JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
20 March 2001 *

In Case T-18/99,

Cordis Obst und Gemüse Großhandel GmbH, established in Ostrau (Germany), represented by G. Meier, avocat,

applicant,

v

Commission of the European Communities, represented by K.-D. Borchardt and H. van Vliet, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for compensation for the loss which the applicant has suffered as a result of the Commission introducing, under Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community

* Language of the case: German.

(OJ 1998 L 293, p. 32), provisions which are alleged to conflict with World Trade Organisation (WTO) rules and certain general principles of Community law,

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

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

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 4 October 2000,

gives the following

Judgment

Legal background

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) introduced, from 1 July 1993, common arrangements for the importation of bananas, which

replaced the various national arrangements. A distinction was drawn between 'Community bananas' produced in the Community, 'third-country bananas' originating in third countries other than the African, Caribbean and Pacific (ACP) States, 'traditional ACP bananas' and 'non-traditional ACP bananas'. 'Traditional ACP bananas' and 'non-traditional ACP bananas' meant the quantities of bananas exported by the ACP States which did not exceed or did exceed, respectively, the quantities traditionally exported by each of those States as set out in the Annex to Regulation No 404/93.

2 In order to ensure satisfactory marketing of bananas produced in the Community and bananas originating in the ACP States and other third countries, Regulation No 404/93 provided for the opening of an annual tariff quota of 2.2 million tonnes (net weight) for imports of bananas from third countries and non-traditional ACP bananas.

3 Article 19(1) of Regulation No 404/93 (old version) divided the tariff quota as follows: 66.5% for the category of operators who had marketed third-country and/or non-traditional ACP bananas (category A), 30% for the category of operators who had marketed Community and/or traditional ACP bananas (category B) and 3.5% for 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 The first sentence of Article 19(2) of Regulation No 404/93 (old version) read 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.'

5 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) defined, *inter alia*, the criteria for determining the types of operators in categories A and B who could apply for import licences, according to the activities which those operators had carried out during the reference period.

6 Those import arrangements were the subject of a dispute settlement procedure within the framework of the World Trade Organisation (WTO) following complaints from some third countries.

7 That procedure gave rise to reports from the WTO Panel of 22 May 1997 and a report from the WTO Standing Appellate Body of 9 September 1997, which was adopted by the WTO Dispute Settlement Body by decision of 25 September 1997. In that decision the Dispute Settlement Body declared certain aspects of the arrangements governing banana imports into the Community incompatible with the rules of the WTO.

8 In order to comply with that decision, the Council adopted Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation No 404/93 (OJ 1998 L 210, p. 28). The Commission subsequently adopted Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32).

9 Under the new arrangements for banana imports, 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 merely 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.

10 Article 4 of Regulation No 2362/98 reads as follows:

'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.'

11 Article 5(2) and (3) of Regulation No 2362/98 reads:

'2. For the purposes of determining their reference quantity, each operator shall send to the competent authority by 1 July each year:

(a) a figure for the total quantity of bananas from the origins listed in Annex I actually imported during each of the years making up the reference period;

(b) the supporting documents detailed in paragraph 3.

3. Actual imports shall be attested by both of the following:

(a) by presenting copies of the import licences used... by the holder... in order to release the relevant quantities for free circulation; and

(b) by presenting proof of payment of the customs duties due on the day on which customs import formalities were completed. The payment shall be made either direct to the competent authorities or via a customs agent or representative.

Operators furnishing proof of payment of customs duties, either direct to the competent authorities or via a customs agent or representative, for the release into free circulation of a given quantity of bananas without being the holder or transferee holder of the relevant import licence used for this purpose... shall be deemed to have actually imported the said quantity provided that they have registered in a Member State under Regulation (EEC) No 1442/93 and/or that they fulfil the requirements of this Regulation for registration as a traditional operator. Customs agents or representatives may not call for the application of this subparagraph'.

12 Article 6(3) of Regulation No 2362/98 provides:

'Using the information received under paragraph 2, and in light of the total volume of tariff quotas and traditional ACP bananas as referred to in Article 2, the Commission shall, where appropriate, set a single adjustment coefficient to be applied to each operator's provisional reference quantity'.

Facts and procedure

13 The applicant company, Cordis Obst und Gemüse Großhandel GmbH ('Cordis'), was formed on 1 November 1990, that is to say after the reunification of Germany, and has its registered office in the former German Democratic Republic ('GDR'). Its business is wholesale fruit trading and, *inter alia*, the ripening and packaging of bananas.

14 Under the planned and centralised economy of the former GDR it was not possible for it to have a turnover in bananas during 1993 and 1994. The consequence of this was that its reference quantities based on those years were very small.

15 Following the entry into force of Regulation No 2362/98 the applicant requested the competent German authorities to establish its reference quantity based on 1994 to 1996 at 2 591 427 kg, which is equivalent to an annual average of 863 809 kg. By decision of 8 December 1998, the competent authorities adopted a provisional reference quantity for 1999 of 848 759 kg, from which they deducted 51 064 kg by applying the adjustment coefficient of 0.939837 set by the Commission under Article 6(3) of Regulation No 2362/98, which gave a

reference quantity of 797 695 kg. The applicant lodged an appeal against that decision on 30 December 1998, contending that the reduction was unlawful. It also contended that putting the reference period back by a year, that is to say taking into account 1994 to 1996 instead of 1995 to 1997, was unlawful and that it had suffered loss as a result. Indeed, according to the competent authorities, the reference quantity based on 1995-1997 would have been 3 393 032 kg, that is to say, 823 436 kg in respect of 1995, 1 127 145 kg in respect of 1996, and 1 442 451 kg in respect of 1997.

16 It was in those circumstances that the applicant, by application lodged at the Registry of the Court of First Instance on 21 January 1999, brought the present action to recover compensation for the loss it suffered as a result of the adoption by the Commission of Regulation No 2362/98. The applicant pleaded *inter alia* infringement of certain agreements contained in Annex 1 to the Agreement establishing the WTO ('the WTO Agreement') in support of its action.

17 In Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 47, the Court held that 'having regard to their nature and structure, [all the agreements and memoranda contained in Annexes 1 to 4 of the WTO Agreement] are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions'.

18 By letter of 16 December 1999, the parties were called on to submit their observations on the possible consequences of that judgment. The Commission and the applicant lodged their observations on 6 and 14 January 2000 respectively.

19 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure. The parties presented oral argument and their replies to the questions from the Court at the hearing in open court on 4 October 2000.

Forms of order sought

20 The applicant claims that the Court should:

— order the Commission to compensate the applicant for the loss it suffered as a result of, first, the Commission's adoption of the years 1994 to 1996 as the reference period for traditional operators and, second, the Commission's reduction of the reference quantity provisionally approved by the competent authorities for 1999 by applying the adjustment coefficient;

— order the Commission to pay the costs.

21 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

22 Although it has not formally raised an objection of inadmissibility, the Commission considers that the action is inadmissible because the applicant should first have tried to prevent the alleged loss from occurring by bringing an action before the competent national court. A claim for compensation under Article 178 of the EC Treaty (now Article 235 EC) and the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) constitutes an ancillary remedy in the Commission's view, since the alleged loss was caused by a national administrative measure adopted in order to implement Community law (see the judgments of the Court of Justice in Case 119/88 *AERPO and Others* v *Commission* [1990] ECR I-2189 and Case C-282/90 *Vreugdenhil* v *Commission* [1992] ECR I-1937, paragraph 12, and those of the Court of First Instance in Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379 and Case T-93/95 *Laga* v *Commission* [1998] ECR II-195, paragraph 33). It contends that it is for the competent national authorities applying the Community rules under a national administrative measure to establish reference quantities, in accordance with the provisions of Regulation No 2362/98 (see the judgments of the Court of First Instance in Case T-47/95 *Terres rouges and Others* v *Commission* [1997] ECR II-481, paragraphs 57 and 59, and that of the Court of Justice in Case C-73/97 P *France* v *Comafrica and Others* [1999] ECR I-185, paragraph 40).

23 The Commission contends that the ancillary nature of the claim for compensation is due to the fact that review of the national administrative measure falls exclusively to the national courts, which may refer the matter to the Court of Justice to assess the validity of the relevant Community provisions, by way of a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) (see

France v *Comafrica and Others*, paragraph 40). It is only where national courts are unable to guarantee adequate legal protection and/or the possibility of obtaining compensation that a direct action would be admissible.

24 The applicant disputes the Commission's view. It contends that no legal remedy is open to it before the national courts. Indeed, it has already challenged by means of an administrative appeal the decision of the national authorities allocating licences (see paragraph 15 above), a procedure which has now been disposed of. According to the applicant, it is not possible under German law to contest the legality of that decision in any other way. This claim for compensation is therefore the only remedy available to it.

25 It stresses that the national administration is required to comply with the conditions laid down by the Commission in Regulation No 2362/98. Any loss suffered by the applicant which is the subject of this action is thus incurred as a result of the rules laid down by the Commission and not the decision adopted at national level.

Findings of the Court

26 It should be noted that the unlawful conduct alleged in this case is not that of a national body but that of a Community institution. Any loss arising from the implementation of the Community legislation by the German authorities would therefore be attributable to the Community (see, for example, the judgments of the Court of Justice in Case 126/76 *Dietz* v *Commission* [1977] ECR 2431, paragraph 5, Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 9, and Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraphs 18 and 19, and of the Court of First Instance in Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 71).

27 Since the Community judicature has exclusive jurisdiction under Article 215 of the Treaty to hear actions seeking compensation for damage attributable to the Community (Joined Cases 106/87 to 120/87 *Asteris and Others* v *Greece and EEC* [1988] ECR 5515, paragraph 14, and *Vreugdenhil*, paragraph 14), remedies available under national law cannot automatically guarantee effective protection of the applicant's rights (see *Exporteurs in Levende Varkens*, paragraph 72).

28 In that connection, as the Commission acknowledged at the hearing, even if the Court, in the context of proceedings for a preliminary ruling, were to consider that the rules applicable were such as to cause damage, the national court would not have power to adopt itself the measures needed in order to compensate in full the loss alleged by the applicant in this case, with the result that a direct application to the Court of First Instance on the basis of Article 215 of the Treaty would still be necessary in such circumstances (see to that effect *Dietz*, paragraph 5).

29 The Commission's challenge to the admissibility of this action must therefore be dismissed.

Non-contractual liability of the Community

30 The applicant submits that the Commission's unlawful conduct consists, first, in infringement of the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Import Licensing Procedures, which are contained in Annex 1 to the WTO Agreement and, second, in the arbitrary establishment of reference periods and infringement of the obligation to state reasons.

The possibility of relying on certain agreements contained in Annex 1 to the WTO Agreement

Arguments of the parties

31 The applicant contends that the provisions of the GATT constitute superior rules of law, in which the prohibitions on discrimination and the most-favoured-nation clause must be regarded as rules for the protection of individuals.

32 It considers that the WTO Agreement and the annexes thereto constitute a genuine world trade order with its own legal system and jurisdiction. The new WTO law is not negotiable, and contains strict prohibitions which can be restricted or temporarily set aside only by measures of the WTO and not by unilateral measures on the part of a Member State. Some of the provisions of that new law are therefore directly applicable in Community law.

33 As regards the possible inferences to be drawn from *Portugal* v *Council*, cited in paragraph 17 above, the applicant acknowledged, in response to the question raised by the Court of First Instance, that the Court of Justice had held that the WTO provisions did not have general direct effect within the Community legal system.

34 It added, however, that the judgment in that case did not conflict with the arguments submitted in support of its action to the effect that the Community institutions were guilty of misuse of powers. The fact that the Community arrangements for banana imports had been declared incompatible with the WTO

rules by a decision having the force of *res judicata* and the Community had undertaken to rectify the infringements concerned, in the applicant's view, precluded the Community institutions from adopting further provisions in breach of those rules.

35 The applicant put forward that argument at the hearing, stating that in the present case, since the Community had given an undertaking to the Dispute Settlement Body to repeal the provisions of its regulations which conflicted with the WTO rules, it had acted in breach of the principle *nemini licet venire contra factum proprium* when putting that undertaking into practice by adopting a regulation containing infringements of those rules. It explained that the principle expressed in that maxim, since it derives from the principle of good faith, constitutes a principle of Community law by which the legality of Community measures can be assessed by the Community judicature. The applicant is therefore entitled to plead infringement of the WTO rules on that ground also.

36 In addition, the applicant states that it does not seek to establish that the defendant was pursuing unlawful aims. Its contention is that the Commission, with full knowledge of the facts, infringed the WTO rules in order to achieve its ends, namely the organisation of the market in bananas. Such conduct constitutes a new category of misuse of powers.

37 Such misuse of powers means that the Commission is under an obligation to provide compensation irrespective of whether the WTO rules in question are designed to protect individuals. Individuals enjoy absolute protection against misuse of power by the Community institutions.

38 The Commission argues that the WTO rules do not have direct effect within the Community legal system and cannot therefore be relied on by individuals.

39 It observes that it is settled case-law that the 1947 GATT rules are not unconditional and that they cannot be recognised as being rules of international law which are directly applicable in the domestic legal systems of the contracting parties (see Case C-280/93 *Germany* v *Council* [1994] ECR I-4973). The Commission considers that that case-law applies also to the WTO Agreement and its annexes, since those documents have the same special features as those in the 1947 GATT provisions which meant that the latter could not have direct effect.

40 In answer to the question raised by the Court of First Instance concerning the possible inferences to be drawn from the judgment in *Portugal* v *Council*, cited above, the Commission stated that that judgment fully supports its view. According to the Commission, it is to be inferred from that judgment that the provisions of the WTO Agreement do not constitute a criterion for assessing the legality of Community secondary legislation. This means also that the finding by the Dispute Settlement Body that an act of Community secondary legislation is incompatible with the WTO rules does not imply that that act must be regarded as unlawful within the Community legal system, and therefore cannot make the Community incur liability under the second paragraph of Article 215 of the Treaty.

41 As regards the applicant's arguments alleging misuse of powers, the Commission considers that the Community can only incur liability on that ground under the same conditions as those applying to any other breach of rights or principles protected under the Community legal system.

42 The allegation of misuse of powers does not therefore mean that the applicant does not need to establish that the provisions which are alleged to have been infringed were intended to protect individuals.

43 Similarly, at the hearing the Commission stated that the applicant could not rely on the principle *nemini licet venire contra factum proprium* in order to disregard that condition.

Findings of the Court

44 It should be noted that according to established case-law, in order for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the alleged conduct of the Community institution concerned, actual damage and the existence of a causal link between that conduct and the alleged damage (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 54).

45 In Case C-352/98 P *Bergaderm and Others* v *Commission* [2000] ECR I-5291, paragraphs 41 and 42, the Court held that the right to reparation requires that the rule of law infringed be intended to confer rights on individuals and that the breach of such a rule be sufficiently serious.

46 As regards the first condition, it should be noted that it is clear from Community case-law that the WTO Agreement and its annexes are not intended to confer rights on individuals which they could rely on in court.

47 In this connection, the Court held in *Portugal* v *Council* (paragraph 36) that while it is true that the WTO Agreement and its annexes differ significantly from

the provisions of GATT 1947 they nevertheless accord considerable importance to negotiation between the parties.

48 As regards, more particularly, the application of the agreements contained in the annexes to the WTO Agreement in the Community legal order, the Court of Justice held in *Portugal* v *Council*, paragraph 42, that, according to its preamble, the WTO Agreement, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to 'entering into reciprocal and mutually advantageous arrangements' and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain imbalance of obligations, or create special relations of integration with the Community.

49 The Court went on to observe that it is common ground that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the agreements contained in the annexes to the WTO Agreement that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law. The Court concluded that the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the agreements contained in the annexes to the WTO Agreement, which are based on 'reciprocal and mutually advantageous arrangements' and which must *ipso facto* be distinguished from agreements concluded by the Community, may lead to disuniform application of the WTO rules. To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manœuvre enjoyed by their counterparts in the Community's trading partners (see *Portugal* v *Council*, paragraphs 43, 45 and 46).

50 The Court of Justice concluded that, having regard to their nature and structure, the agreements in the annexes to the WTO Agreement are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions (see *Portugal* v *Council*, paragraph 47).

51 It is clear from that judgment that as the WTO rules are not in principle intended to confer rights on individuals, the Community cannot incur non-contractual liability as a result of infringement of them.

52 In its observations on the conclusions to be inferred from the judgment in *Portugal* v *Council*, the applicant acknowledged that the WTO provisions had no general direct effect within the Community legal system. However, it argued that its action was founded on a new category of misuse of powers, in so far as the Commission had adopted a regulation infringing a decision declaring the Community system incompatible with the WTO rules and its undertaking to rectify the infringements thus established (see paragraphs 34 to 36 above), in breach of the principle *nemini licet venire contra factum proprium*.

53 That argument cannot be accepted. First, it is settled case-law that an act of a Community institution is vitiated by misuse of powers only if it was adopted with the exclusive or main purpose of achieving an end other than that stated (Case C-285/94 *Italy* v *Commission* [1997] ECR I-3519, paragraph 52) and that a finding of misuse of powers may be made only on the basis of objective, relevant and consistent evidence (Joined Cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 168).

54 In the present case, the applicant does not establish, or even allege, that the Commission adopted Regulation No 2362/98 or some of its provisions with the purpose of achieving an end other than that stated, which was to adopt all the provisions needed in order to bring into effect the arrangements for importing bananas into the Community introduced by Regulation No 404/93, as amended by Regulation No 1637/98.

55 Similarly, the applicant's argument that this is a new category of misuse of powers must also be rejected.

56 To accept the applicant's line of argument would be to misinterpret the very definition of misuse of powers, which involves review by the Community judicature of the purpose of a measure and not its content.

57 Moreover, the applicant's argument that the Community was guilty of misuse of powers in adopting a regulation containing infringements of the WTO rules, or by continuing infringements already established, when it had undertaken to comply with those rules, must likewise be rejected.

58 In that regard, it is only where the Community intends to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the agreements contained in the annexes to the WTO Agreement, that it is for the Court of Justice and the Court of First Instance to review the legality of the Community measure in question in the light of the WTO rules (see *Portugal* v *Council*, paragraph 49).

59 Neither the reports of the WTO Panel of 22 May 1997 nor the report of the WTO Standing Appellate Body of 9 September 1997 which was adopted by the Dispute Settlement Body on 25 September 1997 included any special obligations which the Commission 'intended to implement', within the meaning of the case-law, in Regulation No 2362/98 (see with regard to the 1947 GATT, Case C-69/89

Nakajima v *Council* [1991] ECR I-2069, paragraph 31). The regulation does not make express reference either to any specific obligations arising out of the reports of WTO Bodies, or to specific provisions of the agreements contained in the annexes to the WTO Agreement.

60 The applicant cannot therefore base its action on an alleged infringement of certain agreements contained in Annex 1 to the WTO Agreement in this case or on an alleged misuse of powers.

The arbitrary fixing of the reference period and infringement of the obligation to state reasons

Arguments of the parties

61 The applicant contends that by taking the years 1994 to 1996 as the reference period the defendant interfered with the previous arrangements for the common organisation of the market in bananas and significantly altered them. Under Article 19(2) of Regulation No 404/93 (old version) the relevant reference period for 1999 was 1995 to 1997. Under the 'movable reference period' arrangements, which meant that the three-year reference period was put forward by one year each year, operators were strongly encouraged to improve their figures for the marketing of bananas, as those figures were used as a reference two years later. By putting the reference period back by one year and introducing an *ad hoc* period which can either be kept or amended and which in any event is no longer predictable, the Commission, in the applicant's view, destroyed the legitimate expectations of operators in Category A. Some operators, including the applicant, have been particularly badly affected as a result of this.

62 In this connection, the applicant denies that the actual import figures for 1997 were not known. In any event, there was no need to know the actual import figures in order for the Commission to allocate import quotas to traditional operators, in view of the allocation arrangements.

63 The applicant also questions why it was necessary, as the Commission claims, for the reference period to coincide with the significant period for establishing the market shares of the main supplier countries. It contends that there is nothing in the preamble to Regulation No 2362/98 to indicate such a need.

64 Furthermore, the applicant considers that the effects of the illegality which vitiates Regulation No 2362/98 are all the more serious since that regulation contains no means of remedying, in cases of extreme hardship, the blatant unfairness to operators as a result of the reference period being put back by a year. According to the applicant, Article 30 of Regulation No 404/93 confers wide powers on the Commission. Those powers are, however, intended solely to assist the transition from the market conditions existing before the entry into force of Regulation No 404/93 to the arrangements introduced by that regulation. Regulation No 2362/98, however, altered the actual organisation of the market in bananas.

65 Lastly, the applicant considers that the Commission was in breach of its obligation to state reasons in that it did not explain in Regulation No 2362/98 why it was necessary to take the years 1994 to 1996 as the reference period.

66 The Commission considers that the claim that the reference period was established arbitrarily should be dismissed as unfounded.

67 First, as regards the applicant's argument that the choice of the period 1994-1996 frustrated the legitimate expectations of former operators in Category A, the Commission contends that there can be no legitimate expectations regarding the continuance of a certain pattern of reference periods.

68 The Commission then explains that the choice of 1994 to 1996 is justified on several grounds.

69 First, it was on the basis of the quantities which were exported by the countries which were the main suppliers of third-country bananas to the Community from 1994 to 1996 that those countries' share of the tariff quota was calculated. According to the Commission, it had to choose the same reference period for granting import licences to individual operators.

70 Second, it was obliged to choose the period 1994 to 1996 because at the time Regulation No 2362/98 was adopted the definitive figures for imports which had actually entered the Community were only available for that period, and the 1997 figures were only provisional.

71 The Commission argues that the reference quantities for the various operators cannot be decided according to the allocation method used under the former market organisation since the figures would not be available until the end of a marketing season, when the figures for the quantities actually imported were produced in their final form. It was only on the basis of those figures that it was possible to determine the quantities imported by each operator under the conditions laid down in the second subparagraph of Article 5(3) of Regulation No 2362/98.

72 As regards the alleged absence of any means of remedying the serious injustice allegedly caused by the new arrangements, the Commission argues that any temporary difficulties which may arise on the occasion of a major reform of a market organisation can, in principle, be settled by applying the arrangements provided for in the event of extreme hardship. It adds however that abandoning 1997 as the reference year as regards the issuing of licences for 1999 does not constitute *per se* such a case. Acknowledgement of a case of extreme hardship calls for a detailed examination of all the circumstances relating to the situation of the operator concerned.

73 Lastly, the Commission challenges as unfounded the claim that the obligation to state reasons was infringed. First, according to the case-law of the Court of Justice, a possible inadequacy in the statement of the reasons on which a measure contained in a regulation is based is not sufficient to render the Community liable (see Case 106/81 *Kind* v *EEC* [1982] ECR 2885, and *AERPO and Others* v *Commission*). Second, the reasons which caused the Commission to choose the reference period in question were set out in the third recital in the preamble to Regulation No 2362/98 in a way which meets the requirements laid down in the case-law of the Court of Justice regarding the obligation to state reasons under Article 190 of the EC Treaty (now Article 253 EC) (see Case C-352/96 *Italy* v *Council* [1998] ECR I-6937, paragraph 40).

Findings of the Court

74 It is settled case-law that since the Community institutions enjoy a margin of discretion in the choice of the means needed to achieve their policy, operators cannot claim to have a legitimate expectation that an existing situation which is capable of being altered by decisions taken by those institutions within the limits of their discretionary power will be maintained (see Case 52/81 *Faust* v *Commission* [1982] ECR 3745, paragraph 27, *Germany* v *Council*, cited above, paragraph 80, and Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 77).

75 This is particularly true in an area such as the common organisation of markets, which involves constant adjustments to meet changes in the economic situation (see Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 57, and Joined Cases C-296/93 and C-307/93 *France and Ireland* v *Commission* [1996] ECR I-795, paragraph 59).

76 In the present case, since determination of the reference period to be taken into account in allocating import licences to operators is dependent on the choice of methods needed in order to carry out the policy of the Community institutions with regard to the common organisation of the banana markets, those institutions have a discretion in this matter. In those circumstances, the applicant could not entertain a legitimate expectation that the relative timing of the reference period taken into account for the purposes of issuing import licences, as provided for in the original version of Regulation No 404/93, would be maintained. Thus, it could not legitimately expect that, following the changes in the common arrangements for banana imports, 1997 should be included in the reference period for the allocation of import licences for 1999.

77 Furthermore, the applicant's argument that by adopting the years 1994 to 1996 as the reference period the Commission took an arbitrary decision is unfounded. The applicant did not produce any evidence to show that the Commission's statement that it did not have the actual import figures for 1997 is wrong. As the Commission explained at the hearing, due to the changes in the arrangements for importing bananas into the Community, the figures for 1997 were not collected by Commission staff or by the authorities of the Member States, since at that time it was considered that those figures were not needed under the new arrangements. The period 1994-1996 was therefore the most recent period for which the Commission had the figures for actual imports. Furthermore, the applicant did not, in its arguments, challenge the Commission's explanation that the reference period laid down for operators had to correspond to the period to be taken into account in determining the shares of the tariff quota for the main supplier countries (see paragraph 69 above).

78 Equally unfounded is the applicant's claim that Regulation No 2362/98 does not provide any means of remedying, in cases of extreme hardship, serious injustice caused to operators as a result of putting the reference period back by a year. In this connection, it should be noted that, as the Commission stated, the temporary difficulties which can arise during the reform of a market organisation may in principle be settled on an individual basis by applying the arrangements for hardship cases provided for in Article 20(d) of Regulation No 404/93, as amended by Regulation No 1637/98, even if that requires a detailed examination of all the circumstances of the operator concerned (see by analogy Case C-68/95 *T. Port* [1996] ECR I-6065). The applicant, which has not shown that its situation is one of hardship, cannot claim that the Community incurs non-contractual liability as a result of the alleged absence of such means.

79 Finally, the applicant's claim that the Commission infringed its obligation to state reasons because in Regulation No 2362/98 it does not explain why it was

necessary to choose 1994-1996 as the reference period should be rejected. In this connection, it is sufficient to point out that as this is a complaint relating purely to form, a possible inadequacy in the statement of the reasons on which a measure contained in a regulation is based is not sufficient to render the Community liable (see *Kind* v *EEC*, paragraph 14).

80 It follows from the foregoing that the Community cannot incur liability on the ground that the reference period was established arbitrarily or that the obligation to state reasons was not complied with.

81 Since the applicant has failed to establish the existence of unlawful conduct for which the Community may incur non-contractual liability, the action must be dismissed.

Costs

82 Under Article 87(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action.**

2. **Orders the applicant to pay its own costs and those of the Commission.**

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 20 March 2001.

H. Jung
Registrar

P. Lindh
President