JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
12 July 2001 *

In Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99,

Comafrica SpA, established in Genoa (Italy),

and

Dole Fresh Fruit Europe Ltd & Co., established in Hamburg (Germany), represented by B. O'Connor, Solicitor, and B. García Porras, lawyer, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by X. Lewis, K. Fitch, H. van Vliet, T. van Rijn, C. Van der Hauwaert, E. de March and J. Flett, of its Legal Service, acting as Agents, assisted by J. Handoll, Solicitor, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by

the French Republic, represented by C. Vasak, C. de Salins, K. Rispal-Bellanger and F. Pascal, acting as Agents, with an address for service in Luxembourg,

intervener in Cases T-198/95, T-171/96, T-230/97,

and

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

intervener in Cases T-230/97 and T-225/99,

APPLICATION for:

— in Case T-198/95, first, annulment of Commission Regulation (EC) No 1869/95 of 26 July 1995, amending Regulation (EC) No 2947/94 fixing the single reduction coefficient for the determination of the quantity of bananas to be allocated to each operator in categories A and B within the tariff quota for 1995 (OJ 1995 L 179, p. 38), and, secondly, for damages together with interest thereon, in compensation for the loss caused to the applicants by the adoption of Regulation No 1869/95,

— in Case T-171/96, first, annulment of Commission Regulation (EC) No 1561/96 of 30 July 1996 fixing the reduction coefficients for the determination of the quantity of bananas to be allocated to each operator in categories A and B within the tariff quota for 1996 (OJ 1996 L 193, p. 15), and, secondly, for damages together with interest thereon in compensation for the loss caused to the applicants by the adoption of that regulation,

— in Case T-230/97, first, annulment of Commission Regulation (EC) No 1155/97 of 25 June 1997 fixing the reduction coefficients for the determination of the quantity of bananas to be allocated to each operator in categories A and B within the tariff quota for 1997 (OJ 1997 L 168, p. 67) and, secondly, for damages together with interest thereon in compensation for the loss caused to the applicants by the adoption of that regulation,

— in Case T-174/98, first, annulment of Commission Regulation (EC) No 1721/98 of 31 July 1998 fixing the reduction coefficients for the determination of the quantity of bananas to be allocated to each operator in categories A and B within the tariff quota for 1998 (OJ 1998 L 215, p. 62) and, secondly, for damages together with interest thereon in compensation for the loss caused to the applicants by the adoption of that regulation,

— in Case T-225/99, first, annulment of Commission Regulation (EC) No 1586/99 of 20 July 1999 amending Regulation (EC) No 2632/98 laying down for 1999 the single adjustment coefficient to be applied to each traditional operator's provisional reference quantity under the tariff quotas for traditional ACP bananas (OJ 1999 L 188, p. 19) and, secondly, for damages together with interest thereon in compensation for the loss caused to the applicants by the adoption of Regulation No 1586/99,

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 5 October 2000,

gives the following

Judgment

Legislative background

Regulation (EEC) No 404/93

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, hereinafter 'Regulation No 404/93') introduced under its Title IV, as from 1 July 1993, a common system for trade with third countries in place of the various national systems. A distinction was made between 'Community bananas', grown in the

Community, 'third country bananas', from countries other than the African, Carribbean and Pacific (ACP) States, 'traditional ACP bananas' and 'non-traditional ACP bananas'. Traditional ACP bananas and non-traditional ACP bananas were the quantities of bananas exported by the ACP states which, respectively, did not exceed and exceeded the quantities fixed in the Annex to Regulation No 404/93.

2 Pursuant to the first paragraph of Article 17 of Regulation No 404/93, any importation of bananas into the Community requires the prior submission of an import licence. That licence is issued by the Member States at the request of any interested party and irrespective of his place of establishment within the Community without prejudice to the special provisions made for implementation of Articles 18 and 19.

3 Article 18(1) of Regulation No 404/93 as originally enacted provided for the opening each year of a tariff quota of 2 000 000 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 subject to a levy of ECU 100 per tonne and imports of non-traditional ACP bananas to a zero duty. Article 18(2) of that regulation as originally enacted provided that imports of non-traditional ACP bananas and third country bananas outside the tariff quota were subject to a levy of ECU 750 and 850 per tonne respectively.

4 The fourth subparagraph of Article 18(1) of Regulation No 404/93 provided for a possible increase in the volume of the annual quota on the basis of the supply balance referred to in Article 16 and referred to the so-called 'management committee' procedure laid down in Article 27. That increase was to be made when necessary before 30 November of the year preceding the marketing year concerned.

5 Article 19(1) of Regulation No 404/93 provided for division of the annual tariff quota, opening 66.5% to the category of operators who marketed third country and/or non-traditional ACP bananas (Category A), 30% to the category of operators who marketed Community and/or traditional ACP bananas (Category B) and 3.5% to the category of operators established in the Community who started marketing bananas other than Community and/or traditional ACP bananas from 1992 (Category C).

6 Article 19(2) 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 Regulation (EC) 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, hereinafter 'the 1993 regime'). This regime, which was in force until 31 December 1998, applies to the present cases apart from Case T-225/99.

8 Article 3(1) of Regulation No 1442/93 defined as Category A or B 'operators' for the purposes of Articles 18 and 19 of Regulation No 404/93, economic agents, or any other body which had engaged in any one or more of the following activities on their own account:

'(a) the purchase of green third-country and/or ACP bananas from the producers, or where applicable, the production, consignment and sale of such products in the Community;

(b) as owners, the supply and release for free circulation of green bananas and sale with a view to their subsequent marketing in the Community; the risks of spoilage or loss of the product being equated with the risk taken on by the owner;

(c) as owners, the ripening of green bananas and their marketing within the Community'.

9 Article 4(1) of Regulation No 1442/93 provides:

'The competent authorities of the Member States shall draw up separate lists of operators in Categories A and B and the quantities which each operator has marketed in each of the three years prior to that preceding the year for which the tariff quota is opened, broken down according to economic activity as described

in Article 3(1). Operators shall register themselves and shall establish the quantities they have marketed by submitting individual written applications on their own initiative in a single Member State of their choice.'

10 Article 4(2) of Regulation No 1442/93 required operators to notify the competent authorities each year of the quantities of bananas marketed by them in the relevant reference years provided for in Article 4(1) broken down by reference to origin and class of activity as described in Article 3(1) of that regulation.

11 Article 4(5) of Regulation No 1442/93 provided that each year the competent authorities should then forward the lists of operators provided for in paragraph 1 to the Commission together with the quantities which each operator had marketed. It added:

'As and when required, the Commission shall forward these lists to the other Member States with a view to detecting or preventing inaccurate declarations by operators.'

12 Article 5(1) of Regulation No 1442/93 provided that each year the competent authorities should establish 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 tariff quota is opened, broken down by the economic activity carried out by the operator in accordance with Article 3(1) of that regulation. That average is referred to as the operator's 'reference quantity'.

13 Article 5(2) of Regulation No 1442/93 provided that the quantities marketed were to be adjusted by a weighting coefficient depending on the activity class applicable pursuant to Article 3(1) of that regulation as follows:

— activity (a): 57%,

— activity (b): 15%,

— activity (c): 28%.

14 By applying these weighting coefficients a given quantity of bananas cannot count in the calculation of the reference quantity for an amount greater than this figure whether it has been handled at all three stages corresponding to the activities set out above by the same operator or by two or three different operators. According to the third recital in the preamble to the regulation, the purpose of these weighting coefficients is to take account of the scale of the businesses concerned and of the commercial risk incurred and to correct the negative effects of counting the same quantities of product at various stages of marketing more than once.

15 Article 5(3) of Regulation No 1442/93 provides:

'The competent authorities shall notify the Commission at the latest by 15 October 1993 as regards 1994 and by 15 July each year thereafter of the total reference quantities weighted pursuant to paragraph 2 and the total quantities of bananas marketed in respect of each activity by operators registered with them.'

16 Article 6 of Regulation No 1442/93 provides:

'Depending on the annual tariff quota and the total reference quantities of operators as referred to in Article 5, the Commission shall fix, where appropriate, a single reduction coefficient for each category of operators to be applied to operators' reference quantities to determine the quantity to be allocated to each. The Member States shall determine the quantities for each operator in Categories A and/or B registered with them and shall notify the latter thereof ...'

17 Article 7 of Regulation No 1442/93 lists the documents which the competent authorities may require to be submitted to them by Category A and B operators registered with them in order to establish the quantities marketed by each of them. Article 8 of that regulation required the competent authorities to conduct all necessary checks to verify the validity of applications and supporting documents submitted by operators.

Regulation (EC) No 1637/98

18 With effect from 1 January 1999, important changes were introduced into the common organisation of the market of bananas by Council Regulation No 1637/98 of 20 July 1998 amending Regulation No 404/93 on the common organisation of the market in bananas (OJ 1998 L 210 p. 28). In particular, Articles 16 to 20 of Regulation No 404/93 were replaced by new provisions.

19 Article 16 of Regulation No 404/93 (as amended by Regulation No 1637/98) provides:

'...

For the purposes of this title:

1. "traditional imports from ACP States" means imports into the Community of bananas originating in the States listed in the Annex hereto up to a limit of 857 700 tonnes (net weight) per year; these are termed "traditional ACP bananas";

2. "non traditional imports from ACP States" means imports into the Community of bananas originating in ACP States but not covered by definition 1; these are termed "non-traditional ACP bananas";

3. "imports from non-ACP third States" means bananas imported into the Community originating in third States other than the ACP States; these are termed "third State bananas".'

20 Article 18(1) of Regulation No 404/93, as amended by Regulation No 1637/98, provides that a tariff quota of 2 200 000 tonnes (net weight) is to be opened each year for imports of third State and non-traditional ACP bananas. Under that tariff

quota imports of third State bananas were subject to duty of ECU 75 per tonne, while imports of non-traditional ACP bananas are free of duty.

21 Article 18(2) of that regulation, as amended by Regulation No 1637/98, provided that an additional tariff quota of 353 000 tonnes (net weight) was to be opened each year for imports of third State and of non-traditional ACP bananas. Imports of third State bananas under this tariff quota were subject to duty of ECU 75 per tonne while imports of non-traditional ACP bananas were free of duty.

Regulation (EC) No 2362/98

22 On 28 October 1998 the Commission adopted Regulation (EC) No 2362/98 laying down rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32). Regulation No 1442/93 was repealed with effect from 1 January 1999 by Article 31 of Commission Regulation EC No 2362/98. The new rules (hereinafter 'the 1999 regime') governing the allocation and administration of licences for the import of bananas under the tariff quotas are contained in Titles I, II and IV of Regulation No 2362/98 and are applicable only to Case T-225/99.

23 The important differences between the 1993 regime and the 1999 regime, may be summarised as follows.

(a) the distinctions between the types and functions of operators have been abolished by the 1999 regime;

(b) the 1999 regime is based on quantities of banana imports;

(c) licences are managed under the 1999 regime without regard to the origin (ACP or third country) of the bananas;

(d) the tariff quota as a whole has been increased and the part allocated to newcomers has been enlarged.

24 Article 2 of Regulation No 2362/98 provides, *inter alia*, that the tariff quotas and the traditional ACP quantities, the former established under Article 18(1) and (2) and the latter under Article 16 of Regulation No 404/93 (as amended) are to be made available as follows:

— 92% to 'traditional operators' as defined in Article 3;

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

25 Article 3 of Regulation No 2362/98 provides:

'For the purposes of this Regulation, "traditional operators" shall mean economic agents established in the European Community during the period for determining their reference quantities, and also at the time of their registration

under Article 5 below, who have actually imported a minimum quantity of third-country and/or ACP-country bananas on their own account for subsequent marketing in the Community during a set reference period.

...'

26 In accordance with Article 4(1) of Regulation No 2362/98 traditional operators registered in a Member State 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. Article 4(2) provides that the reference period for imports carried out in 1999 comprises the years 1994, 1995 and 1996.

27 Article 6(1) of Regulation No 2362/98 provides: 'by 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 quantities are to be based on a three-year average even where the operator has not imported bananas for part of that period. Under Article 6(2) of Regulation No 2362/98, the competent authorities are to notify the Commission each year of the list of traditional operators they have registered and the total provisional reference quantity determined.

28 Pursuant to Article 6(2), second paragraph, of Regulation No 2362/98, the Commission, as and when required, is to forward those lists to the other Member States with a view to facilitating the detection or prevention of false claims by

operators. Article 13 of the regulation provides for sanctions which can be taken against operators who by means of fraudulent manipulations or fraudulent documentation seek to obtain an unwarranted reference quantity.

29 Under Title V of Regulation No 2362/98 a number of transitional provisions for the year 1999 are laid down. Pursuant to Article 28(1) of that regulation, applications for registration for the year 1999 were to be submitted by operators at the latest by 13 November 1998. Those applications were to be accompanied, in the case of traditional operators, by a figure for the total quantities of bananas actually imported during each of the years of the reference period 1994 to 1996, the serial numbers of all import licences and licence extracts used for these imports, together with all documents showing that the duties have been paid (Article 28(1)(a) of Regulation No 2362/98).

30 Pursuant to Article 28(2) of Regulation No 2362/98 the Member States are required to forward by 30 November 1998, *inter alia*, a list of the operators who had submitted an application for registration as traditional operators together with their total provisional reference quantities. In addition, the Commission must be notified *inter alia* of the quantity of bananas imported by each traditional operator from 1994 to 1996, their provisional reference quantity and the serial numbers of the licences and licence extracts used.

31 In accordance with Articles 6(3) and 28(3) of Regulation No 2362/98 the Commission could, if necessary, fix a single adjustment coefficient to be applied to each operator's provisional reference quantity. This coefficient was fixed in the light of the notifications under Article 6(2) of that regulation and the total volume of tariff quotas and traditional ACP bananas. The Member States are required under Article 28(4) of Regulation No 2362/98 to determine the reference quantity of each operator and notify him of it by 10 December 1998.

The reduction/adjustment coefficients

The 1993 regime

32 On 19 November 1993 the Commission adopted Regulation (EC) No 3190/93 fixing the uniform reduction coefficient for determining the quantities of bananas to be allocated to each operator in categories A and B in the context of the tariff quota 1994 (OJ 1993 L 285 p. 28). That regulation was the subject of the application for annulment and a claim for damages on which the Court of First Instance delivered its judgment on 11 December 1996 (Case T-70/94 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [1996] ECR II-1741, hereinafter 'the *Comafrica* judgment', see paragraphs 38 to 41 below).

33 On 26 July 1995 the Commission adopted Regulation (EC) No 1869/95 amending Regulation (EC) No 2947/94 fixing the single reduction coefficient for the determination of the quantity of bananas to be allocated to each operator in categories A and B within the tariff quota for 1995 (OJ 1995 L 179, p. 38). This is the regulation annulment of which is sought in Case T-198/95.

34 Article 1 of Regulation (EC) No 2947/94 as thereby amended provides:

'Within the tariff quota [of 2 200 000 tonnes] referred to in Articles 18 *and 19* of Regulation (EEC) No 404/93 [as amended], the quantity to be allocated to each

operator in categories A and B for the period from 1 January to 31 December 1995 shall be calculated by applying to the operators' reference quantity determined in accordance with Article 5 of Regulation (EEC) No 1442/93 the following single reduction coefficients:

— for each Category A operator: 0.553842

— for each Category B operator: 0.472618.

This coefficient shall apply to quantities marketed in the Community during the reference period 1991 to 1993 for operators in categories A and B established in the Community as of 31 December 1994.'

35 In similar terms the Commission fixed reduction coefficients for each of the three succeeding years. The regulations concerned are Regulations (EC) No 1561/96 of 30 July 1996, No 1155/97 of 25 June 1997 and No 1721/98 of 31 July 1998 fixing the reduction coefficients for the determination of the quantities of bananas to be allocated to each operator in categories A and B within the tariff quotas for 1996 (OJ 1996 L 193, p. 15), 1997 (OJ 1997 L 168, p. 67) and 1998 (OJ 1998 L 215, p. 62) respectively. Regulations No 1561/96, No 1155/97 and No 1721/98 are the subject-matter of the actions for annulment and damages in

Cases T-171/96, T-230/97 and T-174/98. The position in the years 1995 to 1998 may thus be summarised as follows:

Case	Market year	Regulation	Reduction coefficient
T-198/95	1995	No 1869/95	0.553842
T-171/96	1996	No 1561/96	0.623432
T-230/97	1997	No 1155/97	0.732550
T-174/98	1998	No 1721/98	0.860438

Cases T-198/95, T-171/96, T-230/97 et T-174/98 are concerned only with the reduction coefficients as applied to operators in Category A.

The 1999 regime

36 On 20 July 1999, the Commission adopted Regulation (EC) No 1586/99 amending Regulation No 2632/98 laying down for 1999 the single adjustment coefficient to be applied to each traditional operator's provisional reference quantity under the tariff quota for traditional ACP bananas (OJ 1999 L 188, p. 19). That regulation is the subject of the action for annulment and damages in Case T-225/99.

37 Article 1 of that regulation fixed a single adjustment coefficient of 0.947938 for 1999.

Background to the litigation

Case T-70/94

38 Comafrica SpA and Dole Fresh Fruit Europe Ltd & Co. import bananas from third countries into Italy and Germany respectively where they were registered from 1993 to 1998 as operators in Category A and in 1999 as traditional operators with the competent national authorities.

39 By application lodged at the Registry of the Court of First Instance on 11 February 1994 (registered as Case T-70/94), the applicants brought an action against the Commission seeking, *inter alia*, annulment of Article 1 of Commission Regulation No 3190/93 (see paragraph 32 above).

40 In its *Comafrica* judgment, the Court of First Instance declared the application admissible but rejected it as unfounded. So far as concerns the admissibility of the application, Regulation No 3190/93 was held to consist of a collection of individual decisions addressed to each operator in categories A and B who had sought and obtained a reference quantity for the importation of bananas in the year 1994 which permitted each to determine the precise quantity which he would be entitled to import during that year.

41 On 20 February 1997 the French Republic brought an appeal before the Court of Justice against that judgment (registered as Case C-73/97 P).

42 In its judgment of 21 January 1999 in Case C-73/97 P *France* v *Commafrica and Others* [1999] ECR I-185 the Court of Justice set aside the *Comafrica* judgment and dismissed the application for annulment against Regulation No 3190/93 as inadmissible.

43 In particular, the Court examined the finding of the Court of First Instance at paragraph 41 of its judgment to the effect that operators had been allocated a reference quantity prior to the adoption of Regulation No 3190/93 fixing the reduction coefficient for 1994. It pointed out that the Court of First Instance had gone on to express the view that the publication of the reduction coefficient had the immediate and direct effect of enabling each operator to ascertain the precise amount he was entitled to import in 1994 by applying the reduction coefficient to the reference quantity already allocated to him (see *France* v *Comafrica and Others*, paragraphs 16 and 17).

44 Having examined all the stages of the process laid down in Articles 4 to 8 of Regulation No 1442/93 governing the issue of import licences to the different categories of operators (*France* v *Comafrica and Others*, cited above, paragraphs 19 to 29), the Court found that the figures notified by operators to the competent authorities might be altered several times during the course of the procedure prior to the fixing of the coefficient without the changes made by those authorities or the Commission being brought to the attention of the operators concerned (*France* v *Comafrica and Others*, paragraph 30).

45 The Court therefore held that the Court of First Instance had erred in holding in paragraph 41 of the *Comafrica* judgment that the contested regulation 'informs each operator concerned that the quantity of bananas it was entitled to import under the tariff quota for the year 1994 may be determined by applying the stated uniform reduction coefficient to its reference quantity' and that the regulation

had the immediate and direct effect of enabling each operator to ascertain his own precise entitlement by applying that coefficient to the reference quantity already allocated to him (*France* v *Comafrica and Others*, paragraph 32).

46 The Court further considered the reliance by the Court of First Instance on the analogy with the judgment in Case C-354/87 *Weddel* v *Commission* [1990] ECR I-3847 and concluded that the Court of First Instance erred in paragraph 41 of its judgment in holding that the contested regulation was a collection of individual decisions addressed to operators informing each of the precise quantity allocated to him (*France* v *Comafrica and Others*, paragraph 38).

Procedure

47 By applications lodged at the Registry of the Court of First Instance on 28 October 1995 (T-198/95), 23 October 1996 (T-171/96), 5 August 1997 (T-230/97), 20 October 1998 (T-174/98) and 8 October 1999 (T-225/99) respectively, the present actions were brought against Regulations No 1869/95, No 1561/96, No 1155/97, No 1721/98 and No 1586/99 ('the contested regulations').

48 By orders of 28 May 1997 in Cases T-198/95 (in which the written procedure had already closed) and T-171/96, of 24 September 1997 in Case T-230/97 and of 12 January 1999 in Case T-174/98, the Court stayed proceedings in those cases pending delivery of the judgment on appeal in Case C-73/97 P *France* v *Comafrica and Others*.

49 By letters dated 2 February 1999, the Court of First Instance invited the applicants in Cases T-198/95, T-171/96, T-230/97 and T-174/98 to lodge observations on the inferences to be drawn from the judgment in *France* v *Comafrica and Others*, cited above, as to the continuance of proceedings in the present cases. Once the applicants had submitted their observations, the written procedure was resumed and completed in Cases T-171/96, T-230/97 and T-174/98.

50 By applications lodged on 25 March 1996, 13 February 1997 and 24 October 1997, the French Republic sought leave to intervene in Cases T-198/95, T-171/96 and T-230/97 respectively in support of the forms of order sought by the Commission.

51 The Kingdom of Spain also applied for leave to intervene in support of the forms of order sought by the Commission by applications lodged on 15 December 1997 and 17 February 2000 in Cases T-230/97 and T-225/99.

52 The parties raised no objection to those applications. However, the applicants sought, as against the French Republic in Cases T-171/96 and T-230/97 and as against the Kingdom of Spain in Cases T-230/97 and T-225/99, to have certain pages or paragraphs in their applications and, where appropriate, certain documents annexed to their pleadings treated as confidential.

53 Those applications for leave to intervene were granted, as regards the French Republic by order of 6 May 1996 in Case T-198/95 and of 30 September 1999 in Cases T-171/96 and T-230/97. In the case of the Kingdom of Spain, the applications were granted by orders of 30 September 1999 and 12 April 2000 in Cases T-230/97 and T-225/99 respectively. In those orders, the Court reserved its

decision on the request for confidential treatment, directed that a non-confidential version of the documents be served on the interveners and that a date be fixed by which the interveners could apply to obtain access to the confidential versions. The interveners made no such applications within the time thus prescribed.

54 In Case T-171/96 the Commission raised an objection of inadmissibility on 11 June 1999 pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance. Having regard to the fact that the judgment in *France* v *Comafrica and Others* had been delivered after the lodging of the defence and constituted a new event, this objection was treated by the Court as a pleading raising a new plea in law. The applicants lodged their observations on that plea on 1 September 1999.

55 In Cases T-230/97 and T-174/98, the Commission lodged an objection of inadmissibility on 10 June 1999 pursuant to Article 114(1) of the Rules of Procedure. The applicants duly lodged their observations on those objections of admissibility on which the Court of First Instance reserved its decision by orders of 27 September 1999.

56 By order of the President of the Fifth Chamber of the Court of 13 July 2000 Cases T-198/95, T-171/96, T-230/97 and T-174/98 were joined for the purposes of the hearing and judgment on account of the connection between them in accordance with Article 50 of the Rules of Procedure.

57 On hearing the report of the Judge Rapporteur the Court (Fifth Chamber) decided to open the oral procedure. By way of measures of organisation of the procedure the Court decided to invite the parties to reply to certain questions and to produce certain documents.

58 In particular, the Court asked the Commission to inform it of corrections made to the reference quantities attributed for the 1997 and 1998 financial years for Italy and Germany and put certain questions to the parties in order to clarify *inter alia* the respective roles of the competent national authorities and the Commission in correcting reference quantities attributed to operators. The Court of First Instance also invited the applicants to quantify in monetary terms the losses they claimed to have sustained and to explain their calculation in relation to their profit margins. The parties complied with those requests and requested that some parts of their replies be treated as confidential as against the interveners.

59 The oral arguments of the parties and their replies to the questions of the Court of First Instance were heard at a hearing which took place on 5 October 2000.

60 At the hearing Case T-225/99 was joined to the other cases for purposes of the hearing and judgment in view of the connection between them pursuant to Article 50 of the Rules of Procedure and the applications for confidential treatment were granted.

Forms of order sought

61 In Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99, the applicants claim that the Court should:

— declare the actions admissible;

— declare each of the contested regulations void pursuant to Article 173 of the EC Treaty (now, after amendment, Article 230 EC) and Article 174 of the EC Treaty (now Article 231 EC) to the extent that they affect the applicants or, in the alternative, to declare the said regulations void *erga omnes*;

— order the Commission, pursuant to Articles 178 of the EC Treaty (now Article 235 EC) and the second paragraph of Article 215 of the EC Treaty (now Article 288 EC), to make good any damage, together with interest thereon, caused to the applicants by the wrongful adoption of the said contested regulations;

— make any additional order which the Court considers necessary for the purpose of determining the damage caused to the applicants;

— order the Commission to pay the costs.

62 In Case T-225/99 the applicants claim the Court should also order the Commission to furnish certain information as to the calculation of the reference quantities for 1999.

63 In Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 the Commission contends that the Court should:

— dismiss the action as inadmissible;

— dismiss the action as unfounded;

— order the applicants to pay the costs.

64 In Case T-225/99 the Commission also contends that the Court should reject the request for measures of inquiry.

65 In Cases T-198/95, T-171/96 and T-230/97, the French Republic as intervener claims that the Court should dismiss the applications.

66 In Cases T-230/97 and T-225/99, the Kingdom of Spain as intervener claims that the Court should:

— declare the action inadmissible and, in the alternative, unfounded and dismiss the action for damages as unfounded;

— order the applicants to pay the costs.

Admissibility of the claims for annulment

Arguments of the parties

67 The Commission submits that the claims for annulment are admissible. It contends that the applicants have failed to establish that the contested regulations can be treated as decisions adopted 'in the form of a regulation' which are 'of direct and individual concern' to them. It is clear that the applicants form a part of a closed class of operators in which each member can, in theory, be identified at the point when the contested regulation is adopted. Nevertheless, even though the existence of a 'closed class' is a necessary condition for a finding of individual concern, it is not of itself sufficient. The contested regulations apply to situations which have been determined objectively and they have legal affects as regards categories of persons viewed in an abstract and general manner. They fix the reduction/adjustment coefficients which the national authorities are required to apply to all operators. The Commission fixed the reduction coefficients on the basis of the global reference quantities determined by the national authorities rather than by reference to the quantities for individual operators. The Commission shares the views of Advocate General Tesauro in Case C-244/88 *Usine* coopératives *de déshydratation du Vexin and Others* v *Commission* [1989] ECR 3811, p. 3821, point 4, and Advocate General Mischo in Case C-229/88 *Cargill and Others* v *Commission* [1990] ECR I-1303, I-1309, point 20, to the effect that it is necessary 'for the circumstance which enables the addressees of the measure to be identified to have in some way prompted the intervention of the institution and therefore to form part of the raison d'être of the measure itself'.

68 Moreover, the present applications are manifestly inadmissible in the light of the judgment of the Court of Justice in *France* v *Comafrica and Others* because the same considerations apply in Cases T-198/95, T-171/96, T-230/97 and T-174/98 and the applicable legal regime is precisely the same apart from some amendments which have no bearing upon the criteria as to admissibility. As

regards Case T-225/99, the Commission contends that, although the 1999 and 1993 regimes are markedly different, they have common characteristics which led the Court to declare the action inadmissible in its judgment in *France* v *Comafrica and Others*, cited above. As a result, the applicants are neither directly nor individually concerned by the contested regulations.

69 The Commission points out that, in its judgment in *France* v *Comafrica and Others*, cited above, the Court of Justice held, first, that Regulation No 3190/93 fixing the uniform reduction coefficient for 1994 was not of direct concern to the applicants because it did not have the effect of informing the operator concerned of the quantity of bananas he would be entitled to import by applying the coefficient to his reference quantity. An operator was not in a position to determine the reference quantity to which the coefficient should be applied because the information submitted by the operators to the national competent authorities could be altered several times during the course of the procedure provided for in Article 5(3) of Regulation No 1442/93 before the fixing of the coefficient and without their knowing of the alteration.

70 The applicants' assertion that the Commission in practice receives detailed figures relating to the quantities of bananas imported by each individual operator so that it follows that the Commission alone fixes the reference quantities for operators, does not lead to the result that the present applications are admissible. As the Court pointed out in paragraph 25 of the judgment in *France* v *Comafrica and Others*, cited above, Article 5(3) of Regulation No 1442/93 requires the competent national authorities to notify the Commission of the total amount of bananas marketed in respect of each activity referred to in Article 3(1) of that regulation, for operators registered with them. The applicants' evidence that detailed figures are forwarded to the Commission does no more than demonstrate that the existing legislation is being properly applied by those national authorities.

71 Second, the Court of Justice held in that case that the contested Regulation No 3190/93 was not of individual concern to the applicants. It held that, unlike

the operator considered in the Court's judgment in *Weddel* v *Commission*, cited above, the operator here did not obtain a reference quantity before the contested regulation was adopted and is not in a position to ascertain the definitive quantity he would be entitled to import. Moreover, he cannot know his own reference quantity until it is fixed by the Member State and notified to him (*France* v *Comafrica and Others*, cited above, paragraph 27). The definitive position of each operator is not fixed unless and until the national authorities notify their decision to him. Moreover, the applicants have submitted no evidence and adduced no arguments which indicate that the present cases can be distinguished from *Comafrica* and *France* v *Comafrica and Others*, cited above.

72 In Case T-225/99 the Commission adds that the Court also noted in *France* v *Comafrica and Others*, cited above, that the applicants were entitled by means of litigation at national level to ask the national Court to assess whether their definitive reference quantity had been fixed in accordance with the 1999 regime.

73 The Kingdom of Spain as intervener relies, in essence, upon the same arguments as the Commission.

74 The French Government contends that the applications in cases T-198/95, T-171/96 and T-230/97 are inadmissible in the light of the judgment of the Court of Justice in *France* v *Comafrica and Others*, cited above.

75 The applicants, in response, submit that the contested regulations are of direct and individual concern to them in the light of the judgment of the Court of Justice in *Weddel* v *Commission*, cited above, in which the Court held that a regulation

fixing a reduction coefficient for applications for import licences of high quality beef and veal was to be regarded as a bundle of individual decisions taken by the Commission, each of those decisions affecting the legal position of each applicant.

76 First, the applicants submit that they are individually concerned, pointing out that, before adopting the contested regulations the Commission had received from the Member States the names and addresses of all operators and the quantities of bananas which each had claimed to have marketed/imported individually. The contested regulations are not, therefore, regulations of general application, but each is a 'bundle of individual decisions' affecting the legal position of the applicants (see judgment of the Court of Justice in Joined Cases 41/70 to 44/70 *International Fruit Company and Others* v *Commission* [1971] ECR 411, at paragraph 21). They assert that the Commission knew precisely which operators would be affected by those regulations.

77 The Commission's claim to have fixed the reduction coefficients on the basis of global reference quantities rather than the reference quantities of individual operators so that each regulation is a measure of general application applied to categories of persons viewed in a general and abstract manner should be rejected. The applicants consider that the total reference quantities are derived from the individual quantities which are determined by the Member States acting as agents of the Commission.

'Any decision in respect of the whole is in fact a decision in respect of each element thereof.'

78 The applicants submit that they form a part of a closed group of economic operators and fulfil all additional criteria which might be required pursuant to the

obiter dicta of the Court of Justice. The applicants can therefore show that 'the circumstances which enable the addressees of the measure to be identified have in some way prompted intervention and therefore form part of the raison d'être of the measure itself' (see the Opinions of Advocates General Tesauro and Mischo, cited above, point 4 and point 20 respectively). It is the act of registration and the application for import licences by operators that initiates the whole licence allocation process leading to the total reference quantities and thereby to the possible need for a reduction/adjustment coefficient.

79 The applicants assert that the Commission's reliance on the order of the Court of Justice in Case C-131/92 *Arnaud and Others* v *Council* [1993] ECR I-2573 to argue that membership of a closed class is insufficient to found individual concern is irrelevant. According to the applicants, the contested measure in that case was not adopted on the basis of information supplied by operators to the Member States and thus to the Commission, upon which the ultimate decision would be based. Similar reasoning applies to the second case cited by the Commission namely the judgment of the Court of Justice in Case C-264/91 *Albertal and Others* v *Commission* [1993] ECR I-3265, in which the measure at issue was one of general application and had not been adopted on the basis of information supplied by those to whom it was addressed.

80 Second, the applicants submit that the contested regulations are of direct concern to them because no margin of discretion is left to the Member States to which they are addressed (see paragraphs 23 to 28 of the judgment in *International Fruit Company* v *Commission*, cited above).

81 In the *Comafrica* judgment, the Court of First Instance declared a similar claim brought by the applicants against the reduction coefficient for the marketing year 1994 to be admissible. In Cases T-198/95, T-171/96, T-230/97 and T-174/98, the applicants argue that they are directly and individually concerned by the contested regulations because the regulations clearly constitute regulations 'for

the determination of the quantity of bananas to be allocated to each operator'. Each of those regulations constitutes, on its face, a bundle of decisions in the form of a regulation.

82 The present cases can in any event be distinguished from the judgment of the Court of Justice in *France* v *Comafrica and Others*, cited above.

83 The question of the direct applicability of Regulation No 3190/93 was considered by the Court in its judgment in *France* v *Comafrica and Others*, cited above. However, the question as to whether the applicants were directly concerned by that regulation was not argued by the Commission before the Court of First Instance nor by the Commission or the French Government on appeal. In fact it was the Advocate General who raised this question for the first time in his Opinion in *France* v *Comafrica and Others*, cited above. The judgment of the Court and the Opinion of the Advocate General were *ultra vires* in deciding on points of fact and law which had not been raised by the parties themselves. The applicants were not invited to comment on these new findings or arguments. There is therefore a clear infringement of the fundamental rights of defence and the principle of equality laid down in Article 6 of the European Convention on Human Rights and the recent case-law of the European Court of Human Rights, in particular, the judgment of 30 October 1991 in Borgers v Belgium, Series A No 214-B.

84 The question whether the contested regulations are of direct concern to the applicants is central to the present cases. The main argument put forward by the Commission in its objection of inadmissibility, to the effect that it did not directly fix the reference quantities of operators, cannot be accepted.

85 There has been some misunderstanding regarding the practice in relation to the annual allocation of rights to import bananas into the Community. Contrary to

the assumption made in *Comafrica* and *France* v *Comafrica and Others*, cited above, the Commission does in fact play a direct role in the examination and verification of figures for each operator and especially in the fixing of individual reference quantities. In that regard the applicants submit that the Court should order a measure of inquiry pursuant to Article 65 of the Rules of Procedure with a view to clarifying the facts, particularly the role of the Commission in the matter.

86 The applicants submit that the Commission intervenes directly in the verification of the validity of claims for reference quantities made by operators. It is the operators who initiate the procedure by first registering as operators with the competent authority of their choice. Then, pursuant to Article 4(2) of Regulation No 1442/93, for the 1993 regime and Article 5 of Regulation No 2362/98 for the 1999 regime, they make a claim as to the past marketing activities which they have carried out during the reference period. All of the claims to a single national authority are gathered together and submitted to the Commission by a particular date.

87 The Commission adds up the valid reference quantities correctly declared by each Member State and if that figure exceeds the available quota for the year, it fixes a single reduction/adjustment coefficient to apply to the provisional reference quantity of each operator in order to determine the quantity of rights to be given to each of them in accordance with Article 6 of Regulation No 1442/93, for the 1993 regime, and Article 6 of Regulation No 2362/98, for the 1999 regime. The real problem is the validity of operator claims. As regards the 1993 regime, once the Commission has received the reference quantities from the Member States, it begins the process of verification. Contrary to the finding on appeal in *France* v *Comafrica and Others*, cited above, the Commission does not conduct that investigation on the basis of global figures for each Member State but on the basis of detailed figures relating to each individual operator and in relation to each activity listed in Article 3(1) of Regulation No 1442/93. The Commission could not conduct such an investigation without recourse to the detailed declarations of the various operators.

88 The applicants point out that it is possible for officials of Member States to detect double counting in respect of double claims for a single quantity of bananas only if the two operators concerned have made their applications to the same competent authority. The direct involvement of the Commission is necessary because it is not possible to detect double counting when the claims were submitted to different authorities. According to the applicants, the Commission should therefore direct and organise the verification of the validity of claims for reference quantities. The Member States are merely acting on behalf of the Commission when they carry out investigations (Case C-478/93 *Netherlands* v *Commission* [1995] ECR I-3081). They point out that, where the Commission considers that a national authority has not done a satisfactory job, it can impose its own view by unilaterally amending the reference quantity submitted by that authority and in relation to a specific operator.

89 In practice, the Commission has great difficulty every year in determining the exact amount of the valid reference quantity. It has fixed a provisional reduction/adjustment coefficient in order, as is demonstrated by the recitals to the regulations fixing those coefficients, to gain time to carry out checks on operator claims where it is clear that there has been double counting.

90 The final valid reference quantity for any operator is determined over a period of time. Sometimes there is an early investigation into the validity of the claims and in that event those claims are confirmed by the Member State's competent authority. In other situations the operators are only informed of their final reference quantity at the time they are notified by the national authority of the definitive reduction/adjustment coefficient and their import rights. However, it is the Commission which fixes finally the definitive reference quantity for each individual operator. It fixes the Community-wide reference quantity and the volumes of the quotas and makes the decision fixing the reduction/adjustment coefficient on the basis of these data. The Commission cannot fix the

Community-wide reference quantity without having fixed the global and the individual operator reference quantities. This direct involvement has been recognised by the Commission in paragraphs 22 to 39 of its defence in Case T-174/98.

91 The applicants maintain that their argument to the effect that the Commission does use individual reference quantities is confirmed by Article 6 of Regulation No 2362/98 which provides that the national authorities notify to the Commission for each operator *inter alia* 'the quantities of their actual banana imports during the reference period'. Using that information and in the light of the total volume of tariff quotas the Commission fixes, where appropriate, a single adjustment coefficient to be applied to each operator's provisional reference quantity. In fact, the introduction of the 1999 regime and, in particular, the adoption of Article 6 of Regulation No 2362/98 merely confirms the practice which had been followed under the 1993 regime.

92 They observe that in *France* v *Comafrica and Others*, the Court of Justice did not make any finding on the question as to whether the Commission fixes the individual reference quantities. It merely found that the operators do not know the amount of their reference quantities before the fixing of the reduction coefficient. But this absence of knowledge does not make the decision of the Commission to fix the reference quantities any less an act of direct and individual concern to the applicants.

93 Finally, the applicants submit that, if the present applications are declared inadmissible, they will be left without a remedy given that the issue of false claims or mistakes in other Member States and of the inadequate supervision and verification by the Commission could not be examined in the course of a legal action in the Member States where the applicants are registered.

Findings of the Court

94 Under the fourth paragraph of Article 173 of the EC Treaty, any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to him. The particular purpose of that provision is to prevent the Community institutions from being able, simply by choosing to use the form of a regulation, to preclude an individual from bringing an action against a decision which concerns him directly and individually and thus to make it clear that the nature of a measure cannot be changed by the form chosen (Case T-47/95 *Terres Rouges and Others* v *Commission* [1997] ECR II-481, paragraph 39).

95 It is therefore necessary to consider first whether the applicants are directly affected by the contested regulations.

Direct concern

96 It is settled case-law that for an individual applicant be directly concerned by a Community measure in the sense of the fourth paragraph of Article 173 of the EC Treaty, that measure must directly affect the legal situation of that person and its implementation must be purely automatic and result from Community rules alone without the need for the application of other intermediate measures (Case T-69/99 *DSTV* v *Commission* [2000] ECR II-4039, paragraph 24).

97 It should be noted that, contrary to the claims made by the applicants, the question as to whether they were directly concerned by Regulation No 3190/93 was not decided by the Court of Justice in its judgment in *France* v *Comafrica and Others*, cited above. As is clear from paragraph 42 of the *Comafrica* judgment,

the Commission did not contest the applicants' claim that the regulation was of direct concern to them, so that this issue could not therefore have been the subject of an appeal to the Court of Justice. Furthermore it is clear from the judgment in *France* v *Comafrica and Others* and particularly from paragraphs 10, 38 and 39, that the appeal was limited to the question as to whether the regulation at issue was of individual concern to the applicants.

98 The essential purpose of the contested regulations is to fix, in accordance with the first paragraph of Article 6 of Regulation No 1442/93 or Article 6(3) of Regulation No 2362/98, the single reduction/adjustment coefficient to be applied to the operators' reference quantities in order to bring them into line with the tariff quotas for the years 1995 to 1999. The competent authorities of the Member States therefore have no choice or discretion as to the use of the coefficients. They must apply them automatically without the intervention of any intermediate rules. It follows that the contested regulations affect the applicants directly.

Individual concern

99 According to settled case-law the test for distinguishing between a regulation and a decision is whether the measure is of general application or not (order of the Court of Justice of 12 July 1993 in Case C-168/93 *Gibraltar and Gibraltar Development* v *Council* [1993] ECR I-4009, paragraph 11, and orders of the Court of First Instance of 19 June 1995 in Case T-107/94 *Kik* v *Council and Commission* [1995] ECR II-1717, paragraph 35, and of 26 March 1999 in Case T-114/96 *Biscuiterie-Confiserie LOR and Confiserie du Tech* v *Commission* [1999] ECR II-913, paragraph 26). A measure is of general application if it applies to objectively determined situations and produces effects with respect to categories of persons envisaged in the abstract (Case 307/81 *Alusuisse Italia* v *Council and Commission* [1982] ECR 3463, paragraph 9, and Case C-321/95 P *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651, paragraph 28; order in *Kik* v *Council and Commission*, cited above, paragraph 35).

100 Moreover, it is settled case-law that the general scope and hence the legislative nature of a measure are not called into question by the fact that it is possible to determine the number or even the identity of the persons to whom it applies at a given moment as long as it is established that it is applied by virtue of an objective legal or factual situation defined by the measure in relation to the objective of the latter (see order of the Court of First Instance of 29 June 1995 in Case T-183/94 *Cantina cooperativa fra produttori vitivinicoli di Torre di Mosto and Others* v *Commission* [1995] ECR II-1941, paragraph 48).

101 Furthermore, it is not impossible that in certain circumstances the provisions of a measure of legislative character applicable generally to the economic operators concerned may, nevertheless, concern some of them individually (see judgments of the Court in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 13, and Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 19). In those circumstances, a Community measure may be of a legislative character yet, at the same time, be in the nature of a decision *vis à vis* some of the traders concerned (see Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1994] ECR II-2941, paragraph 50). Nevertheless, a natural or legal person cannot claim to be individually concerned unless he is affected by the act in question by reason of certain attributes which are particular to him or by reason of circumstances which differentiate him from all other persons (see the judgment in *Codorniu* v *Council*, cited above, paragraph 20, and the judgment of the Court of First Instance in Case T-12/93 *CCE de Vittel and Others* v *Commission* [1995] ECR II-1247, paragraph 36. In the present case, the applicants have not shown that they are affected by the contested regulation by virtue of certain attributes which are particular to them or as a result of facts which distinguish them from other persons in the terms of the above case-law.

102 In the present case the applicants dispute the legislative nature of the contested regulations and submit that, notwithstanding the judgment in *France* v *Comafrica and Others*, cited above, each of those regulations must be analysed as a 'bundle of individual decisions' affecting their legal position as a closed circle limited to the economic operators concerned. The Commission received from the competent national authorities individual data concerning all operators including the

quantities of bananas which each of them claimed to have marketed/imported. According to the applicants, having verified and corrected the individual reference quantities of the operators in cooperation with the national authorities, the Commission fixed their definitive reference quantities. Then it adopted the contested regulations because the definitive reference quantities of each operator when aggregated exceeded the volume of tariff quotas, so that it is that excess which constitutes the raison d'être of those regulations. In adopting the regulations, the Commission thus did not adopt measures of general application but a series of decisions determining the quantities of bananas to be attributed to each individual operator.

103 The replies given by the parties to the written questions posed by the Court prior to the hearing and the documents it required to be produced (see paragraphs 57 and 58 above) clearly show that the Commission plays an important role, jointly with the competent national authorities, in checking and correcting individual reference quantities of operators in order to eliminate cases of double counting. For this purpose, the Commission receives from the Member States by virtue, particularly, of Article 4(5) of Regulation No 1442/93 and Article 6(2) of Regulation No 2362/98, a list of the operators registered with those authorities together with the quantities which those operators have marketed or imported. This active role of the Commission is, for example, shown by a letter of 23 January 1999 written by Mr Mildon, a director in the Directorate-General for Agriculture of the Commission, addressed to Dr Markert of the Bundesanstalt für Landwirtschaft und Ernährung (German agriculture and food authority) in relation to the calculation of the reference quantities for 1997. That letter was concerned, in particular, with arranging a meeting between four members of his directorate and all of the agents of that authority involved in the calculation of reference quantities. Mr Mildon asked, in particular, for specific documents relating to the marketing of bananas in 1995 and involving 12 operators particularly mentioned as well as a list of the operators to whom they had sold bananas. Mr Mildon also requested the authority concerned to provide the names of the operators from whom 30 Category A operators engaged in the activities described at Article 3(1)(c) of Regulation No 1442/93 had purchased the bananas included in their reference quantities, and to distinguish those who had engaged exclusively in activities under (c) from those covered by (b) and (c) and to detail the corresponding quantities. It is clear from the case file that this letter from Mr Mildon is representative of the important role played by the

Commission in checking the reference quantities of individual operators. The Court therefore concludes that the Commission does each year receive figures for individual operators and that it is extensively involved in the checking of these figures both alone and in cooperation with the competent national authorities in order to identify and eliminate cases of double counting.

104 It is to be noted that pursuant to the first paragraph of Article 6 of Regulation No 1442/93 and Article 6(3) of Regulation No 2362/98, the Commission is required to set a reduction/adjustment coefficient if the Community total reference quantity exceeds the tariff quota (in the 1993 regime) or the tariff quota and traditional ACP bananas (in the 1999 regime) in order to eliminate this excess. As a result, it is the existence of such an excess which lies at the origin of the regulations fixing the reduction/adjustment coefficients. The coefficients as thus fixed affect all of the operators in the different categories within the 1993 regime and the traditional operators under the 1999 regime in the same way.

105 Nevertheless, the involvement of the Commission in the process of verifying the individual component figures which make up the Community total reference quantity does not of itself mean that the institution, by adopting the regulations fixing the reduction/adjustment coefficients under the first paragraph of Article 6 of Regulation No 1442/93 or Article 6(3) of Regulation No 2362/98, thereby makes the decision on each application lodged.

106 Moreover, the roles played by the Commission in fixing, on the one hand, the contested reduction/adjustment coefficients and, on the other hand, the coefficient which was an issue in *Weddel* v *Commission*, cited above, are not the same. At paragraphs 20 to 22 of that judgment, the Court held that the contested regulation had been adopted as regards the quantities of beef for which individual requests for import licences had been lodged and in respect of which

no new request could have been added. At paragraph 35 of the judgment in *France* v *Comafrica and Others*, cited above, the Court held that 'in adopting the [contested regulation in *Weddel* v *Commission*] the Commission availed itself of the possibility provided for in Article 15(6)(d) of Regulation (EEC) No 2377/80... according to which the Commission is to decide to what extent applications for licences can be accepted and to reduce the amounts requested by a fixed percentage if the quantities for which licences have been requested exceed the quantities available'. By contrast, in the present cases, the purpose and legal effect of the adoption of the contested regulations is not to decide on the treatment of the individual applications lodged with the national competent authorities but, by applying the first paragraph of Article 6 of Regulation No 1442/93 and Article 6(3) of Regulation No 2362/98, to address the objective factual situation of an excess of the total Community reference quantity over the tariff quota (in the 1993 regime) and over the tariff quota and traditional ACP bananas (in the 1999 regime). This analysis is not invalidated by the fact that the alterations to the definitive reference quantities of operators resulting from the application of the reduction coefficient by the competent national authorities may be said to be foreseeable. It is the competent national authorities which set the reference quantity for each operator and notify him of it (see the second paragraph of Article 6 of Regulation No 1442/93 and Article 6(4) of Regulation No 2362/98).

107 It is clear from the replies to the written and oral questions put to the parties by the Court that operators are not officially informed by the competent national authorities nor by the Commission of the amount of their definitive reference quantities prior to the fixing and publication of the reduction/adjustment coefficient. If some operators were so informed, the Court finds that this did not result from an application of Article 6 of Regulation No 1442/93 or Article 6 of Regulation No 2362/98, but from personal contacts between those operators and the competent national authorities. It follows that the contested regulations do not enable operators to determine the definitive quantities to be allocated to them individually (see the judgment in *France* v *Comafrica and Others*, cited above, paragraph 32).

108 The contested regulations are, accordingly, measures of general application within the meaning of the second paragraph of Article 189 of the EC Treaty (now

Article 249 EC). They apply to objective situations and have legal effect as regards categories of persons generally and in the abstract, namely all of the operators of categories A and B (in the 1993 regime) or all the traditional operators (in the 1999 regime).

109 The contested regulations are, therefore, of their nature, of general application and do not amount to decisions in the sense of the fourth paragraph of Article 189 of the Treaty.

110 It follows that the contested regulations cannot be construed as having concerned the applicants individually. As the applicants do not satisfy the conditions of admissibility laid down in the fourth paragraph of Article 173 of the EC Treaty, the present claims must be dismissed as inadmissible.

111 As regard the arguments based on the absence of a remedy at national level, such a circumstance, even if proved, could not warrant a change, by means of judicial interpretation, of the system of remedies and procedures established by the Treaty. In no case can an action for annulment brought by a natural or legal person be declared admissible where the conditions laid down by the fourth paragraph of Article 173 are not satisfied (see order of the Court of Justice in Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 26).

112 Finally, in the five cases, the applicants request the Court to order measures of inquiry with a view to clarifying the facts and procedure. It lies with the Court to assess the need for any such measure (see, for example, the judgment of the Court in Joined Cases T-112/96 and T-115/96 *Séché* v *Commission* [1999] ECR-SC I-A-115 and II-623, paragraph 284). In the light of the replies to the questions put to

the parties and having examined the documentation furnished by the Commission in relation to the correction of reference quantities carried out by the Commission (see paragraphs 57 and 58 above) the Court finds that such measures are not needed in order to rule on the present claims and, accordingly, it is unnecessary to order the measures of inquiry outlined by the applicant in the five cases.

Claims for damages

The arguments of the parties

113 As a preliminary observation, the applicants point out that the Commission is responsible for the management of the common organisation of the banana market (judgment in *Netherlands* v *Commission*, cited above, paragraphs 33, 34 and 37). The Member States have no power to make decisions in that area. The Commission therefore has an obligation to check and inspect the accuracy of the information which is sent to it by the competent national authorities and to correct it if it appears that there is double counting which is likely to distort the basis for the common importation regime.

114 The applicants submit that the contested regulations are unlawful. They are not legislative measures involving any choice of economic policy but measures which are purely administrative in character.

115 They argue that, to the extent that the reduction/adjustment coefficient is based upon the volume of the tariff quota (under the 1993 regime) or the tariff quota

and the traditional ACP bananas (under the 1999 regime) divided by the total community reference quantity accepted by the Commission, where this reference quantity is inaccurate, the reduction/adjustment coefficient must also be inaccurate.

116 According to the applicants, when it adopted the reduction/adjustment coefficients for the years 1995 to 1999, the Commission knew that the quantities of bananas actually marketed under the 1993 regime or imported under the 1999 regime as indicated by the import licences actually issued and used or by the importations recorded by the Statistical Office of the European Communities (Eurostat) for those periods were substantially lower than the reference quantities declared by the operators. Moreover, the Commission cannot claim not to have known of the existence of double counting because on several occasions it adopted provisional reduction coefficients in order to gain time to check the figures with the Member States and individual operators.

117 According to the applicants, the contested regulations were inaccurate to the following extent:

Cases	Year	Excess tonnes	Percentage error in calculation
T-198/95	1995	343 000 [1]	15 % [1]
T-171/96	1996	548 000 [1]	25 % [1]
		847 000 [2]	31 % [2]
T-230/97	1997	298 351 [2]	14.8 % [2]
T-174/98	1998	225 201 [2]	13 % [2]
T-225/99	1999	129 843 [1]	4 % [1]
		90 157 [2]	3 % [2]

1 Based on actual imports.
2 Based on licence use.

118 The margin of error in the calculation of the total Community reference quantity is unreasonable and exceeds the limits of any acceptable administrative error. It

shows clearly that the verifications carried out by the Commission and the Member States acting as agents of the Commission were inadequate. For this reason, the reduction/adjustment coefficients are unlawful.

119 In Cases T-198/95, T-171/96, T-230/97 and T-174/98, the discrepancies between the total amount of the rights of operators and the amount available under the tariff quota were also fundamentally different from those ascertained during the first years following the entry into force of the common importation regime. During those first years the Commission might not have had available to it all of the information necessary to decide whether the applications for import licences were valid. However, over the years, it ought to have been fully aware of the total number of licences allocated to and used by each operator. The use of numbered licences afforded the Commission an accurate view of all of the quantities of bananas marketed. The applicants claim that if the Commission had done its work correctly, it ought to have been in a position to eliminate cases of double counting and to ascertain precisely the reference quantity of each operator.

120 In Case T-225/99, the applicants argue that the Commission cannot rely upon difficulties in establishing with accuracy the quantities of bananas actually imported in order to explain its mistakes. The calculation of the adjustment coefficient for 1999 was no longer based upon quantities of bananas marketed but on actual imports and on the use of licences during the reference period. Moreover, the 1999 regime was actually devised in order to avoid the errors of the past. However, the Commission has failed to make use of the powers conferred on it by Regulation No 2362/98 in order to detect and penalise false declarations made by operators.

121 This is not a matter of a mistake on the part of the Commission in the exercise of a discretion but a failure on its part in its duty to fix the reduction/adjusment coefficient in accordance with law. This default can be deemed an infringement of

the principle of good administration or of the principle according to which the application of Community law ought to be certain and foreseeable (see judgment of the Court of Justice in Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091).

122 Furthermore, future rights to import licences are dependent upon the quantities marketed in the past. The applicants annexed to their applications in Cases T-230/97 and T-174/98 a table setting out the alleged erosion of their rights to import licences during the years 1989 to 2002. This erosion has a prejudicial effect on their fundamental rights as protected by Community law such as the right to property and the right to carry on a professional or commercial activity. The Council did not authorise such an erosion of rights in Regulation No 404/93. On the contrary, the Council had sought in Article 19(2) of that Regulation to ensure that steps were taken to avoid erosion of the rights of operators in categories A and B. The Commission has, contrary to the intention of the legislature, created a system which permits erosion of rights within each category.

123 The applicants submit in the alternative that, if the Court should consider that the contested regulations are legislative measures involving a choice of economic policy, the Commission has infringed a superior rule of law designed for the protection of individuals and that this infringement is sufficiently serious. That rule provides that an institution ought not to adopt a measure on the basis of facts which it knows or clearly ought to have known are erroneous when the measure will prejudice the rights of individuals.

124 The Commission infringed such a superior rule of law for the protection of individuals by fixing the reduction/adjustment coefficient in the years 1995 to 1999 by using reference quantities which it knew were manifestly inaccurate and, in Cases T-198/95, T-171/96, T-230/97 and T-174/98, by creating a system which was not based upon a publicly verifiable event. The violation of that rule was sufficiently serious and caused loss to the applicants. The conditions for the

award of damages under Articles 178 and 215 of the Treaty on the basis of settled case-law are fulfilled (see judgments of the Court of Justice in Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, Joined Cases 116/77 and 124/77 *Amylum* v *Council and Commission* [1979] ECR 3497, and Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061).

125 The damage alleged in the present cases consists of the loss of the right to import bananas during the reference years 1995 to 1999. This loss is calculated in tonnes for each of the years of this period by reference to the effect on the reference quantities each year of the difference between the use of the coefficients fixed by the contested regulations and the use of the maximum possible lawful coefficient as put forward by the applicants (see table at paragraph 117 above). The applicants have calculated their losses in monetary terms on the basis of the average cost of replacing those lost licences for such quantities in each of the years in question. The amounts of the losses are as follows:

Company	Year	Amount in euros
Comafrica SpA	1995-1998	3 435 447.50
Comafrica SpA	1999	525 412.68 [1]
		360 703.17 [2]
Dole Fresh Fruit Europe Ltd & Co.	1995-1998	19 767 176
Dole Fresh Fruit Europe Ltd & Co.	1999	1 140 105 [1]
		782 697.80 [2]

1 Based on actual imports.
2 Based on licence use.

126 The Commission, supported by the interveners, argues that it exercised its powers properly in implementing Regulation No 404/93. It cannot be held responsible where the 'faultlines' of the system — if any are shown to exist — have necessarily resulted from Council legislation. The actions taken by the

Commission reflected the overriding need to ensure the effective operation of the common organisation of the market in bananas. In legislating to achieve this aim the Commission possessed, within the framework set out by the Council, a wide discretion.

127 Moreover, the applicants have not established any unlawful conduct on the part of the Commission. The existence of instances of uncorrected double counting does not render the contested regulations invalid. The difficulty, so far as concerns the discrepancy between the total of the quantities claimed by operators and the total amount available under the tariff quota, does not lie in the existence of this discrepancy in itself but in knowing how and when the figures supplied by operators should be corrected. The essential problem is that of ascertaining to which operator any given quantity is to be attributed. Moreover, the argument that the continued existence of these discrepancies was not in itself unusual finds support in the power given to the Commission to set a reduction/adjustment coefficient as confirmed by the Court in the *Comafrica* judgment. The Commission has in fact made extensive efforts to reduce these discrepancies and has managed to do so in some cases. Furthermore, the Court has confirmed in its *Comafrica* judgment that such discrepancies existed and required the setting of a reduction coefficient even beyond a particular period of transition.

128 The Commission adds that the responsibility for the accuracy of figures lies primarily with the Member States. The Commission has merely a supervisory role which it has in fact discharged with considerable success. In Case T-225/99 in particular, the Commission argues that it follows clearly from Article 6 of Regulation No 2362/98 that it is the Member States which have the duty to determine the reference quantities throughout the entire procedure for fixing quantities each year. The Commission has access to the list of operators and provisional reference quantities as well as to information relating to their importations of bananas and the numbers of licences used by them during the reference period. Nevertheless, it must be conceded that while the Commission is able to detect potentially questionable cases which require checking, it does not have available to it the detailed vouching documentation nor the powers of investigation and resources necessary in order to ascertain with accuracy where the difficulty lies and who is responsible for it.

129 Nor have the applicants demonstrated that they have suffered loss which requires compensation. The Commission considers that the table which the applicants have produced to demonstrate the erosion of their rights to import licences is based on a theoretical model and not on real data. They have not furnished any empirical proof showing that their allocation of licences was reduced as a direct consequence of the way in which the Commission had calculated the disputed reduction/adjustment coefficients. The Commission contends that the applicants' argument has even less force when it is remembered that as the years progressed, the reduction coefficient as set has come closer to 1, so that the actual quantum of reduction imposed on the reference quantities of operators has decreased.

130 Moreover, the Commission contends that, in order to establish that it acted unlawfully in fixing the contested reduction/adjustment coefficients, the applicants have put forward no pleas other than those already rejected by the Court of First Instance in *Comafrica*. It also considers that individual operators do not have a right in Community law to import a given quantity of bananas at a preferential rate (see *France* v *Comafrica and Others*, paragraph 53). Nor do operators have a right to a fixed share of the tariff quota. The contested regulations are valid and lawful and the applicants have no entitlement to compensation for loss and damage which they may have incurred unless they demonstrate that they have suffered some unusual or special damage (see judgment of the Court of Justice in Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667, paragraphs 59 and 76 to 80). They have produced no such evidence in this case.

Findings of the Court

131 The non-contractual liability of the Community under the second paragraph of Article 215 of the Treaty depends on the fulfilment of a set of conditions, namely the unlawfulness of the acts alleged against the Community institution, the fact of damage and a causal link between the conduct of the institution and the wrongful act complained of (Joined Cases C-258/90 and C-259/90 *Pesquerias De Bermeo*

and Naviera Laida v *Commission* [1992] ECR I-2901, paragraph 42, and Case T-1/99 *T. Port* v *Commission* [2001] ECR II-465, paragraph 42).

132 In these claims for damages, the applicants seek compensation for their loss resulting from the adoption by the Commission of the contested regulations.

133 They allege that the Commission acted unlawfully in adopting those regulations because it relied on reference quantities which were manifestly inaccurate having regard to the data on the quantities actually available for marketing in the Community or imported into the Community during the corresponding reference periods. In Case T-225/99, the applicants also allege that the Commission was at fault in failing to make use of its powers under Regulation No 2362/98 in order to discover and penalise abusive declarations by operators.

134 As regards the liability of the Community for damage caused to individuals the conduct alleged against the Commission must involve sufficiently serious breach of a rule of law intended to confer rights on individuals. The decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned has manifestly and gravely disregarded the limits on its discretion. Where the institution in question has only a considerably reduced or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see judgment of the Court in Case C-352/98 P *Bergaderm and Goupil* v *Commission* ECR [2000] I-5291, paragraphs 41 to 44). In particular, a finding of an error which, in analogous circumstances, an administrative authority exercising ordinary care and diligence would not have committed, will support the conclusion that the conduct of the Community institution was unlawful in such a way as to render the Community liable under Article 215 of the Treaty.

135 It is necessary therefore to examine the extent of the discretion which was available to the Commission when it adopted the contested regulations.

136 In that regard, it is clear that the general or individual nature of an act of an institution is not a decisive test for identifying the limits of the discretion enjoyed by that institution (see the judgment in *Bergaderm and Goupil* v *Commission*, cited above, paragraph 46).

137 As has also been pointed out above at paragraph 104, the Commission is obliged to fix the reduction/adjustment coefficient provided for by Article 6 of Regulation No 1442/93 or Article 6(3) of Regulation No 2362/98 if the aggregate reference quantities throughout the Community exceed the amount of the quota available, in order to eliminate the excess. The reduction/adjustment coefficient is established by dividing the amount of the tariff quota or the aggregate volume of tariff quotas and ACP traditional bananas by the aggregate Community reference quantity. It follows that the Commission has no discretion as to whether or not it fixes a coefficient and no choice as to which figures it will use for the purpose.

138 It follows from the foregoing that the present claims seek compensation for a loss which results from the Commission's adoption of measures of an administrative character in the course of exercising a limited discretion. As a result, the mere breach of Community law may be sufficient to attract the non-contractual liability of the Community. It is necessary therefore to examine next whether the Commission has, in its adoption of the contested regulations, committed a mistake which would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence.

139 The applicants state that the taking into account by the Commission in setting the reduction coefficients for the years 1995 to 1999 of total Community reference

quantities which were materially greater than the quantities which had actually been marketed in the Community or imported into the Community during the corresponding reference periods has led to the setting of wrong coefficients. Put in percentage terms, this error amounts to between 25 to 31% for the year 1996 and 3 to 4% for the year 1999 (see paragraph 117 above).

140 The Commission, while disputing the criteria used by the applicants to demonstrate the alleged margin of error in calculating the reduction/adjustment coefficients does not deny that difficulties were encountered in achieving a reconciliation between the amounts of claims made by operators and the total quantity of bananas marketed or imported into the Community in the corresponding reference periods.

141 Indeed, the Commission has several times adopted provisional reduction coefficients to give itself time to verify the figures sent by the operators to the Member States. Thus, for example, in the recitals to Regulation No 2947/94 of 2 December 1994 fixing the single reduction coefficient for the determination of the quantity of bananas to be allocated to each operator in Categories A and B from the tariff quota for 1995 (OJ 1994 L 310, p. 62), the Commission explained that the total reference quantities notified to it by the Member States pursuant to Article 5(3) of Regulation No 1442/93 revealed double counting. It also stated that 'the use of [those figures] would lead to the determination... of an excessively high single reduction coefficient to the disadvantage of certain operators' and that 'the reduction coefficients should be determined on a provisional basis'. It concluded that 'definitive reference quantities for operators for 1995... can only be laid down after further checks have been made by the Member States in cooperation with the Commission'.

142 Moreover, it is undisputed that during the setting of the definitive reduction/adjustment coefficients for the years 1995 to 1999 the Commission and the

Member States did not succeed in eliminating all instances of double counting in the final reference quantities notwithstanding the extensive checks carried out.

143 Nevertheless it must be emphasised that taking account of those reference quantities does not in itself constitute a mistake which would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence (see *a contrario* Case T-514/93 *Cobrecaf and Others* v *Commission* [1995] ECR II-621, paragraph 70, in which it was not the Commission's error in calculating the amount of eligible aid which rendered it liable, but its lack of care in failing to rectify its manifest error for 15 months after it had been drawn to its attention).

144 The finding of an error or irregularity on the part of an institution is not sufficient in itself to attract the non-contractual liability of the Community unless that error or irregularity is characterised by a lack of diligence or care. It follows that the fact that there were possible discrepancies, when the reduction/adjustment coefficients were fixed, between the figures communicated by the competent national authorities and those from Eurostat or other data concerning the quantities of bananas marketed or imported into the Community during the corresponding reference periods does not in itself constitute proof of a sufficiently serious infringement of Community law on the part of the Commission. Moreover, it must be noted that the Court of First Instance found in the *Comafrica* judgment (paragraph 69) that, as regards the 1993 regime, Regulation No 404/93 required that the reference quantities employed to allocate the tariff quota must be based not on imports but on quantities 'marketed' by operators.

145 It is clear from the file that the figures compiled by Eurostat are not based on the quantities of bananas marketed, as required by Article 5(1) of Regulation No 1442/93, and are not broken down according to the activities carried out by operators, as described in Article 3(1) of that regulation. Accordingly, while Eurostat's figures or other statistics concerning imports during the reference

period may be useful as a general guideline in the proces of verifying possible cases of double counting or discrepancies in the figures submitted by the national authorities, they do not constitute a valid basis for determining reference quantities in the context of Article 6 of Regulation No 1442/93 (see the *Comafrica* judgment, paragraph 69). It follows that, when the Commission fixed the contested reduction coefficients pursuant to the 1993 regime it did not act illegally in refusing to replace figures based on quantities marketed with figures based on quantities imported.

146 Secondly, the conduct of the Commission in relation to the scrutiny of the reference quantity figures communicated by the national authorities was not characterised by any lack of care or diligence. Far from having accepted such figures without question, the Commission, as the applicants themselves have emphasised in the course of their arguments as to the admissibility of these actions, was involved, during the years 1995 to 1999 in conjunction with the national competent authorities, in efforts to identify and eliminate cases of double counting. The Court is satisfied not only from the description of the detection and verification procedures given by the parties but from its own examination of the sample documentation and correspondence submitted to it (see paragraph 103 above) that the Commission exercised considerable diligence and care in checking and correcting discrepancies in the figures sent by the competent national authorities and in eliminating double counting. This assessment is not affected by the fact that it proved impossible to eliminate all cases of double counting.

147 As regards the 1993 regime, however, the elimination of all possible discrepancies in the figures submitted by the competent national authorities was extremely difficult if not impossible. This was due, first, to the complexity of the arrangements based on different categories of operators and activities on the one hand and distinctions resulting from the different origins of the product on the other, second, the magnitude of the trade involved and, third, the constraints imposed by the time-limits set for each marketing year.

148 As regards Case T-225/99, the 1999 regime markedly simplified the arrangements for awarding import licences, in particular, by abandoning marketing as the basis for reference quantities in favour of quantities actually imported by operators during the reference period. However, the alleged discrepancy of 3 or 4% between the data submitted by the competent national authorities and the figures on imports of bananas during the reference period for 1999, is not proof of lack of care and diligence in this case. Given that, on the one hand, 1999 was the first year of implementation of the 1999 regime which is based on the quantities of bananas imported rather on than quantities of bananas marketed and, on the other hand, that import licences were issued to more than 700 operators in 15 countries, a certain margin of error was inevitable.

149 Accordingly, having regard particularly to the limitations imposed by the complex nature of the 1993 and 1999 regimes, the time constraints involved, the vast magnitude of the transactions, the difficulties linked with operations spread over the administrations of 15 Member States and in the light of the extensive efforts made by the Commission to reduce the extent of the apparent discrepancies in the figures, the Court considers that the Commission did act with due care and diligence.

150 In the light of these considerations the Commission cannot be declared responsible for a breach of Community law such as to incur the liability of the Community under the second paragraph of Article 215 of the Treaty.

151 It follows that the claims for damages must be dismissed.

152 It follows from all of the foregoing considerations that the actions must be dismissed in their entirety.

Costs

153 In accordance with 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 pleadings of the successful party. The applicants having failed in their claims and the Commission having asked for costs, the applicants must be ordered to bear their own costs and jointly to pay the costs of the Commission.

154 Pursuant to Article 87(4) of the Rules of Procedure, the Kingdom of Spain and the French Republic must bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the claims for annulment as inadmissible;**

2. **Dismisses the claims for damages as unfounded;**

3. **Orders the applicants to bear their own costs and jointly to pay the costs of the Commission;**

4. **Orders the interveners to bear their own costs.**

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 12 July 2001.

H. Jung

Registrar

P. Lindh

President