# JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
14 September 1995 *

In Case T-571/93,

**Lefebvre Frères et Soeurs**, a public limited company incorporated under French law, established at Douai (France),

**GIE Fructifruit**, a 'groupement d'intérêt économique' governed by French law, established at Barentin (France),

**Association des Mûrisseurs Indépendants**, an association governed by French law, established at Dieppe (France), and

**Star Fruits Cie**, a public limited company incorporated under Belgian law, established in Brussels,

represented by Jean-Philippe Kunlin and Jean-Paul Montenot, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

applicants,

* Language of the case: French.

**Commission of the European Communities**, represented by Gérard Rozet, Legal Adviser, and Marc de Pauw, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

**French Republic**, represented by Catherine de Salins, Sub-Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Nicolas Eybalin, Secretary for Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

intervener,

APPLICATION for damages pursuant to Article 178 and the second paragraph of Article 215 of the EC Treaty,

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

composed of: B. Vesterdorf, President, D. P. M. Barrington and A. Saggio, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 10 May 1995,

gives the following

## Judgment

### Background to the proceedings

1 The applicants in this case, Lefebvre Frères et Soeurs, the 'groupement d'intérêt économique' (GIE) Fructifruit (made up of the companies Lefebvre Frères et Soeurs, Établissements Soly Import, Francor, Mûrisseries du Centre and Mûrisserie Française), the Association des Mûrisseurs Indépendants (AMI) and Star Fruits Cie ('the applicants'), operate in the sector of the industrial ripening of bananas.

2 Prior to the establishment of the common organization of the market in bananas by Council Regulation (EEC) No 404/93 of 13 February 1993 (OJ 1993 L 47, p. 1, hereinafter 'Regulation No 404/93'), the situation in the Community market in bananas was as follows. Consumption of bananas in the Member States was covered by three sources of supply: bananas produced in the Community ('Community bananas'), bananas produced in certain of the States with which the Community had concluded the Lomé Convention ('ACP bananas'), and bananas produced in other States ('dollar area bananas').

3 Community bananas are produced in particular in the Canary Islands and in the French overseas departments of Guadeloupe and Martinique, and, to a lesser extent, in Madeira, the Azores and Crete, as well as the Algarve and Lakonia. Such production accounted for approximately 20% of Community consumption.

4 ACP bananas are imported mainly from certain African States, for example Cameroon and Côte d'Ivoire, and from various Caribbean islands, for example Jamaica and the Leeward Islands. Imports from Africa, the Caribbean and the Pacific accounted for approximately 20% of Community consumption.

5 Dollar area bananas originate in particular in various central and South American countries, mainly Costa Rica, Colombia, Ecuador, Honduras and Panama. Such production accounted for approximately 60% of Community consumption.

6 There are significant differences between the prices of bananas originating in Community countries, ACP countries and the dollar area. In France in 1986, for example, the price per tonne of West Indian bananas was ECU 653, whilst that of ACP bananas was ECU 612 and that of dollar area bananas was ECU 525. The reason for the difference in price levels lies in the fact that production costs are lower in

the dollar area, first, because wages there are lower and, second, because there is an excellent production and distribution network, with large undertakings benefiting from economies of scale and more modern equipment.

7 Within the framework of the successive Lomé Conventions, bananas originating in ACP States enjoy exemption from customs duties and quantitative restrictions. However, the tariff arrangements for ACP bananas were not enough in themselves to ensure the sale of ACP bananas in the Community, by reason of the major price differences between ACP bananas and dollar area bananas. Sales were therefore ensured by the maintenance of national quantitative restrictions in relation to direct imports from third countries other than ACP States and by recourse to measures, based on Article 115 of the EC Treaty, against indirect imports from those countries.

8 Various market organization systems existed in the twelve Member States. In France, Spain, Greece and Portugal, the systems ranged from the operation of a national 'organization' to the closure of the market. Since 1988, France, Greece, the United Kingdom and Italy have had recourse to Article 115 of the Treaty in order to protect either their national production or imports from the ACP States which have traditionally supplied those Member States.

9 There were five Member States (the Netherlands, Belgium, Denmark, Ireland and Luxembourg) which did not apply any particular restrictive measures to imports of dollar area bananas, simply paying the 20% consolidated customs duty in respect of third countries to GATT.

10 The Federal Republic of Germany, the main Community importer, did not apply any quantitative restrictions, and enjoyed the benefit of a zero-duty quota by virtue of the Protocol on the tariff quota for imports of bananas annexed to the Implementing Convention on the Association of the Overseas Countries and Territories

with the Community, which is itself annexed to the EC Treaty. It imported exclusively from Latin American countries.

11 Since the applicants operate on the French banana market, their complaint relates solely to that market. The French banana market was reserved more or less entirely to national production, that is to say, to bananas from Martinique and Guadeloupe, and to production from two ACP countries: Côte d'Ivoire and Cameroon. A market protection system had been in existence since 1932.

12 In the event that those production areas were unable to meet the demand in the French market, the Comité Interprofessionnel Bananier de l'Union Française (Joint-Trade Banana Committee of the French Union), an organization coordinating production and market requirements, was empowered to open a quota allowing bananas to be imported either from Community countries or from third countries. The right to import quota bananas was conditional on obtaining a licence.

13 It was in the light of the circumstances described above (see paragraphs 6 and 7) that France submitted to the Commission on 30 April 1987 an application under Article 115 of the Treaty for authorization to exclude from Community treatment bananas from the dollar area and from ACP States — other than France's traditional suppliers — which were released into free circulation in other Member States. On 8 May 1987 the Commission adopted a decision, applicable until 30 April 1988, authorizing the French Republic to exclude from Community treatment bananas from the dollar area, that is to say, bananas originating in the following countries: Bolivia, Canada, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Nicaragua, Panama, the Philippines, the United States, Venezuela, Honduras and Mexico. However, the Commission refused to grant the French Republic's application in so far as it concerned bananas from ACP countries other than France's traditional suppliers.

14 The Commission's decision of 8 May 1987 formed the subject-matter of an action brought on 7 July 1987 by Lefebvre Frères et Soeurs. The Court of Justice dismissed that action as inadmissible (Case 206/87 *Lefebvre* v *Commission* [1989] ECR 275).

15 The Commission had reserved the right to amend the decision of 8 May 1987 once it became apparent from market forecasts that demand in the French market for bananas originating in the third countries concerned exceeded 15 000 tonnes. In October 1987 the French Government informed the Commission that those conditions were satisfied. On 27 October 1987 the Commission adopted a decision amending its decision of 8 May 1987 and providing that not less than 25% of the quantities of bananas imported to meet demand in the French market not satisfied by national production and imports from ACP States should be reserved to importers wishing to import bananas originating in the dollar area and released into free circulation in other Member States.

16 Between 8 May 1987 and 30 June 1993, ten decisions, based on Article 115 and authorizing the French Republic to exclude from Community treatment bananas originating in the dollar area or ACP countries and released into free circulation in other Member States, were adopted by the Commission, as follows:

— decisions of 8 May 1987 (referred to above, amended on 27 October 1987), 5 May 1988, 19 July 1988, 23 June 1989, 27 June 1990, 28 June 1991, 29 June 1992 and 28 December 1992, concerning dollar area bananas;

— decision of 4 December 1992, concerning bananas from Cameroon and Côte d'Ivoire;

— decision of 5 May 1993, concerning bananas from ACP countries.

17 Apart from the decision of 4 December 1992, which remained in force for 28 days, the periods for which the decisions were to apply ranged from two months to one year.

18 On 4 December 1992 the applicants brought proceedings before a French court for compensation for the damage suffered by them as a result of the refusal by the French authorities to grant banana import licences. On 29 June 1994 the Tribunal Administratif (Administrative Court), Paris, found that the French State had incurred liability on the ground that it had refused, on 18 June 1991, 30 September 1991 and 10 December 1991, to grant licences to import from Belgium bananas originating in the Dominican Republic and Jamaica, despite the fact that that refusal was not covered by the decisions adopted by the Commission on the basis of Article 115 of the Treaty. However, before giving final judgment, the Tribunal Administratif ordered that further inquiries should be carried out.

19 On 13 February 1993 the Council adopted Regulation No 404/93 on the common organization of the market in bananas.

## Procedure and forms of order sought

20 Those were the circumstances in which, by application lodged at the Registry of the Court of First Instance on 2 December 1993, the applicants brought the present action for damages. By order of the President of the Second Chamber of 6 May 1994, the French Republic was granted leave to intervene in support of the form of order sought by the Commission. Since the applicants lodged their reply out of time, it was rejected. The written procedure closed on 3 August 1994 with the submission of the applicants' observations on the intervener's statement in intervention.

21 On hearing the Report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure without any preparatory enquiry. However, it requested the parties to reply to various questions and to produce certain documents.

22 The parties presented oral argument and answered the Court's questions at the hearing on 10 May 1995.

23 The applicants claim, in essence, that the Court should:

— declare that the Commission has caused them to suffer damage as a result of the policies adopted by it in respect of the French banana market, contrary to the rules laid down by the EC Treaty;

— order the Commission to make good the damage suffered by the applicants and their members and, consequently, grant them the following compensation, to be made up where necessary to the full amount of such damage:

(a) Lefebvre Frères et Soeurs:

ECU 261 458.98;

(b) GIE Fructifruit:

ECU 825 000;

(c) Association des Mûrisseurs Indépendants (AMI):

ECU 825 000;

(d) Star Fruit Cie:

ECU 31 249 497;

(e) Soly Import:

ECU 2 387 606;

(f) Francor:

ECU 439 975.64;

(g) Mûrisseries du Centre:

ECU 448 794.22;

(h) Mûrisserie Française:

ECU 572 373.51;

— alternatively, in the event that the Court considers that it has insufficient information regarding the existence and scope of the damage suffered by each of the applicants, order that an expert's report be obtained at the expense of the Commission;

— order the Commission to pay all of the costs.

24 The Commission contends that the Court should:

— declare the action inadmissible as regards the claim for compensation for damage allegedly caused by acts or omissions of the Commission before 1 December 1988;

— dismiss as unfounded the action for damages brought by Lefebvre Frères et Soeurs and the other applicants;

— order the applicants to pay the costs.

25 The French Republic contends that the Court should:

— dismiss as unfounded the action for damages brought by Lefebvre Frères et Soeurs and the other applicants.

## Admissibility

26 As the Commission has rightly pointed out, proceedings against the Community in matters arising from non-contractual liability are barred, pursuant to Article 43 of the Protocol on the Statute of the Court of Justice of the EEC, after a period of five years from the occurrence of the event giving rise thereto. The present action was brought on 2 December 1993. It follows that, taking into account the rules on extension of time under Articles 101 and 102 of the Rules of Procedure of the Court of First Instance, the claims of Lefebvre Frères et Soeurs, GIE Fructifruit and AMI are admissible only in so far as they seek compensation for damage suffered during the period after 25 November 1988 and the claim of Star Fruits Cie is admissible only in so far as it seeks compensation for damage suffered during the period after 29 November 1988.

## Substance

27 Before examining the applicants' pleas, it is appropriate to set out the principles which, according to the case-law of the Court of Justice and the Court of First Instance, govern the non-contractual liability of the Community. By virtue of the second paragraph of Article 215 of the EC Treaty, the non-contractual liability of the Community presupposes the existence of a set of circumstances comprising the illegality of the conduct alleged against the institutions, actual damage, and a causal link between that conduct and the damage claimed (judgments of the Court of Justice in Case 4/69 *Lütticke* v *Commission* [1971] ECR 325 and Case 153/73 *Holtz and Willemsen* v *Council and Commission* [1974] ECR 675).

### *I — The establishment of liability*

28 In support of their claims for compensation, the applicants put forward five pleas with a view to establishing the existence of unlawful conduct on the part of the Commission. Those pleas respectively allege infringement of Articles 38(4) and 43(2) of the EC Treaty, owing to the Commission's delay in submitting to the

Council its proposal for a regulation concerning the banana sector; infringement of Article 115 of the EC Treaty; infringement of Articles 155 and 169 of the EC Treaty; breach of the principle of the protection of legitimate expectations and, lastly, breach of the principle of equality of treatment.

*Plea alleging infringement of Articles 38(4) and 43(2) of the Treaty, owing to the Commission's delay in submitting to the Council its proposal for a regulation concerning the banana sector*

Arguments of the parties

29 The applicants maintain that, by failing until 7 August 1992, well after the end of the transitional period, to propose the establishment of the common organization of the market in bananas, the Commission has infringed, first, Article 38(4) of the Treaty, which requires the establishment of a common agricultural policy among the Member States, and, second, Article 43(2) of the Treaty, which obliges the Commission to submit its proposals for working out and implementing the common agricultural policy. They further state that that failure is particularly serious in view of the completion of the internal market on 31 December 1992.

30 The Commission acknowledges that there were serious delays in the completion of the common organization of the market in bananas. However, it draws attention to the problems encountered in establishing a common policy for the banana sector, given the divergent and often conflicting interests at stake, and states that it was only as a result of the pressure arising from the imminent adoption of the Single European Act and the increased volume of Community banana production caused by bananas from the Canary Islands, following the accession of Spain, that it was finally able to act.

31 The Commission further states that, even if it were found to be at fault, such fault could not be sufficiently serious for it to incur non-contractual liability, having regard to the content of Articles 38(4) and 43(2) of the Treaty and the case-law of the Court of Justice on the second paragraph of Article 215 of the Treaty (judgments of the Court of Justice in Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL and Others* v *Council and Commission* [1978] ECR 1209, Joined Cases 116/77 and 124/77 *Amylum* v *Council and Commission* [1979] ECR 3497 and Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061).

Findings of the Court

32 The Court points out that, as the Court of Justice has consistently held, the scope of the second paragraph of Article 215 has been interpreted in the sense that the Community does not incur liability on account of a legislative measure involving choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred. More specifically, in a legislative field such as the one in question, which is characterized by the exercise of a wide discretion essential for the implementation of the common agricultural policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (see, in particular, the judgment in *Mulder*, cited above).

33 The Court further points out that the Court of Justice held in its judgment in Case 13/83 *Parliament* v *Council* [1985] ECR 1513, in the context of an action for a declaration of failure to act brought against an institution under Article 175 of the EEC Treaty, that the degree of difficulty in performing the obligation incumbent on the institution in question under the Treaty could not be taken into consideration. The Court of Justice further stated, however, that, in the circumstances of that case, the Council enjoyed a discretion and that the absence of a common policy which the Treaty required to be brought into being did not necessarily constitute a failure to act sufficiently specific in nature to form the subject of an action under Article 175.

34 It is in the light of those principles that it must be determined whether the Commission has committed a fault such as to cause it to incur non-contractual liability.

35 As is apparent from the Commission's arguments, a common organization of the market and a common commercial policy should have been established in the banana sector at the latest by the end of the transitional period, that is to say, by 1 January 1970. Despite that deadline, the Commission's proposal for the common organization of the market in bananas was not submitted to the Council until 7 August 1992, and Regulation No 404/93 was not adopted by the Council until 13 February 1993.

36 However, it must be recognized that serious difficulties arose in establishing a common policy in the banana sector. Those difficulties were caused, first, by the diverse market organization systems existing in the twelve Member States prior to the adoption of Regulation No 404/93 (see paragraphs 8 to 10) and, second, by the various interests involved, namely the interests of the different production areas in the Community, commitments with respect to the ACP States, the obligations arising from GATT, the interests of consumers, the interests of Community operators, the interests of the Latin American producers, and, finally, the financial interests of the Community.

37 It should be noted in the present case that the delay for which the Commission is criticized relates to the adoption of a legislative act which is characterized by the exercise of a wide discretion, and that it was for that institution to determine, in accordance with the rules of procedure laid down by the Treaty, when it was appropriate to formulate and submit its legislative proposals.

38 The Court considers that the exercise of the Commission's legislative powers must not be hampered by the prospect of actions for damages whenever it finds itself in

a position to decide whether it should submit a proposal for legislation. If delay on the part of the Commission in submitting legislative proposals were able in itself to provide the basis for an action for damages, the discretionary powers of that institution in the exercise of its legislative competence would be seriously hampered.

39 In the circumstances, the Court finds that, by delaying the submission of a proposal for the common organization of the market in bananas, the Commission did not manifestly and gravely disregard the limits on the exercise of its powers.

40 In addition, as regards the question whether a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred, it is necessary to examine the purpose and scope of Articles 38(4) and 43(2) of the Treaty, on which the applicants rely.

41 It is clear, particularly from those articles, that a common agricultural policy is to be established among the Member States, and the Community institutions are obliged to introduce it. However, Articles 38(4) and 43(2) merely impose obligations on the institutions; they are not intended to protect individuals. Consequently, they cannot be characterized as superior rules of law the breach of which could cause the Community to incur non-contractual liability.

42 It follows that the plea alleging infringement of Articles 38(4) and 43(2) must be rejected.

*Plea alleging infringement of Article 115 of the EC Treaty*

Arguments of the parties

43 The applicants maintain that the basic conditions justifying the adoption by the Commission of a decision based on Article 115 of the Treaty never existed, either when the Commission adopted its decision of 8 May 1987 or during the subsequent five years.

44 Furthermore, they complain that the Commission renewed its decision of 8 May 1987 over a period of more than five years by decisions which were essentially the same, although, according to Commission Decision 87/433/EEC of 22 July 1987 on surveillance and protective measures which Member States may be authorized to take pursuant to Article 115 of the EEC Treaty (OJ 1987 L 238, p. 26, hereinafter 'Decision 87/433'), the application of such measures is only authorized for a limited period, where the gravity of the situation so warrants. The applicants also rely on the judgment in *Holtz and Willemsen* v *Council and Commission*, cited above, in support of their argument that a decision based on Article 115 may be for a limited duration only.

45 The Commission considers that the basic conditions justifying the adoption of the decisions in question were in existence when it adopted those decisions, and that those decisions authorized a derogation from the principle of the free movement of goods only for short periods, the longest of which was one year. According to the Commission, the duration of an authorization to derogate from the principle of the free movement of goods must be assessed with regard to each individual decision, and not cumulatively. In its view, such an assessment of the duration of the authorization accords with the interpretation of the Court of Justice in Case 59/84 *Tezi* v *Commission* [1986] ECR 887.

46 It further states that, even if (which it denies) the duration of the decisions in question was such as to render them unlawful, that illegality does not constitute a

manifest and serious breach of a rule of law, verging on the arbitrary, such as to render the Community liable, since the term 'limited period' has never been clearly defined, either in Article 115 or in the case-law of the Court of Justice.

47 As regards the duration of a decision based on Article 115, the French Republic considers that Article 115 does not itself limit the number of decisions which the Commission may adopt, although each decision must be interpreted and applied strictly.

Findings of the Court

48 Before ruling on the legality of the Commission's decisions based on the first paragraph of Article 115 of the Treaty, it must be noted that, according to settled case-law of the Court of Justice, because the derogations allowed under Article 115 constitute not only an exception to the provisions of Articles 9 and 30 of the Treaty, which are fundamental to the operation of the common market, but also an obstacle to the implementation of the common commercial policy provided for in Article 113, they must be interpreted and applied strictly (judgments of the Court of Justice in Case 41/76 *Donckerwolcke and Schou* [1976] ECR 1921 and *Tezi* v *Commission*, cited above). It also follows from the case-law of the Court of Justice that where a Member State submits a request under Article 115, the Commission is under a duty to review the reasons put forward by the Member State concerned in order to justify the protective measures for which it seeks authorization, and to verify whether those measures are consistent with the Treaty and necessary (Case 29/75 *Kaufhof* v *Commission* [1976] ECR 431).

49 It is also settled case-law that, where the assessment of a complex economic situation is involved, the Commission has a wide discretion and that, in reviewing the exercise of such a power, the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether that authority did not clearly exceed the bounds of its discretion (judgments of the Court of

Justice in Case 55/75 *Balkan-Import Export* [1976] ECR 19, Case 29/77 *Roquette Frères* [1977] ECR 1835 and Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333).

50 The Court regards it as appropriate in the present case to examine the decisions at issue in order to verify whether the conditions which govern authorizations to derogate from Article 115 of the Treaty were fulfilled and whether the duration of those decisions was reasonable in the circumstances of the case.

51 In the context of its assessment of the circumstances in which the decisions in question were adopted, the Court notes that the Commission specified, in its reply to the questions put to it by the Court, the main basic conditions justifying the adoption of those decisions.

52 First of all, the Commission pointed out that France maintained quantitative restrictions on imports of dollar area bananas prior to the adoption of the decisions based on Article 115. Major differences existed between the commercial measures applied by the Member States to imports of dollar area bananas, and those differences were such as to cause deflections of trade capable of giving rise to economic difficulties. In order to ensure, in that context, the survival of the national production of bananas from Guadeloupe and Martinique, which represented an essential part of their economies, the French Government took the view that it was necessary to exclude from Community treatment, *inter alia*, dollar area bananas.

53 Secondly, Article 1 of the protocols on bananas contained in the third and fourth Lomé Conventions provides that 'in respect of its banana exports to the Community markets, no ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present'. According to the Commission, compliance by the French

Republic and the Community with their obligations under that provision could not have been ensured without the adoption of the decisions at issue.

54 As regards the duration of the decisions based on Article 115, it is clear from the case-law of the Court of Justice, in particular its judgment in *Tezi*, cited above, and from Article 3(2) of Decision 87/433, that authorization for such surveillance and protective measures is to be granted for 'a limited period' only. However, the term 'limited period' is not defined either in the judgment in *Tezi* or, more generally, in the case-law of the Community judicature, or in Decision 87/433.

55 In the present case, the Commission provided, in respect of most of the contested decisions, that they were to apply for one year. In its answer to the questions put to it by the Court, it explained that it chose that period in view of the following considerations: the gravity of the situation; the enduring commitments of the Community under the Lomé Convention; the absence of any reasonable grounds for expecting any change, over the 12-month period, in the conditions justifying the grant of the authorization, such as the elimination of the disparities between the import systems applied by the Member States, improvements in the competitiveness of French banana production or any changes to the Community's obligations under the Lomé Convention; the Commission's power at any time to withdraw or amend the authorization granted and, finally, the representative nature of the period.

56 Given that the assessment of a complex economic situation is involved, the Commission has a wide discretion in the present case. In the light of the explanations which it has provided, and the fact that the applicants have not submitted any observations challenging those explanations, the Court considers that the applicants have not established that, in adopting the contested decisions, the Commission exceeded the bounds of its discretion.

57 It follows that the plea alleging infringement of Article 115 of the EC Treaty must be rejected.

*Plea alleging infringement of Articles 155 and 169 of the Treaty*

58 This plea falls into two parts. The first part relates to the Commission's failure to bring an action against France for breach of its obligations, and the second concerns its failure to monitor the application of the decisions adopted on the basis of Article 115.

Failure to bring an action against France for breach of its obligations

59 In the context of this first part of the plea, the applicants maintain that, by preventing imports of bananas from ACP countries, apart from imports of quota goods from Côte d'Ivoire and Cameroon, the French Republic acted contrary to the objectives laid down by Articles 30 and 38 of the EC Treaty, and that, by condoning that infringement of those provisions, the Commission failed to fulfil its obligations under Articles 155 and 169 of the Treaty.

60 It is established case-law that the Commission is not bound to commence proceedings under Article 169 of the Treaty, but has in that regard a discretion which excludes the right for individuals to require it to adopt a specific position (judgment of the Court of Justice in Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291; orders of the Court of First Instance in Case T-29/93 *Calvo Alonso-Cortés* v *Commission* [1993] ECR II-1389 and Case T-5/94 *J* v *Commission* [1994] ECR II-391, and the order of that Court of 23 January 1995 in Case T-84/94

*Bilanzbuchhalter* v *Commission* [1995] ECR II-101). It is also established case-law that the Community can incur non-contractual liability only where an institution acts unlawfully.

61 It follows that, since the Commission was not bound to commence proceedings under Article 169, its decision not to institute such proceedings in the present case must be regarded as consistent with the Treaty and, in particular, Articles 155 and 169 thereof, and cannot therefore give rise to non-contractual liability on the part of the Community.

62 In the circumstances, the first part of this plea must be rejected.

The alleged failure by the Commission to monitor the application of its decisions based on Article 115 of the Treaty

Arguments of the parties

63 As regards the second part of this plea, concerning the Commission's failure to monitor the application of the decisions taken on the basis of Article 115 of the Treaty, the applicants maintain that, by engaging in discriminatory and anti-competitive practices, the French Republic infringed the decision of 27 October 1987, which, they say, was intended to guarantee small and new importers a right of access to French quotas. They further contend that prices on the French market have been maintained at an abnormally high level by action on the part of West Indian banana producers. They conclude that the Commission has not made any serious effort to monitor the decisions taken by the French Republic pursuant to the authorizations granted to it, and that the French Republic has prevented imports of ACP bananas not covered by the decisions based on Article 115. They further draw attention to the Commission's right to amend its decisions, and

maintain that it failed to do so despite the fact that the needs of the French market had changed.

64 The Commission denies that it failed to monitor the manner in which France ensured the implementation on its territory of the protective measures authorized on the basis of Article 115. The Commission contends that it was, in fact, in the context of the exercise of that control that it introduced, with effect from 19 July 1988, the obligation to allocate to new and small operators a fair share of the quotas opened in order to cater for those needs of the French market which were not covered by national production and production by ACP countries.

Findings of the Court

65 It should first be noted that the combined provisions of Articles 178 and 215 of the EC Treaty only give jurisdiction to the Community judicature to award compensation for damage caused by the Community institutions or by their servants in the performance of their duties, or, in other words, for damage capable of giving rise to non-contractual liability on the part of the Community. Damage caused by national institutions, on the other hand, can only give rise to liability on the part of those institutions, and the national courts retain sole jurisdiction to order compensation for such damage (Case 175/84 *Krohn* v *Commission* [1986] ECR 753).

66 The applicants' argument that France prevented imports of bananas calls into question only the conduct of the French Republic, and it therefore falls solely to the French courts to rule on that question. Indeed, it is apparent from the applicants' arguments and the judgment of the Tribunal Administratif de Paris establishing liability (see paragraph 18 above) that the applicants have already initiated proceedings before a French court.

67 As to the other arguments relied on by the applicants, namely that the French Republic infringed the Commission's decision of 27 October 1987, that prices on the French market were maintained at an abnormally high level by action on the part of West Indian banana producers, and that, by failing to amend the derogations granted in its decisions, the Commission infringed the terms of those decisions, the Court considers that the applicants have produced no concrete evidence in support of those arguments.

68 It follows that the second part of this plea must be rejected.

69 Consequently, the plea alleging infringement of Articles 155 and 169 of the Treaty cannot be upheld.

*Plea alleging breach of the principle of the protection of legitimate expectations*

Arguments of the parties

70 The applicants maintain that, having regard to the promises made to them by the Commission, they were entitled to expect, first, that a proposal for common measures would be submitted under Article 43(2) of the Treaty and, second, that their interests would be taken into consideration, both in the submission of such a proposal to the Council and on the adoption of the decisions based on Article 115 of the Treaty. In those circumstances, the Commission's failure to honour its promises constituted a breach of the principle of the protection of legitimate expectations, which is a superior rule of law for the protection of the individual.

71 The Commission maintains that neither the facts relied on nor the documents referred to by the applicants are such as to justify a finding that there has been a breach of the principle of the protection of legitimate expectations. Moreover, there was nothing in any document emanating from the Commission which could have justified a legitimate belief on the part of a prudent and circumspect operator that the Commission was going to adopt, on the basis of information not yet available to it when it was called upon to express a view, a particular position on matters falling within the ambit of the establishment of a common organization of the market or the application of Article 115 of the Treaty.

Findings of the Court

72 First of all, it is settled case-law that the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations. On the other hand, a person may not plead a breach of the principle of the protection of legitimate expectations unless the administration has given him precise assurances (see, in particular, the judgment of the Court of First Instance in Case T-20/91 *Holtbecker* v *Commission* [1992] ECR II-2599).

73 The promises alleged by the applicants are to be found, in particular, in two letters from the Commission of 24 June 1991 and 16 July 1992. In his letter of 24 June 1991, Mr Andriessen, the Vice-President of the Commission, states as follows: 'As regards the problems more closely connected with the application of Article 115 of the Treaty, I am pleased that the operators whom you represent are conscious of the fact that the Commission's decisions in that sphere have always taken their concerns into account. I can assure you that if the French authorities request an extension of the measures in force beyond 30 June 1991, the Commission will certainly assess such a request bearing in mind the wishes expressed by you on behalf of your clients'. In the letter of 16 July 1992, Mr Gaudenzi-Aubier, an adviser, expresses his 'wish to reassure (the applicants) that, in formulating the proposal to the Council for the establishment of a Community system in the banana sector, the Commission will certainly take into account the particular situation of small and medium-sized importers'.

74 There is an important difference between a statement made by the Commission in general terms, which cannot engender any valid expectations, and an assurance in precise terms on which expectations may legitimately be based. The statements made by the Commission in the letters relied on by the applicants fall within the first category, since those letters were worded in very general terms. It follows that those statements are not such as to have been capable of engendering any valid expectations on the part of the applicants.

75 Consequently, the plea alleging a breach of the principle of the protection of legitimate expectations must be rejected.

*Plea alleging breach of the principle of equality of treatment*

Arguments of the parties

76 The applicants consider that, by maintaining a system which has resulted in economic losses for banana ripeners in France, the Commission has breached the principle of equality of treatment enshrined in the second subparagraph of Article 40(3) of the EC Treaty. They further state that those losses do not form part of the economic risks inherent in the activities of undertakings engaged in the ripening of bananas.

77 The Commission maintains that, in view of the difficult situation prevailing in the banana market, it was obliged to take numerous different objectives into consideration. It decided to give priority for the time being to ensuring, first, that the agricultural community enjoyed a fair standard of living and, second, that the international obligations of the Community and its Member States were respected, but without upsetting the various patterns of supply to the Community market.

## Findings of the Court

78 It should be borne in mind, first, that the second paragraph of Article 40(3) of the EC Treaty provides that the common organization of agricultural markets to be established in the context of the common agricultural policy must 'exclude any discrimination between producers or consumers within the Community'. It is settled case-law that the prohibition of discrimination laid down by that provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law (Case C-177/90 *Kühn* [1992] ECR I-35 and Case C-98/91 *Herbrink* [1994] ECR I-223), and which requires that similar situations should not be treated differently unless differentiation is objectively justified (Joined Cases 201 and 202/85 *Klensch* [1986] ECR 3477).

79 It is in the light of those principles that it is necessary to decide whether, in the present case, the Commission has treated similar situations differently.

80 The Court observes, first, that, in order for it to be able to make a finding of discrimination, the applicants must point to a person or group in a situation similar to their own and show that the Commission treated that person or group differently. The applicants merely maintain, however, that the Commission has breached the principle of equality, without further substantiating their contention.

81 It follows that the conditions for establishing the existence of discrimination are not satisfied in the present case.

82 Consequently, the plea alleging breach of the principle of non-discrimination must be rejected as unfounded.

83 It follows that, since the applicants have not established that the conduct of the Commission was unlawful, the Community cannot incur non-contractual liability.

*II — The alleged damage*

84 Furthermore, and in any event, it must be observed that the case put forward by the applicants in order to establish the damage they claim to have suffered in the form, essentially, of the loss of earnings of the applicant undertakings is founded solely on assumptions which are not substantiated by any evidence. Moreover, as regards the damage allegedly suffered by GIE Fructifruit and AMI, those applicants have not produced any evidence whatever of the expenses allegedly incurred by those organizations over the last five years in protecting the interests of their members.

85 Finally, the Court regards the applicants' alternative application as unfounded, having regard to the case-law of the Court of Justice, according to which it is for an applicant to prove the loss alleged by him, which the applicants in the present case have been unable to do.

86 Consequently, the applicants have not succeeded in establishing the damage which they claim to have suffered.

87 It follows from all of the foregoing considerations that the application must be dismissed.

## Costs

88 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs, and since the applicants have been unsuccessful, they must be ordered to pay the costs. The French Republic, which has intervened in support of the Commission, must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

**1. Dismisses the application;**

**2. Orders the applicants to pay the costs;**

**3. Orders the French Republic, intervener, to bear its own costs.**

Vesterdorf Barrington Saggio

Delivered in open court in Luxembourg on 14 September 1995.

H. Jung B. Vesterdorf

Registrar President