (OJ 1999 L 10, p. 1) provides:

'1. For the purposes of Title II, Chapter 3 of the Code and of this Title, persons shall be deemed to be related only if:

(a) they are officers or directors of one another's businesses;

(b) they are legally recognised partners in business;

...

(d) any person directly or indirectly owns, controls or holds 5% or more of the outstanding voting stock or shares of both of them;

(e) one of them directly or indirectly controls the other;

(f) both of them are directly or indirectly controlled by a third person;

(g) together they directly or indirectly control a third person;

...

2. For the purposes of this Title, persons who are associated in business with one another in that one is the sole agent, sole distributor or sole concessionaire, however described, of the other shall be deemed to be related only if they fall within the criteria of paragraph 1.'

25 Article 7(1) of Regulation No 896/2001 states:

'Operators may be registered, in a single Member State of their choice, as a non-traditional operator under tariff quota A/B and/or tariff quota C.

Traditional operators under a tariff quota may be registered as non-traditional operators under the tariff quota for which they do not have a reference quantity.

However, traditional operators C may be registered as non-traditional operators under tariff quota A/B only if they can supply proof that they have imported third-country bananas and/or non-traditional ACP bananas to the declared customs value specified in point (b) of Article 6 during the period indicated.'

26 Recitals 3, 4, 6 and 7 in the preamble to Regulation No 896/2001 give reasons for the amendments made in relation to the earlier rules as follows:

'(3) Article 19 of Regulation (EEC) No 404/93 provides that the tariff quotas may be managed in accordance with the method based on taking account of traditional trade flows ("traditional/newcomers") and/or other methods. To implement the new arrangements from the second half of 2001, it is advisable to grant access to the tariff quotas to traditional operators who have undertaken on their own account the purchase of fresh products from producers in third countries, or their production, as well as their dispatch to and unloading in the customs territory of the Community, during a reference period. For the purposes of this Regulation, these activities are called "primary imports".

(4) A single definition of traditional operators should be adopted for all tariff quotas, and their reference quantities should be determined according to the same rules, but separately depending on whether these operators have supplied the Community market with bananas originating in non-ACP third countries and non-traditional imports from ACP States or with traditional ACP bananas during the reference period, within the meaning of the definitions in Article 16 of Regulation (EEC) No 404/93 applicable before the amendment introduced by Regulation (EC) No 216/2001.

...

(6) A share of the tariff quotas must be reserved for non-traditional operators. That share must allow operators who did not carry out any primary imports during the reference period to continue trading and to adapt to the new rules and to allow new operators to enter this import trade, thereby encouraging healthy competition.

(7) Experience from several years of applying the Community banana import arrangements indicates the need to tighten the criteria for non-traditional operators and the eligibility criteria for new operators so as to avoid the registration of purely fictitious agents and the grant of allocations in response to artificial or speculative applications. In particular, it is justifiable to demand a minimum of experience in importing fresh bananas. [...]'

27 Recital 5 in Regulation No 896/2001 justifies the retention of the years 1994, 1995 and 1996 as the 'reference period' in the following way:

'The reference period to be used for defining categories of operators and determining the reference quantities of traditional operators should be the three-year period 1994 to 1996. The three-year period 1994 to 1996 is the most recent for which the Commission has sufficiently reliable data on primary imports. Using that period can also resolve a dispute which has been going on for a number of years with certain of the Community's trading partners. In the light of the available data established for the purpose of administering the quotas opened in 1998, traditional operators need not be registered.'

28 Article 31 of Regulation No 896/2001 states:

'Regulation (EC) No 2362/98 is repealed from 1 July 2001.

It shall, however, continue to apply to import licences issued for 2001.'

The disputes in the main proceedings and the questions referred to the Court

29 The importers, two companies governed by Italian law engaged in the import of and trade in fresh bananas from third countries, have been registered and recognised in Italy since 1993 as operators eligible for the allocation of tariff quotas under Regulation No 404/93 and its implementing provisions adopted by the Commission. They were therefore eligible for the allocation of tariff quotas A/B until 30 June 2001.

30 According to the case-files the importers are both related, in accordance with Regulation No 2454/93, to Di Lenardo SpA, a company which has the status of 'traditional operator A/B' within the meaning of Article 3 of Regulation No 896/2001.

31 Pursuant to Article 4(1) of Regulation No 896/2001, the importers applied to the Ministry, by letters of 11 May 2001, to be included in the allocation of tariff quotas A/B in respect of the second half of 2001.

32 By decision of 17 May 2001, the Ministry dismissed those applications on the ground that the conditions in Article 4(1) of Regulation No 896/2001 had not been met, as the applicants had not carried out 'any quantity of primary imports of bananas in respect of the years 1994, 1995 and 1996'.

33 The importers then each brought an action before the Tribunale amministrativo regionale per il Veneto for annulment of that decision, and for a declaration that the Ministry is obliged to include them, as traditional operators in the banana sector, in the allocation of tariff quotas A/B in respect of the second half of 2001. In support of their action, they claimed, inter alia, that Regulation No 896/2001 was invalid on the grounds of infringement of Regulation No 404/93, as amended by Regulation No 216/2001, of the first and second paragraphs of Article 5 EC, and of Article 7 EC, of the principles of legal certainty and the protection of legitimate expectations, and of Article 6(1) and (2) EU.

34 The Ministry asked that the actions be dismissed on the ground that the importers had never operated as 'primary operators' but as 'secondary importers' or 'ripeners' of bananas, so that following the adoption of Regulation No 896/2001 they were no longer eligible for the allocation of tariff quotas.

35 The national court takes the view that the Court must be asked to give a preliminary ruling on the validity of Regulation No 896/2001, in so far as it introduces a new classification of operators within the framework of the common organisation of the market in bananas, retains the term 'primary importer' for the purposes of eligibility for allocation of a tariff quota as 'traditional operators A/B' within the meaning of Article 3 of that regulation and lays down new limits on access for importers eligible for allocation of a tariff quota as 'non-traditional operators' in accordance with Article 6 of the regulation.

36 It is in those circumstances that the Tribunale amministrativo regionale per il Veneto decided to stay the proceedings and refer to the Court for a preliminary ruling the following questions, which are identical in the two cases:

'(1) Do Articles 1, 3, 4, 5 and 31 of Regulation (EC) No 896/2001 conflict, first of all, with the Treaty, in particular Article 7 (formerly Article 4) thereof, and with the other rules and principles inherent in that Treaty with regard to the principle of the division of functions and powers between the Community institutions (in particular between the Council and the Commission)?

(2) Do the abovementioned articles of Regulation (EC) No 896/2001 conflict with the principle of non-retroactivity of laws and the associated principles of the protection of legitimate expectations and legal certainty?

(3) Do those same articles of Regulation (EC) No 896/2001 conflict with Council Regulation (EEC) No 404/93 of 13 February 1993 (as subsequently amended and supplemented), in particular with Article 20 of the latter Regulation?

(4) If the above questions are answered in the negative, the Court is asked to state whether, by precluding persons related to traditional operators from eligibility for allocation of a tariff quota, even as "non-traditional operators", Article 6 of the aforementioned Commission regulation, in particular paragraph (c) thereof, conflicts with the fundamental right to pursue a professional activity, in this case the freedom to conduct a business?'

37 By order of the President of the Court of 15 April 2002, Cases C-37/02 and C-38/02 were joined for the purposes of the written and oral procedure and the judgment.

The questions referred to the Court

The first three questions

38 By its first three questions, the national court requests the Court to assess the validity of Articles 1, 3, 4, 5 and 31 of Regulation No 896/2001 in the light of (a) the principles governing the conferment of powers upon and division of powers between the Community institutions as stated in Article 7 EC, and of the enabling provision in Article 20 of Regulation No 404/93, and (b) the principles of non-retroactivity of laws, protection of legitimate expectations and legal certainty.

39 As a preliminary point, the Commission claims that there is no need to consider the validity of Articles 1 and 31 of Regulation No 896/2001 on the ground that those articles are of general application and are not relevant to the outcome of the main proceedings.

40 In this respect, Article 1 of Regulation (EC) No 896/2001 merely states the purpose of the regulation, which is to lay down 'detailed rules for applying the arrangements for importing bananas under the tariff quotas provided for in Article 18(1) of Regulation (EEC) No 404/93 and also outside those quotas', without adopting any legislative provisions as such.

41 No argument was put forward in the orders for reference or indeed in the submissions of the importers in support of the invalidity of Article 1 of Regulation No 896/2001 in the light of the various principles and provisions cited in the first three questions.

42 In those circumstances it must be considered already that examination of the first three questions has disclosed nothing to affect the validity of Article 1 of Regulation No 896/2001.

43 As regards Article 31 of Regulation No 896/2001, this provides that Regulation No 2362/98, the former Commission implementing regulation, is to be repealed from 1 July 2001 but is to continue to apply to import licences issued for 2001.

44 To the extent that one of the grounds for complaint raised by the first three questions relates to infringement of the principles of non-retroactivity, protection of legitimate expectations and legal certainty, the relevance of Article 31 of Regulation No 896/2001 to the outcome of the main proceedings cannot, at this stage, be called into question. The arguments put forward contesting the validity of that article must therefore be considered.

The limits on the implementing power conferred upon the Commission

— Observations submitted to the Court

45 The importers observe that under Article 7 EC each Community institution can act only within the limits of the powers conferred upon it by the Treaty and that Article 20 of Regulation No 404/93, as amended by Regulation No 216/2001, empowers the

Commission to adopt only implementing provisions. However, when it adopted Regulation No 896/2001, the Commission assumed the role of the Council in its legislative capacity.

46 The introduction of the concept of primary importer within the meaning of Article 3 of Regulation No 896/2001 and the requirement that only primary importers are to be regarded as traditional operators are said to go beyond the implementing power conferred upon the Commission. The latter excluded arbitrarily from the banana market all those operators who, without having bought from producers or being producers themselves, have always been recognised as traditional operators under the applicable Council rules. The Commission therefore went against the objective of Regulation No 404/93 of not disturbing trading relations between persons occupying different points in the marketing chain in the sector concerned.

47 The importers conclude that Article 3 of Regulation No 896/2001 and, in consequence, Articles 4, 5 and 31 thereof, which are related to it, are contrary to Article 7 EC.

48 The Commission observes that, in accordance with the case-law of the Court, the concept of implementation in the agricultural sector, and the powers provided for in Article 20 of Regulation No 404/93 must be given a wide interpretation.

49 It states that Regulation No 404/93 does not contain any specific definition of the terms 'operator' and 'importer', but defines simply the various categories of banana imports in an objective manner. It is only in the 13th recital in Regulation No 404/93 that a distinction is made between 'on the one hand, operators who have previously

marketed third country bananas and non-traditional ACP bananas' and, 'on the other, operators who have previously marketed bananas produced in the Community [and traditional ACP bananas]', and that reference is made to 'new operators who have recently embarked on commercial activity or are about to embark on commercial activity in this sector'. According to the Commission, that shows that the Council did not wish to set out subjective and rigid criteria for the issue of import licences.

50 The Commission was therefore required to implement the Council's basic rules while ensuring it did not disturb normal trading relations between the different operators in the sector, and allowing gradual development of marketing structures, as the 14th, 15th and 16th recitals in Regulation No 404/93 require.

51 According to the Commission, the close relationship established in Article 3 of Regulation No 896/2001 between the 'traditional operator' and 'primary imports' was intended to make importers using traditional flows more aware of their responsibilities by ensuring better development of marketing structures for bananas coming from third States and transparency in trading relations between operators in the sector. In that way, the Commission acted in accordance with 'the principle whereby the licences must be granted to natural or legal persons who have undertaken the commercial risk of marketing bananas', observing 'the necessity of avoiding disturbing normal trading relations between persons occupying different points in the marketing chain', as stated in the 15th recital in Regulation No 404/93.

52 The Commission adds that the term 'primary imports' is not a new one in Community legislation concerning bananas and already appeared in Article 3(1)(a) of Regulation No 1442/93. In fact reference to the criterion of actual imports used in Article 3 of Regulation No 2362/98 proved to have certain limitations and may have

resulted in abuse. Moreover, from 1993 traditional operators who did not carry out primary imports, namely 'ripeners', were granted a long transitional period of eight years, until the first half of 2001, to adapt gradually to the new criteria for inclusion in tariff quotas.

53 In conclusion, the Commission is of the opinion that nothing has been disclosed to affect the validity of Article 3 of Regulation No 896/2001.

— Findings of the Court

54 It should be noted that Article 20 of Regulation No 404/93, as amended by Regulation No 216/2001, confers upon the Commission the power to adopt implementing provisions and, inter alia, rules on the management of the tariff quotas referred to in Article 18 of that regulation.

55 The Court has consistently held that it follows from the context of the Treaty in which Article 211 EC must be placed and also from practical requirements that the concept of implementation must be given a wide interpretation. Since only the Commission is in a position to keep track of agricultural market trends and to act quickly when necessary, the Council may confer on it wide powers in that sphere. Consequently, the limits of those powers must be determined by reference to the essential general aims of the organisation of the market in question (Case 22/88 *Vreugdenhil and Van der Kolk* [1989] ECR 2049, paragraph 16, and Joined Cases C-9/95, C-23/95 and C-156/95 *Belgium and Germany* v *Commission* [1997] ECR I-645, paragraph 36).

56 Accordingly, the Court has held that, where agriculture is concerned, the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to such legislation or to the implementing legislation adopted by the Council (Case 121/83 *Zuckerfabrik Franken* [1984] ECR 2039, paragraph 13, and *Belgium and Germany* v *Commission*, cited above, paragraph 37).

57 As regards management of tariff quotas, Regulation No 404/93, as amended by Regulation No 216/2001, does not include a definition of operators eligible for allocation of tariff quotas. Article 19(1) of that regulation merely provides that tariff quotas are to be managed 'in accordance with the method based on taking account of traditional trade flows ... and/or other methods', and Article 19(2) provides that the method thus adopted 'shall take account as appropriate of the need to maintain the equilibrium of supply to the Community market'. Such general provisions certainly leave the Commission broad discretion.

58 In this regard, it is apparent from Article 3 of Regulation No 896/2001 that only primary importers, namely those who have, 'for their own account, purchased a minimum quantity of bananas ... from the producers or, where applicable, produced, consigned and sold such products in the Community', may be considered 'traditional operators'.

59 Such a measure, which means a significant share of the allocation of tariff quotas is reserved to economic operators who take on the commercial risk associated with production or purchase from producers and the transport of fresh products, falls within the discretion afforded to the Commission for the implementation of the basic regulation, to the extent that it is likely to contribute to the proper functioning of the import arrangements. In addition, it has not been shown that the measure is capable of disrupting the equilibrium of supply to the Community market which the basic regulation seeks to ensure.

60 The foregoing considerations also support rejection of the complaint alleging infringement of the limits on the implementing power conferred upon the Commission as regards Articles 4 and 5 of Regulation No 896/2001. Those articles relate to the establishment of reference quantities for traditional operators A/B and C, which is a question specific to the management of tariff quotas and unconnected with the taking into account of primary imports at the core of the first and third questions.

61 Finally, no argument has been put forward to establish that Article 31 of Regulation No 896/2001, inasmuch as it provided for the repeal of the previous Commission implementing regulation, namely Regulation No 2362/98 as from 1 July 2001, failed to have regard to the limits on the implementing power of the Commission.

62 The Court's answer must therefore be that consideration of the first and third questions has disclosed nothing to affect the validity of Articles 3, 4, 5 and 31 of Regulation No 896/2001.

The principles of non-retroactivity, protection of legitimate expectations and legal certainty

— Observations submitted to the Court

63 The importers note that the Commission introduced new terms which are completely different to those used previously in the banana sector. This amounts to revolutionising the arrangements provided for in Regulation No 404/93 and excluding importers with more than 20 years' experience from the market in

question. In so far as the new term 'traditional operator', defined and referred to in Articles 3 and 4 of Regulation No 896/2001, is used to describe an operator in 1994, 1995 and 1996, those provisions are applied with retroactive effect, infringing the principles of legal certainty and protection of legitimate expectations.

64 The Commission observes that application of a reference period, which by its very nature cannot be in the future, is essential in order to make a distinction between traditional operators and non-traditional operators in the context of the management of tariff quotas. It maintains that the 14th recital in Regulation No 404/93 provides that the issue to each operator of import licences must be on the basis of 'the average quantity of bananas marketed by the operator over the three preceding years for which statistical data are available'. The Commission adds that the choice of the years 1994, 1995 and 1996 is fully in line with the choices made previously and with the criteria set out in Regulation No 404/93; that reference period is identical to the period laid down in Regulation No 2362/98 and, as is clear from recital 5 in Regulation No 896/2001, is 'the most recent for which the Commission has sufficiently reliable data on primary imports'.

65 The Commission also notes that under Article 32 of Regulation No 896/2001 that regulation entered into force on 9 May 2001 but was not to apply until 1 July 2001. In addition it states that Article 4 of that regulation provides that the traditional operators concerned were to submit an application for establishment of a reference quantity no later than 11 May 2001.

66 In those circumstances none of the provisions of Articles 4 and 5 of Regulation No 896/2001 have retroactive effect. Since the operators concerned were in a position to know their rights and obligations by reason of a specific and exhaustive legal framework, which laid down dates reconciling respect for individual operators'

particular circumstances with the need to ensure an appropriate transition from the old to the new arrangements, there was no failure to have regard to the principles of protection of legitimate expectations and legal certainty.

— Findings of the Court

67 It must be noted at the outset that under Article 32 of Regulation No 896/2001 that regulation entered into force on 9 May 2001, the day following its publication in the *Official Journal of the European Communities*, and that it was to apply from 1 July 2001, that is, from a date subsequent to its publication. In those circumstances it cannot, in principle, be regarded as having retroactive effect.

68 The fact that imports effected in 1994, 1995 and 1996 are taken into account in order to determine the reference periods used to classify an importer as a traditional operator A/B or C does not in itself show that Regulation No 896/2001 is retroactive in so far as those imports are certainly not covered by the distribution of tariff quotas applicable from 1 July 2001.

69 There can therefore be no question here of an infringement of the prohibition on retroactivity of laws.

70 Any trader on the part of whom an institution has promoted reasonable expectations may rely on the principle of the protection of legitimate expectations. However, if a prudent and circumspect trader could have foreseen that the adoption of a Community measure is likely to affect his interests, he cannot plead that principle if the measure is adopted (Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products* v *Commission* [1987] ECR 1155, paragraph 44, and Case C-22/94

Irish Farmers Association and Others [1997] ECR I-1809, paragraph 25). Furthermore, while the principle of protection of legitimate expectations is one of the fundamental principles of the Community, traders are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained, particularly in an area such as that of the common organisation of the markets, the objective of which involves constant adjustment to reflect changes in economic circumstances (see, in particular, Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 52).

71 In this case, it is enough to point out that the businesses concerned could not have any reasonable expectation promoted by the Commission that the rules applicable to banana imports from third countries would be maintained. Since the adoption of Regulation No 404/93 those rules have not only been amended many times, in particular on account of international commitments given by the Community within the framework of the World Trade Organisation, but require constant adjustment to reflect changes in the economic situation, leaving scope for broad discretion on the part of the Community institutions.

72 The Court's answer must therefore be that consideration of the second question has disclosed nothing to affect the validity of Articles 3, 4, 5 and 31 of Regulation No 896/2001.

The fourth question

73 In its fourth question, the national court requests the Court to assess the validity of Article 6(c) of Regulation No 896/2001 in the light of the fundamental right to pursue a trade or profession.

Observations submitted to the Court

74 The importers claim that Article 6(c) of Regulation No 896/2001 introduces a radical restriction on the recognition of non-traditional operators in so far as those operators may not be related to a traditional operator within the meaning of Article 143 of Regulation No 2454/93.

75 However, that article has the specific and sole function of stating the cases in which the declared customs value of goods is not reliable, by setting up a simple presumption which may be rebutted by adducing proof that 'the transaction value is acceptable for customs purposes ...' in the words of Article 29(1)(d) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

76 By referring to Article 143 of Regulation No 2454/93, the Commission not only used the case of related persons referred to in that article for a purpose other than that for which it was intended, but also set up an irrebuttable presumption of the existence of fictitious agents or artificial or speculative applications where the company in question is related to a traditional operator within the meaning of that article, without that company having the opportunity to prove its effective autonomy and independent management.

77 Therefore undertakings such as the importers who are related to traditional operators cannot be included in tariff quotas as traditional operators or non-traditional operators and are thus completely excluded from the banana market, without the opportunity to prove their independence. This is contrary to Regulation

No 216/2001 and the fundamental principles of freedom to conduct a business and freedom to pursue a trade or profession.

78 The Commission states that Article 6(c) of Regulation No 896/2001 is intended, according to recital 7 in its preamble, 'to avoid the registration of purely fictitious agents and the grant of allocations in response to artificial or speculative applications'. The new rules are a consequence of the change in attitude of the Community institutions towards 'ripeners' and a response to the trade in import licences which related undertakings in particular engaged in.

79 As regards the importers, the Commission maintains that they are both related to a company, namely Di Lenardo SpA, who proves to be a 'traditional operator', so that those companies can continue to pursue their professional activities within the group without the slightest loss; the only negative repercussion for them by virtue of Article 6(c) of Regulation No 896/2001 is the cessation of profits from the speculative trade in import licences to third parties.

80 The Commission further points out that it is settled case-law that the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the right guaranteed (see Case 265/87 *Schräder* [1989] ECR 2237, paragraph 15, and Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 16). In this case, it is undeniable that the restrictions on the activities of

non-traditional operators which do not meet the criteria in Article 6(c) of Regulation No 896/2001 do satisfy a requirement in the general interest. Moreover, no economic operator can claim an acquired right that an advantageous situation, such as inclusion in tariff quotas, will be maintained, especially if at a certain point it becomes apparent that that situation is contrary to the rules of the common market (see, to that effect, Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 80).

81 The Commission concludes that nothing has been disclosed to affect the validity of Article 6(c) of Regulation No 896/2001.

Findings of the Court

82 It is settled case-law that the freedom to pursue a trade or profession, like the right to property, is one of the general principles of Community law. However, those principles are not absolute, but must be viewed in relation to their social function. Consequently, restrictions may be imposed on the exercise of the freedom to pursue a trade or profession, as on the exercise of the right to property, provided that such restrictions in fact correspond to objectives of general interest pursued by the European Community and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (see, inter alia, Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, paragraph 55; Case C-200/96 *Metronome Musik* [1998] ECR I-1953, paragraph 21; and Joined Cases C-20/00 and C-64/00 *Booker Aquacultur and Hydro Seafood* [2003] ECR I-7411, paragraph 68).

83 It is clear that Article 6(c) of Regulation No 896/2001 restricts the freedom to pursue a trade or profession in so far as persons who do not satisfy the definition of 'non-traditional operator' within the meaning of that article on the ground that they are related to a traditional operator in accordance with Article 143 of Regulation No 2454/93 are not entitled to tariff quotas as a non-traditional operator.

84 However, as the Commission has correctly noted, such a restriction corresponds, as follows from recital 7 in Regulation No 896/2001, to an objective of general interest, which is to combat speculative or artificial practices in relation to the issue of import licences, thereby precluding the possibility of a traditional operator who already has a tariff quota from being included in that same quota again as a non-traditional operator through the intermediary of another operator to which it is related. Achievement of that objective itself contributes to steady supply to the Community market which the Community rules are designed to ensure.

85 In addition, in relation to that aim Article 6(c) of Regulation No 896/2001 does not constitute a disproportionate and intolerable interference, impairing the very substance of the right to freedom to pursue a trade or profession.

86 The Commission referred to the lack of effectiveness, in that connection, of Article 11(1) of Regulation No 2362/98, which the importers did not really attempt to refute. Pursuant to that provision, the Member States were to check that the 'newcomers' were commercially active for their own account as importers into the Community and as independent economic units, and, where there was doubt as to whether that condition was met, the operators concerned had to provide evidence of compliance which was considered satisfactory by the national competent authorities in order to have their application accepted and prove their independent manage-

ment. In that regard, Article 6(c) of Regulation No 896/2001 is certainly capable of preventing more effectively the misuse of the Community rules by speculative or artificial practices, without none the less removing any possibility of importing bananas into the Community. At the very most, that opportunity is restricted on the basis of the nature of the links between the economic operators concerned.

87 Moreover, action to counteract speculative or artificial practices that, through fictitious agents, increase the number of traditional operators receiving tariff quotas which were however intended for non-traditional operators, is, if it proves effective, capable of providing a means for genuine new operators to act on the market and therefore to deploy their economic activities fully.

88 In conclusion, the answer to the fourth question raised by the national court must be that consideration of that question has disclosed nothing to affect the validity of Article 6(c) of Regulation No 896/2001.

Costs

89 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Tribunale amministrativo regionale per il Veneto, by orders of 16 January 2002, hereby rules:

Consideration of the questions referred for a preliminary ruling has disclosed nothing to affect the validity of Articles 1, 3, 4, 5, 6(c) and 31 of 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.

Timmermans Puissochet Schintgen

Macken Colneric

Delivered in open court in Luxembourg on 15 July 2004.

R. Grass C.W.A. Timmermans

Registrar President