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

In Case T-521/93,

Atlanta AG, a company incorporated under German law, established at Bremen (Germany),

Atlanta Handelsgesellschaft Harder & Co. GmbH, a company incorporated under German law, established at Bremen,

Afrikanische Frucht-Compagnie GmbH, a company incorporated under German law, established at Hamburg (Germany),

Cobana Bananeneinkaufsgesellschaft mbH&Co. KG, a company incorporated under German law, established at Hamburg,

Edeka Fruchtkontor GmbH, a company incorporated under German law, established at Hamburg,

Internationale Fruchtimport Gesellschaft Weichert & Co., a company incorporated under German law, established at Hamburg.

Pacific Fruchtimport GmbH, a company incorporated under German law, established at Hamburg,

* Language of the case: German.

represented by Erik A. Undritz and Gerrit Schohe, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the chambers of Marc Baden, 24 Rue Marie-Adélaïde,

applicants,

v

European Community, represented by

1) **Council of the European Union,** represented by Jean-Paul Jacqué, Director of the Legal Service, Arthur Brautigam and Jürgen Huber, Legal Advisers, and Anna Lo Monaco, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Director General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

2) **Commission of the European Communities,** represented by Peter Gilsdorf, Principal Legal Adviser, and Ulrich Wölker, of its 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,

defendants,

supported by

French Republic, represented by Edwige Belliard, Deputy Director in the Legal Affairs Department, and Gautier Mignot, Foreign Affairs Secretary, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

and

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

interveners,

APPLICATION for an order requiring the European Community, represented by the Council and the Commission, to pay compensation for damage alleged to have been incurred as a result of the adoption of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas (OJ 1993 L 47, p. 1),

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

composed of: K. Lenaerts, President, R. García-Valdecasas, P. Lindh, J. Azizi and J. D. Cooke, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 5 June 1996,

gives the following

Judgment

Facts

The situation before Regulation No 404/93 was adopted

1 Before a common organization of the market in bananas was established, the consumption of bananas in the Member States was supplied from three sources: bananas produced in the Community (in particular, in the Canary Islands and the French Overseas Departments), representing approximately 20% of Community consumption (hereinafter 'Community bananas'); bananas produced in some of the States with which the Community had concluded the Lomé Convention (in

particular, certain African States and certain Caribbean Islands), representing approximately 20% of Community consumption (hereinafter 'ACP bananas'); and bananas produced in other States (principally certain Central and South American countries, representing approximately 60% of Community consumption (hereinafter 'third country bananas').

2 By virtue of the Protocol annexed to the Implementing Convention on the Association of the Overseas Countries and Territories with the Community, provided for in Article 136 of the EC Treaty (hereinafter 'the Banana Protocol'), Germany enjoyed a special arrangement allowing it to import an annual quota of bananas free of customs duties, determined by reference to the quantities imported in 1956. That base quota was to be progressively reduced as the realization of the common market progressed.

Regulation No 404/93

3 A common organization of the market in bananas was introduced by Council Regulation (EEC) No 404/93 of 13 February 1993 (OJ 1993 L 47 p. 1, hereinafter 'Regulation No 404/93'), last amended by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agricultural sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105). It is with the 1993 version that this case is concerned.

4 The third recital in the preamble to Regulation No 404/93 states that:

'... so that the Community can respect Community Preference and its various international obligations, that common organization of the market should permit bananas produced in the Community and those from the ACP States which are

traditional suppliers to be disposed of on the Community market providing an adequate income for producers and at fair prices for consumers without undermining imports of bananas from other third country suppliers'.

5 The arrangements for trade with third countries, which are dealt with in Title IV, provide that traditional imports of ACP bananas may continue to be effected, free of customs duty, into the Community. In an annex, that quantity is set at 857 700 tonnes divided between the ACP States, the traditional suppliers.

6 Article 18 of Regulation No 404/93 provides:

'1. A tariff quota of two million tonnes (net weight) shall be opened each year for imports of third country bananas and non-traditional ACP bananas.

Within the framework of the tariff quota, imports of third country bananas shall be subject to a levy of ECU 100 per tonne and imports of non-traditional ACP bananas shall be subject to a zero duty.

...

2. Apart from the quota referred to in paragraph 1,

— imports of non-traditional ACP bananas shall be subject to a levy of ECU 750 per tonne,

— imports of third country bananas shall be subject to a levy of ECU 850 per tonne. ...'

7 Article 19(1) provides:

'The tariff quota shall be opened from 1 July 1993 for:

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

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

(c) 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.

...'

8 Pursuant to Article 16, a forecast supply balance is to be prepared on production and consumption in the Community and of imports and exports; that balance may be adjusted during the marketing year where necessary.

9 The fourth subparagraph of Article 18(1) provides for the possibility of increasing the volume of the annual quota on the basis of the forecast balance referred to in Article 16.

10 Article 20 empowers the Commission to adopt conditions governing transferability of import licences.

11 Article 21(2) provides that the tariff quota provided for in the Banana Protocol is to be discontinued.

The situation of the applicants

12 The applicants are traders whose business consists in importing third country bananas into the Community. The first and second applicants are part of the Atlanta Group: the first is a holding company, the second is a subsidiary of the first. The first applicant, which is the only one concerned by the claim for damages in this action (see paragraphs 16 and 28 below), states that another of its subsidiaries, Atlanta Handels-und Schiffahrts-Gesellschaft mbH, responsible for organizing transport by freezer ships, has suffered damage as a result of the entry into force of Regulation No 404/93. Atlanta Handels-und Schiffahrts-Gesellschaft mbH had chartered three vessels which it then made available to an American company. That company terminated the contract prematurely on the ground that the vessels would no longer be needed because of the import restrictions on bananas ensuing from Regulation No 404/93. Atlanta Handels-und Schiffahrts-Gesellschaft mbH, which must continue to pay the agreed charter hire to the shipowner, has assigned its rights in damages *vis-à-vis* the Community to its parent company, the first applicant.

Procedure

13 By application lodged at the Registry of the Court of Justice on 14 May 1993, the applicants applied for an order under the second paragraph of Article 173 of the EEC Treaty (now the fourth paragraph of Article 173 of the EC Treaty, hereinafter 'the Treaty'), annulling Regulation No 404/93 in part and for an order under Article 178 and the second paragraph of Article 215 of the Treaty, requiring the European Community to pay compensation for damage suffered by the first applicant or, as the case may be, by Atlanta Handels-und Schiffahrts-Gesellschaft mbH. It is the second part of this application, originally registered under number C-286/93, then under number T-521/93 (see paragraph 21 below), which is dealt with in this judgment.

14 By application lodged at the Registry of the Court of Justice on the same day, the Federal Republic of Germany sought the annulment pursuant to the first paragraph of Article 173 of the Treaty, of Title IV and Article 21(2) of Regulation No 404/93 (Case C-280/93).

15 On 4 June 1993 the applicants also lodged at the Registry of the Court of Justice an application for interim measures pursuant to Articles 185 and 186 of the Treaty seeking suspension of operation of Title IV of Regulation No 404/93, in particular Articles 17 to 20 thereof and the ordering of any other measure which the President of the Court or the Court considered to be appropriate (Case C-286/93 R).

16 By order of 21 June 1993, the Court of Justice dismissed the applicants' application as inadmissible in so far as they sought annulment of certain provisions of Regulation No 404/93 but allowed the claim for an order requiring the European Community to make good the damage caused by the adoption of that regulation to continue. It also reserved costs (Case C-286/93, now Case T-521/93 — the present action).

17 By documents lodged at the Registry of the Court of Justice on 28 June 1993 and 12 July 1993, the United Kingdom of Great Britain and Northern Ireland and the French Republic respectively sought leave to intervene in this case in support of the defendants.

18 By order of 6 July 1993, the Court of Justice dismissed as inadmissible the application for interim measures lodged by the applicants and reserved costs (Case C-286/93 R).

19 By documents lodged at the Registry of the Court of Justice between 29 June 1993 and 12 July 1993, the Republic of the Ivory Coast, the company Terres Rouges Consultant, the company España et fils and the company Cobana Import sought leave to intervene in this case in support of the defendants.

20 By order of 15 July 1993, the Court of Justice decided to suspend proceedings in the present case pursuant to Article 82a(1)(b) of the Rules of Procedure of the Court of Justice until the proceedings in Case C-280/93 were concluded.

21 Following the entry into force on 1 August 1993 of Council Decision 93/350/Euratom, ECSC, EEC, amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21), this case was referred to the Court of First Instance by order of the Court of Justice of 27 September 1993.

22 On 5 October 1994 the Court of Justice dismissed the action for annulment brought by the Federal Republic of Germany (Case C-280/93 *Germany* v *Council* [1994] ECR I-4973). Following that judgment, the suspension of proceedings was lifted and the written procedure in the present case was resumed.

23 By orders of the President of the Second Chamber, Extended Composition, of the Court of First Instance of 9 March 1995, the French Republic and the United Kingdom were granted leave to intervene in support of the defendants.

24 By order of 14 July 1995, the President of the Second Chamber, Extended Composition, of the Court of First Instance dismissed the applications to intervene lodged by the Republic of the Ivory Coast, the company Terres Rouges Consultant, the company España et fils and the company Cobana Import and ordered those applicants for leave to intervene to support the costs relating to their applications.

25 By order of 1 December 1993, received at the Court of Justice on 14 December 1993, the Verwaltungsgericht Frankfurt am Main referred to the Court of Justice for a preliminary ruling under Article 177 of the Treaty two questions on the validity of Title IV and Article 21(2) of Regulation No 404/93. Those questions had been raised in proceedings between Atlanta Fruchthandelsgesellschaft mbH and 17 other companies in the Atlanta group and the Bundesamt für Ernährung und Forstwirtschaft (Federal Office of Food and Forestry) concerning the allocation of import quotas for third country bananas.

26 On 9 November 1995, the Court of Justice, in answer to the questions referred to it by the Verwaltungsgericht Frankfurt am Main, ruled that consideration of Title IV and Article 21(2) of Regulation No 404/93, in the light of the grounds of the order for reference, had disclosed no factor of such a kind as to affect their validity (Case C-466/93 *Atlanta Fruchthandelsgesellschaft (II)* v *Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3799).

27 Between 8 December 1994 and 6 January 1995, in response to a request from this Court, the parties submitted their observations on the question as to whether the judgment in Case C-280/93 *Germany* v *Council* had any consequences for this proceeding. Between 4 and 16 January 1996, in response to a request from this Court, the parties submitted their observations on the question as to whether the judgment in Case C-466/93 *Atlanta Fruchthandelsgesellschaft (II)* v *Bundesamt für Ernährung und Forstwirtschaft* had any consequences for this proceeding.

28 In view of the order made by the Court of Justice on 21 June 1993, dismissing the applicants' action as inadmissible in so far as it sought annulment of provisions of Regulation No 404/93, this Court will consider only the claims for damages submitted by the applicants.

Forms of order sought

29 The applicants claim that the Court should:

— order the European Community, represented by the Council and the Commission, to pay compensation to the first applicant for the damage suffered or to pay compensation to Atlanta Handels-und Schiffahrts-Gesellschaft mbH, as the case may be;

— order the defendants to pay the costs.

30 The Council contends that the Court should:

— dismiss the action as unfounded;

— order the applicants to pay all the costs, including the costs relating to the action for annulment.

31 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicants to pay all the costs, including the costs relating to the action for annulment.

32 The French Republic submits that the Court should:

— dismiss the action as unfounded.

33 The United Kingdom submits that the Court should:

— dismiss the action as unfounded.

Substance

34 In support of their claim for damages, the applicants advance 14 pleas in law to show that the Council and Commission acted unlawfully. In their observations as to the consequences of the judgment in Case C-280/93 *Germany* v *Council* and in their reply they state that they maintain all the pleas advanced in their application but concentrate on the following four: breach of the principle of non-discrimination; breach of the principle of protection of legitimate expectations; breach of the fundamental freedom to pursue an economic activity and infringement of the rights of the defence. In their reply and in their observations of 16 January 1996 as to the consequences of the ruling in Case C-466/93 *Atlanta Fruchthandelsgesellschaft*, the applicants also submit that, even if the Court were to hold that the provisions in question of Regulation No 404/93 are valid, the first applicant is nevertheless entitled to damages under the second paragraph of Article 215 of the Treaty. The Court will examine this plea first, before going on to examine the four pleas on which the applicants have concentrated and, finally, the other pleas set out in the application.

Council liability for a lawful act

Arguments of the parties

35 The applicants contend that, in accordance with the general principles common to the laws of the Member States, the Community incurs liability even for lawful legislative acts, if the Community legislature imposes on particular traders exceptional burdens which do not affect the other traders in general.

36 The Council maintains that this plea is inadmissible on the ground that it is out of time. It refers to the first paragraph of Article 19 of the EC Statute of the Court of Justice, according to which an application must contain a brief statement of the grounds on which it is based, and to Article 48(2) of the Rules of Procedure of the Court of First Instance, according to which no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

37 The Council points out that the applicants did not raise this plea either in their application nor even in their statement of 5 January 1995 on the consequences to be drawn from the judgment in Case C-280/93 *Germany* v *Council*.

38 The Commission, like the Council, also contends that the issue of liability for a lawful act was raised too late.

Findings of the Court

39 Both Article 42(2) of the Rules of Procedure of the Court of Justice, before which the action was first brought, and Article 48(2) of the Rules of Procedure of this Court provide that no new plea in law may be introduced in the course of the

proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. It is settled case-law that a judgment of the Court of Justice confirming the validity of an act of the Community institutions cannot be regarded as a factor allowing a new legal ground to be introduced, since such acts are presumed to be valid and the judgments in Case C-280/93 *Germany* v *Council* and Case C-466/93 *Atlanta Fruchthandelsgesellschaft* merely confirmed the law as known to the applicants at the time when they brought their action (see Case 11/81 *Dürbeck* v *Commission* [1982] ECR 1251, paragraph 17).

40 In the present case, as the applicants have raised no matter justifying the introduction of a new plea as to the Council's liability for a lawful act, the Court finds that this plea is out of time and therefore inadmissible.

Breach of the principle of non-discrimination

Arguments of the parties

41 The applicants accept that in Case C-280/93 *Germany* v *Council* the Court of Justice held that a distinction between traders marketing third country bananas and traders marketing Community and ACP bananas was justified. However, they consider that the judgment in that case, although implicitly recognizing its importance, did not address the question of the impossibility for traders in the first category to have access to the market. They refer in this regard to paragraph 74 of the judgment, in which it is stated that one of the objectives of the regulation is that of integrating previously compartmentalized markets. According to the applicants, such integration implies that traders marketing third country bananas must have access to Community and ACP bananas.

42 They then refer to the order of the Court of Justice of 29 June 1993 in Case C-280/93 R *Germany* v *Council* [1993] ECR I-3667, in particular paragraph 41, where it is stated that '... it is not sufficiently clear that the contested system of apportionment will deprive the German importers of a substantial portion of their market share, particularly as it is not evident why those importers should not succeed in supplying themselves with Community and ACP bananas'.

43 The applicants conclude that, having regard to the circumstances of the present case, there is discrimination between traders marketing Community and ACP bananas and traders marketing third country bananas since the latter have in practice no access to Community and ACP bananas.

44 The Council rejects this interpretation of the judgment in Case C-280/93 *Germany* v *Council*. It points out that in that judgment the Court stated that where the Community legislature is obliged, in connection with the adoption of rules, to assess their future effects, which cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question.

45 The Council adds that the Court held that it had not been proved that the measures adopted by the Council were manifestly inappropriate to achieve the objective pursued by Regulation No 404/93. It also disputes the applicants' statement that Community or ACP bananas are not available on the German market.

Findings of the Court

46 It is settled case-law that the principle of non-discrimination is one of the fundamental principles of Community law (see Case C-280/93 *Germany* v *Council*, paragraph 67). This principle requires that comparable situations should not be treated in a different manner unless the difference in treatment is objectively justified. As was found in Case C-280/93 *Germany* v *Council*, the situations of the categories of traders amongst whom the tariff quota was divided were not comparable before Regulation No 404/93 was adopted. Those categories of traders were also affected differently by the measures adopted and the Court of Justice specifically recognized that traders who had traditionally been supplied by third country bananas would now find their import possibilities restricted. However, the Court considered that such a difference in treatment appeared to be inherent in the objective of integrating previously compartmentalized markets and in providing a guarantee of disposal of Community production and traditional ACP production (paragraph 74). The Court also found that the machinery for dividing the tariff quota among the various categories of traders was intended to encourage traders in Community and traditional ACP bananas to obtain supplies of third country bananas and to encourage importers of third country bananas to distribute Community and ACP bananas (paragraph 83). It thus recognized that Regulation No 404/93 was not intended to establish identical treatment between the various categories of traders.

47 The Court also found that it was necessary for Regulation No 404/93 to restrict the volume of imports of third country bananas into the Community in connection with the introduction of a common organization of the market (paragraph 82).

48 Finally, the Court held that it had not been demonstrated that the Council adopted measures which were manifestly inappropriate for achieving the objective pursued by Regulation No 404/93 (paragraph 95).

49 It should be added that in Case C-466/93 *Atlanta Fruchthandelsgesellschaft* the Court of Justice held that the difficulties in applying Regulation No 404/93 to which the applicants had referred could not affect the validity of the regulation (paragraph 11). Similarly, the consequences in practice of the adoption of Regulation No 404/93 to which the applicants refer cannot be taken into consideration by this Court in this case, since it must examine the question of the legality of Regulation No 404/93 only in the light of the pleas advanced by the applicants.

50 The Court therefore finds that the applicants have not proved that the defendant institutions failed to observe the principle of non-discrimination. This plea must therefore be dismissed as unfounded.

Breach of the principle of protection of legitimate expectations

Arguments of the parties

51 The applicants first point out that the principle of the protection of legitimate expectations is not one of the grounds advanced by Germany in the *Germany* v *Council* case.

52 They accept that they cannot claim to have had a legitimate expectation that the conditions which existed before 1 July 1993 would be maintained. However, they contend that they were entitled to expect appropriate transitional measures to be adopted so that they could gradually adapt themselves to the new arrangements. They maintain that transitional arrangements would have allowed them to mitigate their losses and maintain jobs or gradually phase them out.

53 The applicants submit that, since such transitional arrangements were not adopted, the damage they have suffered can be made good only by an award of compensation. In support of their case they refer to the judgment of the Court of Justice in Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraph 47, in which the Court held that, on the grounds of protection of legitimate expectations, the Community had to compensate a trader for the loss which it had suffered owing to the abolition of compensatory amounts in the performance of export operations in which it had been engaged.

54 The Council contends that, contrary to the applicants' assertion, the Court did examine in its judgment in the *Germany* v *Council* case the question of a breach of the principle of protection of legitimate expectations. It maintains that it is clear from the reasoning of the Court's judgment that it considered that the absence of transitional measures did not constitute a breach of this principle.

Findings of the Court

55 The principle of protection of legitimate expectations is one of the fundamental principles of the Community legal order. Nevertheless, traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained. This is particularly true in an area such as the common organization of the markets the objectives of which require constant adjustments in order to meet changes in economic circumstances (see, in particular, Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni* [1994] ECR I-4863, paragraph 57). Even though Germany did not rely on the principle of protection of legitimate expectations as one of its pleas in Case C-280/93 *Germany* v *Council*, the Court of Justice did confirm in that judgment that a trader could not claim an acquired right or even a legitimate expectation to the effect that an existing situation which was capable of being altered by decisions taken by the Community institutions within the limits of their discretionary power would be maintained (paragraph 80).

56 Moreover, the possibility of a breach of that principle was raised in the reference made by the national court in Case C-466/93 *Atlanta Fruchthandelsgesellschaft.* Nevertheless, the Court of Justice, when finding that the national court had not raised any grounds of invalidity such as to affect the assessment of the validity of Regulation No 404/93, considered that there had been no such breach.

57 In the absence of specific assurances given by the administration, no one may claim a breach of the principle of protection of legitimate expectations (see Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, paragraph 72). The applicants have adduced no evidence of such assurances either in the Commission's previous practice or in the specific context of the introduction of the common organization of the markets in question here.

58 It follows that the applicants have not established a breach of the principle of protection of legitimate expectations in the present case and that the plea of breach of this principle must be dismissed.

Breach of the fundamental freedom to pursue an economic activity

Arguments of the parties

59 The applicants claim that the question of fundamental rights was considered in Case C-280/93 *Germany* v *Council* only in an abstract and general way and that the individual rights of an actual trader were not considered at all. It therefore asks this Court to rule on the question as to whether actual application of Regulation No 404/93 has in fact infringed their particular fundamental rights.

60 They point out in particular that they have had to close down their businesses and carry out collective redundancies since Regulation No 404/93 was adopted and claim that the contested regulation has infringed their fundamental right to pursue an economic activity.

61 The Council considers that it is clear from the judgment in Case C-280/93 *Germany* v *Council* that no traditional trader in third country bananas may claim a breach of his fundamental right to pursue an economic activity.

Findings of the Court

62 It is settled case-law that freedom to pursue an economic activity is one of the general principles of Community law. It is not, however, an absolute prerogative and must be considered in relation to its social function. It confers the assurance that a trader will not be arbitrarily deprived of the right to pursue his activity but it does not guarantee him a particular volume of business or a specific share of a given market. The guarantees accorded to traders cannot in any event be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity (see Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 14). It follows that restrictions may be placed on the freedom to pursue an economic activity, particularly in a common market organization, provided that they are required in order to meet objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which entrenches upon the very substance of the right guaranteed (see Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraph 15).

63 In this regard, it should be noted that the Court of Justice has already held in Case C-280/93 *Germany* v *Council* that the restriction imposed by Regulation No 404/93 on the freedom of traditional traders in third country bananas to pursue

their trade or business met objectives of general Community interest and did not impair the very substance of that right (paragraph 87). Again, it should be recalled that in Case C-466/93 *Atlanta Fruchthandelsgesellschaft* the Court observed that, while the applicants had referred to difficulties in applying Regulation No 404/93 and the resulting consequences for their activities, such circumstances could not affect the validity of the regulation (paragraph 11).

64 The plea of breach of the fundamental right to pursue an economic activity must therefore be dismissed as unfounded.

Breach of the rights of the defence

Arguments of the parties

65 The applicants point out that respect for the rights of the defence is guaranteed as one of the fundamental rights and that it encompasses the right to be heard in administrative procedures which may lead to the imposition of penalties or other measures (see, for example, Joined Cases C-97/87, C-98/87 and C-99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165, paragraph 12). The applicants point out that, in the present case, before Regulation No 404/93 was adopted, the Commission had made it a precondition of a hearing that all traders speak 'with one voice'. That condition was, in their view, impossible to fulfil because of the divergent interests of the various traders. In those circumstances, the Commission did not hear their views, which meant that the Community institutions completely failed to take into consideration the particular situation of a clearly distinct category of traders. According to the case-law of the Court of Justice, such conduct on the part of the Community legislature constitutes a serious infringement of legal rights (see Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 16, and Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 27).

66 The applicants dispute the assertion, made in the Council's defence, that the question of observance of the rights of defence of the traders, including those of the applicants, was examined in Case C-280/93 *Germany* v *Council*. They maintain that the Court of Justice made no reference to this issue in its judgment.

67 As regards the Council's argument that the right to be heard is not available in a procedure leading to the adoption of a legislative measure, the applicants reply that, as far as an individual is concerned, it makes no difference whether his legal situation is affected by the outcome of an administrative procedure or by the outcome of a legislative procedure. In a field such as that governed by agricultural law, in which the institutions have quite considerable power, the legislature must, before acting, give all the parties the chance to express their views.

68 The Council states that, under the provisions of the Treaty, it had no obligation to consult the economic entitites concerned before adopting Regulation No 404/93. It points out that consultation of representatives of the various groups participating in economic and social life takes place in the Community's legislative process only in the form of consultation of the Economic and Social Committee and that such consultation did in fact take place in the case of Regulation No 404/93.

69 As regards the applicants' reference to the judgment in Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, in which the Court of First Instance stated that the principle of the right to be heard must be respected in all circumstances, the Council observes that this consideration applies only to procedures leading to decisions which are addressed to specific persons or to binding measures which are of direct and individual concern to those persons. It points out that, in the present case, by its order of 21 June 1993, the Court of Justice dismissed the applicants' action in so far as it sought annulment of certain provisions of Regulation No 404/93, on the ground that the applicants were not concerned by it, either directly or individually.

Findings of the Court

70 Contrary to the applicants' argument, the right to be heard in an administrative procedure affecting a specific person cannot be transposed to the context of a legislative process leading to the adoption of general laws. The judgment in *CB and Europay* v *Commission*, cited above, followed a line of settled authority in competition law, according to which undertakings suspected of having infringed rules of the Treaty must be heard before any measures, and particularly sanctions, are taken against them. However, that case-law must be considered in its proper context and should not be extended to the context of a Community legislative process culminating in the enactment of legislation involving a choice of economic policy and applying to the generality of the traders concerned.

71 In the context of a procedure for the adoption of a Community act based on an article of the Treaty, the only obligations of consultation incumbent on the Community legislature are those laid down in the article in question. In its judgment in Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, the Court of Justice held that the obligation to consult the Parliament, as laid down in various places in the Treaty, reflects at Community level the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly.

72 Representation of the various groups of economic and social life also takes place in the Community's legislative process in the form of consultation of the Economic and Social Committee. In the present action, both the Parliament and that committee were in fact consulted before Regulation No 404/93 was adopted, as provided for in the Treaty.

73 The Court considers that, contrary to the thesis advanced by the applicants, the Commission was under no further obligation to consult the various categories of traders concerned by the Community market in bananas. It is quite feasible for the Community legislature to take into consideration the particular situation of distinct categories of traders without hearing them all individually. The Court recalls in this regard that in Case C-280/93 *Germany* v *Council* the Court of Justice held that the applicant had not shown that the Council had adopted manifestly inappropriate measures or that it had carried out a manifestly erroneous assessment of the information available to it at the time when the regulation was adopted (paragraph 95). Since Regulation No 404/93 contains provisions concerning traders marketing third country bananas, it follows that the Court of Justice implicitly recognized that the Community legislature had not failed to take into consideration the interests of this category of traders.

74 It follows from the foregoing considerations that the plea of breach of the rights of the defence must be dismissed.

Breach of the provisions relating to the legislative procedure; breach of Article 190 of the Treaty; breach of the Banana Protocol; wrong choice of legal basis; breach of the principle of proportionality; breach of the right to property; breach of the rules of competition; breach of the General Agreement on Tariffs and Trade and breach of the Fourth Lomé Convention

Arguments of the parties

75 As regards the plea of breach of the provisions relating to the legislative procedure, the applicants maintain in substance that the Council did not respect the Commission's right of initiative and that the Parliament ought to have been consulted again after the Commission's initial proposal had been amended. As regards the plea of breach of Article 190 of the Treaty, the applicants contend that Regulation No

404/93 is not sufficiently reasoned. As regards the plea of breach of the Banana Protocol, the applicants contend that the Council did not have the power to repeal that Protocol. In support of their plea alleging that the wrong legal basis was chosen, the applicants contend that the legal basis chosen for the regulation did not ensure that producers marketing ACP bananas received fair prices on the Community market and that the basis chosen for the raising of customs duties was also wrong. As regards the plea of breach of the principle of proportionality, the applicants contend in substance that Regulation No 404/93 infringed that principle owing to the disproportionate restrictions which it placed on the importation of third country bananas. In support of the plea of breach of the right to property, the applicants contend in substance that the import restrictions and the arrangements for dividing the tariff quota had the effect of expropriating them. As regards the plea of breach of the rules of competition, the applicants contend in substance that the import restrictions and the system of import licences provided for by Regulation No 404/93 distort competition between traders in the Community. In support of the plea of breach of the General Agreement on Tariffs and Trade (hereinafter 'GATT'), the applicants contend that the import restrictions created by Article 17 and 18 of Regulation No 404/93 infringe the rules of the GATT. As regards the plea of breach of the Fourth Lomé Convention, the applicants contend in substance that Regulation No 404/93 infringes Articles 168 and 169 of that Convention.

76 The Council and the Commission consider that all those arguments have already been dismissed by the Court of Justice in its judgment in the *Germany* v *Council* and *Atlanta Fruchthandelsgesellschaft* cases.

Findings of the Court

77 The plea of breach of the provisions relating to the procedure for the adoption of Regulation No 404/93 was dismissed in the judgment in Case C-280/93 *Germany* v *Council*, paragraphs 27 to 43 inclusive. The plea of breach of Article 190 of the

Treaty was dismissed in the ruling in Case C-466/93 *Atlanta Fruchthandelsgesellschaft*, paragraphs 12 to 18 inclusive. The plea of breach of the Banana Protocol was dismissed in Case C-280/93 *Germany v Council*, paragraphs 113 to 118 inclusive. The plea of wrong choice of legal basis was dismissed in Case C-280/93 *Germany* v *Council*, paragraphs 53 to 57 inclusive. The plea of breach of the principle of proportionality was dismissed in Case C-280/93 *Germany* v *Council*, paragraphs 88 to 97 inclusive. The plea of breach of the right to property was dismissed in Case C-280/93 *Germany* v *Council*, paragraphs 77 to 79 inclusive. The plea of breach of the rules of competition was dismissed in Case C-280/93 *Germany* v *Council*, paragraphs 58 to 62 inclusive. The plea of breach of the rules of GATT was dismissed in Case C-280/93 *Germany* v *Council*, paragraphs 103 to 112 inclusive. And, finally, the plea of breach of the Fourth Lomé Convention was dismissed in Case C-280/93 *Germany* v *Council*, paragraphs 100 to 102 inclusive.

78 The Court finds that, for the same reasons explained by the Court of Justice in Case C-280/93 *Germany* v *Council* and Case C-466/93 *Atlanta Fruchthandelsgesellschaft* and referred to above in paragraph 77, all these pleas must be dismissed as unfounded.

Misuse of powers

Arguments of the parties

79 The applicants contend that the import arrangements put in place by Regulation No 404/93 are intended to ensure that producers marketing ACP bananas receive 'adequate income' but that this aim cannot be pursued on the basis of Article 43(2) of the Treaty. They further argue that the way in which it divides the tariff quota bears no logical relation to the aim of protecting Community production and the obligations to purchase ACP bananas but is designed to favour importers of Community and ACP bananas. From this they conclude that Regulation No 404/93 was really adopted in order to achieve aims other than those relied on.

80 The Council and the Commission have not replied in detail to this plea. However, the Council makes the general point that in Case C-280/93 *Germany* v *Council* the Court of Justice considered that Regulation No 404/93 was consistent with the aims of the common agricultural policy and that it did not exceed the limits laid down by Articles 39, 42 and 43 of the Treaty. The Commission, for its part, observes in its observations on the pursuit of the procedure after the judgment in Case C-280/93 *Germany* v *Council* that all the pleas raised by the applicants against Regulation No 404/93 had already been examined by the Court of Justice.

Findings of the Court

81 A measure may be vitiated by misuse of powers if it appears from objective, relevant and consistent indications, to have been adopted in order to achieve purposes other than those relied on (Case C-323/88 *Sermes* [1990] ECR I-3027, paragraph 33). The Court of Justice has already held in Case C-280/93 *Germany* v *Council* that a development policy favouring ACP States, such as that pursued by the regulation, is quite in keeping with the objectives of the common agricultural policy and that, furthermore, in the context of the implementation of internal policies, and particularly in agriculture, the Community institutions cannot disregard the international obligations entered into by the Community under the Lomé Convention (paragraphs 53 to 57 inclusive). It must also be observed that the Court of Justice expressly held that Regulation No 404/93 is intended to ensure the disposal of Community production and traditional ACP production (paragraph 74).

82 This Court therefore considers that the applicants have not shown that the regulation was in any way intended to achieve purposes other than those which it purports to achieve and that this plea must therefore be dismissed as unfounded.

Conclusion

83 According to settled case-law, in order for the Community to incur non-contractual liability under the second paragraph of Article 215 of the Treaty and

for the right to compensation to be enforceable, a number of conditions must be fulfilled: the conduct alleged against the institutions must be unlawful, actual damage must have been suffered and there must be a causal link between that conduct and the damage alleged. Furthermore, in the case of legislative measures involving choices of economic policy, the Community can incur liability only if a sufficiently serious breach of a superior rule of law for the protection of individuals has occurred. In a legislative context such as this, the Community can incur liability only if the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (Joined Cases C-104/89 and C-37/80 *Mulder* v *Council and Commission*, cited above, paragraph 12).

84 It follows from all the foregoing that no illegality such as would impose non-contractual liability on the Community can be found against the defendant parties. Consequently, the action must be dismissed, and it is not necessary to decide whether the other conditions under which the Community incurs liability are fulfilled.

Costs

85 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. Since the applicants have been unsuccessful and the Council and the Commission have applied for costs to be awarded against them, the applicants must be ordered to bear all their own costs and to pay those incurred by the Council and the Commission in this case, including the costs relating to the proceedings for interim relief (see paragraphs 16 and 18 above). In accordance with Article 87(4) of the Rules of Procedure, the Member States which have intervened in the case must be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

1. Dismisses the application;

2. Orders the applicants jointly and severally to pay all the costs incurred in this case, including the costs relating to the proceedings for interim relief.

3. Orders the interveners to bear their own costs.

Lenaerts García-Valdecasas Lindh

Azizi Cooke

Delivered in open court in Luxembourg on 11 December 1996.

H. Jung K. Lenaerts

Registrar President