JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
20 March 2001 *

In Case T-30/99,

Bocchi Food Trade International GmbH, established in Bergisch Gladbach (Germany), represented by G. Meier, avocat,

applicant,

v

Commission of the European Communities, represented by K.-D. Borchardt and H. van Vliet, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

APPLICATION for compensation for the loss which the applicant has suffered as a result of the Commission introducing, under 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), provisions which are alleged to conflict with World Trade Organisation (WTO) rules and certain general principles of Community law,

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

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

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 4 October 2000,

gives the following

Judgment

Legal background

1 Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1) introduced, from 1 July 1993, common arrangements for the importation of bananas, which replaced the various national arrangements. A distinction was drawn between 'Community bananas' produced in the Community, 'third-country bananas' originating in third countries other than the African, Caribbean and Pacific (ACP) States, 'traditional ACP bananas' and 'non-traditional ACP bananas'. 'Traditional ACP bananas' and 'non-traditional ACP bananas' meant the quantities of bananas exported by the ACP States which did not exceed or did exceed, respectively, the quantities traditionally exported by each of those States as set out in the Annex to Regulation No 404/93.

2 In order to ensure satisfactory marketing of bananas produced in the Community and bananas originating in the ACP States and other third countries, Regulation No 404/93 provided for the opening of an annual tariff quota of 2.2 million tonnes (net weight) for imports of bananas from third countries and non-traditional ACP bananas.

3 Article 19(1) of Regulation No 404/93 (old version) divided the tariff quota as follows: 66.5% for the category of operators who had marketed third-country and/or non-traditional ACP bananas (category A), 30% for the category of

operators who had marketed Community and/or traditional ACP bananas (category B) and 3.5% for the category of operators established in the Community who had started marketing bananas other than Community and/or traditional ACP bananas from 1992 (category C).

4 The first sentence of Article 19(2) of Regulation No 404/93 (old version) read as follows:

'On the basis of separate calculations for each of the categories of operators referred to in paragraph 1... each operator shall obtain import licences on the basis of the average quantities of bananas that he has sold in the three most recent years for which figures are available.'

5 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) defined, *inter alia*, the criteria for determining the types of operators in categories A and B who could apply for import licences, according to the activities which those operators had carried out during the reference period.

6 Those import arrangements were the subject of a dispute settlement procedure within the framework of the World Trade Organisation (WTO) following complaints from some third countries.

7 That procedure gave rise to reports from the WTO Panel of 22 May 1997 and a report from the WTO Standing Appellate Body of 9 September 1997, which was adopted by the WTO Dispute Settlement Body by decision of 25 September 1997. In that decision the Dispute Settlement Body declared certain aspects of the arrangements governing banana imports into the Community incompatible with the rules of the WTO.

8 In order to comply with that decision, the Council adopted Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation No 404/93 (OJ 1998 L 210, p. 28). The Commission subsequently adopted 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).

9 Under the new arrangements for banana imports, the allocation of the quota between three different categories of operators was abolished. Regulation No 2362/98 provided that the quotas were to be divided merely between 'traditional operators' and 'newcomers' as defined in that regulation. The subdivision of operators into categories A and B depending on the types of activities which they carried out on the market was also abolished.

10 Article 4 of Regulation No 2362/98 reads as follows:

'1. Each traditional operator registered in a Member State in accordance with Article 5 shall receive, for each year and for all the origins listed in Annex I, a

single reference quantity based on the quantities of bananas actually imported during the reference period.

2. For imports carried out in 1999 under the tariff quotas or as traditional ACP bananas, the reference period shall be made up of the years 1994, 1995 and 1996.'

11 Article 5(2) and (3) of Regulation No 2362/98 reads:

'2. For the purposes of determining their reference quantity, each operator shall send to the competent authority by 1 July each year:

(a) a figure for the total quantity of bananas from the origins listed in Annex I actually imported during each of the years making up the reference period;

(b) the supporting documents detailed in paragraph 3.

3. Actual imports shall be attested by both of the following:

(a) by presenting copies of the import licences used... by the holder... in order to release the relevant quantities for free circulation; and

(b) by presenting proof of payment of the customs duties due on the day on which customs import formalities were completed. The payment shall be made either direct to the competent authorities or via a customs agent or representative.

Operators furnishing proof of payment of customs duties, either direct to the competent authorities or via a customs agent or representative, for the release into free circulation of a given quantity of bananas without being the holder or transferee holder of the relevant import licence used for this purpose... shall be deemed to have actually imported the said quantity provided that they have registered in a Member State under Regulation (EEC) No 1442/93 and/or that they fulfil the requirements of this Regulation for registration as a traditional operator. Customs agents or representatives may not call for the application of this subparagraph'.

12 Article 6(3) of Regulation No 2362/98 provides:

'Using the information received under paragraph 2, and in light of the total volume of tariff quotas and traditional ACP bananas as referred to in Article 2,

the Commission shall, where appropriate, set a single adjustment coefficient to be applied to each operator's provisional reference quantity'.

13 Article 17 of Regulation No 2362/98 provides:

'Where, for a given quarter and for any one or more of the origins listed in Annex I, the quantities applied for appreciably exceed any indicative quantity fixed under Article 14, or exceed the quantities available, a percentage reduction to be applied to the amounts requested shall be fixed.'

14 Article 18 of Regulation No 2362/98 provides:

'1. Where a percentage reduction has been fixed for one or more given origins under Article 17, operators who have applied for import licences for the origin(s) concerned may:

(a) either renounce their use of the licence by informing the relevant issuing authority accordingly within 10 working days of publication of the Regulation fixing the reduction percentage, whereupon the security lodged against the licence shall be released immediately; or

(b) submit one or more fresh licence applications for the origins for which available quantities have been published by the Commission, up to an amount equal to or smaller than the quantity applied for but not covered by the original licence issued. Such requests shall be submitted within the time-limit laid down in point (a) and shall be subject to all the conditions governing licence applications.

2. The Commission shall immediately determine the quantities for which licences can be issued for each of the origins concerned.'

15 Article 29 of Regulation No 2362/98 provides:

'If the quantities covered by applications for licences in respect of the first quarter of 1999 covering imports from one or more of the origins listed in Annex I exceed 26 % of the quantities set out in that Annex, the Commission shall fix a percentage reduction to be applied to all applications in respect of the origin(s) concerned.'

16 In pursuance of that article, Article 1 of Commission Regulation (EC) No 2806/98 of 23 December 1998 on the issuing of import licences for bananas under the tariff quotas and for traditional ACP bananas for the first quarter of 1999 and on the submission of new applications (OJ 1998 L 349, p. 32) provides:

'Import licences shall be issued under the arrangements for the importation of bananas, tariff quota arrangements and arrangements for traditional ACP

bananas for the first quarter of 1999 for the quantity indicated in the licence application, multiplied by reduction coefficients of 0.5793, 0.674 and 0.708 for applications indicating the origins "Colombia", "Costa Rica" and "Ecuador" respectively.'

Facts and procedure

17 The applicant, Bocchi Food Trade International GmbH, is a wholesale business trading in fruit and vegetables. It is a subsidiary of the Bocchi Group, an importer of fruit and vegetables whose registered office is in Verona (Italy). It handles all the Bocchi Group's banana business. Until the entry into force of Regulation No 2362/98 the applicant was in Category A, and it is a traditional operator for the purposes of that regulation.

18 By decision of the competent national authorities of 8 December 1998, the applicant's provisional reference quantity for 1999 was established at 6 660 977 kg and that quantity was reduced by 400 744 kg by application of the adjustment coefficient of 0.939837 set by the Commission under Article 6(3) of Regulation No 2362/98. On 5 January 1999 the applicant lodged an appeal against that decision with the national authorities.

19 On 14 December 1998 the applicant applied, in respect of the first quarter of 1999, for rights to import 1 627 660 kg of bananas originating in Ecuador. A

coefficient of 0.708 was applied to the quantity for which application was made, reducing that quantity by 475 277 kg. On 12 January 1999 the applicant also contested that reduction in a claim to the competent authorities.

20 The applicant subsequently applied, under Article 18(1)(b) of Regulation No 2362/98, in respect of quantities not allocated, for rights to import 110 000 kg of bananas originating in other countries. As a result of the application of the reduction coefficient, the quantity applied for was reduced by 30 822 kg.

21 It was in those circumstances that the applicant, by application lodged at the Registry of the Court of First Instance on 28 January 1999, brought the present action to recover compensation for the loss it suffered as a result of the adoption by the Commission of Regulation No 2362/98. The applicant pleaded *inter alia* infringement of certain agreements contained in Annex 1 to the Agreement establishing the WTO ('the WTO Agreement') in support of its action.

22 In Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 47, the Court held that 'having regard to their nature and structure, [all the agreements and memoranda contained in Annexes 1 to 4 of the WTO Agreement] are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions'.

23 By letter of 16 December 1999, the parties were called on to submit their observations on the possible consequences of that judgment. The Commission and the applicant lodged their observations on 6 and 14 January 2000 respectively.

24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure. The parties presented oral argument and their replies to the questions from the Court at the hearing in open court on 4 October 2000.

Forms of order sought

25 The applicant claims that the Court should:

— order the Commission to compensate the applicant for the loss it suffered as a result, first, of the application of the adjustment coefficient to the reference quantity for 1999 provisionally established by the competent authorities and, second, of the application of the reduction coefficient to the quantities in respect of which it had applied for the grant of import licences;

— order the defendant to pay the costs.

26 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

27 Although it has not formally raised an objection of inadmissibility, the Commission considers that the action is inadmissible because the applicant should first have tried to prevent the alleged loss from occurring by bringing an action before the competent national court. A claim for compensation under Article 178 of the EC Treaty (now Article 235 EC) and the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) constitutes an ancillary remedy in the Commission's view, since the alleged loss was caused by a national administrative measure adopted in order to implement Community law (see the judgments of the Court of Justice in Case 119/88 *AERPO and Others* v *Commission* [1990] ECR I-2189 and Case C-282/90 *Vreugdenhil* v *Commission* [1992] ECR I-1937, paragraph 12, and those of the Court of First Instance in Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379 and Case T-93/95 *Laga* v *Commission* [1998] ECR II-195, paragraph 33). It contends that it is for the competent national authorities applying the Community rules under a national administrative measure to establish reference quantities, in accordance with the provisions of Regulation No 2362/98 (see the judgments of the Court of First Instance in Case T-47/95 *Terres rouges and Others* v *Commission* [1997] ECR II-481, paragraphs 57 and 59, and that of the Court of Justice in Case C-73/97 P *France* v *Comafrica and Others* [1999] ECR I-185, paragraph 40).

28 The Commission contends that the ancillary nature of the claim for compensation is due to the fact that review of the national administrative measure falls exclusively to the national courts, which may refer the matter to the Court of Justice to assess the validity of the relevant Community provisions, by way of a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) (see *France* v *Comafrica and Others*, paragraph 40). It is only where national courts are unable to guarantee adequate legal protection and/or the possibility of obtaining compensation that a direct action would be admissible.

29 The applicant disputes the Commission's view. It contends that no legal remedy is open to it before the national courts. Indeed, it has already challenged by means of administrative appeals the decisions of the national authorities allocating licences (see paragraphs 18 and 19 above), procedures which have now been disposed of. According to the applicant, it is not possible under German law to contest the legality of those decisions in any other way. This claim for compensation is therefore the only remedy available to it.

30 It stresses that the national administration is required to comply with the conditions laid down by the Commission in Regulation No 2362/98. Any loss suffered by the applicant which is the subject of this action is thus incurred as a result of the rules laid down by the Commission and not the decisions adopted at national level.

Findings of the Court

31 It should be noted that the unlawful conduct alleged in this case is not that of a national body but that of a Community institution. Any loss arising from the implementation of the Community legislation by the German authorities would

therefore be attributable to the Community (see, for example, the judgments of the Court of Justice in Case 126/76 *Dietz* v *Commission* [1977] ECR 2431, paragraph 5, Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 9, and Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraphs 18 and 19, and of the Court of First Instance in Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 71).

32 Since the Community judicature has exclusive jurisdiction under Article 215 of the Treaty to hear actions seeking compensation for damage attributable to the Community (Joined Cases 106/87 to 120/87 *Asteris and Others* v *Greece and EEC* [1988] ECR 5515, paragraph 14, and *Vreugdenhil*, paragraph 14), remedies available under national law cannot automatically guarantee effective protection of the applicant's rights (see *Exporteurs in Levende Varkens*, paragraph 72).

33 In that connection, as the Commission acknowledged at the hearing, even if the Court, in the context of proceedings for a preliminary ruling, were to consider that the rules applicable were such as to cause damage, the national court would not have power to adopt itself the measures needed in order to compensate in full the loss alleged by the applicant in this case, with the result that a direct application to the Court of First Instance on the basis of Article 215 of the Treaty would still be necessary in such circumstances (see to that effect *Dietz*, paragraph 5).

34 The Commission's challenge to the admissibility of this action must therefore be dismissed.

Non-contractual liability of the Community

35 The applicant contends, in substance, that the Commission is guilty of unlawful conduct in that, first, it infringed the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Import Licensing Procedures, which are contained in Annex 1 to the WTO Agreement, secondly, it discriminated against small and medium-sized businesses and infringed the right of freedom to pursue a trade or business and, thirdly, it infringed the principle of proportionality.

The possibility of relying on certain agreements contained in Annex 1 to the WTO Agreement

Arguments of the parties

36 The applicant contends that the provisions of the GATT constitute superior rules of law, in which the prohibitions on discrimination and the most-favoured-nation clause must be regarded as rules for the protection of individuals.

37 It considers that the WTO Agreement and the annexes thereto constitute a genuine world trade order with its own legal system and jurisdiction. The new WTO law is not negotiable, and contains strict prohibitions which can be restricted or temporarily set aside only by measures of the WTO and not by unilateral measures on the part of a Member State. Some of the provisions of that new law are therefore directly applicable in Community law.

38 As regards the possible inferences to be drawn from *Portugal* v *Council*, cited in paragraph 22 above, the applicant acknowledged, in response to the question raised by the Court of First Instance, that the Court of Justice had held that the WTO provisions did not have general direct effect within the Community legal system.

39 It added, however, that the judgment in that case did not conflict with the arguments submitted in support of its action to the effect that the Community institutions were guilty of misuse of powers. The fact that the Community arrangements for banana imports had been declared incompatible with the WTO rules by a decision having the force of *res judicata* and the Community had undertaken to rectify the infringements concerned, in the applicant's view, precluded the Community institutions from adopting further provisions in breach of those rules.

40 The applicant put forward that argument at the hearing, stating that in the present case, since the Community had given an undertaking to the Dispute Settlement Body to repeal the provisions of its regulations which conflicted with the WTO rules, it had acted in breach of the principle *nemini licet venire contra factum proprium* when putting that undertaking into practice by adopting a regulation containing infringements of those rules. It explained that the principle expressed in that maxim, since it derives from the principle of good faith, constitutes a principle of Community law by which the legality of Community measures can be assessed by the Community judicature. The applicant is therefore entitled to plead infringement of the WTO rules on that ground also.

41 In addition, the applicant states that it does not seek to establish that the defendant was pursuing unlawful aims. Its contention is that the Commission, with full knowledge of the facts, infringed the WTO rules in order to achieve its ends, namely the organisation of the market in bananas. Such conduct constitutes a new category of misuse of powers.

42 Such misuse of powers means that the Commission is under an obligation to provide compensation irrespective of whether the WTO rules in question are designed to protect individuals. Individuals enjoy absolute protection against misuse of power by the Community institutions.

43 The Commission argues that the WTO rules do not have direct effect within the Community legal system and cannot therefore be relied on by individuals.

44 It observes that it is settled case-law that the 1947 GATT rules are not unconditional and that they cannot be recognised as being rules of international law which are directly applicable in the domestic legal systems of the contracting parties (see Case C-280/93 *Germany* v *Council* [1994] ECR I-4973). The Commission considers that that case-law applies also to the WTO Agreement and its annexes, since those documents have the same special features as those in the 1947 GATT provisions which meant that the latter could not have direct effect.

45 In answer to the question raised by the Court of First Instance concerning the possible inferences to be drawn from the judgment in *Portugal* v *Council*, cited above, the Commission stated that that judgment fully supports its view. According to the Commission, it is to be inferred from that judgment that the provisions of the WTO Agreement do not constitute a criterion for assessing the legality of Community secondary legislation. This means also that the finding by the Dispute Settlement Body that an act of Community secondary legislation is incompatible with the WTO rules does not imply that that act must be regarded as unlawful within the Community legal system, and therefore cannot make the Community incur liability under the second paragraph of Article 215 of the Treaty.

46 As regards the applicant's arguments alleging misuse of powers, the Commission considers that the Community can only incur liability on that ground under the same conditions as those applying to any other breach of rights or principles protected under the Community legal system.

47 The allegation of misuse of powers does not therefore mean that the applicant does not need to establish that the provisions which are alleged to have been infringed were intended to protect individuals.

48 Similarly, at the hearing the Commission stated that the applicant could not rely on the principle *nemini licet venire contra factum proprium* in order to disregard that condition.

Findings of the Court

49 It should be noted that according to established case-law, in order for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the alleged conduct of the Community institution concerned, actual damage and the existence of a causal link between that conduct and the alleged damage (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 54).

50 In Case C-352/98 P *Bergaderm and Others* v *Commission* [2000] ECR I-5291, paragraphs 41 and 42, the Court held that the right to reparation requires that the rule of law infringed be intended to confer rights on individuals and that the breach of such a rule be sufficiently serious.

51 As regards the first condition, it should be noted that it is clear from Community case-law that the WTO Agreement and its annexes are not intended to confer rights on individuals which they could rely on in court.

52 In this connection, the Court held in *Portugal* v *Council* (paragraph 36) that while it is true that the WTO Agreement and its annexes differ significantly from the provisions of GATT 1947 they nevertheless accord considerable importance to negotiation between the parties.

53 As regards, more particularly, the application of the agreements contained in the annexes to the WTO Agreement in the Community legal order, the Court of Justice held in *Portugal* v *Council*, paragraph 42, that, according to its preamble, the WTO Agreement, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to 'entering into reciprocal and mutually advantageous arrangements' and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain imbalance of obligations, or create special relations of integration with the Community.

54 The Court went on to observe that it is common ground that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the agreements contained in the annexes to the WTO Agreement that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law. The Court concluded that the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the agreements contained in the annexes to the WTO Agreement, which are based on 'reciprocal and mutually advantageous arrangements' and which must *ipso facto*

be distinguished from agreements concluded by the Community, may lead to disuniform application of the WTO rules. To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manœuvre enjoyed by their counterparts in the Community's trading partners (see *Portugal* v *Council*, paragraphs 43, 45 and 46).

55 The Court of Justice concluded that, having regard to their nature and structure, the agreements in the annexes to the WTO Agreement are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions (see *Portugal* v *Council*, paragraph 47).

56 It is clear from that judgment that as the WTO rules are not in principle intended to confer rights on individuals, the Community cannot incur non-contractual liability as a result of infringement of them.

57 In its observations on the conclusions to be inferred from the judgment in *Portugal* v *Council*, the applicant acknowledged that the WTO provisions had no general direct effect within the Community legal system. However, it argued that its action was founded on a new category of misuse of powers, in so far as the Commission had adopted a regulation infringing a decision declaring the Community system incompatible with the WTO rules and its undertaking to rectify the infringements thus established (see paragraphs 39 to 41 above), in breach of the principle *nemini licet venire contra factum proprium*.

58 That argument cannot be accepted. First, it is settled case-law that an act of a Community institution is vitiated by misuse of powers only if it was adopted with the exclusive or main purpose of achieving an end other than that stated (Case C-285/94 *Italy* v *Commission* [1997] ECR I-3519, paragraph 52) and that a

finding of misuse of powers may be made only on the basis of objective, relevant and consistent evidence (Joined Cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 168).

59 In the present case, the applicant does not establish, or even allege, that the Commission adopted Regulation No 2362/98 or some of its provisions with the purpose of achieving an end other than that stated, which was to adopt all the provisions needed in order to bring into effect the arrangements for importing bananas into the Community introduced by Regulation No 404/93, as amended by Regulation No 1637/98.

60 Similarly, the applicant's argument that this is a new category of misuse of powers must also be rejected.

61 To accept the applicant's line of argument would be to misinterpret the very definition of misuse of powers, which involves review by the Community judicature of the purpose of a measure and not its content.

62 Moreover, the applicant's argument that the Commission was guilty of misuse of powers in adopting a regulation containing infringements of the WTO rules, or by continuing infringements already established, when it had undertaken to comply with those rules, must likewise be rejected.

63 In that regard, it is only where the Community intends to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the annexes to the WTO Agreement,

that it is for the Court of Justice and the Court of First Instance to review the legality of the Community measure in question in the light of the WTO rules (see *Portugal* v *Council*, paragraph 49).

64 Neither the reports of the WTO Panel of 22 May 1997 nor the report of the WTO Standing Appellate Body of 9 September 1997 which was adopted by the Dispute Settlement Body on 25 September 1997 included any special obligations which the Commission 'intended to implement', within the meaning of the case-law, in Regulation No 2362/98 (see with regard to the 1947 GATT, Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 31). The regulation does not make express reference either to any specific obligations arising out of the reports of WTO Bodies, or to specific provisions of the agreements contained in the annexes to the WTO Agreement.

65 The applicant cannot therefore base its action on an alleged infringement of certain agreements contained in Annex 1 to the WTO Agreement in this case or on an alleged misuse of powers.

Discrimination against small and medium-sized businesses and infringement of the right of freedom to pursue a trade or business

Arguments of the parties

66 The applicant submits that the provisions laid down in Regulation No 2362/98 make it impossible in practice for small and medium-sized businesses like itself to

trade in bananas. This amounts in its view to discrimination against such businesses in favour of the multinationals, which is prohibited under the second subparagraph of Article 40(3) of the EC Treaty (now, after amendment, the second subparagraph of Article 34(2) EC).

67 The applicant stresses that the principle of equality of treatment does not mean that identical situations must not be treated differently. Moreover, different situations should not be treated similarly. A small or medium-sized importer of fruit and vegetables does not enjoy the same conditions for procuring and marketing bananas as those businesses which specialise in the production and marketing of bananas. However, Regulation No 2362/98 deals with both categories of business in the same way and thereby favours unilaterally the multinational companies.

68 Equal treatment of different situations in this way is unjustified. It is not possible to rely on the objectives of the organisation of the market in bananas in that connection. Admittedly, one of the fundamental objectives pursued by the Community in the context of Regulation No 2362/98 is, according to the sixth recital in the preamble to that regulation, to allow operators traditionally marketing bananas to experience competition from newcomers. However, it should also be possible for competition to exist within the category of traditional operators. Only rules which take into account market conditions are justified, provided they do not conflict with the objectives of the Community system as regards quantities.

69 The applicant also contends that the fundamental right of commercial freedom requires the defendant, when availing itself of its powers to organise the market in bananas, to ensure that operators can pursue their activities. The limits on that organising power are exceeded if the trade in bananas is disrupted to the extent that the quarterly quotas force operators to abandon their existing trade with particular producer countries and turn to other countries instead.

70 Although the Court held in *Germany* v *Council*, cited above, that there is no fundamental right to protection of market shares and structural support measures, it has not ruled on the infringement of commercial freedom in a case such as this.

71 The Commission challenges first of all the applicant's contention that small and medium-sized businesses are subjected to discrimination which favours the multinationals. It maintains that the alleged difference in their situation is not a special feature of the banana sector but a general phenomenon and that it already existed under the former market organisation. In order to eliminate that difference it is necessary to implement decisions relating to the conduct of market policy in a way that affords rights to small and medium-sized businesses different from those afforded to the multinationals. This solution might, however, create unjustified distortion of competition.

72 Referring to the case-law of the Court of Justice, in particular *Germany* v *Council*, the Commission contends that the infringement of the freedom to pursue a trade or business resulting from such rules is justified and does not impair the very substance of that right.

73 The Commission considers that since the applicant has not indicated the specific structural difficulties it has experienced as a result of the new rules, one can only suppose that it is concerned only with maintaining its own market share, which enjoys no protection according to case-law.

Findings of the Court

74 It is settled case-law that the principle of non-discrimination is one of the fundamental principles of Community law (see *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 (see Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 97).

75 In this connection it should be stressed that, even if it were possible that the situations of various categories of economic operators had been affected differently by Regulation No 2362/98, this would not constitute discriminatory treatment in so far as such treatment appears to be inherent in the objective of integrating markets within the Community (see *Germany* v *Council*, paragraph 74).

76 The applicant has stressed, however, that it is not possible to rely on the objectives of the market organisation for bananas in this case since the rules in issue do not take into account market conditions, namely that small and medium-sized businesses do not have the same procurement and marketing opportunities as the multinationals.

77 However, as the Commission has correctly stated, the situation is not a special feature of the banana sector but a general phenomenon and it already existed under the former market organisation.

78 Indeed, such differences in the effects of the rules, which are due to objective phenomena such as differences in size and market position, cannot be described

as 'discrimination' within the meaning of the Treaty (see to this effect Case 52/79 *Debauve and Others* [1980] ECR 833, paragraph 21). The applicant's contention would in fact involve political intervention on the part of the legislature in support of small and medium-sized businesses. However, even if such intervention were justified, the absence of it in the context of Regulation No 2362/98 cannot be considered to be a fault giving rise to the non-contractual liability of the Community.

79 Nor can the applicant rely on a breach of the principle of the freedom to pursue a trade or business in this case.

80 It should be noted in this connection that although the freedom to pursue a trade or business is one of the general principles of Community law, those principles are not absolute, but must be viewed in relation to their social function. Consequently, the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute disproportionate and unacceptable interference, impairing the very substance of the right guaranteed (Case 265/87 *Schräder* [1989] ECR 2237, paragraph 15, Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 18, and Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 16).

81 As regards the banana sector in particular, it is clear from the case-law that no economic operator can claim a proprietary right in a market share which he held prior to the establishment of a common organisation of the market. Moreover, restrictions on the right to import third-country bananas resulting from the

opening of the tariff quota and the mechanism for its allocation are inherent in the objectives of general Community interest pursued by the establishment of the common organisation of the market in bananas and therefore do not improperly impair the freedom of traditional traders in third-country bananas to pursue their trade or business (see the judgments of the Court of Justice in *Germany* v *Council*, cited above, paragraphs 79, 82 and 87, and in Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 77).

82 Since the applicant has not complained of any special difficulties besides the general difficulties encountered by small and medium-sized businesses, it has not established that the infringement of its right of freedom to pursue a trade or business is not a consequence of implementing objectives of general Community interest.

83 It follows from the above considerations that the applicant has not established the existence of discrimination against small and medium-sized businesses or infringement of the right of freedom to pursue a trade or profession.

Infringement of the principle of proportionality

Arguments of the parties

84 The applicant argues that the import arrangements provided for in Regulation No 2362/98 constitute an infringement of the principle of proportionality.

85 It contends that it only has trade links with Ecuador and that its application for an import licence for the first quarter of 1999 related to the maximum quantity authorised for that country. The quantity it was authorised to import was reduced as a result of the application of the reduction coefficient. Under the principle of proportionality it should have been allowed to import the amount corresponding to that reduction as an additional quantity for the second quarter. However, it was not until the final quarter that it had the opportunity to use — all at the same time — the licences not allocated in respect of the preceding quarters. The producers of Ecuador did not have a sufficient stock of bananas, since bananas are being harvested all the time and can only be sold on a regular basis. Hence it was unable to import the quantities covered by those licences and its deposit was forfeited.

86 The applicant considers moreover that the current system of dividing up the annual quotas over time and between the different categories of country is disproportionate, given that there are other ways of managing the economy that are less restrictive.

87 The Commission contends that that claim is incorrect on two counts.

88 First, an operator whose application in respect of bananas of a particular origin has been reduced can, under Article 18(1)(b) of Regulation No 2362/98, submit one or more licence applications during the same quarter to import bananas of other origins for which available quantities are published by the Commission. According to the Commission, the applicant did take advantage of that possibility.

89 Secondly, it is possible, under Regulation No 2362/98, to apply again, within the quarterly maximum, for the right to import quantities which have not been allocated during the preceding quarter.

90 Moreover, the Commission contends that most operators are clearly in a position to take advantage of the new import arrangements for bananas. The applicant's problem is that it has trade links with only one supplier country, which means that unlike other operators it is unable to benefit from the flexibility of the new arrangements.

Findings of the Court

91 It should be noted that in matters concerning the common agricultural policy, the Community legislature has a wide discretion corresponding to the political responsibilities imposed on it by Articles 40 and 43 of the EC Treaty (now, after amendment, Article 37 EC).

92 It is apparent from the case-law that the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. More specifically, 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 (see Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 14, Case C-331/88 *Fedesa and Others* [1990] ECR

I-4023, paragraph 14, and Case C-280/93 *Germany* v *Council*, cited above, paragraph 90).

93 Review by the Community judicature must be limited in that way in particular if, in establishing a common organisation of the market, the Commission has to reconcile divergent interests and thus select options within the context of the policy choices which are its own responsibility (see Case C-280/93 *Germany* v *Council*, paragraph 91).

94 In this case, by adopting the contested system of allocating the tariff quota and by laying down the detailed rules for its application, the Community legislature selected from the various possibilities open to it the one which seemed most appropriate for introducing a market organisation for bananas. Such a measure must in principle be regarded as appropriate to the objective of allocating the tariff quota equitably, even if, because of the different situations of the operators, the measure does not affect all of them in the same way (see to that effect *Schräder*, paragraph 23).

95 The applicant fails to establish by its arguments that the system for allocating the tariff quota introduced by Regulation No 2362/98 is manifestly inappropriate. Indeed, this administrative system, by enabling the Commission to make the necessary adjustments during the course of a given year, is designed to ensure a fair allocation of the annual tariff quota among the operators concerned. Furthermore, it is not correct to say that there was no possibility of the applicant actually importing the quantity to which it was entitled. As the Commission pointed out, it was open to the applicant to apply for licences to import bananas coming from exporting countries other than Ecuador, as it did in fact do (paragraph 20 above).

96 Whilst there may have been other means of achieving the desired result, the Court of First Instance cannot substitute its assessment for that of the Commission as to the appropriateness or otherwise of the measures adopted by the Community legislature, if those measures have not been shown to be manifestly inappropriate for achieving the objective pursued (*Germany* v *Council*, paragraph 94).

97 Accordingly, this claim should also be rejected.

98 It follows from the above considerations that the Community cannot have incurred non-contractual liability on the ground of infringement of the principles of non-discrimination, proportionality or the right of freedom to pursue a trade or business.

99 Since the applicant has failed to establish the existence of unlawful conduct for which the Community may incur non-contractual liability, the action must be dismissed.

Costs

100 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 applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action.**

2. **Orders the applicant to pay its own costs and those of the Commission.**

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 20 March 2001.

H. Jung P. Lindh

Registrar President