JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
11 December 1996 *

In Case T-70/94,

Comafrica SpA, a company incorporated under Italian law and having its registered office in Genoa, Italy,

and

Dole Fresh Fruit Europe Ltd & Co., a company incorporated under German law and having its registered office in Hamburg, Germany,

represented by Bernard O'Connor, Solicitor, with an address for service in Luxembourg at the offices of Stanbrook and Hooper at the Chambers of Arsène Kronshagen, 12 Boulevard de la Foire,

applicants,

v

Commission of the European Communities, represented by Eugenio de March, Legal Adviser, and Xavier Lewis, of its Legal Service, acting as Agents, assisted by John Handoll, Solicitor, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by Lucinda Hudson and then by John E. Collins and Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agents, and by David Anderson, barrister, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

APPLICATION for annulment of Article 1 of Commission Regulation (EC) No 3190/93 of 19 November 1993 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, on the one hand, and for compensation for damage caused to the applicants by the allegedly unlawful decisions fixing reduction coefficients in 1993 and 1994, on the other hand,

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

composed of: K. Lenaerts, President, P. Lindh and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 13 March 1996,

gives the following

Judgment

Legislative context

1 Prior to 1993 the marketing of bananas within the Community took place under a variety of national arrangements. There were three main sources of supply: bananas produced within the Community itself, bananas produced in certain of the countries with which the Community had concluded the Lomé Convention (hereinafter 'ACP bananas'), and bananas produced in other countries (hereinafter 'third country bananas').

2 A common organization of this market sector was introduced by Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas (OJ 1993 L 47, p. 1, hereinafter 'Regulation No 404/93') which had the effect of introducing as from 1 July 1993 a common import system to replace the various national systems which had hitherto operated. Regulation No 404/93 was last amended by Regulation (EC) No 3290/94, of 22 December 1994, on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105). It is the version of 13 February 1993 which is relevant for the present judgment.

3 Title IV of Regulation No 404/93, which deals with trade with third countries, provides for the opening of an annual tariff quota for imports of third country bananas and non-traditional ACP bananas. (The terms 'traditional imports' and 'non-traditional imports' of ACP bananas are defined in Article 15(1) of Regulation No 404/93. 'Traditional imports' means the quantities, listed in an annex to Regulation No 404/93, of bananas exported to the Community by each ACP State which has traditionally exported bananas to the Community. Quantities exported by those ACP States in excess of the figures set out in the annex are designated 'non-traditional ACP bananas'.)

4 Article 20 of Regulation No 404/93 authorizes the Commission to adopt, in accordance with the management committee procedure described in Article 27, detailed rules concerning, in particular, the issue of import licences to different categories of operator, the frequency of issue of such licences and the minimum quantities which eligible operators must have placed on the market. The detailed rules for the implementation of Title IV of Regulation No 404/93 were established by Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6, hereinafter 'Regulation No 1442/93').

5 Article 18(1) of Regulation No 404/93 provided for the opening each year of a tariff quota of 2 000 000 tonnes (net weight) for imports of third country bananas and non-traditional ACP bananas and, for the first period of operation of the new market organization, namely, the second half of 1993, set the volume for the tariff quota at 1 000 000 tonnes (net weight). Within the framework of the tariff quota, imports of third country bananas are subject to a levy of ECU 100 per tonne and imports of non-traditional ACP bananas are subject to a zero duty. Other than within the tariff quota, such imports bear a levy of ECU 850 and ECU 750 per tonne respectively.

6 Article 18 also provides, however, that where Community demand increases, the volume of the tariff quota should be consequentially increased in accordance with the management committee procedure provided for in Article 27.

7 The increase in Community demand is to be determined on the basis of a forecast supply balance which must be prepared every year under Article 16 on the basis of:

— available figures concerning quantities of bananas marketed in the Community during the previous year, broken down according to their origin,

— forecasts of the production and marketing of Community bananas,

— forecasts of imports of traditional ACP bananas,

— forecasts of consumption based in particular on recent trends in consumption and the evolution in market prices.

Article 18 provides that, where the forecast supply balance indicates an increase in demand and therefore the need to adjust the annual tariff quota of 2 000 000 tonnes, this adjustment is to be carried out prior to the date of 30 November preceding the marketing year concerned.

8 In addition, Article 16(3) provides that, where necessary, and in particular to take account of the effects of exceptional circumstances affecting production or import conditions, the supply balance may be adjusted during the course of the marketing year and the tariff quota provided for in Article 18 further adapted in accordance with the procedure laid down in Article 27.

9 Imports made within the framework of the annual tariff quota and the licences issued for that purpose are required in accordance with Article 19 to be allocated to three categories of operators as follows:

(a) 66.5% to operators who had marketed third country and/or non-traditional ACP bananas;

(b) 30% to operators who had marketed Community and/or traditional ACP bananas;

(c) 3.5% to operators established in the Community who started marketing bananas other than Community and/or traditional ACP bananas from 1992.

10 Amongst the detailed rules laid down in Regulation No 1442/93 for implementation of the regime established by Regulation No 404/93, as described above, are the following provisions.

11 Article 2 provides for the opening of the tariff quota for the second half of 1993 as follows:

(a) 665 000 tonnes for the category of operators who prior to 1992 marketed third country bananas and/or non-traditional ACP bananas, designated as 'Category A';

(b) 300 000 tonnes for the category of operators who had marketed Community bananas and/or traditional ACP bananas, designated 'Category B'; and

(c) 35 000 tonnes for the category of operators who commenced marketing bananas other than Community bananas and/or traditional ACP bananas as from 1992 or thereafter, designated as 'Category C'. (In the legislation and hereinafter these are referred to respectively as 'Category A', 'Category B' and 'Category C' operators.)

12 Article 5 provides that by 1 October 1993 (for the purposes of the year 1994) and by 1 July for each following year, the competent authorities of the Member States are required to 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 quota was opened, broken down by reference to the different types of economic activity described in the definition of 'operators' in Article 3 of Regulation No 1442/93. The average marketing quantity thus supplied by the competent authorities for an operator is termed the operator's 'reference quantity'.

13 Article 3(1) of Regulation No 1442/93 deems economic agents to be 'operators' in Category A or Category B where they engage in 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 (hereinafter 'class (a) activities');

(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 (hereinafter 'class (b) activities'); and

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

Operators engaged in these activities are hereinafter referred to as 'primary importers', 'secondary importers' and 'ripeners' respectively.

14 Article 5(2) fixes weighting coefficients which are applied to the quantities marketed and which differ according to the activities engaged in. According to the third recital in the preamble of Regulation No 1442/93, these coefficients are intended to take account of the scale of business concerned and the commercial risks incurred and to correct the negative effects of counting the same quantities of products more than once at various stages of marketing.

15 Article 6 provides as follows:

'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 the 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 individually at the latest by 1 November 1993 as regards 1994 and by 1 August each year thereafter.'

16 One of the special features of the trade in question is that bananas do not travel well over long distances with the result that they are picked early to be 'imported green' and are ripened close to the point of sale. For this reason the marketing of bananas involves three stages which are reflected in the three-part definition of 'operator' given in Article 3(1) cited above, namely, purchase of green bananas or primary importation; the release into free circulation or secondary importation; and the ripening prior to ultimate retail sale (see paragraph 13 above).

17 Delays were encountered in the introduction of the new regime during 1993. The Commission adopted four regulations for the purpose, *inter alia*, of extending the date by which the competent authorities were required to inform operators of

their quota allocation and to provide for the issue of additional provisional licences. These are Regulations No 2396/93 (OJ 1993 L 221, p. 9), No 2569/93 (OJ 1993 L 235, p. 29) and No 2642/93 (OJ 1993 L 242, p. 15) of 30 August 1993, 17 September 1993 and 27 September 1993 respectively, amending Regulation No 1443/93 on transitional measures for the application of the arrangements for importing bananas into the Community in 1993, and No 2654/93 of 28 September 1993, on additional transitional measures for the importation of bananas into the Community in October 1993 under the Community tariff quota (OJ 1993 L 243, p. 12). These postponements were required in order to allow the Commission time to verify the reference quantities submitted by the national authorities to the Commission.

18 On 22 October 1993 the Commission adopted Regulation (EEC) No 2920/93 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 for the second half of 1993 (OJ 1993 L 264, p. 40, hereinafter 'Regulation No 2920/93'). On 19 November 1993 the Commission adopted Regulation (EC) No 3190/93 (OJ 1993 L 285, p. 28, hereinafter 'Regulation 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. Article 1 of Regulation No 3190/93 provides as follows:

'In the context of the tariff quota laid down in Articles 18 and 19 of Regulation No 404/93, the quantity allocated to each operator of categories A and B for the period 1 January to 31 December 1994 is determined by applying the following reduction coefficients to the operator's reference quantity, determined in accordance with Article 5 of Regulation (EEC) No 1442/93:

— for each category A operator: 0, 506617

— for each category B operator: 0, 430217'.

The factual background

19 The applicants, Comafrica SpA and Dole Fresh Fruit Europe Ltd & Co., import bananas from third countries into Italy and Germany respectively.

20 In the first half of 1993 the applicants became aware, through their trade association, of the Commission's proposal to adopt a new common organization of the market for bananas. They entered into correspondence with the Commission on this subject. In their initial representations the applicants pointed out that the proposed definition of 'operator' would lead to a misapplication of the tariff quota system and that it would lead to inaccuracies in the calculation of the reference quantities as a result of double counting of products at the different stages of the marketing chain.

21 In further exchanges of letters in the autumn of 1993 the applicants sought to draw attention to the fact that the expected reference quantities, based on the Statistical Office of the European Communities (hereinafter 'Eurostat') figures concerning banana imports during the years 1989 to 1991, were substantially at variance with the amounts for reference quantities submitted by the competent authorities. In reply the Commission stated that the verification of the reference quantities was the responsibility of the Member States but that it had examined the verification process which they had put in place to ensure that they met the required criteria. The Commission also specified that where potential anomalies had been identified in specific cases, the Member States in question had been asked to reexamine the relevant figures.

Procedure and forms of order sought

22 It was in these circumstances that, by application lodged at the Registry of the Court of First Instance on 11 February 1994, the applicants brought this action, on

the one hand, under the fourth paragraph of Article 173 of the EC Treaty for annulment of Article 1 of Regulation No 3190/93 and, on the other hand, pursuant to the second paragraph of Article 215 of that Treaty, for compensation for the damage which they consider they have suffered by virtue of the allegedly unlawful Commission decisions set out in Article 1 of Regulation No 2920/93 and Article 1 of Regulation No 3190/93.

23 On 15 April 1994 the Commission lodged a request for a stay of proceedings. On 29 April 1994, it raised a preliminary objection as to admissibility in relation to the action for annulment of Article 1 of Regulation No 3190/93. The written procedure continued in relation to the action for damages.

24 By order of the President of the Second Chamber (Extended Composition) on 26 September 1994 the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in support of the form of order sought by the defendant.

25 Following the judgment of 5 October 1994 in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, in which the Court of Justice dismissed an action for annulment brought by the Federal Republic of Germany against several provisions of Regulation No 404/93, the Registrar of the Court of First Instance wrote to the parties on 6 December 1994 inviting submissions as to the continuation of the procedure.

26 In reply, the applicants pointed out that their present application presupposed the validity of Regulation No 404/93 so that the judgment of the Court of Justice to that effect had no bearing upon the applicants' arguments impugning the implementing legislation in Regulations No 2920/93 and No 3190/93. The Commission, while conceding that the two cases were directed at different regulations, submitted that the judgment, in upholding the validity of the new market organization,

had the effect of destroying the main thrust of the applicants' present case, namely that 'traditional' importers had a legal right to be given a 'traditional' market share. The Commission, accordingly, called upon the applicants to withdraw this action on the ground that it was unfounded.

27 By order of the Court of First Instance of 2 May 1995, the decision on the defendant's application for a ruling on admissibility was reserved to the final judgment.

28 The written procedure closed on 20 September 1995. By decision of 5 December 1995, the case was reallocated to the Fourth Chamber, composed of three Judges.

29 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry. However, it put a series of questions to the parties and requested the Commission to produce certain documents. The parties, other than the United Kingdom, presented oral argument at the hearing in open court on 13 March 1996.

30 The applicants claim that the Court of First Instance should:

— declare the action admissible;

— declare void, pursuant to Article 173 and Article 174 of the EC Treaty, the Commission's decision set out in Article 1 of Regulation No 3190/93 to apply a reduction coefficient to reference quantities for operators in Category A for the period 1 January to 31 December 1994;

— pursuant to Article 178 and the second paragraph of Article 215 of the Treaty, order the Commission to make good any loss, together with interest thereon, caused to the applicants by:

— the Commission's unlawful decision, set out in Article 1 of Regulation No 2920/93, to apply a reduction coefficient to the reference quantities for operators in Category A for the period 1 July to 31 December 1993, and

— the Commission's unlawful decision, set out in Article 1 of Regulation No 3190/93, to apply a reduction coefficient to the reference quantities for operators in Category A for the period 1 January to 31 December 1994, and

— the Commission's failure to administer and manage the Community quota in accordance with Community law, in particular Article 155 of the Treaty, and Article 20 of Regulation No 404/93;

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

— order that the costs of the proceedings be borne by the Commission.

31 The Commission contends that the Court of First Instance should:

— dismiss the application as inadmissible in so far as it seeks the annulment of Regulation No 3190/93;

— alternatively, dismiss the application, in so far as it seeks such annulment, as unfounded;

— dismiss the application for damages as unfounded;

— order the applicants to pay the costs.

Admissibility

Arguments of the parties

32 The Commission raises an objection as to the admissibility of the application to the extent that it seeks the annulment of Regulation No 3190/93, on the ground that that regulation is not of individual concern to the applicants within the meaning of the fourth paragraph of Article 173 of the Treaty.

33 It points out that in an earlier action brought by the applicants, where they had sought the annulment of certain provisions of Regulation No 404/93, the Court of Justice had, of its own motion, by order of 21 June 1993 (Case C-282/93 *Comafrica and Others* v *Council and Commission*, not reported in the ECR) held that the application was inadmissible, on the ground that the mere possibility of determining more or less accurately the number or even the identity of the persons to whom a measure would apply, did not require that it be regarded as being of individual concern to those persons, as long as it was clear that the measure took effect by virtue of an objective factual or legal situation which the measure defined. The Commission argues that, in the present instance too, the applicants are not the only importers of bananas into the Community, nor do they represent all of the persons who may be affected by Regulation No 3190/93.

34 Furthermore, according to the Commission, Regulation No 3190/93 applies to a situation which has been determined objectively and has legal effects in relation to persons viewed in a general and abstract manner. It recalls that Article 1 applies to Category A and Category B operators, as defined in Regulation No 404/93. It adds that the Court of Justice, in the *Comafrica* order, cited above, had held that those provisions 'apply to situations which have been determined objectively and have legal effects as regards categories of persons viewed in a general and abstract manner'. The Commission also relies upon the decision of the Court of Justice in Case C-213/91 *Albertal and Others* v *Commission* [1993] ECR I-3177.

35 Finally, the Commission points out that for persons to be individually concerned by a measure, that particular measure must affect their legal position because of a factual situation which distinguishes them from all others. The applicants have not, according to the Commission, demonstrated how they are thus affected or distinguished from other importers in the same category, having regard to the fact that Article 1 of Regulation No 3190/93 applies in precisely the same way to all operators within the different classes.

36 The applicants argue that Regulation No 3190/93 must be construed as a bundle of decisions taken in the form of a regulation because, at the time when it was adopted, the Commission had already received from the Member States the names and addresses of all importers and the quantities of bananas which they had imported during the reference period (see Articles 4(5) and 5(3) of Regulation No 1442/93). The Commission was therefore in a position to know both the identity of all operators concerned and the precise quantities that these operators were entitled to import. When it was adopted, Regulation No 3190/93 applied to a closed category of persons, namely those who had imported bananas during a specific earlier period and had registered in a given Member State and, by 1 September

1993, had notified the competent authorities in that Member State of the total amount of bananas marketed by them during the reference period (see judgments of the Court of Justice in Joined Cases 41/70 to 44/70 *International Fruit Company* v *Commission* [1971] ECR 411, paragraphs 16 to 22, and Case C-354/87 *Weddel* v *Commission* [1990] ECR I-3847, paragraphs 20 to 23).

37 The applicants also argue that they were directly concerned because the Member States do not enjoy any margin of discretion in relation to the granting of licence applications (judgments in *International Fruit Company*, cited above, paragraphs 23 to 28, and *Weddel* v *Commission*, cited above, paragraph 19).

Findings of the Court

38 The fourth paragraph of Article 173 of the Treaty entitles individuals to contest a decision which, although adopted in the form of a regulation, is shown to be of direct and individual concern to them. As the Court of Justice and the Court of First Instance have consistently held, one of the main purposes of that provision is to prevent the Community institutions, by mere choice of the form of a regulation, from depriving an individual of a right of action against a measure which is in reality a decision having a direct and distinct impact on his particular situation. It is therefore clear that the choice of form cannot of itself determine the legislative character of a measure (see judgment of the Court of Justice in Joined Cases 789/79 and 790/79 *Calpak and Società Emiliana Lavorazione Frutta* v *Commission* [1980] ECR 1949, paragraph 7, and order of the Court of First Instance in Case T-476/93 *FRSEA and FNSEA* v *Council* [1993] ECR II-1187, paragraph 19).

39 The Court of Justice and the Court of First Instance have also held that, in order for economic operators to be regarded as being individually concerned by the measure they seek to have annulled, their legal position must be affected by reason

of circumstances which differentiate them from all other persons and distinguish them individually in the same way as an addressee of a decision (see, for example, the judgment of the Court of Justice in Case C-131/92 *Arnaud* v *Council* [1993] ECR I-2573).

40 Furthermore, in the particular context of the management of a tariff quota opened in the beef and veal market, the Court of Justice has held that a Commission regulation specifying the extent to which the competent authorities of the Member States should satisfy applications for import licences was of individual concern to those operators who had already applied for import licences at the time of its adoption (Case C-354/87 *Weddel* v *Commission*, cited above, paragraphs 19 to 23). In finding that the operators in question were individually concerned, the Court took account of the fact that, in determining the extent to which the applications were to be satisfied, on the basis of the total quantities applied for and in circumstances in which no new applications could be added, the Commission had, in fact, decided on the treatment to be accorded to each application. Consequently, the Court of Justice considered that the regulation in question was to be regarded as a collection of individual decisions and not as a measure of general application within the meaning of Article 189 of the Treaty.

41 The Court notes that in this case Regulation No 3190/93 is of relevance only to those operators who had applied for and obtained reference quantities for imports of Category A or Category B bananas for the year 1994. It 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. Inasmuch as the only legislative function of the regulation is to fix and publish this reduction coefficient figure, it has 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. As such, it is properly construed as a collection of individual decisions addressed to each operator effectively informing him of the precise quantities which he will be entitled to import in 1994.

42 The Court also notes that the Commission has not contested the applicants' assertion that they are also directly concerned by Regulation No 3190/93 because it does not allow Member States any margin of discretion in relation to the licence applications made.

43 In these circumstances, the action for annulment of Regulation No 3190/93 must be declared admissible.

The substance of the case

A — *The action under Article 173*

44 In support of their action for annulment, the applicants put forward five pleas in law, namely:

(i) that the application by the Commission of a reduction coefficient to the reference quantities of the Category A operators was *ultra vires* the provisions of Regulation No 404/93;

(ii) that the Commission applied the contested reduction coefficient on the basis of incorrect reference quantities;

(iii) that by applying a reduction coefficient based on incorrect reference quantities the Commission infringed Article 40(3) of the Treaty and the principle of equal treatment;

(iv) that by virtue of the late establishment of a forecast supply balance on the basis of which the tariff quota, to which the contested reduction coefficient was applied, should have been established, the Commission infringed Article 16 of Regulation No 404/93; and

(v) that the decision to apply the contested reduction coefficient was based upon provisions of Regulation No 1442/93 which were unlawful, namely Articles 3, 4(3), 5(2), 7 and 8.

First plea: the Commission had no power to apply a reduction coefficient to operators' reference quantities under Regulation No 404/93

Arguments of the parties

45 The applicants note firstly that Article 20 of Regulation No 404/93 permits the Commission to adopt detailed implementing rules and provides in Article 19(3) that if applications from Category C operators should exceed the available quantities, each application is to be reduced by an equal percentage using, for that purpose, a reduction coefficient. The applicants argue that, as no equivalent provision is made in relation to Category A and B operators, this distinction is deliberate and implies that a reduction coefficient may not be applied to reference quantities submitted by those operators. According to the applicants, the Commission decision to apply this coefficient to these operators, taken by means of Regulation No 3190/93, is therefore *ultra vires*.

46 By way of reply, the Commission argues that the only means whereby reference quantities can be adjusted to available annual quota is by applying a reduction coefficient and that failure to employ a reduction coefficient would have resulted in the operation of a seriously flawed system.

47 The applicants reply that the Commission should have proposed appropriate legislation rather than seek to assume power in the manner which has been done. Necessity does not justify illegal action.

48 The Commission argues that the rules governing the application of reduction coefficients for Category A and Category B operators have been validly made under the second paragraph of Article 20 of Regulation No 404/93 which authorizes the Commission generally to adopt the detailed rules necessary to implement Title IV.

49 The United Kingdom, in its statement in intervention, points out that the preamble to Regulation No 2920/93 confirms that the power of the Commission to apply a reduction coefficient derives in particular from Article 20 of Regulation No 404/93. It adds that a reduction coefficient is the fairest and simplest way in which to adjust the operators' total volume of reference quantities to the available tariff quota and is a method which the Commission has used in the past.

Findings of the Court

50 The Court recalls that, under the fourth indent of Article 155 of the Treaty, the Commission is required, in order to ensure the proper functioning and development of the common market, to exercise the powers conferred on it by the Council for the implementation of the rules laid down by the Council. Article 20 of Regulation No 404/93 imposes on the Commission the duty of adopting the detailed rules for implementing Title IV of that regulation and specifies the areas which these rules may particularly cover.

51 As the Court of Justice has consistently held, it follows both from the context of the Treaty in which Article 155 must be placed as well as from practical considerations that the concept of implementation must be given a wide interpretation. Since the Commission alone is in a position to monitor agricultural market trends and to take prompt action when the need arises, the Council is entitled to confer on it wide powers in that sphere. For that reason, the limits of those powers must be determined by reference, *inter alia*, to the essential aims of the market organization (see Case 22/88 *Vreugdenhil and Another* v *Minister van Landbouw en Visserij* [1989] ECR 2049, paragraph 16 and the cases cited therein). Thus, the Court of Justice has held that, in matters relating to agriculture, the Commission is authorized to adopt all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to such legislation or to the implementing legislation adopted by the Council (Case 121/83 *Zuckerfabrik Franken* v *Hauptzollamt Würzburg* [1984] ECR 2039, paragraph 13).

52 In the specific context of imports of bananas into the Community, the Court of Justice has already held that it follows from the above principles that Article 20 of Regulation No 404/93 does not preclude the Commission from adopting detailed implementing rules which, although not expressly referred to in that provision, are necessary for the functioning of the import system (Case C-478/93 *Netherlands* v *Commission* [1995] ECR I-3081, paragraphs 31 and 32).

53 In relation to the question whether the Commission had the power to fix the contested reduction coefficient, the Court notes that the import system created by Regulation No 404/93 is founded on the imposition of an annual tariff quota for imports of third country and non-traditional ACP bananas. In the operation of the system, the operators are granted the right to a share of the tariff quota, calculated on the basis of the average quantities of bananas sold in the three most recent years for which figures are available. They are not afforded any guaranteed right to import a specific quantity at an advantageous levy rate.

54 The Court considers that the ability to fix a reduction coefficient is essential to the operation of such a tariff quota. Once the demand for import licences exceeds the quota, it would be impossible to maintain both the quota and the principle of the operators' right to a share of the quota, based on previous imports, in the absence of a reduction coefficient.

55 It follows that the Commission clearly had the power to fix a reduction coefficient under Article 20 of Regulation No 404/93. The applicants' first plea must therefore be rejected.

Second and third pleas: the contested reduction coefficient was based on incorrect reference quantities in violation of Article 40(3) of the Treaty; breach of the principle of equal treatment

Arguments of the parties

56 The applicants recall that in Community law the principle of equality requires that like situations should not be treated differently unless there is objective justification for such difference of treatment (Case 245/81 *Edeka Zentrale* v *Germany* [1982] ECR 2745 and Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969).

57 The applicants argue that in the present case this principle has been infringed because certain operators registered inflated reference quantities which did not genuinely reflect actual imports made by them during the reference period. The

reduction coefficient was thus doubly flawed; on the one hand, it was derived from incorrect reference quantities, and, on the other hand, it had then been applied to these same quantities. As a result, the application of the uniform reduction coefficient to the total reference quantities prejudiced those operators, including the applicants, who had been granted reference quantities corresponding exactly to their imports during the reference period. The application of the uniform reduction coefficient therefore involved the application of identical treatment to dissimilar situations.

58 The applicants assert that operators registered inflated quantities because of the failure of the Commission, when drafting Regulation No 1442/93, to make provision for a single, verifiable reference point in determining the entitlements of operators, despite the fact that the applicants had suggested an alternative version of Article 3 of Regulation No 1442/93 to the Commission in advance. They emphasize that the alleged infringement of the principle of equality and of Article 40(3) of the Treaty arises not because of the Commission's attempts to remedy the situation after it realized some of the reference quantities were inflated, but because it accepted inaccurate and inflated reference quantities.

59 The Commission maintains that the purpose of the corrections which it made following the submission of inaccurate figures returned by the Member States was to promote equality of treatment. It also points out that these corrections reflected, in so far as possible, those made by the Member States themselves. It states that the accuracy of declarations made by the Member States is ultimately a matter for the national authorities, which alone possess the necessary resources to carry out this exercise. Any differential treatment as between operators is therefore attributable to individual operators themselves or Member States and not to the Commission. Moreover, since it exercises only a supervisory role, the Commission can merely seek to limit the possibility of error, but not to eliminate it entirely, as that is ultimately the responsibility of the Member States.

60 In response to the applicants' assertion that a single verifiable reference point should have been fixed, the Commission states that given the decentralized system necessitated by Regulation No 404/93, such a reference point was not appropriate.

61 The applicants also submit that the purpose of the reduction coefficient in the regulation was unlawful because it was applied to inaccurate reference quantities. In this regard, they refer to judgments of the Court of Justice as authority for the proposition that a decision may be annulled where it is based on a false evaluation of facts (Case 18/62 *Barge* v *High Authority* [1963] ECR 259, Case 27/63 *Raponi* v *Commission* [1964] ECR 129, Joined Cases 94/63 and 96/63 *Bernusset* v *Commission* [1964] ECR 297, and Case 97/63 *De Pascale* v *Commission* [1964] ECR 515).

62 The applicants rely upon three particular points in support of their argument as to the inaccuracy of the reference quantities. Firstly, they say that the figures representing the reference quantity for the Community as a whole were considerably higher than the average quantities based on statistics furnished by 'Eurostat' for the reference period 1989 to 1991; secondly, the figures submitted by the Member States themselves indicated the existence of an error; thirdly, the Commission itself acknowledged that an error had taken place and attempted to correct it. The applicants point out that, during the reference period, the Eurostat figures for total imports of bananas into the Community are materially lower than the total reference quantities of primary importers, secondary importers and ripeners (see paragraph 13 above). They observe that, once imported, each consignment of bananas must pass through the three different stages of the marketing process described in the definition of 'operator' in Article 3(1) of Regulation No 1442/93, namely, primary importation, secondary importation and ripening (see paragraph 16 above). The same quantity of bananas, more or less, should appear in the aggregate figures for each stage. The applicants do not agree that the Eurostat figures are merely a useful reference point in order to establish the quantity of imports and assert that they represent the absolute measure of actual imports of goods put into free circulation during the period and are publicly verifiable as such.

63 The applicants also point out that in the recitals to the regulations postponing the introduction of the new regime (see paragraph 17 above), the Commission had expressed its concern about the accuracy of the reference quantities and that, in the fifth recital in both Regulation No 2920/93 and Regulation No 3190/93, it acknowledged that 'the same quantities [of bananas] in respect of the same activity have been counted twice for different operators in several Member States'.

64 The Commission denies that Regulation No 3190/93 was based on incorrect reference quantities and submits that the reduction coefficient was applied to reference quantities which had been corrected by its services or at their instigation and which had thus been calculated in accordance with the rules fixed pursuant to Regulation No 404/93.

65 It acknowledges that reference quantities originally submitted by the Member States led it to believe that there had been cases of double counting and of overlapping in the figures concerning operators carrying on different classes of activity, and that it was obliged for that reason to correct the figures before applying the reduction coefficient.

66 The Commission emphasizes that, under the system established by Regulation No 404/93, licences were to be granted on the basis of quantities of bananas 'sold' and 'marketed' and not solely upon the basis of imports into the Community. However, the Eurostat figures relate only to imports and could not therefore be used as the basis for determining reference quantities to be attributed to operators carrying out different classes of activity. They could only be used as a general indication as to whether double counting had occurred. It was the fact that the reference quantities submitted by the Member States were at variance with the Eurostat import figures that alerted the Commission to the possibility of double counting. The Commission accordingly took steps to procure the correction of figures wherever possible. In relation to primary importers it resolved the problem by consultation with the Member States. In relation to secondary importers, agreement with Member States was not possible and the Commission was therefore obliged to

reduce the figures in respect of Italy and the Netherlands by 170 000 tonnes. In relation to ripeners, although there appeared to be discrepancies in the figures, the Commission could not detect specific problems and therefore accepted the figures from the Member States unamended.

Findings of the Court

67 So far as concerns the second plea, according to which the contested reduction coefficient is unlawful in that it was fixed on the basis of incorrect reference quantities, it is clear, as the Commission has acknowledged in preambles to certain of its regulations and as it has explained in its answers to the written questions put by the Court, that the figures submitted by the competent authorities of the Member States concerning the reference quantities to be attributed to different operators were, at least initially, higher than they should have been because the same quantities in respect of the same activity had been counted twice in respect of different operators in several Member States (see, for example, the fifth recital in the preamble to Regulation No 2920/93 and to Regulation No 3190/93). The applicants argue in addition that the true measure of the errors committed in calculating the reference quantities should be obtained by comparing the total reference quantities submitted by the Member States with the Eurostat figures concerning imports into the Community for the reference period, and that this comparison shows a percentage of error of 14.8%.

68 The Court does not accept that the Eurostat figures for imports in the reference years must be used as the absolute test as to the validity of the reference quantities ultimately approved by the Commission after adjustments had been made in consultation with the competent authorities of the Member States concerned. The Court has not been furnished by the applicants with any detailed evidence as to the basis of compilation of the Eurostat figures relied upon, but it is not disputed

that these figures are themselves based on returns made by the Member States and that they are frequently revised retrospectively as more accurate information becomes available.

69 Furthermore, as the Commission has pointed out, Regulation No 404/93 provides that reference quantities employed to allocate the tariff quota must be based not on imports but upon quantities 'marketed' by operators. Moreover, in accordance with Article 5(1) of Regulation No 1442/93, the reference quantities must be broken down according to the economic activities of the operator as described in Article 3(1) of the same regulation and the import figures were of no use in that regard. The Court considers, therefore, that while it was appropriate for the Commission to have recourse to Eurostat figures for imports as a general guideline putting it upon inquiry as to possible discrepancies in the figures submitted by the competent national authorities, it was neither entitled nor obliged by the relevant regulations to substitute figures based on imports for figures based on quantities 'marketed', once the latter had been corrected to eliminate discrepancies to the extent possible.

70 While it is clearly the case that the aggregate quantity of third country bananas marketed in the Community ought not, at any one of the three stages of marketing identified in Article 3(1) of Regulation No 1442/93, to exceed the total quantity of imports to the Community, it does not necessarily follow that the quantities handled at each of the three stages in question must be broadly similar *inter se*, as the applicants have argued. This presupposes that all imported bananas are separately handled and counted at each of the three stages. Quite apart from the fact that loss of product and reexports out of the Community at each stage must be taken into account, there is no evidence before the Court to establish that this is the actual practice in the trade. It may be noted that the definition of 'operator' in Article 3(1) of Regulation No 1442/93 expressly recognizes that an operator may carry out 'one or more' of those activities. Furthermore, having regard to the intra

Community trade in the products during the three marketing stages, it is clear that the same consignment may be handled, at each stage, by an operator established in a different Member State. Thus, the volume of activity registered at each stage may differ in each Member State.

71 It is undoubtedly the case that the entry into force of Regulation No 404/93 substantially altered the way in which the national banana markets had hitherto operated in the Member States and that the implications and effects of these necessary changes presented the Commission with exceptional difficulties.

72 In fact, the introduction of a single Community market in this sector involved the replacement of the different national regimes previously in place. In so doing, the entry into force of Regulation No 404/93 inevitably caused disruption and the possibility of commercial losses for the enterprises which had until then traded according to the established rules of these national regimes.

73 Because the pre-existing national regimes had operated in widely differing ways, it was inevitable that the Commission would be faced with difficulties in establishing the precise quantities of bananas which had been handled by the various categories of operators during the years preceding the common organization of the market. Nevertheless, pursuant to Article 19(1) of Regulation No 404/93, primary responsibility for establishing the average quantities marketed by the operators concerned lay with the competent authorities of the Member States.

74 The Commission, in exercising its function of supervising implementation of the regime laid down in Regulation No 404/93 was not obliged to, and did not in fact, accept without question the figures submitted by the Member States. Nor was it obliged to delay indefinitely the implementation of the new regime once it had taken such steps as were reasonably feasible to correct instances of double counting.

75 The Court considers that such variations as remained after the Commission had procured corrections in at least some of the reference quantities originally submitted by the Member States do not establish any invalidity in the reduction coefficient adopted on the basis of the corrected figures. These variations do however demonstrate the practical problems inherent in the introduction of a new common organization of the market, replacing the different regimes previously in force. Difficulties encountered by the competent authorities of the Member States in the implementation of Community legislation do not vitiate the validity of the implementing measures themselves.

76 In relation to the third plea, namely, that the contested reduction coefficient has been fixed in infringement of Article 40(3) of the Treaty and the principle of equal treatment, the Court points out that the prohibition of discrimination laid down in that article is merely a specific articulation of the general principle of equality which is one of the fundamental principles of Community law according to which similar situations ought not to be treated differently unless there is objective justification for the differentiation (Joined Cases 201/85 and 202/85 *Klensch and Others* v *Secrétaire d'État* [1986] ECR 3477, paragraph 9, and Joined Cases C-267/88 to C-285/88 *Wuidart and Others* v *Laiterie coopérative eupenoise* [1990] ECR I-435, paragraph 13).

77 While it is true that the common organization of the market for the banana sector covers economic operators who are neither producers nor consumers, nevertheless, having regard to the general nature of the principle of non-discrimination, the prohibition on discrimination applies equally to such economic operators when they are brought within the scope of application of the market organization in question (Case C-280/93 *Germany* v *Council*, cited above, paragraph 68).

78 The sector in question was, prior to the adoption of Regulation No 404/93, characterized by the coexistence of widely differing national market regimes, many of them having operated in largely the same way since before the creation of the Community or the accession of the Member States concerned. In those national markets which were open, operators could obtain access to supplies of third

country bananas without any quantitative restriction. On the other hand, in the protected national markets, operators marketing ACP and Community bananas were certain of being able to find outlets for their products without competition from distributors of third country bananas. As a result, there were substantial price discrepancies between the different markets.

79 It is therefore clear that the respective situations of the economic operators in the pre-existing national markets were not by any means comparable. While the operators in question have undoubtedly been affected in different ways by the introduction of the common organization, this difference of treatment is, in the consideration of the Court, an inevitable consequence of the need to take into account the different situations in which the operators found themselves and was inherent in the objective of integrating the hitherto partitioned markets (Case C-280/93 *Germany* v *Council*, cited above, paragraphs 70 to 74).

80 Furthermore, the evidence adduced to the Court by the applicants has not established any specific instance of actual treatment applied to them which was different to that applied to other operators.

81 In those circumstances the Court concludes that, in fixing the contested reduction coefficient, the Commission did not exceed the bounds of the discretion which it is entitled to exercise in the Community interest when laying down the rules of a common market organization (see the cases cited in paragraph 51 above).

82 For these reasons, accordingly, the second and third pleas must be rejected.

Fourth plea: infringement of Article 16 of Regulation No 404/93 by virtue of the late establishment of a forecast supply balance on the basis of which the tariff quota, to which the contested reduction coefficient was applied, should have been established

Arguments of the parties

83 The applicants submitted initially that the Commission, in breach of Article 16 of Regulation No 404/93, had failed to establish a forecast supply balance before fixing the tariff quota for 1994. Following Commission Decision 94/654/EC of 29 September 1994 adopting the forecast supply balance for banana production, consumption, imports and exports of bananas for the Community for 1994 (OJ 1994 L 254, p. 90), they submitted that the forecast supply balance had been adopted late.

84 The applicants submit that the forecast supply balance must be used in order to adapt the tariff quota of 2 000 000 tonnes established by Article 18(1) of Regulation No 404/93 and that Article 9 of Regulation No 1442/93, which refers to the existence of a forecast supply balance, provides that the indicative quantities are to be fixed for each quarter on the basis of that balance.

85 According to the applicants, it is implicit in Article 16 of Regulation No 404/93 that the forecast supply balance must be established before the beginning of the marketing year and that, under Article 16(3), it can be adjusted during the year only in exceptional circumstances. This interpretation of Article 16 is reaffirmed by the ninth recital in the preamble to Regulation No 404/93, according to which the balance drawn up each year 'should assess the prospects for production and consumption in the Community'. The applicants argue that, since the forecast supply balance for 1994 was not drawn up until 29 September 1994, after all licences had been distributed, this delay rendered the forecast supply balance superfluous and constituted an infringement of Regulation No 404/93 by the Commission.

86 The Commission states that it did not prepare a formal forecast supply balance, as provided for in Article 16 of Regulation No 404/93, prior to fixing the reduction coefficient for 1994 because of the absence of sufficient information. It explains that it adopted the forecast supply balance when that information became available.

87 The Commission argues that the failure to draw up a forecast supply balance at the material time cannot be regarded as a breach of an essential procedural requirement. Firstly, the failure was attributable to delays or inaccuracies on the part of the competent national authorities, the Commission, for its part, having done all it could to obtain the necessary information in good time. Secondly, the failure to prepare a balance is of importance only where it is necessary to increase import quotas; otherwise, the quotas specified in Regulation No 404/93 apply automatically. Thirdly, the applicants' analysis, if accepted, would call into question the operation of the common organization of the market. Fourthly, the absence of a forecast supply balance is not relevant to the question of the legality of the legislation applying the contested reduction coefficients to the correct reference quantities. According to the Commission, the setting of the quota is an entirely distinct issue. It follows that the adoption of a forecast supply balance before the marketing year in question is not a condition of the validity of Regulation No 3190/93. Finally, the Commission highlights the fact that no date is stipulated for the preparation of a forecast supply balance in the legislation in question. This implies that the Council considered the adoption of such a balance before the beginning of a marketing year to be a useful but not an essential instrument for the proper regulation of the market.

Findings of the Court

88 As this plea turns upon the belated preparation of a forecast supply balance which ought to have been the basis for the quota, it is relevant to point out that the

function of such a balance in the context of the common organization of the market for bananas is that described in Articles 16 and 18 of Regulation No 404/93.

89 The first subparagraph of Article 18(1) provides that a tariff quota of 2 000 000 tonnes is opened for each year. The third subparagraph of the same provision fixes a specific quota of 1 000 000 tonnes for the second half of 1993. The fourth subparagraph provides that, where Community demand calculated on the basis of the forecast supply balance envisaged in Article 16 increases, the volume of the quota is to be increased accordingly and where this increase is found to be necessary, it is to be carried out 'prior to the date of 30 November preceding the marketing year concerned'. It follows by implication that this procedure envisages that the forecast supply balance ought to be available prior to 30 November each year in order to enable an assessment to be made as to whether such an increase is in fact necessary for the following marketing year.

90 Article 16(3) provides for the possibility of another revision, with a distinct purpose. It provides in effect that the forecast supply balance may be further adjusted within the course of a marketing year 'in particular to take account of the effects of exceptional circumstances affecting production or import conditions'.

91 The Court considers that it follows from the combined effect of these provisions that the forecast supply balance should normally be prepared in good time to allow for a decision on the need for an adjustment of the quota before 30 November of the year before the marketing year concerned.

92 The Court also considers that the operators' right to be informed of any likely adjustment of the quota before 30 November of the preceding year is an important right which the operators are entitled to have respected and safeguarded by the Commission and the Member States.

93 However, it does not follow from this that Regulation No 3190/93 must be invalidated by reason only of its having been adopted before a supply balance for the year 1994 had been established and, as a result, before a decision on the need for an adjustment such as that provided for in the fourth subparagraph of Article 18(1) of Regulation No 404/93 could be taken.

94 The Court considers that the Commission has established that it was faced with difficulties in obtaining from the Member States exact figures with which to draw up an accurate forecast supply balance and that, in those circumstances, it had no option but to proceed to calculate the contested reduction coefficient solely on the basis of the tariff quota of 2 000 000 tonnes without prior examination, in the absence of sufficient information, of the need to make the revision provided for in the fourth subparagraph of Article 18(1). The late adoption of this supply balance cannot therefore be regarded as a breach of Article 16 of Regulation No 404/93.

95 Moreover, the Court notes that when, in September 1994, more accurate figures became available, the Commission did adopt a forecast supply balance for that year, carried out the necessary adjustment and altered the contested reduction coefficient accordingly. The Court accepts that these measures substantially reduced any damage suffered by the applicants as a result of the late preparation of the forecast supply balance and recalls that the applicants conceded at the hearing that the damage they had sustained as a result of the late adoption of the supply balance forecast was 'not so great'.

96 By reason of the foregoing considerations it follows that the contested reduction coefficient was not invalidated by the belated establishment of the forecast supply balance used as the basis of the tariff quota to which the reduction coefficient was applied.

97 The fourth plea must, accordingly, be rejected.

Fifth plea: the decision to apply the contested reduction coefficient is based upon provisions of Regulation No 1442/93 which were unlawful

Preliminary observations

98 Pursuant to Article 184 of the Treaty, the applicants plead that certain provisions of Regulation No 1442/93 are inapplicable, thereby rendering the decision to apply the reduction coefficient void. Their plea has five limbs. They submit that:

(i) the definition of 'operator' set out in Article 3 of Regulation No 1442/93 is *ultra vires* Regulation No 404/93;

(ii) the definition of 'secondary importer' at Article 3(1)(b) is ambiguous and appears to give quota entitlement to operators who assume only risk of loss and deterioration and not commercial risk and that, in creating a fourth class of operators, it is *ultra vires* Regulation No 404/93;

(iii) the inclusion of ripeners within the category of operators entitled to a tariff quota, provided for in Article 3(1)(c) of Regulation No 1442/93, is *ultra vires* Regulation No 404/93;

(iv) the weighting coefficient established by Article 5(2) of Regulation No 1442/93 is *ultra vires* Regulation No 404/93;

(v) the provisions regarding supporting evidence for applications for allocation of a share of quota in Articles 4(3), 7 and 8 of Regulation No 1442/93, being unclear, infringe the principle of legal certainty and represent a failure on the

part of the Commission to manage the Community quota in accordance with Community law.

99 The Court will examine each limb of this plea separately.

100 As the Court has already indicated above in its consideration of the applicants' first plea, the Council conferred a wide discretion on the Commission under Regulation No 404/93 for the purpose of adopting detailed rules of implementation; this necessarily included a power to lay down appropriate definitions. The Court notes however that in the first and second limbs of this argument, the applicants submit that certain definitions set out in Regulation No 1442/93 are invalid because they are *ultra vires* what was authorized by the Council in Regulation No 404/93.

(i) The definition of 'operator' set out in Article 3 of Regulation No 1442/93 is *ultra vires* Regulation No 404/93

Arguments of the parties

101 The applicants recall that the 14th and 15th recitals in the preamble to Regulation No 404/93 emphasize the need to preserve existing trade patterns. The 15th recital specifies that licences should be granted to persons who have undertaken the commercial risk of marketing bananas and that it is necessary to avoid disturbing normal trading relations between persons occupying different points in the marketing chain.

102 They allege that the definition of the term 'operator' provided for in Article 3(1) of Regulation No 1442/93, which distinguishes the classes of activity of primary importers, secondary importers and ripeners, breaches the principles set out in Regulation No 404/93. The inclusion of the ripeners, in particular, disrupts the existing marketing chain. The commercial risk to which Regulation No 404/93 refers is the risk of profit and loss, and not of spoilage or loss of product which are insurable risks. Moreover, by giving those who did not traditionally do so the right to import, the Commission has brought about a fundamental break in the marketing chain.

103 The applicants add that the definition of an operator in Regulation No 1442/93 is ambiguous and fails to guard against the possibility of double counting. The result of this ambiguity has been uncertainty amongst national authorities as to who is entitled to apply for a share of the tariff quota, and this in turn has meant that a significant number of operators have applied for a share of the quota to which they had no entitlement. This has resulted in the reduction of the quota entitlement of all operators to the detriment of legitimate operators such as the applicants.

104 The applicants recall that they had suggested an alternative definition of 'operator', which the Commission did not accept, namely, that an operator is the person who has cleared the goods for free circulation within the Community and is responsible for the payment of any duties or taxes due upon such importation.

105 Before addressing the specific arguments raised by the applicants, the Commission emphasizes that the legal basis for Regulation No 3190/93 is Article 20 of Regulation No 404/93, and not Regulation No 1442/93 as the applicants allege. This is confirmed both by the preamble to Regulation No 3190/93 and by the fact that the

Commission followed the 'management committee procedure' under Article 27 of Regulation No 404/93 in adopting it. It follows in the Commission's view that the legality of Regulation No 1442/93 is not relevant to a discussion of the legality of Regulation No 3190/93.

106 In relation to the different activities to which the definition of 'operator' makes reference, the Commission contends that Article 3 of Regulation No 1442/93 is in accordance with Regulation No 404/93. Firstly, account must be taken of the diversity of the supply and marketing structures in Member States. Secondly, it is necessary to give access to the quota to the operators whose business is directly dependent on such access, and who bear commercial burdens and risks. The Commission refutes the suggestion that the definition of operator should have been restricted to those who have cleared customs, pointing out that this would have benefited a particular class of operator to the detriment of other classes directly concerned. Moreover, the system established by Regulation No 404/93 and implemented by Regulation No 1442/93 is based not on importation but on marketing, defined by Article 15(5) of Regulation No 404/93 as 'placing on the market, not including making the product available to the final consumer'.

107 In relation to the dangers of misinterpretation and double-counting invoked by the applicants, the Commission points out that this is an inevitable consequence of the complex legislative framework and does not call into question the usefulness of defining three different classes of activity.

Findings of the Court

108 The applicants' argument under this limb of their plea is essentially two-fold. They first submit that by defining the term 'operators' by reference to the activities which gave an entitlement to access to the tariff quota, including those of ripeners,

the Commission exceeded what was authorized by Council Regulation No 404/93. Secondly, they assert that the ambiguity of the definition caused the unlawful double counting of applications, which consequently distorted the allocation of the tariff quota.

109 So far as concerns the first part of that argument, the Court notes that Regulation No 404/93, in establishing the criteria for the new common organization of the market in this sector, identified the assumption of the commercial risk of placing the products on the market 'on their own account' as a common qualifying characteristic for the first two categories (A and B) of operator mentioned in Article 19(1) of that regulation. It did not seek to confine the entitlement to access to the quota to operators who had imported bananas under the pre-existing national regimes or to importers generally.

110 As the applicants acknowledged in paragraph 40 of their reply, ripeners had played and continued to play a central role in the marketing of these products. Furthermore, as pointed out by the United Kingdom in its statement in intervention — an observation which has not been disputed — ripeners in at least that Member State had traded as importers of bananas on their own account prior to 1992 and had borne the commercial risk of trading loss because no rebate system of the kind mentioned by the applicants had operated in the United Kingdom. It follows that the considerations reflected in the 14th and 15th recitals to Regulation No 404/93 of respecting existing commercial relations not only were not inconsistent with the definition of 'operator' adopted in Article 3 of Regulation No 1442/93 but rendered it entirely appropriate that ripeners be included amongst those to whom quota for imports should be allocated under the common organization of the market.

111 Nor can the Court accept the proposition advanced by the applicants that the concept of commercial risk identified in Regulation No 404/93 is confined to the risk of incurring a trading loss and excluded insurable risk. Many contingencies of

trade such as that of bad debt or the bankruptcy of a valuable customer can be insured against while remaining part of the commercial risk of the trade. Ripeners who purchase stocks of products on their own account with a view to their subsequent resale do incur the commercial risk associated with price fluctuations as well as the risk of loss or spoilage of the product itself.

112 Furthermore, it is clear from the same recitals in Regulation No 404/93, that the introduction of the common market organization, while taking existing commercial links and trading relationships into account, did not purport to preserve those links and relationships rigidly intact but envisaged further development of marketing structures, including the entry of new operators.

113 As regards the second part of the argument, the Court considers that the definition of 'operator' in Article 3(1) of Regulation No 1442/93 cannot be regarded as ambiguous or as inconsistent with the requirements of Regulation No 404/93. Article 3(1) seeks to address the reality of the market situation, in which some operators did indeed engage in one or more of the commercial activities described, on their own account. In so far as the alleged double counting may have occurred in calculations made by the national authorities, those errors derived from the diversity and complexity of the trading structures within the sector and cannot be regarded as the inevitable consequence of any illegality inherent in the definition itself.

114 It follows, accordingly, that this limb of the fifth plea must be rejected.

(ii) The definition of 'secondary importer' in Article 3(1)(b) of Regulation No 1442/93 is ambiguous and appears to give quota entitlement to operators who only assume risk of loss and deterioration and not commercial risk and that, in creating a fourth class of operators, is *ultra vires* Regulation No 404/93

Arguments of the parties

115 The applicants allege that the definition of secondary importer given in Article 3(1)(b) of Regulation No 1442/93 (see above, paragraph 13) has the effect of creating a fourth class of operator by virtue of its ambiguity, and that, to that extent, the article is *ultra vires* Regulation No 404/93 which conferred no such competence on the Commission. They acknowledge that the Commission recognized the ambiguity of this definition and adopted an interpretative note in order to clarify its meaning. This note states that 'the event which determines the categorization as secondary importer for the purposes of Article 3(1) is the release for free circulation of the product'. However, the applicants claim that this note has not resolved the ambiguity and that certain Member States have interpreted the second part of Article 3(1)(b) as equating risks of loss and deterioration with the commercial risk ordinarily assumed by an owner. This interpretation has led to an artificial increase in the reference quantities submitted for secondary importers. The applicants emphasize that, by failing to take adequate steps to remedy the matter, the Commission bears the responsibility for it.

116 In their reply, the applicants raise a new argument to the effect that Article 3 of Regulation No 1442/93 has created a system whereby ripeners will eventually capture the full tariff quota. According to them, banana ripeners will obtain quota entitlement as a result of the ripening activities carried out by them, as well as by exercising the right to import given to them by Article 3. They will therefore 'spiral' into the secondary importer role and thereby eliminate such operators.

117 The Commission states that the applicants have misconstrued the definition of 'secondary importer'. Article 3 of Regulation No 1442/93 provides that the secondary importer must put the bananas into free circulation as owner; however, if the importer putting the bananas into free circulation is not the owner but none the less bears the risk of spoilage or loss, then he may be treated as the owner. The Commission reaffirms that the term 'commercial risk' includes the risks of spoilage or loss.

118 In relation to the 'spiralling' argument, the Commission submits that the system set up under Regulation No 404/93 does not in itself result in the transfer of rights between Category A operators carrying on different classes of activity. It adds, however, that the positions of operators carrying on the different classes of activity are not entrenched vis-à-vis each other. Thus it was correct to allow, for example, primary importers and ripeners the freedom to seek rights attaching to secondary importation, and the fact that this freedom has been exercised both by ripeners and primary importers demonstrates that the applicants' contention that ripeners will eventually capture the full entitlement to the tariff quota is unfounded.

Findings of the Court

119 The Court considers that this limb of the plea is based on a mistaken interpretation of Article 3(1)(b) of Regulation No 1442/93. That provision sets out three cumulative conditions in defining the concept of an 'operator' exercising class (b) activities (in other words a secondary importer), namely, the supply and release of green bananas for free circulation; the sale of the products with a view to their being marketed within the Community; and, thirdly, the status of ownership.

120 As the Court of Justice has held in Case C-478/93 (*Netherlands* v *Commission*, cited above, paragraphs 22 and 23) it is clear from an examination of the above-mentioned provision that those conditions are cumulative and that the condition as to the assumption of the risk of spoilage or loss of the goods is an alternative which can be relied upon by an operator where the condition as to ownership is not met.

121 It follows that, correctly construed, Article 3(1)(b) is not ambiguous as the applicants have suggested and this argument must therefore be rejected.

(iii) The inclusion of ripeners within the category of operators entitled to a tariff quota, provided for in Article 3(1)(c), is *ultra vires* Regulation No 404/93

Arguments of the parties

122 The applicants argue that the inclusion of ripeners defies the traditional definition of a trader who assumes commercial risks related to the placing of bananas on the Community market, and that the principles governing quota allocation set out in the recitals in Regulation No 404/93 do not cover ripeners, because, as a result of a rebate system that has been traditionally adopted between importers and ripeners, the latter do not assume the commercial risks of marketing. Furthermore, ripeners, in having access to import licences, can now import directly from third countries, thus becoming primary and secondary importers and breaking the traditional commercial links that they had with the original primary and secondary importers.

123 The Commission in reply argues that ripeners are treated as operators because they bear a commercial risk, and the question as to whether or not that risk is insurable is irrelevant. They purchase green bananas, assume downstream price risks, and bear significant capital and distribution costs. Further, the Commission says that it did not wish to eliminate from the market those ripeners who had traded bananas under the pre-existing national regimes. It points to the situation which obtained in the United Kingdom prior to the adoption of Regulation No 404/93. It adds that while, for the moment, the system has reflected the existing structure of the market, it does not necessarily entrench the position of existing importers for the future and that ripeners may eventually transfer to another category.

124 The United Kingdom points out, firstly, that the statement of the applicants to the effect that ripeners take no commercial risk is untrue, at least in certain Member States. In the United Kingdom, there is no system of rebates so that when ripeners buy green bananas they assume the risk that either the market price or demand may fall. Secondly, the United Kingdom states that the assertion that ripeners have not traditionally imported bananas is also untrue, since under the national arrangements applicable in the United Kingdom before the common organization of the market, 35% of import licences for third country bananas were allocated to banana handlers, the majority of whom were ripeners. Thirdly, the United Kingdom notes that Article 19(1) provides for the tariff quota to be open to 'operators' and not just 'importers'.

Findings of the Court

125 Under this limb of the fifth plea, the applicants argue, in effect, that ripeners should not have been included among those operators with a right to a share of the tariff quota because they do not assume any commercial risk. This uncorroborated

assertion on the part of the applicants has been contradicted by the United Kingdom, which points out that no system of rebates operates in that country with the result that ripeners do in fact assume a commercial risk and had in fact traded as importers holding import licences prior to the introduction of the common organization.

126 The Court considers that the applicants have already advanced this argument in the context of limb (i) of this plea and rejects it for the same reasons as those set out above at paragraphs 109 to 112.

(iv) The weighting coefficient established by Article 5(2) of Regulation No 1442/93 is *ultra vires* Regulation No 404/93

Arguments of the parties

127 According to the applicants, the weighting coefficient introduced by Article 5(2) of Regulation No 1442/93 was not provided for in Regulation No 404/93. Moreover, the percentages it lays down are arbitrary, in particular to the extent that ripeners have almost twice the entitlement to a share of the tariff quota as that made available to secondary importers, despite the fact that ripeners undertake very little commercial risk, in contrast to the latter. They add that the third recital in Regulation No 1442/93, in stating that the coefficient 'corrects the negative effects of counting the same quantities of products at various stages of marketing more than once', does not explain how the weighting coefficient corrects these effects.

128 The Commission, supported by the United Kingdom, points out that the preamble to Regulation No 404/93 states that licences must be granted to persons who have assumed the commercial risk of marketing bananas and that to limit access to the tariff quota to traders who had previously imported bananas would not have been justified in view of the marketing systems for bananas existing in several Member States.

129 It then adds that the percentages in Article 5(2) of Regulation No 1442/93 were adopted after examination of the market and discussions with the Member States in the management committee, and that they reflect the reality of the market. It was accepted that primary importers took the greatest risk in the marketing of bananas and for this reason they were given a weighting coefficient of 57%; that, because of the more minor role of secondary importers, who merely place in free circulation on their own account bananas which they purchase from primary importers to sell on to the ripener, and because they are not exposed to the same risks as the primary importer or the ripener, they were given a weighting coefficient of 15%; and that, since ripeners, who sell bananas to wholesalers, bear the risk of price fluctuations on the consumer market, they merited a weighting coefficient of 28%. The Commission adds that weighting coefficients are inherent in a quota system.

Findings of the Court

130 As the Court has already pointed out in the course of its consideration of the first plea in relation to the application of the reduction coefficient (see paragraphs 50 to 55), the power to fix a weighting coefficient is inherently necessary in a quota system given the need to compensate for the fact that the same products may well be handled by different operators at the distinct stages of the marketing chain.

131 In fact, in fixing the coefficients at the percentages quoted above, after having studied the market and having consulted the management committee, the Commission was discharging its essential role of assessing complex economic factors. As the applicants have not shown by appropriate evidence that the assessment has been manifestly erroneous or unreasonable, the Court cannot conclude that the Commission has erred in its assessment.

132 It follows that it was reasonable for the Commission to take into account the different degrees of risk borne by the different operator activities in fixing the weighting coefficient.

133 The argument of the applicants under this limb of their plea must accordingly be rejected.

(v) The provisions regarding supporting evidence for applications for allocation of a share of quota in Articles 4(3), 7 and 8 of Regulation No 1442/93, being unclear, infringe the principle of legal certainty and represent a failure on the part of the Commission to manage the Community quota in accordance with Community law

Arguments of the parties

134 According to the applicants, these articles, which set out the manner in which the competent authorities of the Member States must establish the lists of operators in Categories A and B, together with the reference quantities for them, must be construed as imposing a mandatory obligation upon the Member States. Article 4(3) provides that 'the operators concerned shall make the supporting documents specified in Article 7 available to the authorities'. Article 7, on the other hand, appears to make the provision of those documents optional since it provides that 'at the

request of the competent authorities of the Member States the following documents may be submitted to establish the quantities marketed by each operator'.

135 According to the applicants, the ambiguity created by these provisions has resulted in the Member States adopting differing interpretations leading to criteria for entitlement to a quota allocation being more strictly applied in some Member States than in others. Furthermore, if the submission of documents is assumed to be mandatory, Article 7(1) does not indicate whether the submission of one or all of the specified documents is necessary. Finally, Article 8 gives the national authorities no assistance in determining which combination of documents specified in Article 7(1) must be considered to be acceptable as proof of entitlement. On this basis, these articles infringe the principle of legal certainty.

136 The Commission submits that there is no inconsistency between the articles. It points out that Article 4(3) is concerned with documents which operators must make available if required, but that the decision as to whether the production of the particular documents is necessary is left to the discretion of the national authorities. While accepting that such a system may be applied in different ways in the different Member States, the Commission points out that they are bound to apply a minimum standard of proof.

137 The United Kingdom maintains that there is no inconsistency between Articles 4(3) and 7 since these articles merely aim to oblige operators to supply to competent authorities in the Member States whichever of the documents listed in Article 7 those competent authorities decide to require.

Findings of the Court

138 The Court does not consider that there is any inconsistency between the provisions of Article 4(3) and Article 7 of Regulation No 1442/93. The former is clearly directed at the operators concerned and imposes a specific obligation upon them to produce the supporting documents specified in Article 7 to the national competent authorities when so requested. Nevertheless, Article 7 leaves it to the competent authorities to determine the extent of that obligation by deciding themselves the particular documents which must be submitted in support of an application. The documents listed in Article 7 illustrate the minimum standard of proof which may be required by the competent authorities. The choice left to the Member States in this regard reflects the need for flexibility in the implementation of the new system as a result of the variety of different national arrangements which had hitherto operated in this sector.

139 The competent authorities nevertheless remain under a duty, when exercising the choice accorded to them under Article 7, to do so in good faith and with due care so as to ensure that the proofs required are genuinely effective, so far as possible, for the purpose of establishing accurate figures according to the particular circumstances in the Member State in question.

140 In those circumstances, accordingly, the Court does not consider that the Commission has infringed the principle of legal certainty in omitting to determine the supporting documents which must be presented by the operators.

141 The arguments under the fifth limb of the plea must therefore be rejected.

142 It follows that the application for annulment under Article 173 must be dismissed as unfounded.

B — *The action for damages pursuant to Article 178 and the second paragraph of Article 215*

143 The applicants claim compensation for loss and damage allegedly caused to them by:

— the Commission's unlawful decision, set out in Article 1 of Regulation No 2920/93, to apply a reduction coefficient to the reference quantities allocated to operators in Category A for the period 1 July to 31 December 1993; and

— the Commission's unlawful decision, set out in Article 1 of Regulation No 3190/93, to apply a reduction coefficient to the reference quantities allocated to operators in Category A for the period 1 January to 31 December 1994; and

— the Commission's failure to administer and manage the Community quota in accordance with Community law, in particular Article 155 of the Treaty and Article 20 of Council Regulation No 404/93.

Arguments of the parties

144 The applicants argue that the Commission must observe the principle of good administration in fulfilling its obligations pursuant to Article 155 of the Treaty and Article 20 of Regulation No 404/93, and that decisions adopted in breach of this

principle are invalid (Case C-10/88 *Italy* v *Commission* [1990] ECR I-1229). They also refer to Council Resolution 93/C166/01 of 8 June 1993 on the quality of drafting of Community legislation (OJ 1993 C 166, p. 1) and the Opinion of Advocate General Gulmann in *Emerald Meats* v *Commission* (Joined Cases C-106/90, C-317/90 and C-129/91 [1993] ECR I-209), adding that the Commission must also respect the principle that Community legislation must be clear. For the reasons they have already given in their submissions on the claim for annulment, the Commission has failed to meet its obligations with respect to these principles.

145 The applicants also argue that the Commission failed adequately to verify that reference quantities and lists of operators were accurate and to oversee the manner in which the Member States performed their obligations under Regulation No 1442/93. In so doing, it failed to fulfil the duty, which was either expressly imposed on it under Article 4(5) of that regulation or which flows from the general principle of Community law to the effect that powers not expressly provided for but necessary for the proper implementation of a Community measure may be taken as implied.

Findings of the Court

146 The Court has found above (see paragraphs 44 to 142) that the Commission did not act unlawfully in adopting the mechanism of a reduction coefficient for application to the reference quantities of operators in Category A pursuant to Article 1 of Regulation No 3190/93. Accordingly, the applicants' claim for damages by reference to the unlawfulness of such decisions both in the period 1 January to 31 December 1994 and the period 1 July to 31 December 1993 is unfounded.

147 Article 155 of the Treaty, in conjunction with Article 20 of Regulation No 404/93, determine the framework within which the Commission is empowered to adopt such detailed rules as are necessary for the implementation of the common market organization in question. As such, those provisions do not create any right of action by reference to Article 178 and the second paragraph of Article 215 of the Treaty in favour of specific undertakings.

148 It follows from the findings which the Court has already made upon the applicants' second, third and fifth grounds for annulment (see paragraphs 67 to 75, 76 to 81, 108 to 114, 119 to 121, 125 to 126, 130 to 133 and 138 to 141 above) as well as from the judgment in Case C-478/93 *Netherlands* v *Commission*, cited above, that the applicants' other arguments under this heading must be rejected as unfounded as they do not prove any unlawful behaviour on the part of the Commission.

149 It follows that the claim for damages must be rejected.

150 For all the foregoing reasons, it follows that the action must be dismissed in its entirety.

Costs

151 Under Article 87(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful and the Commission has applied for costs, they must be ordered to pay the costs.

152 Under Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. Accordingly, the United Kingdom must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicants to pay the costs;

3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

Lenaerts Lindh Cooke

Delivered in open court in Luxembourg on 11 December 1996.

H. Jung
Registrar

K. Lenaerts
President