JUDGMENT OF THE COURT (Second Chamber)

30 June 2005 *

In Case C-295/03 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 2 July 2003,

Alessandrini Srl, established in Treviso (Italy),

Anello Gino di Anello Luigi & C. Snc, established in Brescia (Italy),

Arpigi SpA, established in Padua (Italy),

Bestfruit Srl, established in Milan (Italy),

* Language of the case: Italian.

Co-Frutta SpA, established in Padua,

Co-Frutta Soc. coop. arl, established in Padua,

Dal Bello Sife Srl, established in Padua,

Frigofrutta Srl, established in Palermo (Italy),

Garletti Snc, established in Bergamo (Italy),

London Fruit Ltd, established in London (United Kingdom),

represented by W. Viscardini Donà and G. Donà, avvocati, with an address for service in Luxembourg,

appellants,

the other party to the proceedings being:

Commission of the European Communities, represented by C. Cattabriga and L. Visaggio, acting as Agents, assisted by A. Dal Ferro, avvocato, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann, R. Schintgen (Rapporteur), G. Arestis and J. Klučka, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 February 2005,

after hearing the Opinion of the Advocate General at the sitting on 12 April 2005,

gives the following

Judgment

1 By their appeal, Alessandrini Srl, Anello Gino di Anello Luigi & C. Snc, Arpigi SpA, Bestfruit Srl, Co-Frutta SpA, Co-Frutta Soc. coop. arl, Dal Bello Sife Srl, Frigofrutta Srl, Garletti Snc and London Fruit Ltd request that the Court set aside the judgment of the Court of First Instance of the European Communities in Joined Cases T-93/00 and T-46/01 *Alessandrini and Others* v *Commission* [2003] ECR II-1635 ('the contested judgment'), by which it dismissed their actions seeking, firstly, the annulment of letter No 02418 of 26 January 2000 from the Commission of the European Communities and compensation for the damage suffered due to that letter (Case T-93/00) and, secondly, the annulment of Commission letter No AGR 030905 of 8 December 2000 and compensation for the damage which they were caused by that letter (Case T-46/01).

Law

Regulation (EEC) No 404/93

2 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), implemented, in Title IV, with effect from 1 July 1993, a common arrangement for trade with third countries in place of the various national arrangements. A distinction was drawn between 'Community bananas' harvested in the Community and 'third-country bananas'

originating from third countries other than the African, Caribbean and Pacific States ('the ACP States'), 'traditional ACP bananas' and 'non-traditional ACP bananas'. Traditional ACP bananas and non-traditional ACP bananas ('ACP bananas') were the quantities of bananas exported by the ACP States which, respectively, did not or did exceed the quantities traditionally exported by each of those States, as laid down in the Annex to that regulation.

3 Under the first paragraph of Article 17 of Regulation No 404/93, the importation of bananas into the Community is to be subject to the submission of an import licence to be issued by the Member States 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.

4 Article 18(1) of that regulation provided for the opening of an annual tariff quota of two million tonnes (net weight) for imports of third-country bananas and non-traditional ACP bananas. Within the framework of that tariff quota, imports of third-country bananas were to be subject to a duty of ECU 100 per tonne and imports of non-traditional ACP bananas were subject to a zero duty. Article 18(2) provided that, apart from the tariff quota, imports of non-traditional ACP bananas and imports of third-country bananas were to be subject to duties of ECU 750 per tonne and ECU 850 per tonne respectively.

5 Article 19(1) of that regulation broke down the tariff quota, opening it 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).

6 The first sentence of Article 19(2) of Regulation No 404/93 provides:

'On the basis of separate calculations for each of the categories of operators [A and B], 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.'

Regulation (EEC) No 1442/93

7 On 10 June 1993, the Commission adopted Commission Regulation (EEC) No 1442/93 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6, 'the 1993 arrangement'). That arrangement remained in effect until 31 December 1998.

8 Under the terms of the first subparagraph of Article 5(1) of Regulation No 1442/93, the competent authorities of the Member States were to establish each year for each Category A and Category B operator registered with them the average quantities

marketed during the three years prior to the year preceding that for which the quota was opened, broken down by activity engaged in by the operator in accordance with Article 3(1) of that regulation. That average was termed the 'reference quantity'.

9 Article 14(2) of Regulation No 1442/93, as amended by Commission Regulation (EC) No 2444/94 of 10 October 1994 (OJ 1994 L 261, p. 3), provided:

'Import licence applications shall be lodged with the competent authorities of any Member State during the first seven days of the last month of the quarter preceding that in respect of which the licences are issued.'

Regulation (EC) No 1637/98

10 Council Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation (EEC) No 404/93 (OJ 1998 L 210, p. 28) introduced, with effect from 1 January 1999, important amendments to the common organisation of the market in bananas. Those amendments concern, in particular, Articles 16 to 20 in Title IV ('Trade with third countries') of Regulation No 404/93.

11 Article 18(1) of Regulation No 404/93, as amended by Regulation No 1637/98 ('Regulation No 404/93'), provided for the opening of an annual tariff quota of 2.2

million tonnes (net weight) for imports of third-country and non-traditional ACP bananas. Within the framework of that tariff quota, imports of third-country bananas were to be subject to duty of ECU 75 per tonne while imports of non-traditional ACP bananas were to be free of duty.

12 Article 18(2) of Regulation No 404/93 provided for an additional annual tariff quota of 353 000 tonnes (net weight) to be opened for imports of third-country and of non-traditional ACP bananas. Within the framework of the tariff quota, imports of third-country bananas were also to be subject to duty of ECU 75 per tonne while imports of non-traditional ACP bananas were to be free of duty.

13 The first subparagraph of Article 19(1) of Regulation No 404/93 states:

'The tariff quotas indicated in Article 18(1) and (2) and imports of traditional ACP bananas shall be managed in accordance with the method based on taking account of traditional trade flows ("traditionals/newcomers").'

14 Under Article 20(d) and (e) of Regulation No 404/93, the Commission has the power to adopt, in accordance with the procedure of the Management Committee for Bananas laid down in Article 27 of that regulation, detailed rules for the management of the tariff quotas referred to in Article 18 of that regulation, such

rules including 'specific provisions needed to facilitate the switch from the import arrangements applying on and after 1 July 1993 to the ... arrangements of ... Title IV [of Regulation No 404/93]' and 'measures needed to ensure respect for obligations stemming from agreements concluded by the Community under Article [300 EC]'.

Regulation (EC) No 2362/98

15 On 28 October 1998, the Commission adopted Regulation (EC) No 2362/98 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). Under Article 31 of Regulation No 2362/98, Regulation No 1442/93 was repealed as from 1 January 1999. The new provisions concerning the management of import licences within the framework of the tariff quotas are found in Titles I, II and IV of Regulation No 2362/98 ('the 1999 arrangement').

16 It is important to note the following differences between the 1993 arrangement and the 1999 arrangement:

— the 1999 arrangement no longer differentiates according to the activities engaged in by operators;

— the 1999 arrangement takes account of the quantities of bananas imported;

— the 1999 arrangement increases the tariff quotas and the share allocated to new operators;

— the import licences under the 1999 arrangement are managed without reference to the origin (ACP States or third countries) of the bananas.

17 Article 2 of Regulation No 2362/98 provides, inter alia, that the tariff quotas and traditional ACP bananas, referred to in Article 18(1) and (2) and Article 16, respectively, of Regulation No 404/93, are to be made available as follows:

— 92% to 'traditional operators' as defined in Article 3 of Regulation No 2362/98;

— 8% to 'newcomers' as defined in Article 7 of the latter.

18 Article 4(1) of Regulation No 2362/98 states that each traditional operator registered in a Member State is to receive, for each year and for all the origins listed in Annex I

to that regulation, a single reference quantity based on the quantities of bananas actually imported during the reference period. According to Article 4(2), for imports carried out in 1999, the reference period was to be made up of the years 1994, 1995 and 1996.

19 Article 6(1) of Regulation No 2362/98 provides that '[b]y 30 September at the latest each year, after making the necessary checks and verifications, the competent authorities shall determine, in accordance with Articles 3, 4 and 5, a single, provisional reference quantity for each traditional operator, on the basis of the average quantities of bananas actually imported by them from the origins listed in Annex I during the reference period'. The reference quantity is based on a three-year average, even where the operator has not imported bananas for part of the reference period. According to the first sentence of Article 6(2), the competent authorities are to provide the Commission each year with a list of traditional operators they have registered and the total provisional reference quantities determined for the latter.

20 The rules for issuing import licences are governed by Articles 14 to 22 of Regulation No 2362/98.

21 Article 14(1) of that regulation provides that '[f]or the first three quarters of the year, an indicative quantity expressed as the same percentage of available quantities from each of the origins listed in Annex I may be fixed for the purposes of issuing import licences'.

22 Article 15(1) of that regulation provides that '[f]or each quarter of the year, applications for import licences shall be submitted to the competent authorities of the Member State in which operators are registered during the first seven days of the month preceding the quarter in respect of which the licences are being issued'.

23 Article 17 of the abovementioned regulation provides that '[w]here, for a given quarter and for any one or more of the origins listed in Annex I, the quantities applied for appreciably exceed any indicative quantity fixed under Article 14, or exceed the quantities available, a percentage reduction to be applied to the amounts requested shall be fixed'.

24 Article 18 of Regulation No 2362/98 reads as follows:

'1. Where a percentage reduction has been fixed for one or more given origins under Article 17, operators who have applied for import licences for the origin(s) concerned may:

(a) either renounce their use of the licence by informing the relevant issuing authority accordingly within 10 working days of publication of the Regulation fixing the reduction percentage, whereupon the security lodged against the licence shall be released immediately; or

(b) submit one or more fresh licence applications for the origins for which available quantities have been published by the Commission, up to an amount equal to or smaller than the quantity applied for but not covered by the original licence issued. Such requests shall be submitted within the time-limit laid down in point (a) and shall be subject to all the conditions governing licence applications.

2. The Commission shall immediately determine the quantities for which licences can be issued for each of the origins concerned.'

25 The first subparagraph of Article 19(1) of that regulation provides inter alia that '[t]he competent authorities shall issue import licences for the following quarter not later than the 23rd day of the last month of each quarter'.

26 Article 20(1) of that regulation provides:

'Unused quantities covered by a given licence shall be re-allocated to the same operator — whether holder or transferee — upon application, for use in a subsequent quarter but still within the year of issue of the original licence. The security shall be retained in proportion to the quantities not used up.'

27 A certain number of transitional provisions for the year 1999 are set out under Title V of Regulation No 2362/98. Under Article 28(1) of that regulation, applications for registration for 1999 had to be submitted by 13 November 1998 at the latest. In the case of traditional operators, those applications had to include inter alia a figure for the total quantity of bananas actually imported in each of the years of the reference period 1994 to 1996 and the serial numbers of all the import licences and licence extracts used for those imports, together with a list, complete with references, summarising all the documentary evidence showing that duties have been paid.

28 Annex I to Regulation No 2362/98 fixes the distribution of the tariff quotas referred to in Article 18(1) and (2) of Regulation No 404/93 and the traditional ACP quantity (857 000 tonnes).

Regulation (EC) No 250/2000

29 The purpose of Commission Regulation (EC) No 250/2000 of 1 February 2000 on imports of bananas under the tariff quotas and of traditional ACP bananas, and fixing the indicative quantities for the second quarter of 2000 (OJ 2000 L 26, p. 6), as indicated by recital 1 in the preamble and by Article 1, is that 'uninterrupted supplies to the market and continued trade [are] ensured', pending the reform of the

arrangements for importing bananas into the Community, by applying the provisions of Regulation No 2362/98, in particular as regards traditional operators registered for 1999 pursuant to Article 5 of the latter regulation.

Regulation (EC) No 216/2001

30 On 29 January 2001, the Council of the European Union adopted Regulation (EC) No 216/2001 amending Regulation No 404/93 (OJ 2001 L 31, p. 2). Article 1(1) of Regulation No 216/2001 amended Articles 16 to 20 of Regulation No 404/93.

31 The rules for applying Title IV of Regulation No 404/93 thus amended were defined by Commission Regulation (EC) No 896/2001 of 7 May 2001 laying down detailed rules for applying Regulation No 404/93 as regards the arrangements for importing bananas into the Community (OJ 2001 L 126, p. 6). They applied as from 1 July 2001, in accordance with the second paragraph of Article 32 of Regulation No 896/2001.

Facts

32 The facts were summarised in the contested judgment as follows:

'29 The applicants are importers of bananas originating in Latin America. They are registered as traditional operators with the competent national authorities (Italy

and, for London Fruit Ltd, United Kingdom) and obtained from those authorities provisional individual reference quantities for the year 1999. They were thus able to obtain import licences for third-country bananas for the first three quarters of 1999.

30 The facts of Case T-93/00 relate to the fourth quarter of 1999. For that quarter, the applicants submitted applications for import licences for the balance of their provisional individual reference quantity to the competent national authorities. Their applications were granted up to the limits of the available quantities for imports of third-country bananas, published in the Annex to Commission Regulation (EC) No 1824/1999 of 20 August 1999 amending Regulation (EC) No 1623/1999 fixing quantities for imports of bananas into the Community for the fourth quarter of 1999 under the tariff quotas or as part of the quantity of traditional ACP bananas (OJ 1999 L 221, p. 6).

31 For the part of the applications which could not be granted, the applicants still had the possibility of applying for import licences for a quantity of 308 978.252 tonnes of traditional ACP bananas, a quantity fixed by Commission Regulation (EC) No 1998/1999 of 17 September 1999 on the issuing of import licences for bananas under the tariff quotas and the quantity of traditional ACP bananas for the fourth quarter of 1999 and on the submission of new applications (OJ 1999 L 247, p. 10). They thus applied for import licences for ACP bananas within the limits of the remaining quantities at their disposal, in accordance with Article 18 (1) of Regulation No 2362/98. The import licences for the remaining quantities of their respective reference quantities were broken down as follows:

Alessandrini Srl	KG 2 050
Anello Gino di Anello Luigi & C. Snc	KG 1 859

Arpigi Spa	KG 757
Bestfruit Srl	KG 2 637
Co-Frutta SpA	KG 209 392
Co-Frutta Soc. coop. arl	KG 30 207
Dal Bello Sife Srl	KG 1 533
Frigofrutta Srl	KG 2 990
Garletti Snc	KG 4 419
London Fruit Ltd	KG 286 004.

32 On 13 October 1999, the competent national authorities issued import licences for ACP bananas for the entire quantity for which the applicants had applied.

33 Despite repeated attempts, the applicants did not succeed in obtaining supplies of ACP bananas.

34 Faced with that situation, on 18 November 1999, the applicants, referring to Article 232 EC, requested the Commission to:

— take the necessary measures to enable them to use the fourth-quarter licences issued for imports from ACP countries to carry out imports of bananas from Latin American or other third countries;

— provide, in any event, for the securities for those licences to be released, since they were not being used and the non-use was not attributable to their holder.

35 Not having received a response to that request, the applicants, by fax of 22 December 1999, drew the Commission's attention to the fact that the licences were going to expire on 7 January 2000 and requested the Commission to make a ruling on their requests.

36 By letter No 02418 of 26 January 2000 ..., addressed to the applicants' counsel, the Commission replied as follows:

"In your letter of 22 December 1999, you referred to difficulties encountered by certain operators in using the banana import licences issued for the fourth quarter of 1999, in particular for the import of bananas originating from ACP countries.

First of all, the nature of those problems is essentially commercial and, therefore, may be attributed to the activities of economic operators. The problem raised concerns the search for commercial partners for the purchase and transport of certain products and, specifically in the present case, of bananas from ACP countries. Although it is regrettable, the fact that your clients were unable to conclude contracts for the supply of ACP bananas is part of the commercial risk which is normally assumed by operators.

Lastly, we note that those difficulties concern only certain operators not described in detail, and that intervention on the part of the Commission would risk favouring some operators to the detriment of others who have assumed the risks associated with the obligations they have taken on."

37 The competent national authorities kept the security lodged by the applicants, after taking the view that the grounds relied on by the applicants to recover that security did not constitute force majeure, the only scenario which would allow for release.

38 The facts of Case T-46/01 relate to the fourth quarter of 2000. For that quarter, the remainder of the available individual reference quantity for each of the applicants was as follows:

Anello Gino di Anello Luigi & C. Snc	KG 5 140
Arpigi Spa	KG 15 792
Bestfruit Srl	KG 7 290
Co-Frutta SpA	KG 236 746
Co-Frutta Soc. coop. arl	KG 80 301
Dal Bello Sife Srl	KG 4 110
Frigofrutta Srl	KG 8 266
Garletti Snc	KG 7 329
London Fruit Ltd	KG 324 124.

39 Since the licence applications for third-country bananas exceeded the available quantities, Commission Regulation (EC) No 1971/2000 of 18 September 2000 on the issuing of import licences for bananas under the tariff quotas and for traditional ACP bananas for the fourth quarter of 2000 and on the submission of new applications (OJ 2000 L 235, p. 10) fixed the quantity of bananas still available for import for the fourth quarter of 2000. According to the Annex to that regulation, import licences could still be issued for traditional ACP bananas up to 329 787.675 tonnes.

40 The applicants did not apply for import licences for those ACP bananas.

41 On 10 October 2000, the applicants, referring to Article 232 EC, requested the Commission to take measures pursuant to Article 20(d) of Regulation No 404/93 which would enable them to obtain, for the fourth quarter of 2000, import licences for third-country bananas for the remainder of the individual reference quantities which had been allotted to them. In the alternative, they requested the Commission to compensate them for lost earnings due to the impossibility of importing and marketing those bananas.

42 By letter No AGR 030905 of 8 December 2000 ..., addressed to the applicants' counsel, the Commission refused to grant those requests in the following terms:

"In your letter of 10 October 2000, you informed the Commission of difficulties encountered by certain operators in obtaining bananas in order to make full use of the reference quantities granted to them for 2000, within the framework of the tariff import quotas arrangement.

The difficulties to which you refer are essentially commercial in nature. We regret to inform you that Community law does not confer any power in these matters on the Commission. You recognise this situation yourself when you state that operators who do not have regular contact with ACP banana producers encounter difficulties in obtaining the goods in question.

You also state that the operators you represent are not able to make full use of all the reference quantities allocated to them.

We must point out to you that, from a legal standpoint, the reference quantities merely open up opportunities for operators and are determined on the basis of their previous business, pursuant to Community regulations; they confer on the parties concerned no more than the right to submit applications for import licences with a view to carrying out commercial operations which they have agreed on with suppliers in producing countries.

Lastly, we must add that, on the basis of the information you have supplied to the Commission, it appears that the difficulties to which you refer are not 'transitory in nature' in that they may be attributed to the transition from the arrangement which applied prior to 1999 to the one which applied as from then. Accordingly, the provision of Article 20(d) of Regulation ... No 404/93 does not allow the Commission to adopt the specific measures which you request.'"

The proceedings before the Court of First Instance and the contested judgment

33 By applications lodged at the Registry of the Court of First Instance on 19 April 2000 and 1 March 2001, the applicants brought their actions seeking the annulment of, respectively, the letter of 26 January 2000 and the letter of 8 December 2000 ('the letters at issue') and compensation for the damage which they claim to have suffered.

34 By order of 15 October 2002 of the President of the Fifth Chamber of the Court of First Instance, Cases T-93/00 and T-46/01 were joined for the purposes of the oral procedure and judgment on account of the connection between them.

35 In support of their actions, the applicants put forward three pleas relating to the illegality of Regulation No 2362/98, alleging infringement, firstly, of Regulation No 404/93, secondly, of the right of property and free enterprise and, thirdly, of the principle of non-discrimination. In addition, they put forward a fourth plea alleging infringement of Article 20(d) of Regulation No 404/93.

36 In paragraphs 76 to 81 of the contested judgment, the Court of First Instance rejected the pleas relating to the illegality of Regulation No 2362/98, holding that the applicants had not established a direct legal link between the letters at issue, on the one hand, and the provisions of that regulation which they alleged were illegal, on the other.

37 As regards the plea alleging infringement of Article 20(d) of Regulation No 404/93, the Court of First Instance held, in paragraphs 85 to 96 of the contested judgment, that the Commission had not exceeded the limits of its discretion in refusing to grant the applicants' requests for measures to be adopted pursuant to that provision to remedy the difficulties allegedly encountered by them due to the change from the 1993 arrangement to the 1999 arrangement.

38 Accordingly, the claims for annulment put forward by the applicants in Cases T-93/00 and T-46/01 were rejected.

39 With regard to the claims for compensation for the damage allegedly suffered by the applicants, the Court of First Instance held as follows:

'106 It is settled case-law that, in order for the Community to incur non-contractual liability, a number of conditions must be satisfied concerning the illegality of the conduct alleged against the Community institutions, the fact of the damage and the existence of a causal link between that conduct and the damage complained of (Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 16; Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 68).

107 Since one of the conditions governing the Community's non-contractual liability is not satisfied, the application must be dismissed in its entirety without its being necessary to examine the other preconditions for such liability (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 81).

108 In the present case, it is clear that the condition relating to the causal link is not satisfied. In Case T-93/00, the cause of the damage alleged relates to the fact that the applicants were unable to find suppliers willing to supply them

with ACP bananas in the fourth quarter of 1999. In Case T-46/01, the lost earnings complained of by the applicants [are] directly attributable to their lack of diligence. They did not apply for import licences for ACP bananas for the fourth quarter of 2000 in conformity with Regulation No 1971/2000 once the quantity of third-country bananas was exhausted. In addition, despite the problems encountered during the fourth quarter of 1999, they did not seek to foster contacts with suppliers of ACP bananas in 2000 so as to be able to obtain banana supplies in the fourth quarter of that year.

109 Since one of the conditions for the Community to incur non-contractual liability has not been satisfied, the claims for compensation must be dismissed in Case T-93/00 and Case T-46/01.'

The appeal

40 By their appeal, the appellants claim that the Court should:

— set aside in part the contested judgment, in so far as it rejected their claims for compensation for the damage which they claim to have suffered;

— order the Commission to compensate them for the damage suffered by them due to the failure to allocate them import licences for third-country bananas;

— order the Commission to pay the costs of the proceedings both before the Court of First Instance and in connection with the present appeal.

41 The Commission contends that the Court should:

— dismiss the appeal;

— in the alternative, if the contested judgment is set aside in part, refer the case back to the Court of First Instance for a ruling on the substance of the claim for compensation;

— in the further alternative, dismiss the claim for compensation on the substance, and

— in any event, order the appellants to pay the costs of both sets of proceedings.

42 In support of their appeal, the appellants put forward two pleas in law. By their first plea, they maintain that the Court of First Instance failed to assess the legal arguments on which their claims for compensation for the damage suffered are based. By their second plea, they complain that the Court of First Instance took into consideration claims which were in part different from those contained in their applications.

Arguments of the parties

43 In the first place, the appellants submit that the Court of First Instance was wrong to hold, in paragraph 108 of the contested judgment, that the damage which they allege arises from the fact that they did not succeed in importing ACP bananas.

44 However, in their applications, in reality they criticised the fact that they had been unable to make full use of the import licences, as their reference quantities, which

were based solely on imports of third-country bananas, entitled them to do. That circumstance is attributable to Regulation No 2362/98, which arbitrarily penalised traditional importers of third-country bananas.

45 Although the appellants share the assessment of the Court of First Instance that there is no direct legal link between Regulation No 2362/98 and the letters at issue, a consideration which led the Court of First Instance, in paragraph 81 of the contested judgment, to declare that, on that ground, the pleas of illegality put forward in the actions for annulment brought against those letters were inadmissible, they submit that the alleged illegality of that regulation was wrongly disregarded when the Court of First Instance examined whether there was a causal link between the conduct of which the Commission is accused and the damage which they allege.

46 In the second place, the applicants complain that, in paragraphs 47 and 48 of the contested judgment, the Court of First Instance in part distorted the claims made in the applications initiating proceedings by considering that they were seeking compensation for the damage caused by the letters at issue, whereas it was clear from those claims that the primary cause of the damage alleged lay in the illegality of Regulation No 2362/98.

47 The Commission disputes the admissibility of the appeal in its entirety. It contends that the appellants are seeking to alter the subject-matter of the dispute brought before the Court of First Instance, thereby prompting the Court of Justice to rule directly on the Commission's non-contractual liability arising solely from the adoption of Regulation No 2362/98.

48 First, it is clear from the applications at first instance that the cause of the damage alleged lay neither principally nor solely in Regulation No 2362/98, but in the fact that the Commission had not adopted the measures necessary to remedy the consequences which application of the regulation allegedly entailed for the appellants, the latter having been refused the benefit of measures taken pursuant to Article 20(d) of Regulation No 404/93. In other words, the applicants challenged the legality of Regulation No 2362/98 only in so far as it had, in their view, given rise to the letters at issue refusing to grant them transitional measures.

49 Secondly, the Commission contends that the applicants, both in Case T-93/00 and in Case T-46/01, merely claimed that the Court of First Instance should 'order the Commission to make good the damage in accordance with Article 235 and the second paragraph of Article 288 of the EC Treaty', as indicated by the second form of order sought in the applications initiating proceedings in the two abovementioned cases. They did not challenge the summary of their claims contained in the report for the hearing in those cases, that summary having been incorporated in the same terms in the contested judgment.

50 In the alternative, the Commission contends that the appeal should be dismissed as unfounded.

51 With regard to the first plea in law, the Commission maintains that neither the allocation of a reference quantity nor the holding of the corresponding import

licences implies actual availability of bananas up to that quantity. The operator's individual reference quantity constitutes the maximum quantity for which he may, during a given year, submit import licence applications in order to enjoy the rights recognised under the tariff quotas, without, however, having any certainty that that quantity will actually be available.

52 Confining itself to examination of the condition relating to the causal link between the conduct of which the Commission is accused and the damage alleged, the Court held, in paragraph 108 of the contested judgment, that, although the applicants did not import any bananas, that was due to difficulties of a commercial nature in finding suppliers, and even to their actual negligence, since they did not take the trouble to seek the desired quantities of bananas on the market, but not to the Commission's conduct, and in particular its refusal to adopt transitional measures following the change from the 1993 import arrangements to those of 1999. Those considerations, which are also referred to in paragraphs 88 to 90, 95 and 96 of the contested judgment, have not been challenged in the appeal and are now definitive. In those circumstances, the alleged illegality of Regulation No 2362/98 is not relevant for the purpose of assessing the claims for compensation.

53 With regard to the second plea in law, the Commission contends that the Court of First Instance did no more than summarise the claims of the applicants in the light of all the arguments put forward by them, both in writing and orally. It maintains that it is apparent from those arguments that the cause of the damage alleged lies in the fact that the Commission did not take the measures which would have made it possible to remedy the consequences arising, in the applicants' view, from the application of Regulation No 2362/98. From that point of view, it was perfectly reasonable to establish a link between the damage alleged and the letters at issue. The Commission also refers to the summary of the parties' submissions contained in the report for the hearing and which the appellants have never challenged.

54 The Commission adds that, if the Court of First Instance had held that the claim for compensation for damage was based solely on the letters at issue, the legality of which the Court of First Instance had previously recognised, it would not have examined the causal link, since, in the absence of any unlawful conduct, the Commission's liability would in any event have been excluded.

Findings of the Court

55 Both the first and the second pleas in law put forward by the appellants in support of their appeal are based on the complaint that the Court of First Instance did not examine the legality of Regulation No 2362/98, in particular having regard to Regulation No 404/93, to the fundamental right to property, to the right to engage in free enterprise and to the principle of non-discrimination.

56 In those circumstances, it must be noted that, in order to reject, in paragraph 108 of the contested judgment, the existence of a causal link between the conduct of which the Commission is accused and the damage alleged, the Court of First Instance could not confine itself to stating, in Case T-93/00, that the cause of the damage related to the fact that 'the applicants were unable to find suppliers willing to supply them with ACP bananas in the fourth quarter of 1999' and, in Case T-46/01, that the damage was 'directly attributable to [the applicants'] lack of diligence'.

57 In order to exclude any liability on the part of the Commission, the Court of First Instance ought to have ascertained whether, over and above the difficulties

encountered by the applicants in making full use of their reference quantities and import licences, the cause of the damage alleged by them did not indeed lie in the alleged illegality of Regulation No 2362/98 and, in particular, in the method of combined management of tariff quotas introduced by the Commission, which, they claimed, had then given rise directly to the commercial difficulties encountered by traditional third-country operators, who in the end were obliged to import ACP bananas.

58 Such a determination by the Court of First Instance was required a fortiori since the alleged illegality of Regulation No 2362/98 was an essential part of the reasoning set out in their actions by the applicants, who sought to prove the adverse repercussions of that legislation for the business of undertakings traditionally importing third-country bananas, in the light of the difficulties encountered by them in obtaining supplies of ACP bananas.

59 Consequently, by omitting to examine whether the alleged illegality of Regulation No 2362/98 could be the cause of the damage alleged by the applicants, the Court of First Instance failed to state sufficient grounds for the contested judgment which must, for that reason, be set aside.

60 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court quashes a decision of the Court of First Instance, it may itself give final judgment in the matter, where the state of the proceedings so permits, as it does in this case.

Substance

61 According to settled case-law, the Community's non-contractual liability under the second paragraph of Article 288 EC is subject to the satisfaction of a set of conditions as regards the unlawfulness of the conduct alleged against the Community institution, the fact of damage and the existence of a causal link between the conduct of the institution and the damage complained of (see, inter alia, Joined Cases C-258/90 and C-259/90 *Pesquerias De Bermeo and Naviera Laida* v *Commission* [1992] ECR I-2901, paragraph 42, and *KYDEP* v *Council and Commission*, cited above, paragraph 19).

62 In that regard, it is necessary to examine first the claim that the Commission's conduct was unlawful.

63 As has already been stated in paragraph 55 of the present judgment, the appellants contest the legality of Regulation No 2362/98 on the basis of the three pleas in law put forward in support of their claim for annulment of the letters at issue.

64 By their first plea in law, the appellants submit that, by adopting Regulation No 2362/98, the Commission exceeded the limits of the powers conferred on it by Regulation No 404/93.

65 By their second plea in law, they submit that the impossibility of making full use of their reference quantities in order to import third-country bananas derives solely from the allegedly unlawful and arbitrary decision by the Commission to combine the management of the third-country tariff quotas and of the ACP tariff quota. By proceeding in that way, the Commission infringed their fundamental right to property and to engage in free enterprise.

66 By their third plea in law, the applicants submit that, by allowing operators importing traditional ACP bananas to use all their imports of such bananas and third-country bananas in order to obtain import licences for third-country bananas, the Commission created more favourable supply conditions for those operators than those provided for in the case of traditional third-country banana operators.

The first plea in law

67 The first plea in law is in two parts.

68 In the first place, the applicants complain that, in Article 4(2) of Regulation No 2362/98, the Commission chose as the reference period for the allocation of reference quantities to traditional operators the three-year period from 1994 to 1996 during which Regulation No 404/93 was in force. The Commission thus maintained and consolidated the favourable position enjoyed, under the provisions of the

General Agreement on Tariffs and Trade, by Category B operators before certain aspects of the trade arrangements with third countries laid down by Regulation No 404/93 were called in question in 1997 by the authorities of the World Trade Organisation.

69 In that regard, as the Advocate General observed in point 80 of his Opinion, in so far as the appellants assert that it was impossible for them to use the import licences for the reference quantities they had been granted, since they were unable to conclude contracts for the supply of ACP bananas, and impute that alleged malfunction to the method of combined management of the tariff quotas and to the merging of reference quantities introduced by Regulation No 2362/98, the criticisms made with regard to the detailed rules for prior allocation of reference quantities, which are unrelated to the use of import licences, must be rejected on account of their manifest irrelevance.

70 In the second place, the appellants take issue with the adoption by the Commission of a method of combined management of tariff quantities, which, together with the merging of reference quantities, served to strengthen the privileged position of importers of ACP bananas.

71 In their view, combined management of the tariff quotas reduces the opportunities to import third-country bananas, whereas, by contrast, in the case of ACP banana operators, such opportunities are increased.

72 The Commission contends, on the contrary, that common management of the tariff quotas favours greater fluidity of trade and probable increased freedom for operators as compared with that ensured by the earlier arrangement, in particular by enabling importers of ACP bananas and importers of third-country bananas to import bananas of either origin without distinction.

73 The Commission adds that non-use of a certain quantity of ACP bananas in 1999 and 2000 does not prove that the new system of allocating quotas favours importers of ACP bananas. That circumstance could result from economic factors connected with market choices.

74 In that regard, it must be stated at the outset that, according to settled case-law, it is clear from the Treaty context in which Article 211 EC must be placed and also from practical requirements that the concept of implementation must be given a wide interpretation. Since only the Commission is in a position to keep track of agricultural market trends and to act quickly when necessary, the Council may confer on it wide powers in that sphere. Consequently, the limits of those powers must be determined by reference amongst other things to the essential general aims of the market organisation in question (see Case C-239/01 *Germany* v *Commission* [2003] ECR I-10333, paragraph 54, and the case-law cited).

75 Thus, the Court has held that, in matters relating to agriculture, the Commission is authorised to adopt all the implementing measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to such legislation or to the implementing legislation adopted by the

Council (see, in particular, Case 121/83 *Zuckerfabrik Franken* [1984] ECR 2039, paragraph 13; Case C-478/93 *Netherlands* v *Commission* [1995] ECR I-3081, paragraph 31; Case C-356/97 *Molkereigenossenschaft Wiedergeltingen* [2000] ECR I-5461, paragraph 24, and *Germany* v *Commission*, cited above, paragraph 55).

76 In this case, Regulation No 2362/98 was adopted by the Commission on the basis of Article 20 of Regulation No 404/93. That article authorises it to adopt provisions to apply Title IV of that regulation, including inter alia, according to Article 20(d) and (e), 'any specific provisions needed to facilitate the switch from the import arrangements applying on and after 1 July 1993 to the present arrangements of ... Title [IV of Regulation No 404/93]' and 'measures needed to ensure respect for obligations stemming from agreements concluded by the Community under Article [300] of the Treaty'.

77 With regard, more specifically, to the management of the tariff quotas referred to in Article 18(1) and (2) of Regulation No 404/93 and of imports of traditional ACP bananas, Regulation No 2362/98 also has as its legal basis Article 19(1) of Regulation No 404/93. That provision confers on the Commission the task of adopting the implementing arrangements required for the management of the tariff quotas, stipulating that the method chosen is to be 'based on taking account of traditional trade flows'.

78 The appellants have not demonstrated, in the light of the case-law mentioned in paragraph 75 of this judgment, that the method of managing tariff quotas adopted in

Regulation No 2362/98 is contrary to the basic legislation implemented by that method. It is common ground that the method takes account of traditional trade flows and enables the quotas and imports of traditional ACP bananas, as referred to, respectively, in Article 18(1) and (2) and Article 16 of Regulation No 404/93, to be managed.

79 Moreover, the basic legislation does not preclude import licences from being managed without reference to the origin (ACP States or third countries) of the bananas.

80 With regard, more specifically, to the argument that the method of management in question strengthened the privileged position of importers of ACP bananas, that matter will be examined below, in the context of the analysis of the appellants' third plea in law, alleging infringement of the principle of non-discrimination.

81 In those circumstances, since it has not demonstrated that the Commission failed to have regard to the relevant basic legislation or that it manifestly exceeded the limits of the discretion in the choice of implementing arrangements conferred on it by the Council, the second part of the first plea in law must, subject to further examination of the argument referred to in the previous paragraph, be rejected.

82 Accordingly, the first plea in law put forward by the appellants in support of their actions must be rejected.

The second plea in law

83 The appellants submit that the impossibility of their making full use of their reference quantities by obtaining import licences which could actually be used for the whole of those quantities is the result of the Commission's decision to combine the management of the tariff quotas for third-country bananas and ACP bananas. That decision in fact reduced to nil the opportunities available to importers of third-country bananas to market the quantities of bananas allocated annually.

84 At the end of 1999, the tariff quota for ACP bananas was the only one not yet used up but was not in fact available. During 2000, when faced with the same difficulties in obtaining supplies of ACP bananas, the appellants gave up applying for licences to import such bananas.

85 In those circumstances, by adopting the method of combined management of the tariff quotas, the Commission infringed the fundamental right to property and the freedom to trade.

86 In that regard, it is settled case-law that both the right to property and the freedom to pursue a trade or profession form part of the general principles of Community law. However, those principles do not constitute absolute prerogatives, but must be viewed in relation to their social function. Consequently, the exercise of the right to property and to pursue a trade or profession freely may be restricted, particularly in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see Case 44/79 *Hauer* [1979] ECR 3727, paragraph 32; Case 265/87 *Schräder* [1989] ECR 2237, paragraph 15, and Case 5/88 *Wachauf* [1989] ECR 2609, paragraphs 17 and 18). The compatibility of the method of combined management of tariff quotas with the requirements of the protection of the fundamental rights invoked by the appellants must be assessed in the light of those criteria.

87 Having regard to the claims made by the appellants, it should be pointed out from the outset that a reference quantity allocated to an operator in the context of a common organisation of the market represents the maximum quantity up to which that operator may, during a given year, submit applications for import licences in order to enjoy the rights attaching to a tariff quota. The allocation of reference quantities therefore does not guarantee either the availability of those quantities or the right for operators actually to export to the Community all the quantities allocated under the tariff quota.

88 With regard, first, to the right to property of importers of third-country bananas, the Court has already held that that right is not undermined by the introduction of the Community quota and the rules for its subdivision. No economic operator can claim a right to property in a market share which he held at a time before the establishment of a common organisation of a market, since such a market share

constitutes only a momentary economic position exposed to the risks of changing circumstances (see Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 79, and Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 77).

89 Nor can a trader claim that he has a vested right or even a legitimate expectation as to the maintenance of an existing situation which is capable of being altered by decisions taken by Community institutions in the exercise of their discretion (Case 52/81 *Faust* v *Commission* [1982] ECR 3745, paragraph 27; Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 33 and 34, and Case C-280/93 *Germany* v *Council*, cited above, paragraph 89). That is a fortiori the case where the existing situation has to be altered in order to comply with the obligations arising from international agreements concluded by the Community.

90 With regard, secondly, to the alleged infringement of the freedom to pursue a trade or profession, it must be pointed out that the introduction of a method of combined management of the tariff quotas, such as that provided for by Regulation No 2362/98, is in fact such as to alter the competitive position of importers of third-country bananas in so far as, under that method, all operators, without distinction, can import bananas of any origin whatsoever. However, although importers of third-country bananas are thus in competition with importers of ACP bananas, they no longer suffer, as rightly pointed out by the Commission, the 30% reduction of their imports, provided for by the earlier arrangement, to the advantage of Category B importers of ACP bananas. Moreover, they are also free, under the new arrangement, to acquire ACP bananas. The difficulties alleged by the appellants in finding suppliers able to supply them with ACP bananas are not such as to affect the legality of an arrangement which specifically grants them the right to import such bananas under the Community quota.

91 In any event, it is clear from the Court's case-law that restrictions on the right to import third-country bananas resulting from the opening of any tariff quota and from the machinery for its subdivision are inherent in the establishment of a common organisation of the market designed to ensure that the objectives of Article 33 EC are safeguarded and that the Community's international obligations are complied with. Such restrictions are therefore not such as to impair improperly the freedom of traditional traders in third-country bananas to pursue their trade or business (see Case C-280/93 *Germany* v *Council*, paragraphs 82 and 87, and Case C-122/95 *Germany* v *Council*, paragraph 77).

92 In the light of the foregoing, the second plea in law put forward by the appellants in support of their appeal must be rejected.

The third plea in law

93 The appellants submit that, by giving importers of ACP bananas the right to use their imports both of such bananas and of third-country bananas for the determination of their reference quantities and the issue of import licences for third-country bananas, Regulation No 2362/98 provided for those operators supply conditions that are more faviourable than those enjoyed by traditional third-country banana importers.

94 By providing for a method of combined management of the tariff quotas applicable to third countries and to ACP States and for the merging of reference quantities, the Commission thus infringed the principle of non-discrimination.

95 In that regard, it is sufficient to note that, in so far as all economic operators are entitled, within the limits of their reference quantities, to import from any origin whatsoever and are thus placed in an identical situation, the principle of non-discrimination specifically precludes them from being treated differently when import licences are allocated.

96 Accordingly, the third plea in law put forward by the appellants in support of their actions must also be rejected.

97 It follows from all the foregoing considerations than none of the pleas of illegality put forward against Regulation No 2362/98 can be accepted.

98 Since, therefore, the first condition to which the Community's non-contractual liability within the meaning of the second paragraph of Article 288 EC is subject is not fulfilled, the actions must be dismissed in their entirety, without there being any need to examine whether the other conditions governing that liability are satisfied,

namely the fact of the damage alleged and the existence of a causal link between that damage and the conduct of which the institution concerned is accused.

Costs

99 Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118, 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 costs against the appellants and the latter have been unsuccessful in their pleas, they must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 10 April 2003 in Joined Cases T-93/00 and T-46/01 *Alessandrini and Others* v *Commission*;**

2. **Dismisses the applications brought before the Court of First Instance of the European Communities in Cases T-93/00 and T-46/01;**

3. **Orders Alessandrini Srl, Anello Gino di Anello Luigi & C. Snc, Arpigi SpA, Bestfruit Srl, Co-Frutta SpA, Co-Frutta Soc. coop. arl, Dal Bello Sife Srl, Frigofrutta Srl, Garletti Snc and London Fruit Ltd to pay the costs incurred both at first instance and in connection with the appeal.**

[Signatures]