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Press and Information

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Judgment of the Court of Justice in Joined Cases C-120/06 P and C-121/06 P

Fabbrica italiana accumulatori motocarri Montecchio SpA and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (FIAMM) and Giorgio Fedon & Figli SpA and Fedon America, Inc. (Fedon) v Council and Commission

THE COMMUNITY CANNOT BE CALLED UPON TO MAKE GOOD DAMAGE RESULTING FROM A FAILURE OF ITS INSTITUTIONS TO COMPLY WITH THE WTO AGREEMENTS

The Court of First Instance erred in law in affirming the existence of a regime providing for non-contractual liability of the Community for the lawful pursuit by it of its legislative activities

The Agreement establishing the World Trade Organisation (WTO) is intended to reduce customs tariffs and other barriers to trade between the contracting parties. In 1993 the Council adopted a regulation introducing common rules for the Member States in respect of the import of bananas¹. This regulation established preferential provisions for bananas originating in certain African, Caribbean and Pacific States. Several WTO members, including the United States of America, lodged complaints with the WTO Dispute Settlement Body (DSB), which found that the Community banana import regime was incompatible with the WTO agreements.

In 1998 the Council adopted a new regulation amending that regime.

Since the DSB considered that this new regime was still incompatible with the WTO agreements, it authorised the United States, following a request by it, to levy increased customs duty on imports of certain Community products, in respect of trade amounting to up to USD 191.4 million per year².

Six companies established in the European Union brought proceedings before the Court of First Instance claiming compensation from the Commission and the Council for the damage alleged to have been suffered by them as a result of the application of the United States retaliatory measures to their exports to that country.

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).

² In 2001 the Community amended the Community regime governing trade in bananas, by means of Council Regulation (EC) No 216/2001 of 29 January 2001 amending Regulation No 404/93 (OJ 2001 L 31, p. 2). The United States suspended the imposition of its increased customs duty. From 1 July 2001 its import duties were reduced to their initial rate.

The Court of First Instance held those actions to be unfounded³. It stated that, since the WTO agreements are not among the rules in the light of which the Community courts review the legality of action by the Community institutions, it was not possible to establish in the case in point that the conduct of which the Council and the Commission were accused was unlawful. With regard to the rules governing liability which the Community may incur even in the absence of unlawful action by its institutions, the Court of First Instance held that where it cannot be established that the conduct of the institutions is unlawful, undertakings which bear a disproportionate part of the burden resulting from the Community institutions' conduct may, under certain conditions, obtain compensation for the damage to them. However, since the condition requiring the damage to be special and unusual in nature was not met, the Court of First Instance dismissed the actions for compensation.

Two Italian companies and their United States subsidiaries, FIAMM and FIAMM Technologies and G. Fedon & Figli SpA and Fedon America, whose business activities relate respectively to stationary batteries and to spectacle cases and associated accessories, requested the Court of Justice to set aside the Court of First Instance's judgments concerning them.

In today's judgment, the Court of Justice confirmed first of all that that the Court of First Instance rightly decided that the Community courts could not, in the circumstances of the case in point, review the legality of the actions of the Community institutions in the light of WTO rules and of the decision of the DSB even for the purposes of compensation.

The Court of Justice then pointed out that it has held that the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of individuals, and conferring rights upon them, has occurred.

It also observed that, while the principle of Community liability for unlawful acts of the institutions is an expression of the general principle familiar to the legal systems of the Member States that an unlawful act gives rise to an obligation to make good the damage caused, no such convergence of the Member States' legal systems has been demonstrated with regard to the existence of a principle of liability in the case of a lawful act of the public authorities, in particular where such an act is of a legislative nature.

The Court of Justice concluded that **Community law as it currently stands does not provide for a regime enabling liability of the Community for its legislative conduct to be put in issue in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts.**

In addition, it explained that a Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession could give rise to non-contractual liability of the Community where it entails disproportionate and intolerable impairment of the very substance of those rights, perhaps because it makes no provision for compensation calculated to avoid or remedy that impairment.

However, an economic operator cannot claim a right to property in a market share which he held at a given time, since such a market share constitutes only a momentary economic position, exposed to the risks of changing circumstances. Likewise, the guarantees accorded by the right

³ See, in particular, the judgments of 14 December 2005 in Case T-69/00 *FIAMM and FIAMM Technologies v Council and Commission* [2005] ECR II-5393 and in Case T-135/01 *Fedon & Figli and Others v Council and Commission*; see Press Release No 108/05.

to property or by the general principle safeguarding the freedom to pursue a trade or profession cannot be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity. An economic operator whose business consists in exporting goods to a non-member State must therefore be aware that that business may be affected by various circumstances, including the possibility that that non-member State will adopt measures suspending tariff concessions, as provided by the WTO agreements.

Since it considered that the grounds of the judgments of the Court of First Instance under appeal disclosed an infringement of Community law but that their operative parts were well founded on other legal grounds, **the Court of Justice dismissed the appeals.**

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Languages available: EN FR DE EL ES HU IT NL PL

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-120/06>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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