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

In Case T-52/99,

T. Port GmbH & Co. KG, established in Hamburg (Germany), represented by G. Meier, avocat,

applicant,

v

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

defendant,

APPLICATION for compensation for the loss which the applicant has suffered as a result of the Commission introducing, under Regulation (EC) No 2362/98 of

* Language of the case: German.

28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32), provisions which are alleged to conflict with World Trade Organisation (WTO) rules and certain general principles of Community law,

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment

Legal background

1 Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1) introduced, from 1 July 1993, common arrangements for the importation of bananas, which replaced the various national arrangements. A distinction was drawn between 'Community bananas' produced in the Community, 'third-country bananas' originating in third countries other than the African, Caribbean and Pacific (ACP) States, 'traditional ACP bananas' and 'non-traditional ACP bananas'. 'Traditional ACP bananas' and 'non-traditional ACP bananas' meant the quantities of bananas exported by the ACP States which did not exceed or did exceed, respectively, the quantities traditionally exported by each of those States as set out in the Annex to Regulation No 404/93.

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

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

(category B) and 3.5% for the category of operators established in the Community who had started marketing bananas other than Community and/or traditional ACP bananas from 1992 (category C).

4 The first sentence of Article 19(2) of Regulation No 404/93 (old version) read as follows:

'On the basis of separate calculations for each of the categories of operators referred to in paragraph 1... each operator shall obtain import licences on the basis of the average quantities of bananas that he has sold in the three most recent years for which figures are available.'

5 Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6) defined, *inter alia*, the criteria for determining the types of operators in categories A and B who could apply for import licences, according to the activities which those operators had carried out during the reference period.

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

7 That procedure gave rise to reports from the WTO Panel of 22 May 1997 and a report from the WTO Standing Appellate Body of 9 September 1997, which was

adopted by the WTO Dispute Settlement Body by decision of 25 September 1997. In that decision the Dispute Settlement Body declared certain aspects of the arrangements governing banana imports into the Community incompatible with the rules of the WTO.

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

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

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

'1. Each traditional operator registered in a Member State in accordance with Article 5 shall receive, for each year and for all the origins listed in Annex I, a single reference quantity based on the quantities of bananas actually imported during the reference period.

2. For imports carried out in 1999 under the tariff quotas or as traditional ACP bananas, the reference period shall be made up of the years 1994, 1995 and 1996.'

11 Article 5(2) to (4) of Regulation No 2362/98 provides:

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

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

(b) the supporting documents detailed in paragraph 3.

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

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

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

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

4. For operators established in Austria, Finland or Sweden, proof of the quantities released into free circulation in those Member States in 1994, and in 1995 up to the third quarter thereof, shall be furnished by presenting copies of the relevant customs documents and import permits issued by the competent authorities and duly used'.

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

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

Facts and procedure

13 The applicant, T. Port GmbH & Co. KG, whose registered office is in Hamburg, is in the business of importing fruit and vegetables. Until the entry into force of Regulation No 2362/98 it was in Category A, and it is a traditional operator for the purposes of that regulation.

14 By decision of the competent national authorities of 8 December 1998, the applicant's provisional reference quantity for 1999 was established at 13 709 963 kg and that quantity was reduced by 824 833 kg by application of the adjustment coefficient of 0.939837 set by the Commission under Article 6(3) of Regulation No 2362/98. In addition, the national authorities deducted from the quantities sought by the applicant, first, the quantities which it was alleged to have imported in 1994 into Austria, Finland and Sweden, that is to say, 898 692 kg, and, second, the quantity of third-country bananas, fixed at 9 838 861 kg, which it had been authorised to import by the Finanzgericht (Finance Court), Hamburg.

15 The applicant lodged an administrative appeal with the national authorities on 11 and 24 December 1998.

16 It was in those circumstances that the applicant, by application lodged at the Registry of the Court of First Instance on 19 February 1999, brought the present action to recover compensation for the loss it suffered as a result of the adoption by the Commission of Regulation No 2362/98. The applicant pleaded *inter alia* infringement of certain agreements contained in Annex 1 to the Agreement establishing the WTO ('the WTO Agreement') in support of its action.

17 In Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 47, the Court held that 'having regard to their nature and structure, [all the agreements

and memoranda contained in Annexes 1 to 4 of the WTO Agreement] are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions'.

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

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

Forms of order sought

20 The applicant claims that the Court should:

— order the Commission to compensate the applicant for the loss it occasioned it by causing the national authorities to reduce, first, its reference quantity by applying the adjustment coefficient and, second, the quantities the applicant had applied for by the amounts imported in 1994 into Austria, Finland and Sweden and by the amount judicially determined;

— order the Commission to pay the costs.

21 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

22 Although it has not formally raised an objection of inadmissibility, the Commission considers that the action is inadmissible because the applicant should first have tried to prevent the alleged loss from occurring by bringing an action before the competent national court. A claim for compensation under Article 178 of the EC Treaty (now Article 235 EC) and the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) constitutes an ancillary remedy in the Commission's view, since the alleged loss was caused by a national administrative measure adopted in order to implement Community law (see the judgments of the Court of Justice in Case 119/88 *AERPO and Others* v *Commission* [1990] ECR I-2189 and Case C-282/90 *Vreugdenhil* v *Commission* [1992] ECR I-1937, paragraph 12, and those of the Court of First Instance in Case T-571/93 *Lefebvre and Others* v *Commission*

[1995] ECR II-2379 and Case T-93/95 *Laga* v *Commission* [1998] ECR II-195, paragraph 33). It contends that it is for the competent national authorities applying the Community rules under a national administrative measure to establish reference quantities, in accordance with the provisions of Regulation No 2362/98 (see the judgments of the Court of First Instance in Case T-47/95 *Terres rouges and Others* v *Commission* [1997] ECR II-481, paragraphs 57 and 59, and that of the Court of Justice in Case C-73/97 P *France* v *Comafrica and Others* [1999] ECR I-185, paragraph 40).

23 The Commission contends that the ancillary nature of the claim for compensation is due to the fact that review of the national administrative measure falls exclusively to the national courts, which may refer the matter to the Court of Justice to assess the validity of the relevant Community provisions, by way of a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) (see *France* v *Comafrica and Others*, paragraph 40). It is only where national courts are unable to guarantee adequate legal protection and/or the possibility of obtaining compensation that a direct action would be admissible.

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

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

Findings of the Court

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

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

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

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

Non-contractual liability of the Community

30 The applicant submits that the Commission is guilty of unlawful conduct in that, first, it infringed the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Import Licensing Procedures, which are contained in Annex 1 to the WTO Agreement, second, it infringed the principle of equal treatment, and third, it infringed the principles of protection of property and legitimate expectations and the principle of proportionality.

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

Arguments of the parties

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

32 It considers that the WTO Agreement and the annexes thereto constitute a genuine world trade order with its own legal system and jurisdiction. The new WTO law is not negotiable, and contains strict prohibitions which can be restricted or temporarily set aside only by measures of the WTO and not by

unilateral measures on the part of a Member State. Some of the provisions of that new law are therefore directly applicable in Community law.

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

34 It added, however, that the judgment in that case did not conflict with the arguments submitted in support of its action to the effect that the Community institutions were guilty of misuse of powers. The fact that the Community arrangements for banana imports had been declared incompatible with the WTO rules by a decision having the force of *res judicata* and the Community had undertaken to rectify the infringements concerned, in the applicant's view, precluded the Community institutions from adopting further provisions in breach of those rules.

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

36 In addition, the applicant states that it does not seek to establish that the defendant was pursuing unlawful aims. Its contention is that the Commission,

with full knowledge of the facts, infringed the WTO rules in order to achieve its ends, namely the organisation of the market in bananas. Such conduct constitutes a new category of misuse of powers.

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

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

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

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

as unlawful within the Community legal system, and therefore cannot make the Community incur liability under the second paragraph of Article 215 of the Treaty.

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

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

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

Findings of the Court

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

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

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

47 In this connection, the Court held in *Portugal* v *Council* (paragraph 36) that while it is true that the WTO Agreement and its annexes differ significantly from the provisions of GATT 1947 they nevertheless accord considerable importance to negotiation between the parties.

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

49 The Court went on to observe that it is common ground that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the agreements contained in the annexes to the WTO Agreement that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law. The Court concluded that the lack of reciprocity in

that regard on the part of the Community's trading partners, in relation to the agreements contained in the annexes to the WTO Agreement, which are based on 'reciprocal and mutually advantageous arrangements' and which must *ipso facto* be distinguished from agreements concluded by the Community, may lead to disuniform application of the WTO rules. To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manœuvre enjoyed by their counterparts in the Community's trading partners (see *Portugal* v *Council*, paragraphs 43, 45 and 46).

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

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

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

53 That argument cannot be accepted. First, it is settled case-law that an act of a Community institution is vitiated by misuse of powers only if it was adopted with

the exclusive or main purpose of achieving an end other than that stated (Case C-285/94 *Italy* v *Commission* [1997] ECR I-3519, paragraph 52) and that a finding of misuse of powers may be made only on the basis of objective, relevant and consistent evidence (Joined Cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 168).

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

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

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

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

58 In that regard, it is only where the Community intends to implement a particular obligation assumed in the context of the WTO, or where the Community measure

refers expressly to the precise provisions of the agreements contained in the annexes to the WTO Agreement, that it is for the Court of Justice and the Court of First Instance to review the legality of the Community measure in question in the light of the WTO rules (see *Portugal* v *Council*, paragraph 49).

59 Neither the reports of the WTO Panel of 22 May 1997 nor the report of the WTO Standing Appellate Body of 9 September 1997 which was adopted by the Dispute Settlement Body on 25 September 1997 included any special obligations which the Commission 'intended to implement', within the meaning of the case-law, in Regulation No 2362/98 (see with regard to the 1947 GATT, Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 31). The regulation does not make express reference either to any specific obligations arising out of the reports of WTO bodies, or to specific provisions of the agreements contained in the annexes to the WTO Agreement.

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

Infringement of the principle of equal treatment

Arguments of the parties

61 The applicant considers that the rules for proving the quantities of bananas imported into Finland, Austria and Sweden in 1994 for the purposes of calculating the reference quantities result in traditional importers suffering unequal treatment without justification. It submits three sets of arguments in support of its claim.

62 First, as a result of the accession of those three States, the Commission adopted transitional arrangements which recognised only operators established in those States as importers. Under Article 149(1) of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) the Commission's authority to adopt transitional measures ended on 31 December 1997.

63 The applicant considers that the effect of Article 5(4) of Regulation No 2362/98 is to maintain treatment which was unfair to traditional importers beyond that time-limit.

64 Whilst it is true that Regulation No 2362/98 does not preclude imports into Austria, Finland and Sweden being taken into account when calculating the reference quantity, it does prevent traditional importers from furnishing evidence of such imports. Under Article 5(4) of that regulation, only copies of the relevant customs documents and import permits for 'operators established in Austria, Finland or Sweden' are to be accepted as proof.

65 Moreover, operators established in those States are not 'economic agents... who have actually imported... third-country and/or ACP-country bananas on their own account'. On the contrary, those operators simply bought from actual importers within the meaning of Regulation No 1442/93 bananas which they marketed in their own country. They are not therefore importers, they have merely cleared the bananas through customs.

66 The applicant argues that it assumed the commercial risk in respect of importing bananas from Ecuador and transporting them to the places of customs clearance

in the three countries concerned. It also points out that in 1994 the principle uniformly applied in the Community was that the importer was the person who assumed the economic risk for the transaction. That principle, in the applicant's view, should, according to the principle of equality, be applied also to subsequently take account of imports into the Community in the calculation of the reference quantity, irrespective of whether the bananas have been marketed in the Community or in the three countries mentioned above. This applies in any event as regards the licences allocated in 1999 on the basis of imports in 1994. By linking proof of imports into those Sates to proof of payment of customs duties, the Commission infringes the principle of equal treatment.

67 Secondly, the applicant submits that, as regards the objective of Article 5(3) of Regulation No 2362/98, the payment of duties on imports into Austria, Finland and Sweden before the accession of those States cannot be taken into account as being payment of those duties within the Community.

68 As the result of changes in the Commission's administrative practice in 1995, importing businesses entered into contracts which related, to a significant extent, to fictitious transactions, so that operators in Category B could also have the quantities covered by those contracts taken into account for the calculation of their reference quantities.

69 It is true that the defendant sought, quite properly, to put an end to such irregularities by adopting Article 5(3) of Regulation No 2362/98. However, with regard to imports into Finland, Austria and Sweden in 1994, it is totally

unjustified in the applicant's view to make proof of such imports conditional retrospectively on payment of the import duty in those States. There were no licences or fictitious contracts connected to those imports. The breach of the principle of equal treatment therefore resulted from the fact that, without any objective justification, different situations, namely that of operators who had paid customs duties in the Community and that of operators who had paid customs duties in the three States concerned, were treated in the same way. For wholesale and retail businesses in Finland, Austria and Sweden who had not imported any bananas from third countries or ACP countries in 1994, taking into account instances of customs clearance which took place in 1994 for the calculation of the reference quantity for 1999 was a windfall that was not enjoyed by traditional importers of bananas originating principally in third countries in Latin America.

70 Thirdly, the applicant contends that reducing the quantities it applied for by the amount determined by the Finanzgericht Hamburg also infringes the principle of equality.

71 It explains that the Finanzgericht Hamburg ruled by interim order that importation of the amount judicially determined should be approved without a licence provided the normal import duty was paid. The applicant had paid that duty.

72 It observes that under Article 5(3) of Regulation No 2362/98 operators who, although they do not hold the import licence for the transaction concerned, furnish proof that they have paid the relevant customs duties are to be deemed to be the importers. The applicant considers it has furnished such proof, although it has no import licences, by means of the interim order of the Finanzgericht Hamburg mentioned above. It argues that, according to the principle of equal

treatment, imports on the basis of an interim order of a national court should give rise to the same rights as those under licences.

73 The Commission contends that, as regards the first argument relied on by the applicant, the provision contained in Article 5(4) of Regulation No 2362/98 takes account of the fact that those States were not yet subject to the common organisation of the market in bananas in 1994 and enjoyed transitional measures during the first three quarters of 1995. Traditional importers, however, are not discriminated against, since all operators were able to have the quantities of bananas they imported into the abovementioned States taken into account for allocation of their reference quantity, provided they submitted the relevant administrative documents before the accession of those States or the permits issued during the first three quarters of 1995.

74 According to the Commission, what adversely affects the applicant is not, in fact, the contested rules relating to proof but the fact that the applicant did not import any bananas in 1994 into the three States in question, since it only arranged for their transport as far as the border. The rules laid down in Article 5(3) and (4) of Regulation No 2362/98 require proof that bananas were actually imported into Austria, Finland and Sweden. The applicant's practice of simply transporting the bananas as far as the border is the result of a business choice, and this cannot prevent the Community legislature from altering the conditions for granting import licences in the context of its broad discretion, taking Community interests into account.

75 In Article 5(4) of Regulation No 2362/98 the Commission drew the appropriate inference from the particular situations in the three States in question in 1994 and up until the third quarter of 1995, and adapted accordingly the rules relating to proof under the new Community arrangements for importing bananas into those

States during that period. This did not, however, constitute discrimination or different treatment.

76 The Commission also submits that the contention that it changed its administrative practice in 1995 has no basis in fact and that, in any event, even if that were the case, the change is not likely to affect the reference quantities for 1999, since they are determined on the basis of the new system of import duties introduced by Regulation No 2362/98.

77 The Commission goes on to challenge the applicant's third argument, concerning the fact that the quantities it had applied for had been reduced by the amount judicially determined.

78 It explains in this connection that amounts judicially determined may be allocated as reference quantities provided the import duties have actually been paid and the imports have actually taken place during the reference period, namely, in this case, between 1994 and 1996.

79 The applicant's customs debt in respect of the amount judicially determined was, it is true, established by a decision of the competent national authority, but the Finanzgericht Hamburg ordered the suspension of the payment of that debt

without stipulating that any security should be provided. It is not possible therefore to regard the customs debt as having been paid.

80 Furthermore, the Commission notes that the quantity of bananas at issue was imported by the applicant without a licence and, hence, outside the tariff quota, which means that the full rate under the common customs tariff applies to them. So long as that customs duty remains unpaid it is not possible to take that quantity of bananas into account in calculating the reference quantity.

Findings of the Court

81 It is settled case-law that the principle of equal treatment, of which the prohibition of discrimination laid down in the second subparagraph of Article 40(3) of the EC Treaty (now, after amendment, the second subparagraph of Article 34(2) EC) is only a specific expression, is one of the fundamental principles of Community law (see *Germany* v *Council*, paragraph 67). This principle requires that comparable situations should not be treated in a different manner unless the difference in treatment is objectively justified (see Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 97).

82 In this connection, different treatment may not be regarded as discrimination prohibited by Article 40(3) of the Treaty unless it appears to be arbitrary, or in other words, devoid of adequate justification and not based on objective criteria (see Case 106/81 *Kind* v *EEC* [1982] ECR 2885, paragraph 22).

83 In the light of that case-law, the applicant cannot argue that the Commission infringed the principle of non-discrimination or equal treatment by treating operators established in Finland, Austria and Sweden differently from traditional importers as regards activities in those countries during 1994. It should be noted in this connection that those States were not yet subject to the common organisation of the market in bananas in 1994, so that special arrangements were necessary in order to enable imports by operators established in those countries in 1994 to be taken into account in determining their reference quantity.

84 There is therefore no reason to believe that the respective situations of operators from the new Member States and traditional importers are comparable for the purposes of the case-law cited above.

85 The applicant is not justified either in asserting that Article 5(4) of Regulation No 2362/98 breaches the principle of non-discrimination. That provision actually takes into account the fact that the three States concerned were not yet subject to the common organisation of the market in bananas in 1994 and that transitional arrangements therefore had to be introduced for those countries, so that it was necessary to adopt special rules regarding the provision of proof in relation to their imports during 1994.

86 Furthermore, the applicant cannot maintain that abandoning the principle that the person who assumed the economic risk for the transaction should be deemed to be the importer is an infringement of the principle of non-discrimination. In view of the change in the Community import arrangements, the situation in which operators on the market find themselves under the new arrangements is not comparable to the situation they were in whilst the former arrangements were in force. In any event, since the Commission chose wholly objective criteria for calculating the reference quantities, in the form of production of copies of the

relevant customs documents and the proper import permits, the applicant cannot complain that it adopted a system based on arbitrary criteria.

87 It follows also that the applicant has no grounds for claiming that the principle of equal treatment has been infringed because different situations are treated in the same way, inasmuch as Article 5(3) of Regulation No 2362/98 lays down the same rules regarding proof for operators who have paid customs duties in the Community and those who have paid customs duties in the three States concerned, since that provision is based on objective criteria.

88 Lastly, with regard to the applicant's contention that it could have a quantity of bananas determined by an interim order of the Finanzgericht Hamburg taken into account, suffice it to say that the Commission is entitled to require all imports which may be taken into account as reference quantities to be genuine imports. The quantity referred to by the applicant was imported outside the tariff quota and was therefore subject to the full rate under the common customs tariff. The payment of the relevant customs duties was then suspended by the interim order of the Finanzgericht Hamburg. In those circumstances, the applicant cannot ask for that quantity to be taken into account in determining its reference quantity. It is for the applicant to establish that the customs duties in question have actually been paid, which it has failed to do. In that connection, it should be added that the Commission stated at the hearing, and was not contradicted on this point, that it informed the competent German authorities that it would be necessary to take that quantity into account if the abovementioned duties are paid.

89 It is clear from the above considerations that the claim that the principle of equality was infringed must be rejected.

Infringement of the principles of protection of property and legitimate expectations and the principle of proportionality

Arguments of the parties

90 The applicant contends that the contested rules relating to proof also give rise to a breach of the legitimate expectations of operators in Category A in so far as they relate to quantities imported into the three States concerned in 1994.

91 The applicant argues that in 1994 the proof required in order for an operator to be recognised as an importer was, according to the preamble to Regulation No 404/93, that he had assumed the economic risk of marketing the bananas, and he was therefore required to submit the business records substantiating the imports. It was only from 1995 onwards that the Commission altered its administrative practice — without any clear reason and without any legal basis — and began to require customs clearance documents to be submitted.

92 Customs clearance documents in respect of imports into Austria, Finland and Sweden before the accession of those States are in the possession of operators established in those States. Operators like the applicant who had imported bananas into those States in 1994 for the purposes of Regulation No 1442/93 were entitled to expect those imports to be taken into account for the allocation of licences. Those vested rights were withdrawn from them, however, because they were allocated to operators established in Austria, Finland and Sweden, despite the fact that the latter did not meet the conditions to be regarded as importers for the purposes of Regulation No 1442/93. The applicant stresses that it could not have expected the Community legislature to infringe its vested rights retrospectively. Those rights, based on an activity which took place in the past,

should be protected by the principles of protection of property and legitimate expectations.

93 The applicant also notes that, according to the 18th recital in the preamble to Regulation No 2362/98, it is only where reference quantities or annual allocations are provisionally allocated that they may not be regarded as vested rights or be claimed by operators as legitimate expectations. The reason for this is that the verifications and checks by the competent national authorities may, if need be, lead to corrections of operators' reference quantities or annual allocations. Since the allocation of quantities is based on precise information, this would justify such rights. The mere possibility of a correction to quantities should not, therefore, in the view of the applicant, deprive operators of their rights. Consequently, it argues that the legal view expressed by the applicant in that 18th recital constitutes an infringement of the principle of proportionality.

94 The Commission contends that it is settled case-law of the Court of Justice that there is no justification for a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained; this is particularly true in an area such as the common organisation of the markets, whose purpose involves constant adjustments to meet changes in the economic situation (see Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 57, and Joined Cases C-296/93 and C-307/93 *France and Ireland* v *Commission* [1996] ECR I-795, paragraph 59). Economic operators cannot therefore claim a legitimate expectation that a favourable situation will be maintained.

95 The determination, as provided for in Regulation No 1637/98 and Regulation No 2362/98, of previous imports which should be used as a reference and the criteria for allocating rights to licences are, in the Commission's view, components of the common organisation in the banana sector, which the Community legislature makes provision for in the exercise of its discretion and adjusts to meet changes in the economic and legal situation.

96 In view of the fact that the legal context may be amended, the Commission submits that operators could not therefore expect that imports into the three States concerned in 1994 should entitle them to rights for three years, as provided for under the former Community arrangements.

97 The same applies as regards the conditions required for an operator to be regarded as an importer. There can be no legitimate expectation that such conditions will be maintained, or that the possibility of establishing on the basis of those conditions the operator's status as an importer under the new common import arrangements will be maintained.

98 Finally, the Commission submits that there can have been no retrospective infringement of the applicant's alleged rights to licences. It explains that under the new arrangements it made provision for the allocation of licences for 1999, that is to say for the future, and the fact that the reference period is located in the past does not make the regulations themselves retrospective.

Findings of the Court

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

100 This is particularly true in an area such as the common organisation of markets, which involves constant adjustments to meet changes in the economic situation (see *Crispoltoni and Others*, cited above, paragraphs 57 and 58, and *France and Ireland* v *Commission*, cited above, paragraph 59).

101 In this case, since determination of the criteria to be taken into account in order to recognise an economic operator as an importer for the purposes of allocating import licences is one of the choices as to the appropriate means for implementing the policy of Community institutions with regard to the common organisation of the market in bananas, those institutions had discretion in the matter. This being so, the applicant had no grounds for a legitimate expectation that the criteria adopted under the former Community arrangements, according to which the applicant's imports into Austria, Finland and Sweden in 1994 would be taken into account in order to determine its reference quantity, would be maintained.

102 On the same grounds, the applicant cannot argue that the imports concerned gave it, under the former Community arrangements, vested rights to import licences. As the Commission quite rightly explained, those imports merely gave the applicant the possibility of obtaining licences in the future, but the realisation of that possibility depended on that legal context being maintained.

103 Finally, as regards the alleged infringement of the principle of proportionality, it should be noted that the Commission's statement in the 18th recital in the preamble to Regulation No 2362/98 that reference quantities and annual allocations may not constitute vested rights or be pleaded by operators as legitimate expectations is intended to inform operators of the fact that those quantities or allocations may be altered following verifications and checks by the national authorities. This statement, which appears only in the preamble to the

contested regulation and not among the legislative provisions, cannot be regarded as a breach of the principle of proportionality.

104 The claim that the principles of protection for property and legitimate expectations and the principle of proportionality have been infringed should therefore be rejected.

105 It follows from the above considerations that, since the Commission did not infringe the principles of equal treatment, protection of property and legitimate expectations or the principle of proportionality, the Community cannot incur liability.

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

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action.**

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

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 20 March 2001.

H. Jung P. Lindh

Registrar President