# JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
13 July 2005 *

In Case T-260/97,

**Camar Srl,** established in Florence (Italy), represented by W. Viscardini Donà, M. Paolin and S. Donà, lawyers, with an address for service in Luxembourg,

applicant,

v

**Council of the European Union,** represented initially by J.P. Hix and A. Tanca, and subsequently by J.P. Hix and F. Ruggeri Laderchi, acting as Agents, with an address for service in Luxembourg,

and

* Language of the case: Italian.

**Commission of the European Communities,** represented initially by H. van Vliet, and subsequently by C. Van der Hauwaert and L. Visaggio, acting as Agents, and A. Dal Ferro, lawyer, with an address for service in Luxembourg,

defendants,

supported by

**French Republic,** represented by K. Rispal-Bellanger and C. Vasak, acting as Agents, with an address for service in Luxembourg,

intervener,

ACTION to determine the amount of damages which the Commission was ordered to pay the applicant following the annulment, by interlocutory judgment of the Court of First Instance in Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico* v *Commission and Council* [2000] ECR II-2193, of the Commission's decision of 17 July 1997 rejecting the application by the applicant for transitional measures under Article 30 of 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),

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

composed of H. Legal, President, P. Mengozzi and I. Wiszniewska-Białecka, Judges,

Registrar: J. Palacio González, Principal Administrator,

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

gives the following

## Judgment

### Legal framework

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) replaced the various earlier national arrangements with a common system of trade with third countries. In the version in force at the material time, the regulation provided for the opening of an annual tariff quota for imports of bananas from third countries and from

Africa, the Caribbean and the Pacific (ACP). Article 15, which became Article 15a when it was amended by Council 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), established a distinction between what are known as 'traditional ACP bananas' and 'non-traditional ACP bananas', depending on whether or not they formed part of the quantities, set out in the Annex to Regulation No 404/93, traditionally exported to the Community by the ACP States.

2 The first paragraph of Article 17 of Regulation No 404/93 provided that all banana imports into the Community were subject to the submission of an import licence.

3 Article 18(1) of Regulation No 404/93, as amended by Regulation No 3290/94, specified that a tariff quota of 2.1 million tonnes (net weight) was opened for 1994 and 2.2 million tonnes (net weight) for subsequent years for imports of bananas from third countries other than ACP countries (hereinafter 'third-country bananas') and of non-traditional ACP bananas. Within the framework of that tariff quota, imports of third-country bananas were subject to a duty of ECU 75 per tonne and imports of non-traditional ACP bananas were free of duty. In addition, Article 18(2) provided that imports outside the quota, whether non-traditional imports from ACP countries or from third countries, were subject to a duty calculated on the basis of the common customs tariff.

4 Article 19(1) of Regulation No 404/93 divided the tariff quota thus opened, allocating 66.5% to the category of operators who had marketed third-country and/or non-traditional ACP bananas (Category A), 30% to the category of operators who had marketed Community and/or traditional ACP bananas (Category B), and 3.5% to the category of operators established in the Community who had started

marketing bananas other than Community and/or traditional ACP bananas from 1992 (Category C).

5 According to the second subparagraph of Article 19(2) of Regulation No 404/93, for the second half of 1993 each operator was to be issued import licences on the basis of half of the annual average quantity marketed between 1989 and 1991.

6 Article 30 of Regulation No 404/93 provided:

'If specific measures are required after July 1993 to assist the transition from arrangements existing before the entry into force of this Regulation to those laid down by this Regulation, and in particular to overcome difficulties of a sensitive nature, the Commission, acting in accordance with the procedure laid down in Article 27, shall take any transitional measures it judges necessary.'

7 Article 27 of Regulation No 404/93 established what is known as the 'Management Committee' procedure. Article 20 of the same regulation called on the Commission to adopt detailed rules for trading arrangements with third countries in accordance with that procedure.

8 At the material time, the detailed rules governing trading arrangements with third countries were laid down in 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). Articles 4 and 5 of

that regulation provided that the division of the tariff quota between Category A operators (66.5%) was to be based on the quantity of third-country and non-traditional ACP bananas marketed in the three years prior to that preceding the year for which the tariff quota was opened. The division of the quota between Category B operators (30%) was to be based on the quantities of Community or traditional ACP bananas marketed during a reference period determined in the same way as for Category A.

9 In accordance with the provisions of the second subparagraph of Article 19(2) of Regulation No 404/93, as well as Articles 4 and 5 of Regulation No 1442/93, the reference period was moved forward annually by one year. Therefore, while the reference period for 1993 imports covered the years 1989, 1990 and 1991, then for 1997 and 1998 imports it covered the years 1993, 1994 and 1995, and 1994, 1995 and 1996, respectively.

10 Furthermore, under Article 13 of Regulation No 1442/93, Category A and B operators could transfer the rights accruing from the import licences issued to them in that capacity to Category A, B or C operators during the term of validity of those licences.

11 The arrangements established by Regulation No 404/93 and by Regulation No 1442/93 are hereinafter referred to as 'the 1993 arrangements'.

12 Council Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation No 404/93 (OJ 1998 L 210, p. 28), which applied with effect from 1 January 1999, repealed Article 15a and amended Articles 16 to 20 of Regulation No 404/93.

13 Article 18 of Regulation No 404/93, as amended by Regulation No 1637/98, opened an additional tariff quota for imports of third-country bananas and non-traditional ACP bananas (Article 18(2)), over and above the tariff quota of 2.2 million tonnes which was consolidated within the framework of the World Trade Organisation (Article 18(1)).

14 The first subparagraph of Article 19(1) of Regulation No 404/93, as amended by Regulation No 1637/98, provided that henceforth '[t]he tariff quotas indicated in Article 18(1) and (2) and imports of traditional ACP bananas [would] be managed in accordance with the method based on taking account of traditional trade flows (traditionals/newcomers)'.

15 Article 20 of Regulation No 404/93, as amended by Regulation No 1637/98, made the Commission responsible for adopting provisions for the implementation of the new import arrangements which, under Article 20(d), had to include, in particular, 'any specific provisions needed to facilitate the switch from the import arrangements applying on and after 1 July 1993 to the [new] arrangements'.

16 On the basis of Article 20, the Commission adopted Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Regulation No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32), which replaced Regulation No 1442/93 with effect from 1 January 1999.

17 The first paragraph of Article 3 of Regulation No 2362/98 defined traditional operators in the following terms:

'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.'

18 Article 4(1) of Regulation No 2362/98 provided that '[e]ach traditional operator registered in a Member State in accordance with Article 5 [would] receive, for each year and for all the origins listed in Annex I [third countries and ACP countries], a single reference quantity based on the quantities of bananas actually imported during the reference period'. Article 4(2) specified that, for imports carried out in 1999 under the tariff quotas or as traditional ACP bananas, the reference period would comprise the years 1994, 1995 and 1996.

19 The arrangements established as a result of the amendments introduced by Regulation No 1637/98 and Regulation No 2362/98 are hereinafter referred to as 'the 1999 arrangements'.

20 Under the 1999 arrangements, the further application of the reference quantities notified to traditional operators for 1999 was confirmed until 30 June 2001 by, in succession, Commission Regulation (EC) No 2268/1999 of 27 October 1999 on imports of bananas under the tariff quotas and of traditional ACP bananas for the

first quarter of 2000 (OJ 1999 L 277, p. 10), Commission Regulation (EC) No 250/2000 of 1 February 2000 on imports of bananas under the tariff quotas and of traditional ACP bananas, and fixing the indicative quantities for the second quarter of 2000 (OJ 2000 L 26, p. 6), Commission Regulation (EC) No 1077/2000 of 22 May 2000 fixing certain indicative quantities and individual ceilings for the issue of licences for the import of bananas into the Community in the third quarter of 2000 under the tariff quotas or as part of the quantity of traditional ACP bananas (OJ 2000 L 121, p. 4), Commission Regulation (EC) No 1637/2000 of 25 July 2000 fixing quantities for imports of bananas into the Community for the fourth quarter of 2000 under the tariff quotas or as part of the quantity of traditional ACP bananas (OJ 2000 L 187, p. 36), Commission Regulation (EC) No 2599/2000 of 28 November 2000 fixing certain indicative quantities and individual ceilings for the issuing of Community import licences for bananas for the first quarter of 2001 under the tariff quotas or as part of the quantity of traditional ACP bananas (OJ 2000 L 300, p. 8), and finally Commission Regulation (EC) No 395/2001 of 27 February 2001 fixing certain indicative quantities and individual ceilings for the issuing of Community import licences for bananas for the second quarter of 2001 under the tariff quotas or as part of the quantity of traditional ACP bananas (OJ 2001 L 58, p. 11).

21 The arrangements for importing bananas into the Community were subsequently amended with effect from 1 July 2001 following the adoption of Council Regulation (EC) No 216/2001 of 29 January 2001 amending Regulation No 404/93 (OJ 2001 L 31, p. 2), in particular, Articles 16 to 20 thereof, and the adoption of Commission Regulation (EC) No 896/2001 of 7 May 2001 laying down detailed rules for applying Regulation No 404/93 as regards the arrangements for importing bananas into the Community (OJ 2001 L 126, p. 6). The arrangements established by the amendments introduced by Regulation No 216/2001 and by Regulation No 896/2001 are hereinafter referred to as 'the 2001 arrangements'.

## Procedure and forms of order sought by the parties

22 By judgment of 8 June 2000 in Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico* v *Commission and Council* [2000] ECR II-2193, hereinafter 'the judgment of 8 June 2000', which, inter alia, was handed down in the present case, the Court of First Instance annulled the Commission's decision of 17 July 1997 rejecting the application by the applicant of 21 January 1997 pursuant to Article 30 of Regulation No 404/93, and ordered the Commission to compensate the applicant for the damage suffered as a result of that decision.

23 In addition, the Court ordered the Commission and the Council to pay 90% and 10% respectively of the costs of Case T-260/97, and the French Republic, as intervener, to bear its own costs.

24 According to paragraph 5 of the operative part of the judgment of 8 June 2000, the parties were required to submit to the Court, within six months of the date of delivery of the judgment, the amounts to be paid, drawn up by agreement, or, failing agreement, to submit to the Court within the same time-limit details of the amounts sought.

25 By application lodged at the Registry of the Court of Justice on 17 August 2000, the Commission brought an appeal against the judgment of 8 June 2000 (Case C-312/00 P).

26 Under Article 77(b) of its Rules of Procedure, the Court of First Instance decided, by order of 7 February 2001, to stay proceedings in Case T-260/97 pending the judgment of the Court of Justice disposing of the appeal in Case C-312/00 P.

27 By judgment of 10 December 2002 in Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, the Court of Justice dismissed the appeal in so far as it was directed against that part of the judgment of 8 June 2000 which concerned Case T-260/97.

28 By letter from the Registry of the Court of First Instance of 9 January 2003, the parties were informed of the resumption of the proceedings in Case T-260/97 and of the fact that the six-month period prescribed in paragraph 5 of the operative part of the judgment of 8 June 2000 had recommenced and would end on 10 June 2003.

29 The applicant and the Commission thus commenced negotiations to assess the loss caused. Having failed to reach agreement within the period allowed, they lodged their proposals for assessing the loss at the Court Registry on 10 June 2003.

30 The applicant submitted its observations on the Commission's proposal on 18 July 2003, and the Commission subsequently made its observations on the proposal as well as on the applicant's observations on 5 September 2003.

31 On hearing the Report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure and, in the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put written questions to the applicant and to the Commission, which responded within the prescribed period.

32 The applicant and the Commission presented oral argument and answered the questions put by the Court at the hearing which took place on 24 February 2005.

33 The applicant claims that the Court should:

— declare the following assessment by the applicant of the loss suffered to be correct, excluding interest: EUR 2 771 132 for 1997, EUR 2 253 060 for 1998, EUR 7 190 000 for 1999, EUR 7 190 000 for 2000 and EUR 4 399 200 for the first half of 2001;

— order the Commission to pay those amounts in full as well as the amounts due in respect of currency revaluation and default interest calculated in accordance with the criteria suggested by the applicant or any other criteria which the Court may consider more appropriate;

— order the Commission to pay the costs arising from that additional step in the proceedings.

34 The Commission contends that the Court should determine the amounts payable to the applicant in the light of the following factors:

— compensation is due for the period from 1 January 1997 to 31 December 1998;

— the period to be taken into consideration in calculating the applicant's reference quantity corresponds to the years 1989 and 1990;

— the amount of compensation must be calculated on the basis of a profit shortfall comprising the difference between the income which the applicant would have received from the banana trade during the period between 1 January 1997 and 31 December 1998 if the Commission had approved its application for transitional measures of 21 January 1997, and the actual income received from that trade during the period under consideration together with the income which it received or could have received from possible replacement activities during that same period;

— the additional quantities of bananas which the applicant could have marketed if the Commission had approved its application for transitional measures of 21 January 1997 amount to 13 855.66 tonnes for 1997 and 11 265.30 tonnes for 1998;

— the amount of compensation thereby obtained will be reevaluated in line with official data available for Italy and applicable to the period concerned; default interest at the statutory rate in force in Italy will be added to that reevaluated figure from the date of delivery of the judgment of 8 June 2000 to the date of payment.

## Law

*Preliminary remarks*

35 It must be pointed out at the outset that, by letter of 21 January 1997, the applicant had, on the basis of Article 175 of the EC Treaty (now Article 232 EC), asked the Commission, pursuant to Article 30 of Regulation No 404/93, for the import

licences for third-country bananas and non-traditional ACP bananas to be allocated to it as a Category B operator for 1997 and subsequent years to be determined on the basis of the quantities of bananas marketed in 1988, 1989 and 1990 until its normal reference quantities were re-established.

36 As is clear from paragraph 208 of the judgment of 8 June 2000, the damage to be made good lies in the allocation to the applicant of a smaller number of import licences than it would have received if Article 30 of Regulation No 404/93 had been correctly applied.

37 Although the applicant and the Commission agree as to which years are to be taken into consideration in calculating the applicant's reference quantity to be used in assessing the number of import licences it should additionally have obtained, they disagree on three main points:

— the period in respect of which the loss must be compensated;

— the general criteria to be applied in assessing the loss;

— the criteria for taking account of the effects of inflation and default interest.

*Period to be taken into consideration in calculating the reference quantity*

Arguments of the parties

38 The Commission states that the period to be taken into consideration in calculating the applicant's reference quantity, that is, the reference period, should in principle comprise the three years preceding the entry into force of the common organisation of the markets established by Regulation No 404/93 for which data were available, that is, 1989 to 1991. However, the outbreak of civil war in Somalia would, with regard to the applicant, justify not taking 1991 into account. The Commission emphasises that the remaining period covering 1989 and 1990 can be described as a period of normal activity for the applicant, which has acknowledged that 1988 had been marked by a significant increase in its imports by comparison with its average imports. The period to be used as the reference period therefore covers 1989 and 1990.

39 The applicant accepts that the reference period mentioned by the Commission should be used instead of the three-year period from 1988 to 1990 referred to in its application under Article 30 of Regulation No 404/93 for the purpose of assessing the damage to be made good.

Findings of the Court

40 Although in its judgment of 8 June 2000 the Court declared unlawful the Commission's refusal to adopt transitional measures to deal with the difficulties encountered by the applicant, it did not state that the Commission had a duty, specifically, to take into account as regards the applicant specifically the period from

1988 to 1990 as the reference period for the purpose of calculating the number of import licences to be allocated to the applicant as a Category B operator.

41 Taking into account, first, the fact that nothing in the relevant legislation requires the reference period necessarily to be redefined as a three-year period in a case of serious hardship such as this and, second, the fact that the applicant accepts that 1988 should be excluded, the approach agreed by the parties can be approved. The period by reference to which the applicant's reference quantity must be calculated for the purpose of assessing its loss thus covers the two years 1989 and 1990.

*The period in respect of which the loss must be compensated*

Arguments of the parties

42 The applicant considers that the period of loss suffered as a result of the rejection of its application for transitional measures is the period from 1 January 1997 to 30 June 2001.

43 The applicant argues that, in spite of the removal of the distinction between Category A and B licences, obtaining import licences for third-country bananas under the 1999 arrangements, as under the previous arrangements, depended in particular on the quantities of traditional ACP bananas imported during the reference period. It emphasises that traditional ACP bananas were taken into account, together with bananas of every origin, for the purpose of determining the single reference quantity established by Regulation No 2362/98, which was always calculated on the basis of the reference period covering the years 1994 to 1996.

44 In addition, the fact that the applicant referred to Category B licences in its application to the Commission of 21 January 1997 does not in any way undermine the conclusion that there was a loss also for the period after 31 December 1998, for which the Commission must provide compensation. The applicant points out that although it had mentioned Category B licences in its application, it was only to distinguish licences allocated on the basis of a reference quantity made up of traditional ACP banana imports. In the application which culminated in the judgment of 8 June 2000, it sought an adjustment to its reference quantities, as the Court acknowledged in the third to fifth sentences of paragraph 194 of the judgment referred to.

45 According to the applicant, compensation for loss must therefore cover all the years during which, on the basis of the Community legislation, it could have relied on its normal reference quantities as a traditional operator of ACP bananas, that is to say, until 1 July 2001, the date on which the 2001 arrangements came into effect. Those arrangements established new criteria for calculating reference quantities for the allocation of import licences for third-country or non-traditional ACP bananas, which, for an operator such as the applicant, resulted in that calculation having from then on to be made on the basis only of actual imports undertaken as a Category A operator during the reference period.

46 The applicant states, moreover, that for the purpose of assessing the loss for 1999 and 2000 and the first half of 2001, it is necessary to take account of the imports which it could have undertaken in the years 1994 to 1996 if the Commission had taken the necessary measures to enable it to replace the Somalian bananas which were no longer available at that time.

47 The Commission considers that the period of loss for which the applicant is entitled to be compensated must be limited to the period from 1 January 1997 to 31 December 1998.

48 It points out that the damage to be made good is that which flows from its refusal to grant the applicant, pursuant to Article 30 of Regulation No 404/93, a greater number of Category B import licences, calculated on the basis of banana imports carried out by the applicant before the civil war in Somalia.

49 The Commission points out that a significant reform of trading arrangements came into effect on 1 January 1999 in the context of the common organisation of the markets in bananas which, inter alia, ended the division of importers into Categories A, B and C and introduced a common administration of tariff quotas and traditional ACP bananas. It emphasises that, under the 1999 arrangements, the applicant never asked for particularly favourable treatment, whereas the measures requested under the preceding arrangements, which ended on 31 December 1998, could not have had any effect under the new arrangements.

50 The Commission points out that the legal basis for the measures requested by the applicant itself changed with effect from 1 January 1999. If the applicant considered itself to be particularly disadvantaged, it should have reapplied to the Commission for appropriate measures to be adopted on the basis, on that occasion, of the new Article 20(d) of Regulation No 404/93, as amended by Regulation No 1637/98.

Findings of the Court

51 It must be noted that the Commission accepts that it is obliged to compensate the applicant for the loss suffered in 1997 and 1998 as a result of its refusal to grant the application of 21 January 1997. On the other hand, the Commission disputes the applicant's claim that the loss which it claims to have suffered while the 1999 arrangements were in force (1 January 1999 to 30 June 2001) is attributable to that refusal.

52 That claim by the applicant cannot be upheld.

53 It is true that the applicant's request of 21 January 1997 can be interpreted as being intended, in substance, to ensure that the competent national authorities would be authorised to establish the reference quantity that would serve as the basis for the allocation to the applicant as a Category B operator of import licences for third-country or non-traditional ACP bananas based on the quantities of traditional ACP bananas marketed during a reference period other than that arising under the relevant legislation.

54 In particular, it is evident from that request that the substitution of the 1993 to 1995 reference period used under the 1993 arrangements for the allocation of import licences in 1997 was justified — for the allocation to the applicant of licences to import third-country or non-traditional ACP bananas — in the light of the abnormally low level of traditional ACP banana imports made by the applicant during that same period, due to the combined effect of the civil war which had broken out in Somalia and the introduction of the common organisation of the markets.

55 The applicant requested that the years 1988 to 1990 be taken into account as the reference period 'until its normal reference quantities are re-established' which means, in terms of the request referred to, until, by dint of the annual moving forward prescribed by the legislation in force (see paragraphs 8 and 9 above), the reference period includes only years which are not marked by the difficulties in the supply of traditional ACP bananas underlying the applicant's request.

56 Thus, the measures which the Commission should have adopted in granting the application referred to should have allowed the quantities of traditional ACP bananas marketed by the applicant in the period it suggested to be taken into

account also in respect of 1998 for the purpose of calculating the number of Category B import licences to be allocated to it. In fact, the relevant reference period (1994 to 1996) for that year, according to Regulation No 1442/93, still included years in which the applicant had suffered those supply difficulties, as the Court expressly confirmed at the end of paragraph 148 of the judgment of 8 June 2000.

57 If the 1993 arrangements had continued to apply in 1999, the measures which the Commission should have adopted in granting the applicant's request would also have allowed the reference period for 1999 to be similarly substituted, given that the reference period under Regulations No 404/93 and No 1442/93, moved forward by a further year (1995 to 1997), would still have covered years (1995 and 1996) affected by the difficulties in question.

58 However, the 1993 arrangements were reformed with effect from 1 January 1999. It must be noted that that reform was such as to bring to an end, on 31 December 1998, the effects of the measures which the Commission should have adopted in granting the applicant's request of 21 January 1997.

59 That conclusion cannot however be supported, as the Commission claims, on the formal ground that Article 20(d) of Regulation No 404/93, as amended by Regulation No 1637/98, introduced a new legal basis for the adoption of transitional measures.

60 The applicant's situation is not covered by the aforesaid Article 20(d), since the extreme hardship it refers to, namely, the difficulties in the supply of traditional ACP bananas it experienced during the period 1994 to 1996, is not linked to the transition from the 1993 arrangements to those of 1999. By contrast, although connected to the civil war in Somalia at the end of 1990, that hardship was a direct result of the establishment of the common organisation of the markets, since the 1993 arrangements in fact involved a significant objective reduction in the applicant's

ability, under previous Italian arrangements, to make up for the reduced supply of Somalian bananas with other traditional ACP bananas in particular (judgment of 8 June 2000, paragraphs 140 to 143). Those difficulties, which arose from the transition from national arrangements to the 1993 arrangements, therefore remained within the scope of Article 30 of Regulation No 404/93 under the 1999 arrangements, that article being neither repealed nor amended by Regulation No 1637/98.

61 There are substantial arguments against the continuation beyond 31 December 1998 of the measures which the Commission should have adopted in granting the application of 21 January 1997, and they concern those elements which fundamentally distinguish the 1999 arrangements from those of 1993, as regards the purpose of the application referred to.

62 According to recital 5 in the preamble to Regulation No 2362/98, the 'common administration of the tariff quotas and traditional ACP bananas' was likely to favour an increase in international trade and smoother trade flows and avoid unjustified distinctions. Thus, according to the recital, traditional operators and newcomers had to 'be defined according to the single criteria regardless of the third-country or ACP country from which they [were] importing', and the rights of traditional operators had to 'be determined on the basis of actual imports regardless of origin and supply source' and had to 'allow imports to be made from any origin', that same approach having to 'be reflected in the method of administering imports by period without differentiation according to their different origins'.

63 Consequently, the 1999 arrangements removed the distinction made in Article 19 of Regulation No 404/93 between Category A, B and C operators (and licences) for the purpose of dividing the tariff quota. The 1999 arrangements simply distinguished 'traditional operators' (see paragraph 17 above), such as the applicant, from newcomers.

64 Furthermore, whereas under the 1993 arrangements reference quantities were calculated for Category A operators on the basis of the quantities of third-country and non-traditional ACP bananas marketed during a reference period and, for Category B operators, on the basis of the quantities of Community or traditional ACP bananas marketed during the same reference period (see paragraph 8 above), under the 1999 arrangements, a 'single reference quantity' established under Article 4 of Regulation No 2362/98 (see paragraph 18 above) was calculated taking into account imports into the Community from any origin, namely, traditional and non-traditional ACP bananas as well as third-country bananas (Annex I to Regulation No 2362/98), carried out during a reference period by the operator concerned.

65 It is the case that, despite the abolition of categories A, B and C for operators and licences, and the establishment of a single reference quantity, imports of traditional ACP bananas during the reference period continued under the 1999 arrangements to determine the number of licences which could be allocated to the applicant for imports of third-country and non-traditional ACP bananas. It is also the case that, throughout the period in which the 1999 arrangements were in force, the reference period remained fixed as the period 1994 to 1996 (see paragraphs 18 and 20 above), the same three-year period which had constituted the reference period in 1998, the last year of the 1993 arrangements, and which, due to the supply difficulties resulting from the civil war in Somalia and the introduction of the common organisation of the markets, was not representative of the applicant's normal level of activity in the traditional ACP banana sector.

66 However, even assuming that it was not completely irreconcilable with the detailed rules for the operation of the 1999 arrangements to take into account, for the purpose of fixing the applicant's single reference quantity, the years 1989 and 1990 instead of 1994 to 1996 just for the part of that quantity made up of traditional ACP banana imports, that could not, under the 1999 arrangements, have been the effect of the measures which the Commission should have adopted under the 1993 arrangements in acceding to the applicant's request of 21 January 1997.

67 The fact remains that, under the 1993 arrangements, an operator importing traditional ACP bananas during the reference period became entitled to a share in the division of a clearly-defined portion (30%) of the tariff quota. It is in that context that the substitution of the reference period sought in the applicant's request of 21 January 1997 was intended to take effect.

68 Under the 1999 arrangements, unlike under the 1993 arrangements, reference quantities of traditional ACP bananas were no longer used to calculate the number of import licences for third-country or non-traditional ACP bananas to be allocated in the context of the 30% of the tariff quota granted to Category B operators, but they helped to make up the single reference quantity used, more generally, to calculate the number of licences to be allocated to operators for imports of any origin in the context of the common administration of tariff quotas and of traditional ACP bananas. Under the 1999 arrangements, according to recital 5 in the preamble to Regulation No 2362/98, the rights of traditional operators not only had to 'be determined on the basis of actual imports regardless of origin and supply source' but they also had to 'allow imports to be made from any origin'.

69 Therefore, under the 1999 arrangements, the quantities of traditional ACP bananas imported during the reference period did not affect only competition between operators for the division of a clearly-defined portion of the tariff quota, as they had under the 1993 arrangements, but also competition for the division of the whole of the tariff quotas as well as competition for the distribution of import licences for traditional ACP bananas (Articles 3, 4 and 6 of Regulation No 2362/98), whereas under the 1993 arrangements imports of traditional ACP bananas were not subject to having a reference quantity (Articles 14 to 16 of Regulation No 1442/93).

70 Those fundamental changes to the terms of access to third-country and non-traditional ACP bananas and, above all, to traditional ACP bananas, clearly show a

lack of continuity between the 1993 and the 1999 arrangements in terms of the applicant's request of 21 January 1997. The applicant's proposition that, although Category B licences no longer existed under the 1999 arrangements, the system for allocating licences for third-country or non-traditional ACP bananas did continue to exist and was essentially the same as under the 1993 arrangements, is therefore incorrect.

71 The measures which the Commission should have adopted in granting the applicant's request of 21 January 1997 could not therefore have produced effects beyond 31 December 1998. In terms of the 1999 arrangements, substituting the reference period just for the part of the single reference quantity made up of traditional ACP banana imports would have a considerably different and far more significant effect than the measures which the applicant requested. Such a substitution, assuming it was legitimate under the 1999 arrangements, could only have been the subject of a new Commission decision, which it was for the applicant to request by means of a new application that would have had to be made in accordance with the particular rules of those arrangements.

72 It follows that the damage which the Commission is required to make good in this case is that caused by the allocation to the applicant, for 1997 and 1998 only, of a number of licences to import third-country and non-traditional ACP bananas which was smaller than it would have been allocated for those years if the Commission had approved its application of 21 January 1997 by giving authority, pursuant to Article 30 of Regulation No 404/93, for the years 1989 and 1990 to be taken into account as the reference period.

73 That conclusion appears all the more valid if one considers that, according to the case-law of the Court, individuals can rely on future damage in an action for non-contractual liability that is directed against the Community only in relation to imminent damage which is foreseeable with sufficient certainty on the basis of the

existing factual situation and rules (Joined Cases 56/74 to 60/74 *Kampffmeyer and Others* v *Council and Commission* [1976] ECR 711, paragraphs 6 to 8).

74 Accordingly, the applicant's request for compensation in this case could only be intended to compensate the loss likely to have occurred as a result of the Commission's decision of 17 July 1997 on the basis of the rules existing at the time the request was made, namely the 1993 arrangements. The alleged loss for which the applicant seeks compensation in respect of the period from 1 January 1999 to 30 June 2001 was not caused by those rules in any event, but by substantially different rules adopted after the action was brought, the characteristics of which were not in any way foreseeable when the action was brought.

*General criteria to be applied in assessing the loss*

Arguments of the parties

75 The applicant considers that the Court has already clearly set out, in paragraphs 194, 195 and 211 of its judgment of 8 June 2000 in particular, the criterion for calculating the damages due, referring in particular to the yardstick proposed by the applicant itself, namely the exchange value of the unallocated import licences, which is estimated to be EUR 200 per tonne in a statement of 9 and 10 February 1998 from the Commission's departments to the 'Bananas' working group of the Council's Special Committee on Agriculture. Consequently, according to the applicant,

damages must be calculated by multiplying by EUR 200 the number of tonnes covered by the additional licences it should have received if the reference period used had been the period before the civil war, instead of 1993 to 1995 for imports in 1997 and 1994 to 1996 for imports in subsequent years.

76 The applicant emphasises that the Court cannot order a party to pay compensation for damage if it is not actual damage and if there is not yet certainty as to the principle and quantum at the time of the order (see Case T-99/98 *Hameico Stuttgart and Others* v *Council and Commission* [2003] ECR II-2195, paragraph 67, and the case-law cited) meaning that the damage can at least be accurately assessed according to established criteria. The Commission, which claims that the Court did not identify those criteria in its judgment of 8 June 2000, would like to suggest, wrongly, that the damage is not only unspecified but still uncertain.

77 The applicant points out that although in its judgment of 8 June 2000 the Court did not expressly consider the merits of the applicant's proposed yardstick of the exchange value of the licences, nor did it hold that yardstick to be invalid or inappropriate as a means of quantifying the damage. If it had, it would have refrained from confirming in paragraph 195 of the judgment that that yardstick made it possible for the extent of the damage to be foreseen 'with sufficient certainty' and from inviting the parties, in paragraph 211, to 'seek agreement, in the light [of that] judgment, as to the amount of compensation for the whole of the damage claimed'.

78 Furthermore, the applicant underlines the fact that in the rejoinder submitted in the main action the Commission could have challenged the applicant's proposed yardstick, but it had not done so. Consequently, the Commission can no longer object to it.

79 In any event, the applicant confirms that the exchange value of the licences is a valid and reliable factor on which to base the assessment of loss in this case. It recalls that the transferable nature of the import licences for bananas has been expressly provided for in Community legislation since the 1993 arrangements first came into effect (Article 20 of Regulation No 1442/93) and that it was precisely the Category B licences which were traded, since, in accordance with Article 13(3) of Regulation No 1442/93, their transfer did not involve any reduction in the reference quantities of the licence-holder and made it possible to supplement the weak profit margins allowed in the ACP banana trade. On that point, the applicant refers back to Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 86. The transfer value of the licences thus represents a fixed receipt and, more importantly, a minimum profit.

80 To support its claim that the exchange value of import licences is a valid yardstick, the applicant recalls that, in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [2000] ECR I-203, paragraph 79, the Court confirmed that statistical and commercial factors could be taken into consideration in assessing loss.

81 The Commission claims that the judgment of 8 June 2000 did not define the criteria for assessing the compensation due to the applicant. The Court did take the applicant's suggested yardstick into consideration solely in order to assess the admissibility of the compensation claim, without thereby holding that it was appropriate. Moreover there was no inter partes discussion as to the merits of such a criterion.

82 The Commission does not accept that the compensation due can be calculated on the basis of the import licences' hypothetical exchange value, disregarding altogether the issue whether or not the goods in question were imported. Such a factor is not related to the event which caused the loss and to its actual effect on the applicant's

situation (Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245).

83 It emphasises that the transfer of import licences by one operator to another happens only rarely in practice. Furthermore, it points out that, even under the 1993 arrangements, the transfer of licences meant in principle, by virtue of Article 13 of Regulation No 1442/93, that the quantities transferred were deducted from the transferor's reference quantity. According to the Commission, Category B operators such as the applicant admittedly avoided that constraint, but their ability to obtain licences to import third-country and non-traditional ACP bananas depended on the actual marketing of their share of Community and traditional ACP bananas during the reference period.

84 As for the applicant's claim that the import licences' exchange value is EUR 200 per tonne, which was made on the basis of the statement of 9 and 10 February 1998 from the Commission's departments to the 'Bananas' working group of the Council's Special Committee on Agriculture, the Commission points out that it is not a significant factor in determining loss. It could not in any case apply throughout the whole period under consideration, as it was information that applied only to a specific moment, was limited to Category B licences, and the price of licences varied according to the price of bananas. Furthermore, such information is not derived from an official statistical and commercial report, since there was no real market in import licences.

85 To assess the loss concerned, the Commission suggests instead the application of settled case-law, according to which compensation is intended, so far as possible, to put the person who suffered the damage back in the position in which they would have been had the damage not occurred (Case C-308/87 *Grifoni* v *EAEC* [1994] ECR I-341, paragraph 40). So far as possible, account must therefore be taken of the actual situation of the person who suffered loss, particularly where compensation is linked to the conduct of an economic activity which, by its nature, can involve not

only profits but losses too (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraphs 32 to 34, and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 73 et seq.).

86 In referring to *Mulder and Others* v *Council and Commission* [1992], cited above, (paragraph 26) and *Mulder and Others* v *Council and Commission* [2000], cited above, the Commission proposes taking into consideration, in the present case, the profit shortfall comprising the difference between the income which the applicant would have received from the banana trade during the relevant period (1997 and 1998) if the Commission had approved its application for transitional measures of 21 January 1997, and the actual income received from that trade during the same period, to which should be added the income which it received or could have received from possible replacement activities during that same period. In order to assess the additional income which the applicant could have obtained during the period concerned if its application had been approved, the Commission considers it reasonable to take into account the profit margins which the applicant actually achieved from banana imports during that period. The Commission also states that if the Court applied that criterion, it would be for the applicant to supply all the evidence necessary to establish its profit margins precisely.

Findings of the Court

— Whether the yardstick of the licences' exchange value was confirmed by the judgment of 8 June 2000

87 First of all, it is necessary to verify whether the yardstick invoked by the applicant was held in the judgment of 8 June 2000 to be appropriate for the purpose of the assessment of loss in the present case.

88 On that point, as the Commission argues, it is clear that the Court's deliberations concerning the exchange value of import licences as a yardstick for calculating loss form part of the analysis of the admissibility of the action for damages (paragraphs 194 and 195 of the judgment of 8 June 2000).

89 It is clear from reading paragraphs 194 and 195 that the finding by the Court that the applicant had adduced evidence enabling the extent of the damage claimed to be foreseen with sufficient certainty simply means that the applicant provided the Court with the evidence from which it could conclude that the extent of the alleged damage was ascertainable and that, as a result, the action for damages was admissible.

90 In its analysis of the merits of the compensation claim, the Court did not make any declaration concerning the extent of the damage to be made good, but confined itself to stating in paragraph 211 of the judgment of 8 June 2000 that 'it [was] appropriate to invite the parties to seek agreement, in the light [of that] judgment, as to the amount of compensation for the whole of the damage claimed'. That means that the parties had to take into account in their negotiations the fact that the Commission was liable for the damage resulting from its unlawful conduct as declared in the judgment, and that it had to pay compensation for the whole of the loss, and only the loss, in so far as there was a causal link to that conduct. By contrast, it is not possible to infer from the paragraph of the judgment of 8 June 2000 cited above, as the applicant does, a reference to the Court's deliberations in its analysis of the admissibility of the action and, in particular, a reference to the exchange value of the licences as a yardstick by which to determine the extent of the loss.

91 The applicant is wrong to rely on *Hameico Stuttgart and Others* v *Council and Commission*, cited above. In paragraph 67 of that judgment, the Court merely pointed out that the Community cannot be deemed to incur liability unless the applicant has in fact suffered 'actual and certain' damage. That is a condition to be fulfilled if the Community is to incur extra-contractual liability, which the Community Court can regard as being fulfilled in a particular case without

necessarily having first to examine in detail the extent of the alleged damage, where it is clear from the actual circumstances of the case that there is no doubt that damage did occur. In paragraphs 207 and 208 of the judgment of 8 June 2000, the Court specifically found, in substance, that the Commission's infringement of Article 30 of Regulation No 404/93 had had damaging consequences for the applicant, consequences which the Court identified in the allocation to the applicant of a number of import licences which was lower than that it would have obtained if that provision had been correctly applied. The fact that such loss could not yet be precisely quantified at the time the action was brought did not in any way prevent the conclusion that the loss was certain.

92 The parties' negotiations having failed, it therefore falls to the Court to rule on the criteria to be used to assess the loss suffered by the applicant and to determine the amount of compensation.

— Whether the Commission is debarred from challenging the yardstick of the licences' exchange value

93 It is necessary also to reject the applicant's claim that, since the Commission failed in the rejoinder submitted during the stage in the present proceedings culminating in the judgment of 8 June 2000 to challenge the merits of the yardstick of the import licences' exchange value put forward by the applicant in the reply, it is now debarred from doing so in this new stage of the proceedings.

94 It is sufficient to point out in that respect that the applicant had not set out in its application the criteria by which the alleged damage was to be determined. It had confined itself to stating that it was not possible, at that time, to quantify the loss which was ongoing, and to inviting the Court therefore to rule initially on the

existence of the loss, leaving it to be assessed in an out-of-court settlement between the parties or, failing such a settlement, by a decision of the Court in subsequent proceedings. It is only in the reply and in response to the Council's plea that the action for damages was inadmissible for lack of information, inter alia, as to the nature and extent of the alleged damage that the applicant referred to the exchange value of the import licences which were not allocated.

95 In those particular circumstances, the Commission was not obliged, in order to avoid being debarred from doing so, to include in the rejoinder its submissions on the merits of the yardstick for assessment which the applicant proposed, but it could legitimately do so following the interlocutory judgment of 8 June 2000 in the stage in the proceedings specifically devoted to assessing the loss.

96 In any event, the Court, having been called upon to consider the scope of the obligation to make good damage for which the Community is liable, is not bound to adopt the criterion for determining the amounts payable which the applicant proposes, solely on the ground that the Commission did not state its position on the merits of that criterion at a particular stage in the written procedure.

— Criteria to be used in quantifying the loss to be made good

97 It is settled case-law that compensation for loss in the context of non-contractual liability is intended so far as possible to provide restitution for the victim (*Grifoni* v *EAEC*, cited above, paragraph 40, and *Mulder and Others* v *Council and Commission* [2000], cited above, paragraphs 51 and 63).

98 According to the case-law, it is for the applicant to prove, first, the existence of the loss thus sustained and, second, its constituent elements and extent (*Mulder and Others* v *Council and Commission* [2000], cited above, paragraph 82).

99 The fact that there has been damage was confirmed in the present case in the judgment of 8 June 2000, in which the Court held that the damage lay in the allocation to the applicant of a smaller number of import licences than it would have received if its application of 21 January 1997 had been approved (paragraph 208 of the judgment). The applicant is therefore required only to establish the various constituent elements and extent of that damage.

100 In that respect, the applicant seeks compensation for loss based on the economic exchange value allotted to the unallocated import licences, an approach which, in its view, simply compensates a 'minim[al] defined loss' represented by the loss of the 'fixed receipt' that is the transfer price of those licences. It explains that such an approach in fact underestimates the damage suffered as a whole, which includes items such as 'loss of customers and supply channels, to the point where virtually all activity ceases'. Those items moreover are first mentioned only in the applicant's observations on the Commission's compensation proposal and are neither detailed nor proven.

101 In the present case, compensation for loss must in principle allow the applicant to be placed in the position, financially, in which it would have been if the Commission had refrained from the unlawful conduct which caused the loss. That involves, first of all, determining the number of additional import licences which should have been allocated to the applicant in accordance with the decision the Commission should have taken in approving the applicant's request of 21 January 1997, and, secondly, the reinstatement of the financial situation in which the applicant would have found itself if it had received and made use of those licences.

102 As regards the number of additional import licences, only the years 1997 and 1998 must be taken into consideration, as held in paragraph 72 above, since those are the years which constitute the period of loss for which compensation is to be paid.

103 According to the calculations in its compensation proposal, taking 1989 and 1990 as the reference period, the applicant should have received, over and above what it had in fact received, Category B licences for 13 855.66 tonnes in 1997 and 11 625.30 tonnes in 1998.

104 In its compensation proposal, the Commission, which does not object to the method or data used by the applicant for the purpose of calculating the number of additional licences, indicated that if it had approved the application made by the applicant on 21 January 1997, the applicant would have received additional Category B licences for 13 855.66 tonnes in 1997 and 11 265.30 tonnes in 1998, on the basis of the reference period 1989 to 1990.

105 The disparity between the two parties' proposals in relation to the details of the additional licences which the applicant should have obtained in 1998 (11 625.30 tonnes according to the applicant and 11 265.30 tonnes according to the Commission) is clearly due to an arithmetical or clerical error by the applicant. In its calculations, the applicant states that, for that year, it should have received licences for 15 610.39 tonnes but received them for only 4 345.092 tonnes. The difference between those figures is 11 265.298 tonnes, which, rounded up, confirms the figure given by the Commission.

106 It must therefore be held that if the Commission had approved the applicant's request of 21 January 1997, the applicant would have received additional Category B licences for 13 855.66 tonnes in 1997 and 11 265.30 tonnes in 1998.

107 As regards the reinstatement of the financial situation in which the applicant would have been if it had been able to rely on the additional licences, it must be pointed out that, under the 1993 arrangements, the holders of Category B import licences had double the opportunity to make economic use of those licences. Not only could they use them to import third-country or non-traditional ACP bananas into the Community, but they were also expressly permitted by Article 13 of Regulation No 1442/93 (see paragraph 10 above) to transfer them to other Category A, B or C operators.

108 The Court of Justice indeed had occasion to note that alternative means of economically exploiting Category B licences under the 1993 arrangements in *Germany* v *Council,* cited above (paragraphs 84 to 86), in which it remarked that '[t]he practical consequence of [the principle that licences are transferable was] that the holder of a licence, instead of himself importing and selling third-country bananas, [could] assign his import rights to another economic operator who himself [wished] to import' and that 'the transfer of import licences [was] an option which ... Regulation [No 1442/93] [allowed] the various categories of economic operators to exercise according to their commercial interests'. The Court also clarified that '[t]he financial advantage which such a transfer [could] in some cases give traders in Community and traditional ACP bananas [was] a necessary consequence of the principle of transferability of licences and [had to] be assessed in the more general framework of all the measures adopted by the Council to ensure the disposal of Community and traditional ACP products'. In that context, the Court added, 'it [had to] be regarded as a means intended to contribute to the competitiveness of operators marketing Community and ACP bananas and to facilitate the integration of the Member States' markets'.

109 Furthermore, it is common ground that Category B import licences were, as a matter of fact, traded on the market.

110 On that point, the applicant rightly relies on the statement of 9 and 10 February 1998 by the Commission's representative in the 'Bananas' working group of the Special Committee on Agriculture, according to which Category B import licences were, at that time, traded on the market at a price in the region of EUR 200 per tonne.

111 The Commission's claim that the transfer of licences from one operator to another occurred only rarely in practice is immaterial and is moreover contradicted by the statement in recital 4 in the preamble to Regulation No 2362/98, in which the Commission itself referred to 'the large number of informal communications and transfers of import documents against payment which occurred during the final period of application of the initial arrangements established by Regulation ... No 404/93'.

112 Furthermore, the Commission's arguments, set out in paragraph 83 above, do not preclude the use of the exchange value of the licences as a yardstick for assessing the loss suffered by the applicant. The Commission itself acknowledges that, until the 1999 arrangements came into effect, Category B operators such as the applicant were not subject to the system of reducing reference quantities after the transfer of licences which, under the terms of Article 13(3) of Regulation No 1442/93, applied only in the event 'of a transfer of rights from a Category A operator to another operator in Category A or C'. As for the fact, which the Commission pointed out, that the opportunity for Category B operators to obtain licences to import third-country and non-traditional ACP bananas depended on their actual marketing of Community and traditional ACP bananas during the reference period, it is entirely immaterial in this context.

113 As regards the Commission's reliance on the Court's method of assessing loss in the *Mulder and Others* v *Council and Commission* cases cited above, it must be pointed out that the applicants in those cases were seeking compensation for the profits which they could have made if, when their non-marketing undertaking expired, they

could have resumed milk deliveries on the basis of the reference quantity to which they were entitled and which they had been denied by the relevant legislation, which the Court held to be invalid. The defendant institutions proposed instead to calculate the compensation which the applicants were owed by the Community on the basis of the amount of the non-marketing premium paid to each of the applicants. That premium, which was introduced into the milk sector by Council Regulation (EEC) No 1078/77 of 17 March 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (OJ 1977 L 131, p. 1), was awarded to producers who undertook not to market their products for five years and was fixed at a level enabling it to be regarded as 'some compensation for loss of income from the marketing of the products in question' (third recital in the preamble to that regulation).

114 In *Mulder and Others* v *Council and Commission* [1992], cited above, (paragraph 26) the Court of Justice considered that '[a]s regards the extent of the damage which the Community should make good, in the absence of particular circumstances warranting a different assessment, account should be taken of the loss of earnings consisting in the difference between, on the one hand, the income which the applicants would have obtained in the normal course of events from the milk deliveries which they would have made if, during the [relevant] period ... , they had obtained the reference quantities to which they were entitled and, on the other hand, the income which they actually obtained from milk deliveries made during that period in the absence of any reference quantity, plus any income which they obtained, or could have obtained, during that period from any replacement activities'.

115 Having clarified and defined it, the Court of Justice thus applied the method proposed by the applicants, which was based on the restoration of the hypothetical situation in which they would have been if they had carried out the milk deliveries corresponding to the reference quantities to which they were entitled. The Court nevertheless allowed that particular circumstances might warrant a different assessment as to the factors to be taken into consideration in assessing loss, whilst

ruling out using the amount of the non-marketing premium as the yardstick of the applicants' profit shortfall on the ground that 'that premium constitutes the quid pro quo for the non-marketing undertaking and has no connection with the damage which the applicants suffered' (*Mulder and Others* v *Council and Commission* [1992], cited above, paragraph 34).

116 Although the non-marketing premium had no real connection with the gains which the applicants in the *Mulder and Others* v *Council and Commission* cases, cited above, could have made if they had not unlawfully been denied their reference quantities, it follows from the findings in paragraphs 107 to 111 above that the position is not the same in the present case with regard to the exchange value of the import licences which were not allocated to the applicant. Unlike the non-marketing premium in the milk sector, that exchange value did not represent an amount fixed administratively at a standard rate in order to award operators 'some compensation for loss of income from the marketing of the products in question' but was a strictly commercial figure, determined by the economic operators concerned in accordance with the laws of supply and demand and therefore intended to reflect, approximately at least, the economic value of the licences traded, which enabled them to carry out economic activities on preferential terms.

117 It is admittedly possible that the applicant would have found itself in a different financial situation depending on how it actually chose to use the licences. The transfer of the licences would have generated fixed net receipts, whereas the import and marketing of bananas would have exposed the applicant to the uncertainties inherent in any commercial activity, and so to the possibility of profits, in some circumstances even exceeding the gains to be made by transferring the licences, but also to possible operating losses, depending, inter alia, on the market situation and the economic efficiency of the undertaking.

118 It is not necessary however to assess the loss suffered by the applicant on the basis of the hypothetical use of the licences by the applicant for importing and marketing

purposes, and by applying the method adopted by the Court in the *Mulder and Others* v *Council and Commission* cases, cited above. As well as the complexity of such an exercise, and the delay in restitution for the applicant, it would also lead to a necessarily approximate outcome, being a largely hypothetical exercise in assessing economic activity (see, to that effect, *Mulder and Others* v *Council and Commission* [2000], cited above, paragraphs 79 and 84). Furthermore, an assessment of the additional income which the applicant could have obtained if its application had been approved, such as that proposed by the Commission — based on applying the profit margins obtained by the applicant from banana imports actually undertaken in the period 1997 to 1998 to the quantities of bananas represented by the licences which were not allocated — would appear to be inadequate in this case, since those margins have in all likelihood been adversely affected by the fact that the applicant's level of activity in the marketing of third-country and non-traditional ACP bananas during that period remained much lower than that which the applicant could have demonstrated by using for importing and marketing purposes the additional licences which it would have been allocated if its application of 21 January 1997 had been approved.

119 There is an economic foundation to a method of assessing loss that is based on the hypothetical transfer of licences, and there are clear advantages in terms of simplicity, speed and reliability. It is therefore approved, subject to an examination of the available information concerning the exchange value of the licences which were not allocated.

— Information available concerning the exchange value of the licences which were not allocated and the assessment of loss

120 The applicant asks the Court to determine its loss taking into account the value of EUR 200 per tonne taken in relation to Category B import licences from a statement

of 9 and 10 February 1998 by the Commission's representative in the 'Bananas' working group of the Council's Special Committee on Agriculture.

121 More particularly, it is apparent from that statement, which is annexed to the applicant's reply, that that figure represents the approximate price of Category B import licences at the time of that statement, that is to say, at the beginning of February 1998.

122 The fact, emphasised by the Commission, that that figure is not taken from an official statistical and commercial report does not make it immaterial. It must be pointed out that, in accordance with the second paragraph of Article 288 EC, the amount of compensation must be established in accordance with the general principles common to the laws of the Member States in relation to non-contractual liability, and that, as regards the question of proof of loss, it is a general feature of those laws that the court has an unfettered discretion in assessing all the evidence submitted to it (Case 261/78 *Interquell Stärke-Chemie* v *Council and Commission* [1982] ECR 3271, paragraph 11). The value of EUR 200 per tonne was mentioned by the departments of the Commission itself and the Commission does not dispute that value as such in its written submissions. It must therefore be taken into consideration for the purpose of assessing the loss in the present case.

123 However since that figure does not represent an average value of Category B licences throughout the period for which compensation is to be paid, namely 1997 and 1998, and taking into account the Commission's claim, which the applicant does not dispute, that the exchange value of import licences is subject to fluctuations in the price of bananas, the Court, by way of measures of organisation of procedure, requested the applicant to supply, with supporting documents, information on the developments in the exchange value of Category B licences during the period referred to.

124 The applicant complied by producing, inter alia, 19 invoices relating to transfers of Category B licences between third party undertakings within the territory of the Community on various dates between 31 December 1997 and 20 October 1998. It is apparent from those invoices, which are not contested by the Commission, that, with only one exception, the price at which those licences were transferred in those transactions was above EUR 200 per tonne, and in many cases even reached EUR 289 per tonne.

125 At the hearing, the Commission emphasised that the price achieved in individual transfers such as those evidenced by the invoices the applicant produced was not objective information, since it could vary according to the circumstances and, in particular, the contingent needs of the transferees to dispose of the licences. That objection must be placed in context. It is clear that the price recorded in an individual transaction cannot in itself be regarded as representative of the market value of the goods traded. Nevertheless, that value is obtained from an average of the prices achieved in individual transactions and it is on the basis of, no doubt, more extensive observation of the market that the Commission's departments were able to report, in the context of the business of the 'Bananas' working group of the Council's Special Committee on Agriculture on 9 and 10 February 1998, an approximate value for Category B licences of EUR 200 per tonne at that time. The prices achieved in the various transactions to which the invoices produced by the applicant relate are evidence that is just as reliable, accurate and supportive of the fact that the exchange value of Category B licences did not drop during 1998 by comparison with the level established by the Commission's departments in February 1998. For its part, the Commission did not produce any evidence to the contrary. Moreover, the graphics showing changes in the wholesale price of so-called 'dollar' bananas in the European Union, drawn up by the Commission's departments and annexed to the Commission's compensation proposal, show that the price which, in the Commission's view, affected the exchange value of Category B licences was, at the time of the statement referred to in paragraph 120 above, virtually one euro per kilogramme and that it fluctuated around that level in 1998 in such a way that it cannot be argued that it was substantially above the average for 1998 at the time of the statement.

126 Accordingly the Court considers that although the figures in the documentation submitted by the applicant cannot be regarded as enabling a precise assessment of loss to be made, bearing in mind also the volatility of the transfer price of licences shown therein, they are nevertheless sufficiently conclusive and provide a sound basis for concluding that the value of EUR 200 per tonne indicated by the applicant is a reasonable and acceptable estimate of the average value of Category B licences in 1998.

127 As regards 1997, the applicant produced an invoice dated 31 December 1997 showing a transfer price for Category B licences equivalent to EUR 274 per tonne, and indicated that, in a transaction relating to the actual import of bananas in August 1997, the value of the Category B licences used was assessed at around EUR 172 per tonne.

128 In the light of the above, the loss suffered by the applicant can be determined, according to an equitable assessment, as the principal amount of EUR 5 024 192, being EUR 2 771 132 (13 855.66 x 200) in respect of 1997 and EUR 2 253 060 (11 265.30 x 200) in respect of 1998.

*Effects of inflation and default interest*

Arguments of the parties

129 The applicant considers that the effects of inflation must be taken into account, and that the sums to be paid must therefore be revalued for each of the periods under consideration using coefficients set at the national Italian level by the Istituto centrale di statistica (Central Office for Statistics) for the purpose of compiling economic data, since the applicant's headquarters are in Italy.

130 The revalued figures, year by year, should also have default interest added from the day the actionable event occurred. Default interest should be calculated from 1 January in respect of each annual payment, since the operators knew before the beginning of each year how many licences they would receive and could plan how to use them.

131 The applicant makes the point that it is appropriate to combine monetary revaluation and default interest because the two elements of compensation have different functions. Monetary revaluation is intended to put the person suffering loss into the position in which he or she would have been if the actionable event had not occurred, whereas default interest is intended to compensate for the delay in granting what was owed to that person.

132 As regards the rate of default interest, the applicant submits that, for the period before 1 January 1999, in the absence of a European Central Bank (ECB) reference rate for its main refinancing operations, it is necessary to apply the statutory interest rate in force in Italy, which was 5% both in 1997 and in 1998. From 1 January 1999 however the ECB refinancing rate should be applied, increased by seven percentage points in accordance with the criterion laid down in Article 3(1)(d) of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ 2000 L 200, p. 35), which applies in this case precisely because it concerns the compensation of an economic operator for the loss resulting from the lack of liquid assets (Case T-171/99 *Corus UK* v *Commission* [2001] ECR II-2967, paragraph 64).

133 In the event that the date from which default interest accrues and the rates proposed by the applicant are not accepted in conjunction with one another, the applicant proposes two other solutions in the alternative: either to apply to the revalued sums

for each year from 1997 to the date of payment the statutory interest rate in force in Italy, or to calculate interest on the whole of the revalued sum from the date of the interlocutory judgment (8 June 2000), but at a rate seven points above the ECB rate.

134 The Commission agrees that the effects of inflation should be taken into account and that the sums payable should be revalued on the basis of the official data available for Italy, since the applicant's business was carried on in the Italian market. The revaluation should be carried out with effect from the occurrence of the actionable event until the date of the interlocutory judgment confirming the Community's non-contractual liability.

135 Default interest on the revalued sum should be calculated from the same date, not from the occurrence of the actionable event, until the date of payment (*Grifoni* v *EAEC*, cited above, paragraph 43). The Commission points out in that respect that, according to settled Community case-law, the obligation to pay default interest can arise only where the amount of the principal sum is certain or can at least be ascertained on the basis of established objective factors (Case 174/83 *Amman and Others* v *Council* [1986] ECR 2647, and Joined Cases T-17/89, T-21/89 and T-25/89 *Brazzelli and Others* v *Commission* [1992] ECR II-293, paragraph 24).

136 The Commission considers that, as regards default interest, the statutory interest rate in force in Italy must be applied throughout the relevant period. Directive 2000/35, according to recital 13 in its preamble, does not apply to payments due in respect of compensation for damage.

Findings of the Court

137 As far as the effects of inflation are concerned, it must be stated that the applicant and the Commission agree that they must be taken into account and that monetary revaluation must be carried out using official statistical data for Italy.

138 It is clear from the case-law that compensation for loss in the context of non-contractual liability is intended so far as possible to provide restitution for the victim. Accordingly, where the conditions for non-contractual liability are met, the adverse consequences of a lapse of time between the occurrence of the actionable event and the date of payment of compensation cannot be disregarded inasmuch as the effects of inflation must be taken into account (see *Grifoni* v *EAEC*, cited above, paragraph 40, and *Mulder and Others* v *Council and Commission* [2000], cited above, paragraph 51).

139 The effects of inflation will therefore have to be taken into account in this case for the purpose of calculating compensation, using official data drawn up for Italy by the competent national authority, from the date the damage occurred.

140 As regards the date from which the monetary revaluation is to take effect, account must be taken of the fact that the applicant would have received its licences at intervals if the Commission had approved its application of 21 January 1997. It must be pointed out that, under the 1993 arrangements, import licences were issued on a quarterly basis. Thus, in accordance with Article 11 of Regulation No 1442/93, as amended by Commission Regulation (EC) No 875/96 of 14 May 1996 (OJ 1996 L 118, p. 14), import licences were issued not later than the 23rd day of the last month of each quarter in respect of the following quarter.

141 Those are the dates therefore which, in respect of each batch of unallocated licences, must be regarded as the dates on which the damage occurred, and from which the revaluation of the exchange value of each batch of licences must be calculated, on the basis of EUR 200 per tonne.

142 As regards the end date for the monetary revaluation, that must be assessed at the same time as that from which default interest is to be calculated.

143 According to the settled case-law of the Court of Justice, the amount of compensation due must be subject to default interest from the date of the judgment establishing the obligation to make good the damage (Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others* v *Council* [1979] ECR 3091, paragraph 25, and *Mulder and Others* v *Council and Commission* [1992], cited above, paragraph 35). In the present case, it is the interlocutory judgment of 8 June 2000 which established the Commission's obligation to make good the damage suffered by the applicant.

144 Nevertheless, in so far as neither was the amount of the principal sum certain nor could it be ascertained on the basis of established objective factors at the date of that judgment (see, on that point, paragraphs 87 to 92 above), default interest cannot run from that date but only, in the event of delay and until payment in full, from the date of this present judgment regarding the payment of compensation (see the case-law cited in paragraph 135 above, as well as the Opinion of Advocate General Tesauro in *Grifoni* v *EAEC*, cited above, ECR I-343, point 24).

145 It follows that the revaluation of the compensation due to the applicant should not stop at the date of delivery of the judgment of 8 June 2000 but should extend to the date of delivery of this present judgment.

146 Default interest from the date of delivery of the present judgment until payment in full must be added to the compensation, as revalued to take into account the effects of inflation. The interest rate to be applied shall be two points above the rate set by the ECB for its main refinancing operations as applicable during the period in question.

## Costs

147 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 other party's pleadings. According to Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared or decide that each party is to bear its own costs where each party succeeds on some and fails on other heads of claim. Finally, in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States which intervened in the proceedings are to bear their own costs.

148 It must be pointed out that a ruling as to the costs incurred in these proceedings was made in the interlocutory judgment of 8 June 2000 (see paragraph 23 above).

149 The present case is not a new action but a continuation of Case T-260/97 in which the Court delivered the judgment of 8 June 2000 ordering the Commission and the Council to bear 90% and 10% respectively of the costs of the case (see paragraphs 7 and 8 of the operative part). That distribution must be reaffirmed in relation to the stage in the present proceedings which follows that judgment, and the Commission and the Council must therefore be ordered to pay 90% and 10% respectively of the costs incurred in connection with that stage.

150 The French Republic, as intervener, shall bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Orders the Commission to pay the applicant compensation in the amount of EUR 5 024 192;**

2. **Orders that that compensation figure be revalued in accordance with the criteria laid down in paragraphs 139 to 141 and 145 of this judgment;**

3. **Orders that default interest from the date of delivery of this judgment until payment in full be added to the compensation figure, as revalued. The interest rate to be applied shall be two points above the rate set by the European Central Bank for its main refinancing operations as applicable during the period in question;**

4. **Orders the Commission to pay 90% of the costs of the stage in the present proceedings which follows the judgment of the Court of First Instance in Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico* v *Commission and Council* [2000] ECR II-2193;**

5. **Orders the Council to pay 10% of the costs of the stage in the present proceedings which follows the judgment of the Court of First Instance in Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico* v *Commission and Council* [2000] ECR II-2193;**

6. **Orders the French Republic to bear its own costs.**

Legal Mengozzi Wiszniewska-Białecka

Delivered in open court in Luxembourg on 13 July 2005.

H. Jung — Registrar

H. Legal — President