ORDER OF THE PRESIDENT OF THE FIFTH CHAMBER OF THE COURT OF FIRST INSTANCE
28 April 1999 *

In Case T-11/99 R,

Firma Léon Van Parys NV, a company incorporated under Belgian law, established in Antwerp (Belgium),

Pacific Fruit Company NV, a company incorporated under Belgian law, established in Antwerp,

Pacific Fruchtimport GmbH, a company incorporated under German law, established in Hamburg (Germany),

Pacific Fruit Company Italy SpA, a company incorporated under Italian law, established in Rome,

represented by Philippe Vlaemminck, Lode Van Den Hende and Julien Holment, of the Ghent Bar, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe,

applicants,

v

* Language of the case: Dutch.

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

defendant,

supported by

Kingdom of Spain, represented by Rosario Silva de Lapuerta, Abogado del Estado, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

and

French Republic, represented by Kareen Rispal-Bellanger, Deputy Director of the Legal Directorate of the Ministry of Foreign Affairs, with an address for service in Luxembourg at the French Embassy, 8 B Boulevard Joseph II,

interveners,

APPLICATION under Articles 185 and 186 of the EC Treaty for an order of the Court allowing the applicants — or ordering the Commission to take the necessary measures to allow them — to import in 1999 a quantity of bananas corresponding to the average of the quantities imported by them into the European Community during the years 1994-1996 and cleared through customs in the European Community, with the help of an import licence, either by the applicants themselves or by another holder of a licence or granting such other interim relief it may deem appropriate,

THE PRESIDENT OF THE FIFTH CHAMBER OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal framework

1 Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1, hereinafter 'Regulation No 404/93') established, from 1 July 1993, a common arrangement for imports of bananas which replaced the various national arrangements.

2 Article 18(1) of Regulation No 404/93, which comes under Title IV on trade with non-member countries, as 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 multilateral trade negotiations (OJ 1994 L 349, p. 105), provided that from 1995 a tariff quota of 2.2 million tonnes (net weight) was to be opened each year for imports of third-country bananas and non-traditional ACP bananas.

3 Article 19(1) split the tariff quota, which was opened as to 66.5% to the category of operators who had marketed third-country and/or non-traditional ACP bananas (category A), 30% to the category of operators who had marketed Community and/or traditional ACP bananas (category B) and 3.5% to the category of operators established in the Community who had started marketing bananas other than Community and/or traditional ACP bananas from 1992 (category C).

4 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) (hereinafter 'Regulation No 1442/93') defined, *inter alia*, the criteria for determining the types of operators in categories A and B who could apply for import certificates, according to the activities which those operators had carried out during the reference period. The quantities marketed by the operators selected were then multiplied by a weighting in order to take account of the size of the economic function assumed and the commercial risks incurred.

5 Those import arrangements were the subject of a dispute-resolution procedure within the framework of the World Trade Organisation (WTO) following complaints from a number of non-member countries.

6 The WTO body responsible for resolving disputes declared certain aspects of the arrangements governing banana imports into the Community incompatible with the rules of the WTO, following which Council Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation No 404/93 (OJ 1998 L 210, p. 28, hereinafter 'Regulation No 1637/98') and Commission 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, hereinafter 'Regulation No 2362/98') were adopted for the purpose, *inter alia*, of ensuring that the Community provisions were compatible with the WTO rules.

7 Thus, in particular, the allocation of the quota between three different categories of operators was abolished. Regulation No 2362/98 provided that the quotas were to be divided between 'traditional operators' and 'newcomers' as defined in that regulation. The subdivision of operators into categories A and B depending on the types of activities which they carried out on the market was also abolished.

8 The first paragraph of Article 3 of Regulation No 2362/98 provides, in particular:

'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.'

9 Regulation No 2362/98 also adopts, *inter alia*, the provisions applicable for the registration of operators, specifies the checks and controls which the competent national authorities are required to carry out and defines the consequences to be drawn from the failure to meet certain obligations. It also maintains the instruments of periodic management created by Regulation No 1442/93 and adapts the detailed rules which that regulation defined as far as necessary and defines all the communications necessary between operators, Member States and the Commission for the application of that regulation. Finally, it defines certain transitional measures which allow the Member States and the Commission to gather all the information necessary to ensure that import licences are used from 1 January 1999.

Facts and procedure

10 The applicants are part of the Noboa group, a family undertaking which originated in Ecuador. Their main activity consists in importing bananas into the European Community from Ecuador.

11 By application lodged at the Court Registry on 15 January 1999 the applicants brought an action for the annulment of Regulation No 2362/98.

12 By separate document lodged at the Registry on 29 January 1999 the applicants lodged the present application, pursuant to Articles 185 and 186 of the EC Treaty, whereby they request the Court to allow them — or to order the Commission to take the necessary measures to allow them — to import in 1999 a quantity of bananas corresponding to the average quantity imported by them into the European Community during the years 1994-1996 and cleared through customs in the European Community, with the help of an import licence, either by the applicants themselves or by another licence holder or to order such other interim relief as it may deem appropriate.

13 The Commission submitted its written observations in a document lodged at the Registry on 15 February 1999.

14 By applications lodged at the Registry on 8 and 10 February 1999 respectively the Kingdom of Spain and the French Republic applied for leave to intervene in the proceedings in support of the form of order sought by the Commission.

15 In a document lodged at the Registry on 11 February 1999 the applicants requested the Court, pursuant to Articles 5(4) and 17(4) of the Instructions to the

Registrar of the Court of First Instance, not to disclose either in the published version of the judgment or in any other document to which the public might have access the quantities referred to in paragraph 55 of their application for interim measures, in paragraph 44 of their originating application or in annexes 2 to 3 thereto. They also asked the Court to order the Commission and the intervening Member States to treat those figures as confidential.

16 By a document lodged at the Registry on 24 February 1999 the Commission expressed its views in regard to the last-mentioned request.

17 The original parties and the interveners presented oral argument at the hearing on 15 March 1999.

18 Pursuant to the second paragraph of Article 106 of the Rules of Procedure of the Court of First Instance the present application for interim measures was assigned to the President of the Fifth Chamber.

The request for non-disclosure of certain particulars

19 The Commission points out that the applicants did not submit an application within the meaning of the second sentence of Article 116(2) of the Rules of Procedure of the Court of First Instance. It therefore requests the President to dismiss their application for an order restraining the Commission and the intervening Member States from making public the first applicant's precise reference quantities as stated in their written pleadings. On the other hands, it does not object to those figures not being mentioned in this order. It suggests, however, that the Court should disclose the changes in those quantities in percentages.

20 The applicants' request that the judge hearing the application for interim measures should not mention in this order the figures which they wish to be treated as confidential may be granted, since their publication is not essential.

21 On the other hand, the applicants' request that the Commission and the intervening Member States be ordered to treat those figures in confidence cannot be granted.

22 The third subparagraph of Article 5(3) of the Instructions to the Registrar provides that no third party, private or public, may have access to the case-file or to the procedural documents without the express authorisation of the President, after the parties have been heard; such authorisation can be granted only upon written request accompanied by a detailed explanation of the third party's legitimate interest in inspecting the file. Furthermore, under the rules which govern procedure before the Court of First Instance, parties are entitled to protection against the misuse of pleadings and other procedural documents. It follows that the parties to a case are entitled to use the procedural documents of other parties only for the purpose of pursuing their own case (Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraphs 135 and 137). Accordingly, there is no need to grant the applicants' request, since the confidential treatment which they demand is already adequately ensured.

23 Second, the second subparagraph of Article 8(5) of Regulation No 2362/98 provides, in particular, that the Commission may forward to the Member States the list of operators who have submitted requests for registration and for renewal of registration, and in the case of renewals the serial numbers of licences or any licence extracts, used and issued, with a view to facilitating the detection or prevention of false claims by operators. It may also publish any of the details contained in the notifications from Member States. Accordingly, it is not appropriate to grant the applicants' request, in so far as to do so might prove detrimental to the effective administration by the Commission of the common organisation of the market in bananas.

The application for interim relief

24 Pursuant to Articles 185 and 186 of the Treaty in conjunction with Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court may, if it considers that the circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.

25 Article 104(2) of the Rules of Procedure provides that applications for interim measures are to specify the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. The measures sought must also be provisional in the sense that they do not prejudge the points of law or fact at issue or neutralise in advance the consequences of the decision eventually to be taken in the main proceedings (order of the President of the Court of First Instance in Case T-65/98 R *Van den Bergh Foods* v *Commission* [1998] ECR II-2641, paragraph 34).

Arguments of the parties

Admissibility

26 The Commission maintains that the applicants are manifestly not individually or directly concerned by Regulation No 2362/98. It has consistently been held that where the main proceedings are manifestly or, at least, very probably inadmissible a related application for interim measures must be declared inadmissible (order of the President of the Court of First Instance in Case T-6/95 R *Cantine dei colli Berici* v *Commission* [1995] ECR II-647, paragraph 26 et seq.).

27 Such an approach is all the more necessary in a case where an individual seeks the annulment of a measure of general application, in order to prevent a situation where that person is able, by means of an application for interim relief, to obtain suspension of operation of a measure which the Court subsequently refuses to annul because, on examination of the substance of the case, the action is declared inadmissible (order of the President of the Court of Justice in Case 376/87 R *Distrivet* v *Council* [1988] ECR 209, paragraph 22).

28 A regulation which applies to objectively determined situations and entails legal effects for categories of persons considered in the abstract is of general application and cannot be of individual concern to operators for the purposes of Article 173 of the Treaty. The contested regulation concerns all economic operators wishing to import bananas into the Community from 1 January 1999, whatever the country of origin, and whether or not within the framework of the tariff quotas and the traditional ACP quantity. It concerns not only economic operators who had already imported bananas into the Community before 1999 but also all those first wishing to import bananas in 1999.

29 The Commission points out that applications having virtually the same object and lodged, at least in part, by the same applicants have previously been declared inadmissible in accordance with that case-law (order of the Court of Justice in Case C-257/93 *Van Parijs and Others* v *Council and Commission* [1993] ECR I-3335, paragraph 12, and order of the President of the Court of Justice in Case C-257/93 R *Van Parijs and Others* v *Council and Commission* [1993] ECR I-3917).

30 The Commission also rejects the various points which the applicants put forward in order to establish the admissibility of their action. It observes, first, that the applicants have adduced no evidence that they are responsible for 40% of imports into the Community of bananas from Ecuador. Although it disputes the accuracy of those figures, it adds that in any event they merely establish that the applicants together import some 8% of the total quantity of bananas that can be imported into the Community each year at a zero or reduced customs tariff. The applicants are therefore just some of the many banana importers active in the

Community. Unlike the situation at issue in the judgment in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, the applicants are neither the largest importers of the product nor end users of that product.

31 Second, the contested regulation affects all importers of bananas from Latin America and does not affect the applicants in a particular manner.

32 Third, the contested regulation reserves a part of the tariff quota for imports from Ecuador. However, the fact that the applicants at present import a large proportion of Ecuadorean bananas does not mean that they are in a special factual situation which differentiates them from other importers, since all economic operators are entitled to import bananas from Ecuador (Case T-47/95 *Terres Rouges and Others* v *Commission* [1997] ECR II-481, paragraph 47).

33 Fourth, the applicants adduce no evidence of the actual existence of speculation on licences as a result of the contested regulation. Furthermore, even supposing that such speculation exists, it would affect all economic operators who intend to import bananas from one or more of the four countries to which part of the tariff quota was allocated. All traditional operators and all newcomers are entitled to apply for licences to import bananas from those four countries.

34 The judgment of the Court of Justice in Case C-309/89 *Codorniu and Others* v *Council* [1994] ECR I-1853 has no particular relevance to the present case, since the contested regulation does not adversely affect any specific right of the applicants in the sense defined in that judgment.

35 Nor is the contested regulation of direct concern to the applicants. It is for the Member States to determine the number of import licences which will be granted to each importer and to issue them. It follows that only the decisions of the Member States granting or refusing those licences are capable of concerning the applicants directly (*Terres Rouges and Others* v *Commission*, paragraphs 57 and 58).

36 Finally, the Commission states that the absence of a remedy under national law cannot constitute a ground for the Court to exceed the limits of its jurisdiction (Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477, paragraph 50).

37 The Spanish and French Governments claimed at the hearing that the action is manifestly inadmissible, since the applicants are not individually concerned by Regulation No 2362/98. The application for interim measures should therefore be dismissed.

38 The applicants claim, *first*, in essence, that the contested regulation produces a number of consequences which have a particularly serious effect on their competitive position. They are therefore in a very specific situation and, in accordance with the case-law of the Court of Justice, are to be regarded as being directly and individually concerned by that regulation (judgments in *Extramet Industrie* v *Council* and *Codorniu* v *Council*).

39 They point out that Ecuador is the main supplier to the Community of bananas grown outside the Community and that together they are responsible for approximately 40% of all imports of those bananas.

40 The system of allocating import licences introduced in 1993 had unfavourable consequences for importers of bananas from Latin America, including the applicants, consequences which persist despite the amendment of Regulation No 2362/98.

41 The applicants are also affected in a very particular manner by the system of 'quota by country' imposed on Ecuador by Regulation No 2362/98. This quota reduces exports from Ecuador to 668 120 tonnes, whereas they had already reached 728 492 tonnes in 1997.

42 The combination of quotas by country and the method of allocating import licences renders the applicants particularly vulnerable to speculation on import licences. Owing to the restriction aimed at Ecuador and to speculation on import licences the applicants are unable to make full use of their allocated reference quantity to import bananas from Ecuador.

43 The applicants claim, *second*, that no other effective remedy is available to them before the national courts. Although it is true that they could have challenged the communication from the national authorities informing them of the reference quantity allocated to them for 1999 before the national courts, in the present case by contesting the decision of the Belgian intervention and restitution agency before the Belgian Conseil d'Etat (Council of State), they point out that there is no real dispute between them and the Belgian authorities. In those circumstances, it cannot be precluded that the Court of Justice would, for that reason, refuse to answer a question referred to it for a preliminary ruling. The applicants see no acceptable advantage in subjecting the main proceedings to a 'diversion' before the national court. In any event, the Belgian Conseil d'Etat (Council of State) has no jurisdiction to order the interim measures which would assist the applicants.

Urgency

44 The applicants claim that they are suffering serious damage because imports of bananas from Ecuador are hindered in two ways, first because those bananas do not have access to the separate quota reserved for traditional ACP bananas and, second, by reason of the quotas by country which are not compatible with the rules of the GATT. The applicants suffer even greater harm because a system of import licences is maintained in force.

45 They acknowledge that the damage which they claim to suffer is essentially financial in nature. In principle, that harm could therefore be made good by an order for compensation. They none the less wish to obtain the interim measures which they seek, since they fear that even if they were successful in the main action they would not be able to obtain reparation in an action for damages.

46 The Commission contends that the first applicant itself acknowledges that between 1998 and 1999 its provisional reference quantity increased by 3%. The reference quantity which it obtained has increased consistently since the common organisation of the market was established and in 1999 it received a greater quantity than it had ever received before. Consequently, the new system does not cause the applicants any irreparable damage. In the order in Case T-260/97 R *Camar* v *Commission and Council* [1997] ECR II-2357 the President of the Court of First Instance considered that since the applicant's imports had stabilised there could be no irreparable damage. Still less can the applicants in this case suffer irreparable damage, since their reference quantities are rising considerably.

47 It is, moreover, settled case-law that damage of a purely financial nature cannot in principle be regarded as irreparable or reparable only with difficulty since it can subsequently be the subject of financial compensation.

48 The fact that any action for compensation is doomed to fail, as the applicants claim, is a further reason for dismissing the application for interim measures.

Findings of the Court

Admissibility

49 Under the second subparagraph of Article 104(1) of the Rules of Procedure an application for the adoption of interim measures is admissible only if it is made by a party to a case before the Court of First Instance. That rule is not a mere formality but assumes that the main proceedings to which the application for interim measures relates actually fall within the jurisdiction of the Court of First Instance.

50 It is settled case-law that, in principle, the issue of the admissibility of the main application is not to be examined in proceedings for interim relief, so as not to prejudge the substance of the case. None the less, where, as in the present case, it is contended that the main application to which the application for interim measures relates is manifestly inadmissible, it may prove to be necessary to establish whether there are any grounds for a prima facie finding that the main application is admissible (see, in particular, orders of the President of the Court of Justice in *Distrivet* v *Council*, paragraph 21, and in Case 160/88 R *Fédération Européenne de la Santé Animale and Others* v *Council* [1988] ECR 4121, paragraph 22; and orders of the President of the Court of First Instance in *Cantine dei colli Berici* v *Commission*, paragraph 26, and in Case T-219/95 R *Danielsson and Others* v *Commission* [1995] ECR II-3051, paragraph 58).

51 In that regard, it is particularly important to ensure that the applicants do not obtain, through proceedings for interim relief, the benefit of measures to which

they would not be entitled if their action were declared inadmissible by the Court when it examines the substance of the case (see order in *Distrivet* v *Council*, paragraph 22).

52 It follows that, although the judge hearing an application for interim relief is not empowered to make a definitive ruling on the admissibility of the main action, he must, in circumstances such as those in the present case, verify whether the applicants have at the very least established the existence of certain grounds on which the Court might hold that the main action is in fact admissible.

53 In that regard, it must be pointed out that there appear to be no grounds for a prima facie finding that the main action is admissible.

54 Under the fourth paragraph of Article 173 of the Treaty individuals are entitled to challenge any decision which, although adopted in the form of a regulation, is of direct and individual concern to them. The purpose of that provision is, in particular, to prevent the Community institutions from being able, simply by choosing the form of a regulation, to preclude an individual from bringing an action against a decision which concerns him directly and individually and thus to make it clear that the nature of a measure cannot be changed by the form chosen (see the *Terres Rouges and Others* v *Commission* judgment, paragraph 39).

55 However, there does not at first sight appear to be anything in Regulation No 2362/98 which would enable it to be characterised as a decision adopted in the form of a regulation. It is drafted in general and abstract terms and is applicable in all Member States, and no account is taken of the situation of individual importers. The purpose of Regulation No 2362/98 is to define the

detailed rules for the implementation of Regulation No 404/93, as amended by Regulation No 1637/98, regarding imports of bananas into the Community.

56 Admittedly, it cannot be excluded that in certain circumstances the provisions of a legislative measure applying to the economic operators concerned in general may be of individual concern to some of them (judgments in *Extramet Industrie* v *Council*, paragraph 13, and *Codorniu* v *Council*, paragraph 19). The applicants admitted at the hearing, however, that the essential problem is that the common organisation of the market in bananas established in 1993 created unfavourable competitive conditions for the undertakings in the group and that those conditions persist even after the system was amended in 1998. They have not put forward anything to justify a finding that particular circumstances, within the meaning of the case-law referred to above, existed in the present case.

57 In that regard, it should be pointed out 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 the measure must be regarded as being of individual concern to them (judgment in *Terres Rouges and Others* v *Commission*, paragraph 44). *A fortiori*, since all traditional operators, and also newcomers, who wish to develop commercial activities in the sector in question and who meet the conditions laid down are entitled to apply for licences to import bananas from the four countries to which a part of the tariff quota is allocated, the applicants cannot establish that they are individually concerned by Regulation No 2362/98.

58 In the light of all the foregoing considerations, and without there being any need to consider the question whether the contested regulation is of direct concern to the applicants, it is not possible to hold, prima facie, that Regulation No 2362/98 is of individual concern to the applicants and that they are therefore entitled to apply for its annulment under the fourth paragraph of Article 173 of the Treaty.

Urgency

59 Since the judge hearing this application for interim relief is not called upon to give a definitive ruling on the admissibility of the action, it is further necessary to ascertain whether the conditions necessary for the grant of interim relief are satisfied, beginning with the condition relating to urgency.

60 It is settled case-law that the issue of *urgency* must be assessed by examining whether, pending the Court's decision on the substance, the applicants could suffer serious and irreparable damage which could not be made good by the judgment on the application in the main proceedings. Damage of a purely financial nature cannot in principle be held to be irreparable, or reparable only with difficulty, if it can ultimately be the subject of financial compensation (see, in particular, the order in *Camar* v *Commission and Council*, paragraph 42).

61 It is clear from the documents before the Court that the condition relating to the existence of a risk of serious and irreparable damage is not satisfied. The applicants themselves acknowledge that the damage which they claim to suffer is of a purely financial nature.

62 Nor have the applicants adduced any evidence to justify a prima facie finding that the damage in question would be such as to threaten their survival or to cause them serious and irreparable harm and that it could not therefore be fully compensated for in the event of the main action succeeding (see order in *Cantine dei colli Berici* v *Commission*, paragraph 31). To the contrary, they acknowledged in their application for interim measures that the quantity of bananas in respect of which licences had been granted to the first applicant rose in 1999 by 3% as compared with 1998. They also stated at the hearing that the number of licences granted to the Noboa group had risen by 10% between 1998 and 1999.

63 It follows that the conditions which, in law, would make it possible to grant the interim measures requested are not satisfied and that, accordingly, the application must be dismissed.

On those grounds,

THE PRESIDENT OF THE FIFTH CHAMBER OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. The decision as to costs is reserved.

Luxembourg, 28 April 1999.

H. Jung — Registrar

J.D. Cooke — President