JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
2 July 2003 *

In Case T-99/98,

Hameico Stuttgart GmbH, formerly A & B Fruchthandel GmbH, established in Stuttgart (Germany),

Amhof Frucht GmbH, established in Schwabhausen (Germany),

Hameico Dortmund GmbH, formerly Dessau-Bremer Frucht GmbH, established in Dortmund (Germany),

Hameico Fruchthandelsgesellschaft mbH, formerly Bremen-Rostocker-Frucht GmbH, established in Rostock (Germany),

Leipzig-Bremer Frucht GmbH, established in Leipzig (Germany),

represented by G. Schohe, lawyer, with an address for service in Luxembourg,

applicants,

* Language of the case: German.

Council of the European Union, represented by J.-P. Hix and A. Tanca, acting as Agents,

and

Commission of the European Communities, represented by K.-D. Borchardt, acting as Agent, assisted by A. von Bogdandy, with an address for service in Luxembourg,

defendants,

supported by

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

intervener,

APPLICATION for compensation for the damage allegedly suffered by the applicants as a result of the application 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) and of 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),

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

composed of: B. Vesterdorf, President, N.J. Forwood and H. Legal, Judges,
Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 20 February 2002,

gives the following

Judgment

Background and legal framework of the dispute

1 The context of this dispute is the litigation between the Federal Republic of Germany, together with various companies within the Atlanta Group, and the

Council and the Commission, following the entry into force 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).

2 Those proceedings have given rise *inter alia* to the judgments of the Court of Justice in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, Case C-466/93 *Atlanta Fruchthandelsgesellschaft and Others (II)* [1995] ECR I-3799, and Case C-68/95 *T. Port* [1996] ECR I-6065, and to the judgment of the Court of First Instance in Case T-521/93 *Atlanta and Others* v *EC* [1996] ECR II-1707, hereinafter 'the *Atlanta* judgment of the Court of First Instance', and, on appeal, the judgment of the Court of Justice in Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, hereinafter 'the *Atlanta* judgment of the Court of Justice'.

3 The background and legal framework of this dispute are essentially set out in those judgments, and in particular in the *Atlanta* judgment of the Court of First Instance, to which reference is therefore made.

4 For the purposes of this judgment it is sufficient to recall that Regulation No 404/93 introduced a common system for the importation of bananas which replaced the various national arrangements. In order to ensure satisfactory marketing of bananas produced in the Community and of bananas originating in the African, Caribbean and Pacific (ACP) States and in other third countries, Article 18(1) of Regulation No 404/93 provides for the opening of an annual tariff quota for imports of 'third-country' bananas and 'non-traditional ACP' bananas. Article 19(1) provides that that quota is opened for 66.5% to the category of operators who marketed third-country and/or non-traditional ACP bananas (Category A operators), 30% to the category of operators who marketed Community and/or traditional ACP bananas (Category B operators) and 3.5% to the category of operators established in the Community who started marketing bananas other than Community and/or traditional ACP bananas from 1992 (Category C operators). Each Category A operator obtains import licences on the basis of the average quantities of bananas that he has sold in the course of the

three most recent years for which figures are available. The first reference period laid down was for the years 1989 to 1991 so that import licences could be issued for the second half of 1993.

5 The Commission was authorised to adopt additional criteria. According to the 15th recital in the preamble to Regulation No 404/93, it was to be guided by the principle that the licences must be granted to persons who have undertaken the commercial risk of marketing bananas and by the necessity of avoiding disturbing normal trading relations between persons occupying different points in the marketing chain. Those additional criteria 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), which was repealed by Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32). According to those criteria, economic agents established in the Community who, during the reference period, had engaged in one or more of the following activities were regarded as Category A operators: the purchase of green bananas from third-country producers and/or from ACP States, or where applicable the production, consignment and sale of such bananas in the Community; the supply to the Community market of green bananas or the ripening as owners of green bananas and their marketing within the Community.

6 The 22nd recital in the preamble to Regulation No 404/93 is worded as follows:

'... [T]he replacement of the various national arrangements in operation when this Regulation comes into force by this common organisation of the market threatens to disturb the internal market;... the Commission, as of 1 July 1993, should be able to take any transitional measures required to overcome the difficulties of implementing the new arrangements'.

7 Article 30 of Regulation No 404/93 provides as follows:

'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... shall take any transitional measures it judges necessary.'

Facts and procedure

8 The applicants, who are part of the Atlanta Group, are traders whose business consists in importing third-country bananas into the Community. They were incorporated and/or established in the former German Democratic Republic (GDR) during the first reference period laid down by Regulation No 404/93, which is to say 1989 to 1991.

9 By an application lodged at the Court Registry on 30 June 1998 the applicants brought this action, by which they are requesting compensation for the damage allegedly caused them by the introduction of the common organisation of the markets (hereinafter 'the COM').

10 By order of 3 December 1998, the Court of First Instance (Second Chamber) ordered that the proceedings be stayed until delivery of the judgment of the Court of Justice on the appeal in Case C-104/97 P brought against the *Atlanta* judgment of the Court of First Instance by Atlanta AG, the Atlanta Group's holding company, and other importers of third-country bananas. The Court of First Instance essentially gave as its reason for staying the action the fact that the

damage alleged and the pleas in law raised in this case and those raised in Case C-104/97 P were for the most part identical or similar, so that the judgment of the Court of Justice should enable the legal framework of these proceedings to be determined and ought therefore to precede this action before the Court of First Instance.

11 The *Atlanta* judgment of the Court of Justice dismissed the appeal brought against the *Atlanta* judgment of the Court of First Instance. In its judgment, the Court of Justice dismissed as unfounded the pleas based on infringement of the rights of the defence, and the principles of non-discrimination, freedom to pursue an economic activity, and the protection of legitimate expectations, which were also raised by the applicants in this case.

12 Following that judgment, the stay of proceedings was lifted and the written procedure was therefore resumed before the First Chamber of the Court of First Instance, to which the Judge-Rapporteur had meanwhile been assigned.

13 By an order of the President of the First Chamber of the Court of First Instance of 31 January 2000, the Kingdom of Spain was given leave to intervene in support of the defendants.

14 The parties and the intervener were all requested to submit their observations, in their reply, rejoinder or statement in intervention, on the possible repercussions of the *Atlanta* judgment of the Court of Justice on these proceedings.

15 The written procedure was closed on 17 August 2000.

16 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure and to request the applicants and defendants to produce certain documents and/or to reply to certain written questions. Those requests were complied with within the periods laid down. With the exception of the Kingdom of Spain, which apologised for its absence, the Court heard oral argument from the parties and their answers to the questions at the hearing on 20 February 2002.

Forms of order sought

17 The applicants claim that the Court should, by an interim judgment:

— declare that the defendants must pay compensation for the damage which the applicants suffered or are suffering by reason of the application of Regulation No 404/93, and in particular Articles 17 to 19 and 21(2), and by reason of the application of Regulation No 1442/93;

— require the parties to state, within a period to be laid down by the Court of First Instance, the amounts which they agree are payable, or, in the event that no agreement is reached, to submit to the Court of First Instance, within the same period, detailed claims;

— reserve its decision on costs.

18 The Council and the Commission, supported by the Kingdom of Spain, contend that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Admissibility

Arguments of the parties

19 Although they do not formally raise a plea of inadmissibility by a separate document under Article 114 of the Rules of Procedure of the Court of First Instance, the defendants maintain that the action is inadmissible for two reasons.

20 First of all the defendants argue that, in the absence of a summary of the facts with sufficient cogent evidence, they are precluded from validly exercising their rights of defence. In that regard, they refer to Article 44(1)(c) of the Rules of Procedure and point out that, according to the case-law (Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 3), the application must contain all the details necessary to establish with certainty the subject-matter of the dispute and the legal scope of the grounds invoked in support of the form of order sought, together with a summary of the facts which, in the context of the proceedings, enable it to be determined whether the conditions for a provision of Community

law to apply have been met. The Commission also refers to the obligation on the applicant to produce conclusive evidence (Case 74/74 *CNTA* v *Commission* [1976] ECR 797, paragraphs 12 et seq.; Cases T-168/94 *Blackspur and Others* v *Council and Commission* [1995] ECR II-2627, paragraphs 38 et seq., and T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 30).

21 In this case the application does not satisfy those requirements because it does not enable it to be determined whether the applicants have suffered any harm, nor does it enable a causal link to be established between the unlawful conduct alleged against the institutions and the alleged damage.

22 The Commission adds that the application refers almost exclusively to the adoption of Regulation No 404/93, and that the applicants have not endeavoured to demonstrate in what way it committed a separate error and caused separate harm by adopting Regulation No 1442/93.

23 Secondly, the Commission argues that the application is inadmissible and must be regarded as an abuse of process, since the applicants did not make use of the existing possible remedies or, more particularly, of their right to invoke Article 30 of Regulation No 404/93 to remedy an instance of excessive harshness. The Commission considers that that provision applies in circumstances such as those claimed by the applicants.

24 In reply to the first plea of inadmissibility, the applicants maintain that the application satisfies the requirements of Article 44(1)(c) of the Rules of Procedure.

25 In response to the second plea of inadmissibility the applicants argue, first of all, that the admissibility of an action for damages, which was instituted by the Treaty as a separate remedy, cannot be limited by a provision of secondary law such as Article 30 of Regulation No 404/93 and, secondly, that the compensation they seek to obtain by this action is not, according to the case-law, a measure the Commission may adopt under Article 30 of Regulation No 404/93.

Findings of the Court

26 According to Article 21 of the EC Statute of the Court of Justice, which applies to proceedings before the Court of First Instance pursuant to the first paragraph of Article 53 thereof, and according to Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, an application must, *inter alia*, state the subject-matter of the dispute and give a summary of the pleas advanced. In order to satisfy those requirements, an application seeking compensation for damage allegedly caused by a Community institution must contain elements from which can be identified the conduct alleged against the institution, the reasons why it considers that a causal link exists between that conduct and the damage which the applicant claims to have suffered, and the nature and extent of that damage. A claim for an unspecified form of damage, however, is not sufficiently concrete and must therefore be regarded as inadmissible (see Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 9; Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 73, and Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico* v *Commission and Council* [2000] ECR II-2193, paragraph 181).

27 In this case, the application states the evidence enabling the conduct alleged against the institutions to be identified (see paragraphs 43 to 45 of this judgment), the nature and character of the alleged damage (see paragraphs 49 to 55 of this judgment), and the reasons why the applicants take the view that there is a causal link between that conduct and the damage.

28 It is true that the application does not contain any estimate of the extent of the damage, since the applicants have confined themselves at this stage to requesting that the Court of First Instance deliver an interim judgment declaring the Community to be liable in principle.

29 It is also true that the applicants produce no conclusive evidence that they personally suffered any harm directly linked to the entry into force of the COM (see paragraphs 68 et seq. of this judgment).

30 However, the objections raised in that regard by the defendant, in particular in so far as they relate to the extent or evidence of harm, in fact fall to be considered in the context of the assessment of the merits of the application for damages and not its admissibility.

31 The same applies to the Commission's argument that the applicants have not endeavoured to demonstrate how the Commission itself made a separate error and caused separate harm by adopting Regulation No 1442/93. In that connection, the applicants rightly point out that their application relates to the import regime under the COM, as it is set out in both Regulation No 404/93 and Regulation No 1442/93.

32 Nor, further, does the case-law cited by the Commission in any way support its argument that a lack of conclusive evidence ought to result in the action being inadmissible. In *CNTA* v *Commission* (paragraph 17), the Court dismissed the application as unfounded, and not as inadmissible, on the ground that the applicant had not shown that it had suffered a loss for which the Commission must compensate it. Similarly, in *Blackspur and Others* v *Council and Commission* (paragraph 50), the Court of First Instance dismissed Blackspur's application as unfounded, taking the view that it was not necessary to rule on its admissibility 'in the manifest absence of a causal link demonstrated by the applicants between the damage alleged and the ostensibly unlawful conduct of

the Community institutions'. With regard to the judgment in *Dubois et Fils* v *Council and Commission* (paragraphs 30 and 31), the Court of First Instance simply stated in that case that the application met the minimum requirements of Article 44 of the Rules of Procedure.

33 In addition, the application clearly enabled the defendants to prepare their defence and to formulate any observations they considered relevant as to the merits of the action.

34 In the circumstances of the case, therefore, the requirements of Article 44(1)(c) of the Rules of Procedure are met, so that the first plea of inadmissibility must be rejected.

35 By its second plea of inadmissibility, the Commission essentially argues that an action for damages constitutes an abuse of process, and must therefore be rejected as inadmissible, where the alleged damage could have been avoided or repaired by using another legal remedy provided for by the applicable Community legislation.

36 In this case, Article 30 of Regulation No 404/93, as interpreted by the Court of Justice in *T. Port* (paragraph 43), is claimed to be such a legal remedy, which is effective in ensuring that the applicant's rights are protected.

37 That argument cannot, in principle, be upheld because Articles 178 and 215 of the EC Treaty (now Articles 235 EC and 288 EC respectively) do not make the admissibility of actions for damages subject to any kind of condition that the other remedies provided for by the Treaty or the procedures laid down in secondary Community law must first be exhausted.

38 Accordingly, even if the applicants were entitled to call upon the Commission to intervene under Article 30 of Regulation No 404/93, as the Commission maintains, that would not result in this action for damages being inadmissible solely because the parties concerned failed to take advantage of that procedure.

39 Any such failure on the part of the applicants ought rather to be taken into account in the course of examining the merits, when assessing whether or not there has been fault and whether there is a causal link between the fault and the alleged damage. If, as the Commission maintains, in Article 30 of Regulation No 404/93 the COM provides a mechanism to prevent damage of the type alleged by the applicants, or to remedy it, that would have to be considered relevant for the purposes of assessing whether the COM infringes the applicants' fundamental rights and, at the very least, whether such alleged infringement caused the damage they allege they suffered.

40 The second plea of inadmissibility must therefore also be rejected.

41 It follows that the application is admissible.

Merits

Arguments of the parties

42 The applicants claim that the Community has incurred non-contractual liability under the second paragraph of Article 215 of the Treaty.

43 They claim that the import regime for bananas instituted by the COM is unlawful.

44 In that regard, the parties agree that, according to the case-law, the Community can incur liability for unlawful acts only where there is an infringement of a rule intended to confer rights on individuals. They also acknowledge that if the institution adopted the act when exercising a wide margin of discretion, the Community can incur liability only if the infringement is sufficiently serious, that is to say it is manifest and grave (see Case C-352/98 P *Bergaderm and Goupil* [2000] ECR I-5291, paragraphs 40 to 43). The applicants submit that those conditions are satisfied in this case. The defendants and the intervener dispute that.

45 The applicants argue more particularly that the rights of the defence have been infringed, in so far as the operators in question were not given an opportunity to make submissions to the Commission during the procedure for adopting Regulation No 404/93, and that there has been a breach of the principles of non-discrimination, the protection of legitimate expectations and the freedom to pursue an economic activity. They also rely on the Community's failure to comply with the decision of 27 September 1997 (European Communities — Regime for the importation, sale and distribution of bananas, WT DS27/AB/R), by which the dispute settlement body of the World Trade Organisation found certain fundamental provisions of the COM, and in particular of the licensing system, to be incompatible with the provisions of the 1994 General Agreement on Tariffs and Trade and the General Agreement on Trade in Services.

46 When asked to submit any observations they might have on the consequences of the *Atlanta* judgment of the Court of Justice for this case, the applicants stated in their reply that they maintained all the pleas put forward in their application but focused first of all on the alleged infringement of the fundamental rights of the economic operators established in the former German Democratic Republic (hereinafter 'the GDR operators') as a 'type group', as distinct from all Category A

operators and, secondly, on the alleged failure to comply with the decision of the dispute settlement body, in so far as neither of those questions have yet been considered in the case-law.

47 In the alternative, the applicants base their action on objective or no-fault liability on the part of the Community for 'exceptional burdens' (*'Sonderopfer'*) or 'unequal discharge of public burdens'.

48 The defendants and the intervener consider that the requirements for there to be such liability are not met in this case, inasmuch as such liability is in principle to be recognised under Community law at all, which the Council and the Kingdom of Spain contest.

49 With regard to the damage for which compensation is claimed, the applicants allege two distinct heads of damage.

50 First of all they argue that the entry into force of the COM on 1 July 1993 suddenly deprived Category A operators established in the Community, including subsidiaries of the Atlanta Group holding import licences, of more than 50% of the third-country banana quotas they had been able to import before that date.

51 The Atlanta Group, to which the applicants belong, therefore lost, in the course of the first year following the entry into force of the COM, 73.73% of the third-country banana quotas it had been able to import, as an annual average, during the reference years 1989 to 1991. That loss was repeated, as a consequence of the 'spiral effect' of the reference amounts, during the subsequent adjudication periods.

52 Those losses could not have been compensated for by the purchase of Community or ACP bananas, contrary to the expectations expressed by the Court of Justice at paragraph 83 of the judgment in *Germany* v *Council*, because the Category B operators, thanks to their exclusive contracts with the producers, maintained their monopoly on marketing those bananas and there was therefore no integration of the markets. Furthermore, the import of third-country bananas outside the tariff quota is subject to a prohibitive customs duty (see Article 18 of Regulation No 404/93).

53 The Atlanta Group was therefore forced to close 11 of its 44 companies during the second half of 1993 and to dismiss 700 of its 2 300 staff. In order to reduce its losses and cover its fixed costs, it is forced to buy from Category B operators import licences for third-country bananas which they cannot use, at a price that varies from USD 4 to 6 per 18.6 kg box of bananas.

54 The second type of damage suffered by the applicants is connected with the fact that, as GDR operators, they were not able to establish their first reference quantity, for the purposes of Regulation No 404/93, for the whole three-year period from 1989 to 1991, but only from 3 October 1990 — the date of German reunification when the GDR became part of the Community — to 31 December 1991.

55 In that regard, the applicants produce, as an annex to the application, tables of the reference quantities they were able to establish during that period, based on information provided by the Atlanta Group to the Bundesamt für Ernährung und Forstwirtschaft on 21 June 1993. No quantity was included in the information provided for 1989 and 1990, since, according to the applicants, the reference period for GDR operators could not begin before 3 October 1990.

56 In so far as the Council and the Commission complain that there is no estimate or detail of the alleged harm, the applicants state that at this point they are confining themselves to requesting a declaration of principle, by interim judgment, that the Community is liable for damages. If judgment is delivered upholding that request, the parties will have an opportunity to seek to establish the amount of damage by negotiation. The Court of First Instance will be called upon to consider the question of the amount of damages and the causal link only if negotiations fail. In support of this approach, which they justify on the basis of considerations of procedural economy, the applicants cite the Court's judgments in Case 90/78 *Granaria* v *Council and Commission* [1979] ECR 1081, paragraph 6, and Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraphs 37 and 38.

57 The defendants and the intervener essentially argue that the applicants have brought no evidence at all in this case of the fact or scope of the harm allegedly suffered by reason of the entry into force of the COM.

58 As regards the applicants' argument that their application at this stage is merely for a declaration of principle that the Community is liable, the defendants reply that it is not possible to make such a declaration by an interim judgment unless the applicants show that they satisfy all the conditions for entitlement to damages, and that it is not sufficient to allege hypothetical prejudice or a hypothetical causal link.

Findings of the Court

59 It is settled case-law that in order for the Community to incur non-contractual liability owing to an unlawful act, a number of conditions must be satisfied concerning the illegality of the conduct alleged against the Community institutions, the fact of the damage allegedly suffered and the existence of a

causal link between that conduct and the damage complained of (see Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 16, and Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 68).

60 Moreover, if the principle of non-contractual liability on the part of the Community as a result of a lawful act were to be recognised under Community law, the Community would not in any event incur liability unless three conditions were cumulatively met, namely the fact of the alleged damage, the existence of a causal link between that damage and the act of the Community institutions complained of, and the unusual and special nature of that damage (Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraphs 17 to 19).

61 It is therefore necessary to examine first of all the condition relating to the fact of the damage allegedly suffered by the applicants, and then that relating to the causal link, which is closely connected with it.

62 In that regard it must be stated immediately that, contrary to the applicants' contention, merely alleging harm of some kind is not sufficient to satisfy the conditions laid down by the case-law for a finding, by interim judgment, that the Community has incurred liability.

63 It is true that Article 215 of the Treaty does not prevent the Community Courts being asked to declare the Community liable for imminent damage that is foreseeable with sufficient certainty, even if the damage cannot yet be precisely assessed. To prevent even greater damage it may prove necessary to bring the matter before the Court as soon as the cause of damage is certain (Joined Cases 56/74 to 60/74 *Kampffmeyer and Others* v *Commission and Council* [1976] ECR

711, paragraph 6). In addition, for such a declaration it is necessary that the injured party indicate the evidence enabling the extent of the alleged damage to be foreseen with sufficient certainty (Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico* v *Commission and Council* [2000] ECR II-2193, paragraph 195).

64 However, in this case the damage for which the applicants are requesting compensation is neither imminent nor even future but essentially comprises losses which were incurred before the action was even brought. The case-law cited in the previous paragraph is therefore not relevant.

65 In *Mulder and Others* v *Council and Commission*, the Court did in fact rule (at paragraphs 23 et seq.) on the existence of damage and a causal link, leaving only the question of the amount of damage open.

66 In *Granaria* v *Council and Commission* (paragraph 5), the Court furthermore stated that an application by which the applicant merely states that it has sustained pecuniary damage as a result of the regulations at issue, reserving the right to give details of the extent thereof at a later stage, cannot generally be sufficient to comply with the requirements of the Rules of Procedure as regards stating the subject-matter of the dispute and the grounds on which the application is based. It is only in the particular circumstances of the case, in which the problem of the legal basis of Community liability appeared to it to be particularly appropriate for separate treatment at an early stage of the procedure, that, reserving consideration of questions of causality and of the nature and extent of the damage for a later stage, the Court, for reasons of procedural economy, found that *Granaria's* application could 'strictly speaking' be considered adequate and therefore admissible (see paragraphs 4 to 6 of the judgment). It must further be pointed out that in that case the failure to state the exact amount of damage was attributable to the fact that the defendant institutions had not fixed the amount of the refunds to which the applicant claimed to be entitled (see the Opinion of Advocate General Capotorti in the same case, point 3).

67 There is no particular fact or consideration of that nature in this case to justify a derogation from the principle that the Community cannot be deemed to incur liability unless the applicant has in fact suffered 'actual and certain' damage within the meaning of the relevant case-law (see Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, paragraph 9; Case 51/81 *De Franceschi* v *Council and Commission* [1982] ECR 117, paragraph 9; Case T-108/94 *Candiotte* v *Council* [1996] ECR II-87, paragraph 54; Case T-99/95 *Stott* v *Commission* [1996] ECR II-2227, paragraph 72; and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 74). It is for the applicant to produce to the Court the evidence to establish the fact and extent of the loss which he claims to have suffered (see Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677, paragraphs 22 to 24; Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 97, and Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667, paragraph 60).

68 In this case the applicants confined themselves in their application to relying in general terms on alleged redundancies, closures of businesses and financial losses suffered by the Atlanta Group, without giving the least indication as to the nature or extent of the damage which they consider they had suffered individually.

69 Since the action was brought by individual companies and not by the Atlanta Group, such information cannot give rise to a finding that the applicants suffered damage themselves.

70 The applicants' reference to the summary of the facts of the case leading to the *Atlanta* judgment of the Court of First Instance is irrelevant because the applicants were not parties to that case.

71 Moreover, the annexes to the application do not contain any evidence in support of the applicants' allegations. In particular, they contain no useful information on

imports of third-country bananas by the applicants prior to the entry into force of Regulation No 404/93. At most, the documents relating to the quantities declared to the competent national authorities by the applicants for the reference period 1990 to 1992 (annex K2 to the application), which were supplemented by those relating to the quantities declared by them for the reference period 1989 to 1991 (documents produced by the Commission at the hearing), enable the following findings to be made:

— Hameico Stuttgart GmbH (formerly A & B Fruchthandel GmbH) declared that it imported 5 091 760 kg of third-country bananas in 1991 and none in 1989, 1990 and 1992;

— Amhof Frucht GmbH declared that it imported 3 798 463 kg of third-country bananas in 1992 and none in 1989, 1990 and 1991;

— Hameico Dortmund GmbH (formerly Dessau-Bremer Frucht GmbH) declared that it imported 3 175 649 kg of third-country bananas in 1991 and none in 1989, 1990 and 1992;

— Hameico Fruchthandelsgesellschaft mbH declared that it imported 4 901 724 kg of third-country bananas in 1991 and none in 1989, 1990 and 1992;

— Leipzig-Bremer Frucht GmbH declared that it imported 11 903 757 kg of third-country bananas in 1991 and none in 1989, 1990 and 1992.

72 The same is true with regard to the expenses allegedly incurred to acquire import licences from other Category B operators, in relation to which the applicants did not seek to prove either their existence, or their volume or cost.

73 In addition, it is not evident from the documents annexed to the application that the applicants must be considered to be GDR operators.

74 Whilst it is not for the Community judicature to carry out, of its own motion, an investigation of the file in order to remedy the parties' omissions in regard to the production of evidence (order of the Court of 13 December 2001 in Case C-263/01 P *Giulietti* v *Commission*, not published in the ECR, paragraph 30), the Court of First Instance put a number of written questions to the applicants in the context of the measures of organisation of procedure, to afford them an opportunity to substantiate the fact and extent of the damage for which they are claiming compensation from the Community, and the causal link between that damage and the measures in question.

75 It is clear from the answers given by the applicants to the questions put by the Court of First Instance, read in the light of the documents annexed to the application, that:

— none of the applicants may be regarded as the economic successor to the former State bodies or nationalised industries to which the planned and centralised economy of the former GDR had attributed the monopoly for importing and ripening bananas within the meaning of the judgment of the Court of First Instance in Case T-612/97 *Cordis* v *Commission* [1999] ECR II-2771, paragraphs 6 and 37;

— the first applicant was incorporated in Bremen (FRG) by an act dated 16 February 1991 and entered on the companies register at Bremen on

12 March 1991; its registered office was transferred from Bremen to Dresden (former GDR) by a document dated 5 November 1991, which was entered on the register on 17 August 1992; it marketed bananas only in 1991;

— the second applicant was incorporated in Bremen (FRG) by an act of 9 August 1991 and entered on the companies register at Bremen on 3 September 1991; its registered office was transferred from Bremen to Gotha (former GDR) by an act of 25 September 1991, entered on the register on 17 December 1991; it began marketing bananas only in December 1991;

— the third applicant was incorporated in Dessau (former GDR) by an act dated 14 June 1990 and entered on the companies register on 29 June 1990; its registered office was first of all transferred from Dessau to Bremen (FRG) by a decision of the shareholders of 19 September 1994, then from Bremen to Dortmund (FRG) by a decision of the shareholders of 20 December 1995, entered on the companies register at Dortmund on 3 June 1996; it undertook activities entitling it to reference quantities from its incorporation, that is to say before German reunification;

— the fourth applicant was incorporated in Bremen (FRG) by an act dated 15 June 1990 and entered on the companies register on 10 July 1990; its registered office was transferred from Bremen to Rostock (former GDR) by an act of 20 December 1990, entered on the register on 29 October 1991; it marketed bananas in Rostock from the time of its incorporation, that is to say before German reunification, in a joint venture with the State enterprise OGS of the Rostock district; before the end of 1990, the East German partner left the company, which then marketed bananas on its own;

— the fifth applicant, with its registered office in Leipzig (former GDR), was incorporated by an act of 21 June 1990, which was entered on the companies register on 13 September 1990.

76 In addition, in response to the request made by the Court of First Instance to the applicants to give details of and substantiate, with all documentary evidence in support, specific economic activities actually engaged in during the period 1 January 1989 to 2 October 1990 which would have enabled them to be allocated reference quantities under Regulations Nos 404/93 and 1442/93 if they had been established within the Community during that period, the applicants merely stated as follows:

— the question does not arise for the first and second applicants, in so far as they became legal persons only after German reunification;

— the last three applicants engaged in fruit retailing and banana ripening activities in various locations in the former GDR and, had they been established in the Community before 3 October 1990, it must be supposed that they could have claimed reference quantities for 1990.

77 With regard to the conditions relating to evidence of damage and causal link, it must therefore be concluded:

— that the first and second applicants were incorporated after German reunification and in no circumstances can they therefore be regarded as third-country banana operators established in the former GDR prior to German reunification;

— that the other applicants merely state that they had engaged in activities giving rise to an entitlement to reference quantities prior to German reunification without adducing any evidence, despite a request by the Court of First Instance;

— that, for the rest, although they were expressly requested to do so by the Court of First Instance in written questions and during the hearing, the applicants have provided no figures indicating the fact, nature or extent of the damage that each of them suffered personally as a result of the entry into force of the COM, in particular in their capacity as GDR operators.

78 It follows that the applicants have not established that they suffered any damage as a result of the establishment of the COM, in particular in their capacity as GDR operators.

79 The application must therefore be rejected in any event as unfounded and there is no need to rule on the other conditions for the Community to incur liability as a result of an unlawful act or on the conditions for possible liability on the part of the Community as a result of a lawful act.

Costs

80 In accordance with Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Council and the Commission. The Kingdom of Spain must bear its own costs under Article 87(4) of the Rules of Procedure, which provides that Member States which intervene in the proceedings must bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicants to bear their own costs in addition to those incurred by the Council and the Commission. The Kingdom of Spain is to bear its own costs.

Vesterdorf Forwood Legal

Delivered in open court in Luxembourg on 2 July 2003.

H. Jung B. Vesterdorf

Registrar President