ORDER OF THE COURT (Third Chamber)
13 November 2001 *

In Case C-430/00 P,

Anton Dürbeck GmbH, established in Frankfurt am Main (Germany), represented by G. Meier, Rechtsanwalt,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) in Case T-252/97 *Dürbeck* v *Commission* [2000] ECR II-3031, seeking to have that judgment set aside,

the other parties to the proceedings being:

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

defendant at first instance,

* Language of the case: German.

Kingdom of Spain, represented by R. Silva de Lapuerta, acting as Agent, with an address for service in Luxembourg,

and

French Republic, represented by G. de Bergues and C. Vasak, acting as Agents,

interveners at first instance,

THE COURT (Third Chamber),

composed of: C. Gulmann, acting for the President of the Third Chamber, J.-P. Puissochet and J.N. Cunha Rodrigues (Rapporteur), Judges,

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

after hearing the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 21 November 2000, Anton Dürbeck GmbH ('Dürbeck' or the 'appellant') brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance in Case T-252/97 *Dürbeck* v *Commission* [2000] ECR II-3031 (the 'contested judgment') by which the Court of First Instance dismissed Dürbeck's application for partial annulment of the Commission decision of 10 July 1997 on the adoption of transitional measures in favour of the appellant within the framework of the common organisation of the market in bananas (the 'contested decision').

Legal background

2 As regards the legal background to the dispute, the Court of First Instance stated:

'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), in Title IV, replaced the various national arrangements governing trade with third countries by a common system.

2 The first paragraph of Article 17 of Regulation No 404/93 provides:

"Any importation of bananas into the Community shall be subject to the submission of an import licence issued by the Member State at the request of any party concerned, irrespective of his place of establishment within the Community, without prejudice to the special provisions made for the implementation of Articles 18 and 19."

3 Article 18(1) of Regulation No 404/93, 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 a tariff quota of 2.1 million tonnes (net weight) for 1994 and 2.2 million tonnes (net weight) for subsequent years was to be opened for imports of bananas from third countries other than African, Caribbean and Pacific (ACP) States (hereinafter "third-country bananas") and non-traditional imports of bananas from ACP States (hereinafter "non-traditional ACP bananas"). Within that quota, imports of third-country bananas were to be subject to duty of ECU 75 per tonne and imports of non-traditional ACP bananas to zero duty.

4 Article 19(1) of Regulation No 404/93 divided the tariff quota, which was to be opened for 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).

5 Article 19(2) of Regulation No 404/93 is 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.

...

For the second half of 1993, each operator shall be issued licences on the basis of half of the annual average quantity marketed between 1989 and 1991."

6 Article 30 of Regulation No 404/93 is worded as follows:

"If specific measures are required after July 1993 to assist the transition from arrangements existing before the entry into force of this Regulation to those laid down by this Regulation, and in particular to overcome difficulties of a sensitive nature, the Commission... shall take any transitional measures it judges necessary."'

Facts of the dispute

3 As regards the facts of the dispute, the Court of First Instance stated:

'8 The applicant is an undertaking established in Germany and trading in fruit and vegetables. It began to market bananas at the end of 1992.

9 On 29 November 1991 the applicant concluded a contract governed by Netherlands law with the Ecuadorean company Consultban (hereinafter "Consultban"), under which it undertook to market between 100 000 and 150 000 tonnes of bananas per week (hereinafter "the contract").

10 The contract provides that the applicant is entitled to commission of 6% of total sales volume. Under point 3 of Addendum B to the contract, however, the applicant is required to pay Consultban the difference between the net proceeds of sales and the official prices which Consultban pays to the Ecuadorean growers (hereinafter the "price guarantee").

11 Clause 4.1. states that the contract is to be valid for seven years; it also provides that the contract is to be renewable for another period of seven years if not otherwise agreed. The contract was still in force when the present application was lodged.

12 Clause 4.1. also specifies that:

> "... Both parties have the right to terminate this contract with 180 days' notice in five years from the date hereof, provided that the party terminating the contract withdraws irrevocably [from] the banana business in Europe from the date of termination either directly or indirectly or through any other person and/or affiliated company or any other third party whatsoever, for a period of five years from the date of termination."

13 Moreover, Clause 6.3. of the contract provides:

> "The parties agree and accord that they are aware that circumstances may arise which will render compliance with the terms and conditions of this contract impossible. These vis major cases may include, but are not limited to, occurrences of internal commotion in the countries involved, war whether declared or not, act of God, strikes and the like which will render the normal evolution of trade activities impossible, plagues, meterological adverse conditions such as floods, droughts, etc., revolutions or insurrections, as well as the closure of the [Panama Canal]. In the event that any non - performance of this contract results from *Force Majeure*, both parties will negotiate in good faith to find a solution to the problem, failing which this contract may be cancelled by either party without any claim for damages provided that vessels loading or loaded at sea will remain subject to this contract."

14 Last, point 2 of Addendum B to the contract provides:

> "[Consultban] and [the applicant] agree that in the event [the applicant] requests the cancellation of this contract for reasons not covered as per the terms of the contract, and [Consultban] is obliged to indemnify owners as per the terms of COA [Contract of Affreightment] between the owners and [Consultban], then [the applicant] to indemnify [Consultban], upon first request in writing up to the amount of USD 1 000 000, provided adequate proofs are presented by [Consultban]."

15 The applicant began to market bananas under the contract at the end of 1992.

16 Regulation No 404/93 entered into force on 26 February 1993 and became applicable on 1 July 1993.

17 In accordance with Article 19(1) of that regulation, the applicant was classified as a category C trader. In 1996, after taking over an undertaking, the applicant acquired the status of a category A trader.

18 Since it only obtained a small number of import licences to import bananas into the Community, the applicant had to sell most of the bananas covered by the contract outside the Community, at a price which meant that the price guarantee became applicable. Under that guarantee the applicant had to pay Consultban USD 1 661 537 in 1994, USD 4 211 142 in 1995 and USD 1 457 549 in 1996.

19 On 24 December 1996, in consideration of the judgment in *T. Port* [Case C-68/95 [1996] ECR I-6065], the applicant requested the Commission to issue to it, as a transitional measure pursuant to Article 30 of Regulation No 404/93, additional licences to import third-country bananas at the reduced rate of ECU 75 per tonne, in the following amounts:

— 42 000 tonnes for 1997 as a category A trader;

— 48 000 tonnes for 1998 as a category A trader, or a total volume of 65 800 tonnes;

— 48 000 tonnes for 1999 as a category A trader, or a total volume of 65 800 tonnes.

20 By decision of 10 July 1997 (hereinafter 'the contested decision') the Commission granted that request in part.

21 Thus, under Article 1(3) of the contested decision, the applicant obtained additional import licences up to the amount of, first, the losses which it had incurred in 1994 as a result of performing the contract with Consultban and, second, USD 1 000 000. The applicant's request was rejected, in Article 2 of the contested decision, in so far as it related to "licences over and above those allocated under Article 1".

22 The second subparagraph of Article [1(4)] of the contested decision provides that those import licences are to be counted against the specific reserves provided for cases of hardship in the tariff quota. Article 1(6) provides that the quantities of bananas imported into the Community by the applicant under those licences are not to be taken into account for the purpose of determining its total reference quantities for future years.'

4 It is in those circumstances that, on 16 September 1997, Dürbeck brought an action before the Court of First Instance seeking partial annulment of the contested decision.

The contested judgment

5 By the contested judgment the Court of First Instance dismissed the application.

6 Firstly, the Court of First Instance, in paragraphs 39 to 43 of the contested judgment, partially upheld the arguments of the Commission and the Spanish Government challenging the admissibility of certain pleas submitted by Dürbeck. In particular, the Court dismissed, on the ground that it was submitted out of time, the plea relating to breach of the principle of equal treatment. On that point, it stated:

'39 It follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the application initiating proceedings must contain, *inter alia*, a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a plea which may be regarded as

amplifying a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463, paragraph 38, and Case T-118/96 *Thai Bicycle* v *Council* [1998] ECR II-2991, paragraph 142).

...

42 On the other hand, it was only in its reply that the applicant first raised a plea alleging breach of the principle of equal treatment. While it is true that the Commission refers to that principle in certain passages of its defence, it does so only in passing and in a different context from that in which the applicant develops its plea. Thus, in paragraph 16 of its defence, the Commission merely observes, generally, that "in the interest of equal treatment for all traders", who were also obliged to adapt to the new legal and economic conditions, it had to take account of the fact that the applicant had the opportunity to cancel the contract against payment of the sum of USD 1 000 000 "when determining the scope of the provisions regulating cases of hardship" (see, to the same effect, paragraph 33 of the defence). Likewise, in paragraphs 28 and 32 of its defence, the Commission merely states, generally, that to take into account, in determining the applicant's total reference quantities for future years, the quantities imported by the applicant under the additional licences would have the effect of granting the applicant excessive compensation and thereby treating it more favourably than other traders. In its reply and at the hearing, on the other hand, the applicant claims essentially that the principle of equal treatment obliged the Commission to treat the applicant in the same way as traders in category A who, like the applicant, had adopted certain commercial conduct before the publication of the draft organisation of the market in bananas in the *Official Journal of the European Communities* but who, unlike the applicant, were able to continue to market their bananas during the reference period; and the applicant concludes that it should have been treated as though it had

imported, during the 1989 to 1991 reference period, the quantities which it actually imported between 1993 and 1995. As thus developed by the applicant, the plea alleging breach of the principle of equal treatment is manifestly unrelated to the Commission's observations referred to above and cannot therefore be regarded as based on matters of law or of fact which came to light in the course of the proceedings. It must therefore be declared inadmissible.'

7 Secondly, on the substance of the case, the Court of First Instance dismissed the two parts of the applicant's plea relating to infringement of Article 30 of Regulation No 404/93, one part concerning Article 2 of the contested decision, the other concerning Article 1(6).

8 Under the first part of that plea, the appellant challenged the lawfulness of the contested decision in that in Article 2 thereof rejected the appellant's request for the allocation of additional import licences in so far as it exceeded the quantities of licences referred to in Article 1(3) of that decision. In rejecting the first part of the plea, the Court of First Instance gave, *inter alia*, the following grounds:

'76 As regards the second question, there is nothing to show that the Commission exceeded the limits of the broad discretion which it also enjoys in determining the subject-matter of the measures to be taken to enable the traders concerned to overcome cases of hardship by confining itself to allocating the applicant additional import licences up to the amount of, first, the loss incurred by the applicant in 1994 as a result of performing the contract and, second, USD 1 000 000.

77 It should first be observed that the applicant does not challenge the lawfulness of Article 2 of the contested decision in so far as it compensates

the loss which the applicant incurred in 1994. It disputes that provision only in so far as compensation for the loss which it incurred in 1995 and subsequent years is limited by that provision to the issue of additional import licences for the amount of USD 1 000 000 and claims, essentially, that it was under no obligation to cancel the contract, in order to avoid liability thereunder in 1995, by taking advantage of the clause in point 2 of Addendum B to the contract.

78 Next, the applicant's assertion that point 2 of Addendum B to the contract was intended only to cover, up to the amount mentioned above, a claim for compensation from Consultban by the shipowner for non-performance of the contract of affreightment must be rejected. It was only in its written answer to the questions put by the Court, and at the hearing, that the applicant put that argument forward. Until then it had never disputed that that clause allowed it to cancel the contract in any event against payment of a penalty of USD 1 000 000 to Consultban.

79 In the light of the purpose of Article 30 of Regulation No 404/93 and the fact that that article is to be interpreted restrictively as a derogation from the general provisions applicable, it must be held that the Commission applied that article reasonably in taking the view that it was only required to make compensation for the costs which the trader concerned had to incur to adapt to the new legal conditions.

80 In that context, the Commission was justified in taking account of the fact that point 2 of Addendum B to the contract allowed the applicant to cancel the contract before it had run its course against payment of the sum of USD 1 000 000 to Consultban. In that regard, contrary to what the applicant claims, if it had taken advantage of that cancellation clause it would not have had to withdraw from the banana market for five years: the obligation to withdraw from the market was stipulated only in the event of the contract being cancelled in accordance with Article 4.1. Furthermore, the applicant had not relied on that argument during the

administrative procedure preceding the adoption of the contested decision and, accordingly, the lawfulness of that decision cannot be called in question on the basis of that argument.

81 The Commission was likewise justified in taking the view that if the applicant had acted as a trader exercising due care it would in fact have cancelled the contract in order to be released from it in 1995, in accordance with point 2 of Addendum B to the contract, for the purpose of limiting its own loss. It is common ground that the applicant had to pay the sum of USD 1 661 537 to Consultban in 1994 under the price guarantee, or a sum higher than the penalty of USD 1 000 000 provided for in point 2 of Addendum B, and it was very likely that a sum in excess of the latter amount would also have to be paid under that guarantee in the following years.

82 The Commission's approach was all the more reasonable because the applicant had been active on the banana market only for a short time and because it had a broad range of activities connected with other fruit and with vegetables.

83 Contrary to what the applicant claims, moreover, that approach cannot be interpreted as meaning that the Commission was forcing the applicant effectively to cancel the contract. The Commission's approach is based solely on the wholly justified consideration that it was not for the Community to bear the consequences of the applicant's business decision to continue to perform the contract in spite of the resulting losses.

84 It follows from the foregoing that the Commission correctly applied Article 30 of Regulation No 404/93 in adopting Article 2 of the contested decision.

85 The first part of the application must therefore be dismissed as unfounded.'

9 Under the second part of its plea, the appellant challenged the lawfulness of the contested decision in that, under Article 1(6), the quantities of bananas imported into the Community under the additional import licences were not taken into account for the purpose of determining its total reference quantities for future years. In rejecting the second part of the plea, the Court of First Instance gave, *inter alia*, the following grounds:

'93 It has been shown above, in the examination of the first part of the application, that the Commission did not exceed the limits of its broad discretion by taking the view that the grant to the applicant of additional import licences up to the amount of, first, the losses which it had incurred as a result of performing the contract in 1994 and, second, USD 1 000 000 made it possible to resolve the case of hardship facing the applicant.

94 In those circumstances, there would have been no justification for granting the applicant any further advantage under Article 30 of Regulation No 404/93, such as taking into account the quantities of bananas imported under the abovementioned licences when determining the reference quantities by way of tariff quotas for future years.

95 At the hearing, moreover, the Commission and the applicant accepted that the hardship suffered by the applicant could have been compensated by the grant of a lump-sum payment rather than by the allocation of additional import licences.

96 Those conclusions cannot be invalidated by the arguments which the applicant bases on [Commission] Regulation [EC] No 2601/97 [of 17 December 1997 establishing, pursuant to Article 30 of Council Regulation (EEC) No 404/93, a reserve for 1998 to resolve cases of hardship], which merely establishes a reserve of 20 000 tonnes to allow transitional measures to be adopted in order to resolve cases of hardship. The fact that Article 1 of that regulation provides that that reserve is to be counted against the tariff quota referred to in Article 18 of Regulation No 404/93 does not in any way mean that the quantities granted in the context of the reserve must necessarily be taken into account for the purpose of determining reference quantities for future years.

...

99 It follows that the second part of the application is unfounded and that, accordingly, the application must be dismissed in its entirety.'

The appeal

10 In its appeal Dürbeck asks the Court to set aside the contested judgment and annul the contested decision and to order the Commission to pay the costs of the proceedings.

11 Dürbeck claims that the Court of First Instance erred in law in rejecting as inadmissible its plea concerning breach of the principle of equal treatment (first plea), in holding that point 2 of Addendum B of the contract allowed it to cancel the contract before it had run its course (second plea) and in finding lawful the Commission's refusal to take into account, for the purpose of determining

reference quantities under tariffs quotas for future years, licences allocated in order to resolve the situation of hardship in its case (third plea).

12 The Commission and the French Republic contend that the appeal should be dismissed as being either clearly inadmissible or clearly unfounded.

13 The Kingdom of Spain proposes that the Court should dismiss the appeal as being inadmissible in that it seeks total annulment of the contested decision and dismiss the remainder of the appeal as being unfounded.

14 Under Article 119 of the Court's Rules of Procedure, where the appeal is clearly inadmissible or clearly unfounded, the Court may at any time dismiss it by reasoned order, without opening the oral procedure.

The first plea

15 Dürbeck claims that the Court's Rules of Procedure do not limit the right of parties to raise a new plea based on matters which only came to light in the course of the proceedings. In the present proceedings, such a matter is constituted by the fact that the Commission is pleading, for the first time in its defence, the necessity of ensuring equal treatment for all traders in accordance with the principle of equal treatment. According to Dürbeck, the plea that, in the present proceedings, it first raised in its reply is the 'other side of the coin' in relation to a plea which

the Commission had first raised in its defence. Dürbeck concedes that it has not confined itself to challenging the validity of the Commission's arguments, but has used them to show the result which would have been achieved by a correct application of the principle of equal treatment in its favour.

16 Dürbeck adds that, since the requirement to comply with the principle of equal treatment was not referred to in the contested decision, it could properly consider that the present proceedings were limited to that decision and there was no reason for it to raise, of its own motion and in advance, a plea in defence by the Commission of which it could not be aware. The Court of First Instance therefore erred in law in not examining the appellant's plea relating to breach of the principle of equal treatment.

17 It must be observed that the Court of First Instance was right in pointing out, in paragraph 39 of the contested judgment, that it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the application initiating proceedings must contain, *inter alia*, a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. In the same paragraph, the Court also properly pointed out that a plea which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the originating application and which is closely connected therewith, must be declared admissible.

18 The Court of First Instance then observed, in paragraph 42 of the contested judgment, that the appellant had first raised in its reply a plea alleging breach of the principle of equal treatment and that the plea was manifestly unrelated to the Commission's observations formulated in its defence.

19 The Court of First Instance properly concluded from those findings, which have not been challenged before the Court of Justice, that that plea, since it cannot be considered as founded on matters of law or fact which came to light in the course of the proceedings, had to be declared inadmissible. In those circumstances, there was nothing to prevent the appellant from raising the plea at the stage of the application initiating proceedings before the Court of First Instance.

20 The first plea must therefore be rejected as clearly unfounded.

The second plea

21 Dürbeck contends that the Court of First Instance disregarded the meaning which the parties intended to attribute to point 2 of Addendum B to the contract, in finding, in paragraph 78 of the contested judgment, that that clause allowed it to cancel the contract, on no particular ground, before it had run its course against payment of a penalty of USD 1 000 000 to Consultban. The right of the parties to terminate the contract itself, in accordance with its provisions, is governed in detail by Articles 4.1 and 6.3 of the contract.

22 Dürbeck contends that by the contested clause Consultban was seeking solely to protect itself against claims for compensation which, in the context of contracts of affreightment, the shipowners could bring against it if Dürbeck terminated the contract with Consultban for reasons other than those set out in the contract. For that reason, Dürbeck's guarantee was included as an addendum to the contract. Dürbeck argues that, on the basis of that interpretation of the contested clause, there was even less reason to refer to it during the administrative procedure, in the course of which it was not, moreover, heard before the decision was taken, given that the Commission had not asked any question on that point. According

to Dürbeck, it was only when a question was put by the Court of First Instance on the scope of that clause that the clause was brought into issue.

23 Consequently, contrary to what the Court of First Instance found in paragraph 81 of the contested judgment, the question of cancellation of the contract before it had run its course was not in issue, since the conditions referred to in Article 6.3 of the contract were not satisfied. The Community is under an obligation not to infringe the principle that contracts must be honoured, which the Court of First Instance called in question when it stated, in paragraph 83, 'that it was not for the Community to bear the consequences of the applicant's business decision to continue to perform the contract in spite of the resulting losses'.

24 In accordance with the settled case-law of the Court of Justice, the Court of First Instance has sole jurisdiction to find the facts, save where the factual inaccuracy of its conclusions results from the documents before it. The appraisal of the facts does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (see, in particular, Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 78).

25 At paragraph 78 of the contested judgment, the Court of First Instance rejected Dürbeck's argument based on a restrictive interpretation of point 2 of Addendum B to the contract, observing that it was only in its written answer to the questions put by the Court, and at the hearing, that Dürbeck had put that argument forward and that until then it had never disputed that that clause allowed it to cancel the contract in any event against payment of a penalty of USD 1 000 000 to Consultban.

26 As the Spanish Government has, moreover, rightly pointed out, Dürbeck itself had mentioned in its originating application to the Court of First Instance, when it expressly referred to point 2 of Addendum B to the contract, the possibility of terminating the contract before it had run its course 'for reasons other than those it provided for', explaining that it 'had contracted to pay Consultban compensation of USD 1 000 000' in such a situation.

27 Consequently, the Court of First Instance could properly find, without misinterpreting the facts, that point 2 of Addendum B to the contract allowed the appellant to cancel the contract before it had run its course against a payment to Consultban of a USD 1 000 000 penalty. Accordingly, the Court rightly found, in paragraph 81 of the contested judgment, that the Commission was justified in taking the view that if the appellant had acted as a trader exercising due care it would in fact have cancelled the contract, in accordance with point 2 of Addendum B to the contract, for the purpose of limiting its own loss.

28 In those circumstances, the second plea must also be rejected.

The third plea

29 Dürbeck argues that although the Commission has a broad discretion in determining the way in which it takes account of transitional difficulties related to the introduction of the common organisation of the market in bananas ('COM') (see, in particular, *T. Port*, cited above), its discretion is none the less not unlimited.

30 According to Dürbeck, the Commission had to state the reasons for which, instead of paying in cash the compensation due to Dürbeck, it considered it necessary to grant compensation in the form of additional import licences not taken into account for the purpose of determining reference quantities for future years.

31 Dürbeck observes that, according to the Commission, it had suffered loss as a result of the payment of a sum of money to Consultban. It would have been reasonable to compensate it by means of that sum of money instead of allocating it additional import licences and exposing it to the risk of marketing those bananas if imports of them were not taken into account for the purpose of determining reference quantities for future years.

32 Dürbeck contends that the Commission was not entitled to create, to Dürbeck's detriment, a derogation from Regulation No 404/93. According to Dürbeck, the Commission, in choosing to allocate it additional import licences on the ground that there was a case of hardship, could not refuse to take those licences into account for the purpose of determining the reference quantities, in accordance with Article 19 of Regulation No 404/93, on the ground that the choice could involve, in relation to the development of the COM, excessive compensation for its loss. Since Regulation No 404/93 provides, in Article 19, for a regime under which all imports during a reference period must be taken into account in determining the tariff quotas for future years, the Commission may depart from that higher-ranking regime only where there are reasons to proceed in that way, which is not the case here.

33 In relation to the argument that the Commission should have paid the appellant a sum of money in order to compensate it for the hardship suffered by it, instead of allocating to it additional import licences, it need merely be observed that Dürbeck did not put forward such a plea at any time before the Court of First Instance. In accordance with the case-law of the Court of Justice, to allow a party to raise before it a plea which it has not raised before the Court of First Instance would amount to allowing it to bring before the Court of Justice, whose jurisdiction relating to appeals is limited, proceedings that are more wide-ranging

than those before the Court of First Instance. In the context of an appeal, the jurisdiction of the Court of Justice is therefore limited to reviewing the assessment by the Court of First Instance of the pleas argued before it (see, in particular, order in Case C-111/99 P *Lech-Stahlwerke* v *Commission* [2001] ECR I-727, paragraph 25).

34 Consequently, that argument is clearly inadmissible.

35 As regards the argument that the Commission, since it had decided to allocate to the appellant additional import licences on account of hardship, should have taken into account the quantities of bananas relating to those licences for the purpose of determining the reference quantities for future years, the Court of First Instance did not, after observing, at paragraph 93 of the contested judgment, that the measures taken by the Commission made it possible to resolve the case of hardship facing the appellant, err in law in stating, in paragraph 94 of that judgment, that there would have been no justification for according to the appellant any further advantage under Article 30 of Regulation No 404/93, such as taking into account the quantities of bananas imported under the above-mentioned licences when determining the reference quantities by way of tariff quotas for future years.

36 The Court of First Instance also rightly held, in paragraph 96 of the contested judgment, that the fact that Article 1 of Regulation No 2601/97 establishes a reserve of 20 000 tonnes, to be counted against the tariff quota referred to in Article 18 of Regulation No 404/93, in order to allow transitional measures to be adopted in order to resolve cases of hardship, does not in any way mean that the quantities allocated in the context of the reserve must necessarily be taken into account for the purpose of determining the reference quantities for future years.

37 The allocation of additional import licences under the transitional provisions laid down in Article 30 of Regulation No 404/93 is subject to the condition that such

measures are intended to assist transition from national arrangements to the COM and that they are necessary for that purpose (see, to that effect, in particular, *T. Port*, cited above, paragraph 35). Consequently, traders cannot invoke an acquired right to the taking into account of reference quantities allocated in such exceptional circumstances for the purpose of determining, in accordance with the general provisions of the COM, the reference quantities for future years, since, as the Court of First Instance held in the present case, the Commission could properly consider that the temporary allocation of additional licences made it possible to resolve the transitional difficulties found to exist.

38 In those circumstances, that argument must be rejected as being clearly unfounded.

39 It follows from all the foregoing considerations that the appeal is in part clearly inadmissible and in part clearly unfounded and that it must, therefore, be dismissed pursuant to Article 119 of the Rules of Procedure.

Costs

40 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 of those Rules, 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 Commission has applied for the costs and the appellant has been unsuccessful, the appellant must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of those Rules the Member States and institutions which intervene in the proceedings are to bear their own costs.

On those grounds,

THE COURT (Third Chamber)

hereby orders:

1. **The appeal is dismissed.**

2. **Anton Dürbeck GmbH shall pay the costs.**

3. **The French Republic and the Kingdom of Spain shall bear their own costs.**

Luxembourg, 13 November 2001.

R. Grass

Registrar

F. Macken

President of the Third Chamber