# JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
8 June 2000 *

In Joined Cases T-79/96, T-260/97 and T-117/98,

**Camar srl**, established in Florence (Italy),

applicant in Cases T-79/96, T-260/97 and T-117/98,

and

**Tico Srl**, established in Padua (Italy),

applicant in Case T-117/98,

represented by W. Viscardini Donà, M. Paolin and S. Donà, of the Padua Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, 8-10 rue Mathias Hardt,

the applicant in Case T-79/96 supported by

**Italian Republic**, represented by Professor U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by

* Language of the case: Italian.

F. Quadri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

intervener,

v

**Commission of the European Communities,** represented, in Case T-79/96, by E. de March, in Case T-260/97, by H. van Vliet, and, in Case T-117/98, by F. Ruggeri Laderchi and H. van Vliet, of its Legal Service, acting as agents, assisted, in Cases T-260/97 and T-117/98 by A. Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant in Cases T-79/96, T-260/97 and T-117/98

and

**Council of the European Union,** represented by J.P. Hix and A. Tanca, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of A. Morbilli, General Counsel of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant in Case T-260/97,

supported by

**French Republic,** represented in Case T-79/96 by C. de Salins, Assistant Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and by F. Pascal, Administrative Attaché in the same directorate, acting as Agents, and in Case T-260/97 by K. Rispal-Bellanger, Assistant Director for international economic law and Community law in the same directorate, and by C. Vasak, Assistant Secretary in the same directorate, acting as agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

intervener in Cases T-79/96 and T-260/97,

APPLICATION in Case T-79/96, for a declaration that the Commission unlawfully failed to take measures, on the basis of Article 30 of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p.1), which would have enabled the applicant to obtain supplies of bananas from third countries following the situation resulting from the civil war in Somalia; in Case T-260/97, for annulment of the Commission's decision of 17 July 1997 rejecting the applicant's request seeking, by virtue of Article 30 of that regulation, transitional measures to allow the annual quantity allocated to it for obtaining import licences for bananas from non-traditional ACP countries to be calculated in relation to the quantities which it marketed during 1988, 1989 and 1990; and, in Case T-117/98, for annulment of the Commission's decision of 23 April 1998 rejecting the applicants' request for an adjustment, pursuant to Article 16(3) of that regulation, of the tariff quota for banana imports for the first half of 1998 in order to take account of the consequences of the floods which occurred in Somalia on and after 28 October 1997; and, in all three cases, for compensation for the damage allegedly caused, in Case T-79/96, by the Commission's conduct, and allegedly suffered, in Cases T-260/97 and T-117/98, as a result of the Commission's rejections of their requests,

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

composed of: R.M. Moura Ramos, President, V. Tiili and P. Mengozzi, Judges,

Registrar: J. Palacio González, Administrator

having regard to the written procedure and further to the hearing on 7 July 1999,

gives the following

## Judgment

### Legal framework

1 Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1) replaced the various previous national arrangements with a common trading system with third countries. In the version in force at the material time, the regulation provided for the opening of an annual tariff quota for banana imports from third countries and from the African, Caribbean and Pacific (ACP) countries. Article 15, which became Article 15a when the regulation was amended by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105), established a distinction between 'traditional' and

'non-traditional' bananas depending on whether they formed part of the quantities, set out in the Annex to Regulation No 404/93, traditionally exported by the ACP States to the Community. For Somalia, the 'traditional quantity' was 60 000 tonnes.

2 Article 18(1) of Regulation No 404/93 (as amended by Regulation No 3290/94) provided that a tariff quota of 2.1 million tonnes (net weight) would be opened for 1994 and 2.2 million tonnes (net weight) for each subsequent year for imports of third country bananas and non-traditional ACP bananas. Within the framework of the tariff quota, imports of third country bananas were subject to a levy of ECU 75 per tonne and imports of non-traditional ACP bananas to a zero duty. Moreover, the second indent of Article 18(2) provided that imports outside the tariff quota, whether of non-traditional ACP bananas or of third country bananas, were subject to a levy calculated on the basis of the Common Customs Tariff.

3 Article 19(1) of Regulation No 404/93 divided the tariff quota thus opened, allocating 66.5% to the category of operators who had marketed third country and/or non-traditional ACP bananas (category A), 30% to the category of operators who had marketed Community and/or traditional ACP bananas (category B), and 3.5% to the category of operators established in the Community who had started marketing bananas other than Community and/or traditional ACP bananas from 1992 (category C).

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

5 Article 19(4) of Regulation No 404/93 provided that if the tariff quota was increased the additional available quantity would be allocated to importers in the categories referred to in Article 19(1).

6 Under Article 16(1) and (3) of Regulation No 404/93 a forecast supply balance was to be prepared each year of production and consumption in the Community and of imports and exports. Where necessary, in particular to take account of the effects of exceptional circumstances affecting production or import conditions, the balance could be adjusted during the marketing year. In such a case, the tariff quota provided for in Article 18 was to be adjusted in accordance with the procedure laid down in Article 27.

7 The fourth subparagraph of Article 18(1) of Regulation No 404/93 provided for a possible increase in the volume of the annual quota on the basis of the supply balance referred to in Article 16, and it referred to Article 27 of the regulation for the procedure governing any such increase.

8 Article 20 of the regulation gave the Commission the power to adopt and adjust the forecast supply balance referred to in Article 16 and to adopt detailed rules for the trading system with third countries, which might cover in particular additional measures concerning the issue of licences, their term of validity and the conditions governing transferability.

9 Article 30 of Regulation No 404/93 provided that:

'If specific measures are required after July 1993 to assist the transition from arrangements existing before the entry into force of this Regulation to those laid

down by this Regulation, and in particular to overcome difficulties of a sensitive nature, the Commission, acting in accordance with the procedure laid down in Article 27, shall take any transitional measures it judges necessary.'

10 Article 27 of the same regulation, which is referred to in Articles 16, 18 and 30 in particular, authorised the Commission to adopt measures for the implementation of the regulation in accordance with the 'management committee' procedure.

11 At the material time, the detailed rules governing the system for importing bananas into the Community were laid down in Commission Regulation (EEC) No 1442/93 of 10 June 1993 (OJ 1993 L 142, p. 6). Articles 4 and 5 of that regulation provided that the division of the tariff quota between category A operators (66.5%) was to be based on the quantity of third country or non-traditional ACP bananas marketed during the three years prior to the year preceding the year for which the tariff quota was opened. The division of the quota between category B operators (30%) was to be based on the quantities of Community or traditional ACP bananas marketed during a reference period calculated in the same way as for category A.

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

13 Following the amendments to Articles 15a, 16, 18 and 19 of Regulation No 404/93 by Council Regulation (EC) No 1637/98 of 20 July 1998 (OJ 1998 L 210, p. 28), Regulation No 1442/93 was replaced by Commission Regulation

(EC) No 2362/98 of 28 October 1998 (OJ 1998 L 293, p. 32), which is currently in force. Under Article 4 of Regulation No 2362/98 the tariff quotas and the quantities of traditional ACP bananas are to be divided up on the basis of the quantities of bananas actually imported by each operator during the reference period. For imports in 1999 of bananas under the tariff quotas and of traditional ACP bananas, the reference period covered the years 1994, 1995 and 1996.

14 Commission Regulation (EC) No 2268/99 of 27 October 1999 on imports of bananas under the tariff quotas and of traditional ACP bananas for the first quarter of 2000 (OJ 1999 L 277, p. 10) provisionally extended the 1999 import regulations. Article 2 of that regulation states: 'For the first quarter of 2000, traditional operators and newcomer operators registered in respect of 1999 pursuant to Articles 5 and 8 of Regulation... No 2362/98 may submit applications for licences covering imports under the tariff quotas and of traditional ACP bananas for up to 28%, as the case may be, of the reference quantity or the annual allocation notified to them for 1999 by the competent national authority.' Similar provisions for traditional operators are set out in Articles 1 and 5 of Commission Regulation (EC) No 250/2000 of 1 February 2000 on imports of bananas under the tariff quotas and of traditional ACP bananas and fixing the indicative quantities for the second quarter of 2000 (OJ 2000 L 26, p. 6) and in Article 2 of Commission Regulation (EC) No 1077/2000 of 22 May 2000 fixing certain indicative quantities and individual ceilings for the issue of licences for the import of bananas into the Community in the third quarter of 2000 under the tariff quotas or as part of the quantity of traditional ACP bananas (OJ 2000 L 121, p. 4).

15 Between 1994 and 1996, following tropical storms Debbie, Iris, Luis and Marilyn which had damaged the banana plantations in Martinique, Guadeloupe, St Vincent and the Grenadines, St Lucia and Dominica, the Commission adopted a

number of regulations (Commission Regulations (EC) Nos 2791/94 of 16 November 1994, 510/95 of 7 March 1995, and 1163/95 of 23 May 1995 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas in 1994, the first quarter of 1995 and the second quarter of 1995 respectively, as a result of tropical storm Debbie (OJ 1994 L 296, p. 33; OJ 1995 L 51, p. 8; and OJ 1995 L 117, p. 12); Commission Regulations (EC) Nos 2358/95 of 6 October 1995, 127/96 of 25 January 1996 and 822/96 of 3 May 1996 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas for the fourth quarter of 1995, the first quarter of 1996 and the second quarter of 1996 respectively, as a result of tropical storms Iris, Luis and Marilyn (OJ 1995 L 241, p. 5; OJ 1996 L 20, p. 17; and OJ 1996 L 111, p. 7)). The regulations increased the tariff quota and introduced specific rules for the distribution of the additional quantity among operators including or directly representing the banana producers affected by the storm damage. Those distribution rules derogated from the rules set out in Article 19(4) of Regulation No 404/93.

16 The Commission adopted the above regulations on the basis of Articles 16(3), 20 and 30 of Regulation No 404/93.

17 The reasons given for adopting the regulations were that the tropical storms had caused enormous damage to the banana plantations in the Community regions of Martinique and Guadeloupe and in the ACP States of Saint Vincent and the Grenadines, St Lucia and Dominica, that the impact of those exceptional circumstances on production in the regions hit would continue to be felt for several months and considerably affect imports and supplies to the Community market, and that there was a risk that this would result in a steep increase in market prices in some regions of the Community.

18 As to the system for increasing the tariff quota provided for in Article 16(3) of Regulation No 404/93, the Commission stated in the fourth recital to the regulations:

'Whereas the adaptation of the tariff quota must permit adequate supplies to the Community market... and provide compensation to operators who include or directly represent banana producers who suffered damage and who, in addition, in the absence of appropriate measures, risk losing their traditional outlets on the Community market on a long-term basis.'

19 In the fifth recital the Commission stated:

'... Whereas the measures to be taken should have a specific transitional nature, within the meaning of Article 30 of Regulation... No 404/93; whereas, prior to the entry into force of the new common market organisation on 1 July 1993, existing national market organisations, in order to cope with urgent cases or exceptional circumstances [such as the tropical storms referred to above], included provisions ensuring supplies to the market from other suppliers while safeguarding the interests of operators who are victims of such exceptional events.'

## Facts and procedure

20 The applicant, Camar srl, was set up in 1983 by the Italian investment group De Nadai in order to import Somalian bananas into Italy. Until 1994 it was the sole importer and until 1997 the main importer of that type of banana.

21 Between 1984 and 1990 banana production reached its peak in Somalia, attaining an annual production of 90 000 to 100 000 tonnes. Part of that production was imported into Europe (51 921 tonnes in 1988, 59 388 tonnes in 1989 and 57 785 tonnes in 1990) and, in particular, into Italy by Camar (45 130 tonnes in 1990).

22 On 31 December 1990 civil war broke out in Somalia and the normal flow of Camar's imports was interrupted.

23 From the outbreak of war until the common organisation of the market came into force in 1993 Camar supplied the Italian market by obtaining supplies from two ACP countries, Cameroon and the Windward Islands, and from certain third countries from which it had already been importing bananas since 1988.

24 From the introduction of the common organisation of the market in July 1993 to the end of 1997 Camar was issued with Category A import licences (for 4 008.521 tonnes in 1993, 8 048.691 tonnes in 1994, 3 423.761 tonnes in 1995 and 5 312.671 tonnes in 1996) and also with Category B licences (for 5 622.938 tonnes in 1993, 10 739.088 tonnes in 1994, 6 075.934 tonnes in 1995 and 2 948.596 tonnes in 1996). In 1997 Camar was issued with import licences for a quantity of 7 545.723 tonnes for Category A and 2 140.718 tonnes for Category B.

25 During that period the quantities of bananas imported from Somalia by the applicant amounted to approximately 482 tonnes in 1993, 1 321 tonnes in 1994, 14 140 tonnes in 1995 and 15 780 tonnes in 1996. In 1997 banana production in Somalia was expected to be around 60 000 tonnes, but following climatic problems and in the absence of any suitably equipped port other than Mogadishu, exports from Somalia were limited to 21 599 tonnes, 12 000 of which were marketed by Camar.

26 At the Agriculture Council meeting on 14 June 1993, the Government of the Italian Republic asked the Commission to take steps to enable the import quota allocated to Somalia for the Community market to be maintained by provisionally allocating it to other sources of imports. The Commission did not act on this request.

27 Since the common organisation of the market came into force Camar has repeatedly requested the Commission to increase its third country banana quota by an amount equal to the difference between the traditional quantity of Somalian bananas provided for by Regulation No 404/93 (60 000 tonnes) and the quantities which Camar actually imported or could have imported into the Community, and to issue it with licences corresponding to the difference between those quantities. The applicant cited as precedents here the measures which the Commission had adopted after cyclones Debbie, Iris, Luis and Marilyn.

28 On 24 January 1996 the applicant put the Commission on notice that it was calling on it to act, within the meaning of the second paragraph of Article 175 of the EC Treaty (now Article 232 EC), with regard to the applications submitted for the 1996 marketing year.

29 Having received no reply within the period provided for, by application lodged at the Registry of the Court of First Instance on 28 May 1996, Camar brought an action for declaration of failure to act and for compensation which was registered under number T-79/96.

30 By separate document lodged at the Registry of the Court of First Instance on 27 January 1997, the applicant also applied for interim measures under Article 186 of the EC Treaty (now Article 243 EC), seeking 'an order that in the course of 1997 the Commission should issue Camar with additional licences for the import of bananas from non-member countries or non-traditional ACP States at the rate of duty applicable under the Common Customs Tariff in an amount equal to the difference between the quantity of Somalian bananas which

Camar is able to import in 1997 and the quantity imported by it during the years 1988, 1989 and 1990', and 'in the alternative, that the Court should adopt such other measures pending final judgment on the action for declaration of failure to act as it may see fit in order to prevent Camar from suffering irreparable damage'.

31 That application, registered under number T-79/96 R, was dismissed by order of the President of the Court of 21 March 1997 (Case T-79/96 R *Camar* v *Commission* [1997] ECR II-403). The order stated that, in the light of the production forecast for Somalia for 1997 (some 60 000 tonnes), the applicant could, prima facie, import Somalian bananas within the framework of the tariff quota provided for that year, and that there did not appear to be any difficulties which could threaten Camar's existence.

32 By document lodged at the Registry of the Court of First Instance on 16 October 1996 the French Republic applied to intervene in Case T-79/96 in support of the defendant's claims.

33 By document lodged at the Registry of the Court of First Instance on 14 November 1996 the Italian Republic applied to intervene in the same case in support of the applicant's claims.

34 By order of the Court of First Instance of 21 January 1997 the French Republic and the Italian Republic were granted leave to intervene.

35 The written procedure in Case T-79/96 was concluded on 26 May 1997.

36 On 27 January 1997, under Article 175 of the Treaty, Camar called on the Commission to determine, pursuant to Article 30 of Regulation No 404/93, the licences to be issued to Camar to import bananas from third countries and non-traditional ACP countries as a category B operator for 1997 and subsequent years on the basis of the quantities of bananas which it marketed during the years 1988, 1989 and 1990 until its normal reference quantities were restored.

37 Having received no reply within the period provided for, Camar, by application lodged at the Registry of the Court of First Instance on 5 June 1997, brought an action for declaration of failure to act and for compensation, which was registered under number T-172/97.

38 By separate document lodged at the Registry of the Court of First Instance on 10 July 1997, the applicant also applied for interim measures pursuant to Article 186 of the EC Treaty.

39 By decision of 17 July 1997 the Commission rejected Camar's call to act under Article 175 of the Treaty. Following that decision Camar withdrew its application for interim measures in Case T-172/97 R and its application for compensation in Case T-172/97, which were removed from the register by order of the President of the Court of First Instance of 8 October 1997 in Case T-172/97 *Camar* v *Commission* (not published in the ECR), and by order of the Court of 28 January 1998 in Case T-172/97 *Camar* v *Commission* [1998] ECR II-77 respectively. In this latter order the Court also decided, in the light of the Commission's action, that there was no longer any need to adjudicate on the action for declaration of failure to act in Case T-172/97.

40 On 25 September 1997 Camar lodged at the Registry of the Court of First Instance an application for annulment of the Commission's decision of 17 July 1997 and an application for compensation from the Commission and the Council. This action was registered under number T-260/97.

41 By separate document lodged at the Registry of the Court of First Instance on 22 October 1997 Camar applied for suspension of the operation of the decision of 17 July 1997 and for interim measures under Articles 185 (now Article 242 EC) and 186 of the Treaty, seeking the issue of an appropriate quantity of category B licences for 1998, or financial assistance.

42 That application, registered under number T-260/97 R, was dismissed by order of the President of the Court of First Instance of 10 December 1997 in Case T-260/97 R *Camar* v *Commission and Council* [1997] ECR II-2357, it being held that there was no imminent risk of serious and irreversible damage.

43 That order was the subject of an appeal, which was dismissed by order of the President of the Court of Justice of 15 April 1998 in Case C-43/98 P(R) *Camar* v *Commission and Council* [1998] ECR I-1815.

44 By document lodged with the Registry of the Court of First Instance on 1 December 1997 the French Republic applied to intervene in Case T-260/97 in support of the defendants' claims and was given leave to do so by order of the Court of 19 February 1998.

45 The written procedure in Case T-260/97 was concluded on 15 June 1998.

46 By letter of 5 March 1998 Camar and Tico asked the Commission to adjust the tariff quota, as provided for in Article 16(3) of Regulation No 404/93, for the first two quarters of 1998 to take account of imports from Somalia in 1996 following the reduction in the quantities of Somalian bananas available as a result

of the meteorological phenomenon known as 'El Niño' which had damaged banana plantations in Somalia between October 1997 and January 1998.

47 By letter dated both 23 and 24 April 1998 (hereinafter 'the letter of 23 April 1998') the Commission informed the two companies that it did not intend to comply with the request to adjust the tariff quota. It had not noted any shortage in supplies to the Community market either during the second half of 1997 or during the first half of 1998. Moreover, it was impossible to distinguish, in regard to their request, between damage caused by climatic problems and other difficulties affecting Somalian banana exports, resulting in particular from the unreliable loading structures and transport conditions.

48 By application lodged with the Registry of the Court of First Instance on 14 July 1998 Camar and Tico applied for the annulment of, and compensation for, the Commission's decision of 23 April 1998. This application was registered under number T-117/98.

49 The written procedure in Case T-117/98 was concluded on 18 December 1998.

50 By letter of 11 January 1999 Camar, the applicant in Cases T-79/96, T-260/97 and T-117/98, and Tico, the applicant in Case T-117/98, asked for the cases to be joined. The Court decided to join the three cases by order of 25 March 1999, which noted the connection between them.

51 By document lodged with the Registry of the Court of First Instance on 6 February 1999 the Italian Republic sought leave to intervene in support of the defendant. The request was dismissed by order of the Court of 7 May 1999 on the ground that it was submitted out of time.

52 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and requested the Commission and Camar to reply in writing to certain questions as part of measures of organisation of procedure.

53 The parties presented oral arguments and their replies to the Court's questions at the hearing on 7 July 1999.

## Forms of order sought

54 In Case T-79/96 the applicant, supported by the Italian Republic, claims that the Court should:

— declare that, by failing to take the steps necessary to enable the applicant to overcome its supply problems resulting from the crisis in Somalia, the Commission has infringed Article 30 of Regulation No 404/93 and Article 40(3) of the EC Treaty (now, after amendment, Article 34(2) EC);

— declare that the Commission is under a duty to take appropriate measures for the future;

— order the Commission to pay compensation for the damage suffered by the applicant as a result of the Commission's failure to act;

— order the Commission to pay the costs.

55 The Commission, supported by the French Republic, claims that the Court should:

— dismiss the action as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs.

56 In Case T-260/97 the applicant claims that the Court should:

— annul the Commission's decision of 17 July 1997 rejecting its application for transitional measures in the context of the tariff quota system for banana imports;

— order the Commission to pay compensation for past and future damage resulting from its refusal to take account, when calculating category B licences, of its reference quantity under normal circumstances for the three years immediately preceding the outbreak of civil war in Somalia;

— in the alternative, order the Council to pay compensation for failing to adopt special provisions under Regulation No 404/93 to deal with situations such as those which the applicant had faced;

— order the Commission and/or the Council to pay the costs.

57 The Council, supported by the French Republic, contends that the Court should:

— dismiss the action;

— in the alternative, dismiss the application for compensation for non-contractual liability allegedly resulting from the adoption of Regulation No 404/93 as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs.

58 The Commission, supported by the French Republic, contends that the Court should:

— dismiss the application for annulment;

— declare the application for compensation inadmissible or, in the alternative, dismiss it as unfounded;

— order the applicant to pay the costs.

59 In Case T-117/98 the applicants claim that the Court should:

— annul the Commission's decision rejecting the application for adjustment of the tariff quota for banana imports under Article 16(3) of Regulation No 404/93;

— order the Commission to pay compensation;

— order the Commission to pay the costs.

60 The Commission claims that the Court should:

— dismiss the action as inadmissible or unfounded;

— order the applicants to pay the costs.

## The claim for annulment and for declaration of failure to act

*Admissibility of the action in Case T-79/96*

61 The Commission advances two grounds for the inadmissibility of the action in Case T-79/96 alleging, firstly, that the measures requested in the letter of formal notice differ from those requested in the form of order sought in the action, and, secondly, that the action relates to the failure to adopt a measure which would not have been addressed to the applicant and which, in any event, is of no direct or individual concern to it.

The first ground of inadmissibility, alleging that the measures requested in the letter of formal notice differ from those requested in the form of order sought in the action

— Arguments of the parties

62 The Commission contends that a comparison between the detailed description of the measures requested in the letter of formal notice and in the form of order sought in the action, which refers in general to 'appropriate measures', shows that the subject-matter of the action is different from and broader than that of the request to act; the Commission therefore cannot know whether it is to defend itself for having failed to take the measures specifically mentioned in the request to act, or for having failed to take measures subsequently.

63 It argues that it follows from the case-law of the Court of Justice on Article 35 of the ECSC Treaty (Joined Cases 41/59 and 50/59 *Hamborner and Thyssen* v *High Authority* [1960] ECR 559, and Case 75/69 *Hake* v *Commission* [1970] ECR

535) that an action for declaration of failure to act must relate to the measure previously requested, since the pre-litigation procedure defines the limits of the action.

— Findings of the Court

64 The defendant's argument that there is a difference between the subject-matter of the letter of formal notice and that of the application cannot be upheld.

65 In the letter of formal notice the applicant requested the adoption of similar measures to those by which the Commission, in order to deal with the consequences of tropical storms Debbie, Iris, Luis and Marilyn, had increased the tariff quota and allocated the resulting additional quantity to operators including or directly representing the banana producers who had suffered damage, allowing them to make up the quantities of bananas not available with third country or non-traditional ACP bananas.

66 In its application the applicant has asserted that the Commission did not adopt, for its benefit, similar measures to those it had adopted following tropical storms Debbie, Iris, Luis and Marilyn, and that it had not increased the tariff quota and allocated the applicant an additional quantity corresponding to that increase as an operator representing banana producers in Somalia. In the formal order sought it has asked the Court to declare that the Commission infringed the Treaty in failing to take the 'steps necessary to enable the applicant to overcome its difficulties'.

67 Account must also be taken of the fact that, in an action for a declaration of failure to act, the Community judicature cannot substitute itself for the

Commission and by final judgment adopt the provisions which the Commission should have adopted in order to fulfil its obligation to act as provided for in Community law. As Advocate General Elmer pointed out in his Opinion in Case C-68/95 *T. Port* [1996] ECR I-6065, I-6068), 'nor can the Court, in an action for failure to act, order the Commission to adopt the provisions referred to in Article 30 of Regulation [No 404/93]: it can only, if occasion should arise, declare that by not adopting such provisions the Commission has infringed the Treaty' (point 52 of the Opinion). Therefore, in formulating the form of order sought before the Court of First Instance, the applicant could not use the same terms as those in the letter of formal notice sent to the Commission; it could only request the Court to declare that the obligations imposed upon the Commission had been breached.

68 The first ground of inadmissibility must therefore be dismissed.

The second ground of inadmissibility, alleging that the action relates to the failure to adopt a measure which would not have been addressed to the applicant and which in any event is not of direct or individual concern to it

— Arguments of the parties

69 The Commission contends that the action is inadmissible because it relates to the failure to adopt a measure which would not have been addressed to the applicant.

70 It points out that the third paragraph of Article 175 of the Treaty lays down that a natural or legal person may bring an action for failure to act before the Court of Justice only in order to obtain a declaration that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

71 It argues that Camar's request to take action and its application seek the adoption of similar measures to those which the Commission took following the tropical storms, and which, in both form and content, were proper regulations.

72 It follows that the application concerns the adoption of a regulation, a measure which, by definition, cannot be addressed to the applicant (see Case 90/78 *Granaria* v *Council and Commission* [1979] ECR 1081, and Case 15/71 *Mackprang* v *Commission* [1971] ECR 797).

73 In any event, according to the Commission, even if, on a broad interpretation of the third paragraph of Article 175 of the Treaty, it were accepted that a natural or legal person may accuse an institution of failing to adopt a measure which would not have been addressed to that person, but which would be of direct and individual concern to it if it were adopted, the measure to which the application refers cannot be of direct or individual concern to the applicant.

74 Regarding the condition expressed by the term 'direct', the Commission argues that this is not satisfied since, under the common organisation of the market in bananas, it is for the authorities in the Member States to determine which operators have suffered damage and to allocate individual quantities.

75 As for the condition expressed by the term 'individual', the Commission argues that the Court of Justice and the Court of First Instance have consistently held that 'an act does not lose its... legislative nature simply because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to whom it applies at any given time as long as there is no doubt that it is applicable as the result of an objective situation of law or fact which it specifies and which is in harmony with its ultimate objective' (Case

101/76 *Koninglijke Scholten Honig* v *Council and Commission* [1977] ECR 797, and Case T-298/94 *Roquette Frères* v *Council* [1996] ECR II-1531, paragraph 42).

76 The Commission argues that the measures taken following the tropical storms to which the applicant refers are legislative in nature since they introduce special rules for a category of operators defined on an objective basis.

77 Therefore the act invoked by the applicant is of concern to it only in its objective capacity as an importer of Somalian bananas, in the same way as any other importer in the same situation, and the fact that it is the sole importer of Somalian bananas in Italy (a fact which was disputed in 1994 and 1995) does not alter the legislative nature of the act.

— Findings of the Court

78 According to the third paragraph of Article 175 of the Treaty, any natural or legal person may complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

79 In its *T. Port* judgment, cited above, the Court of Justice held that, just as the fourth paragraph of Article 173 of the Treaty (now Article 230 EC) allows individuals to bring an action for annulment against a measure of an institution

not addressed to them provided that the measure is of direct and individual concern to them, the third paragraph of Article 175 must be interpreted as also entitling them to bring an action for failure to act against an institution which they claim has failed to adopt a measure which would have concerned them in the same way (see the *T. Port* judgment, paragraph 59, and Case T-95/96 *Gestevision Telecinco* v *Commission* [1998] ECR II-3407, paragraph 58 and Case T-17/96 *TF1* v *Commission* [1999] ECR II-1757, paragraph 27).

80 In the present case it should be pointed out that, contrary to the Commission's contention, even if the Commission had taken action in the form of a regulation in response to Camar's request for the adoption of measures 'similar' to those taken following the tropical storms, that act would have been of direct and individual concern to the applicant.

81 As regards the requirement of direct concern, there is no doubt that the applicant would have been directly concerned by the measures requested since, if the Commission had adopted them, the national authorities would have had a purely executive role in applying them (Case 113/77 *NTN Toyo Bearing and Others* v *Council* [1979] ECR 1185, paragraph 11, and Case T-155/94 *Climax Paper* v *Council* [1996] ECR II-873, paragraph 53).

82 As for the requirement that the person in question must be individually concerned, the Court of Justice and the Court of First Instance have explained that, in certain circumstances, a legislative measure applying to the traders concerned in general may also be of individual concern to some of them (Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraphs 13 and 14, Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 19, and Joined Cases T-481/93 and T-848/93 *Exporteurs in Levende Varkens and Others*

v *Commission* [1995] ECR II-2941, paragraph 50). In such a situation, a Community act may thus be both legislative and, at the same time, in the nature of a decision for some of the traders concerned.

83 Nevertheless, natural or legal persons may claim that a contested measure is of individual concern to them only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107, and *Codorniu*, cited above, paragraph 20; *Exporteurs in Levende Varkens*, cited above, paragraph 51, and Case T-12/93 *CCE de Vittel and Others* v *Commission* [1995] ECR II-1247, paragraph 36).

84 It should be pointed out in that regard that the applicant had asked the Commission to take measures on the basis of Article 30 of Regulation No 404/93 in order to deal with the effects of the civil war in Somalia on the production and export of bananas. As the Court stated in its *T. Port* judgment, cited above, when adopting measures under that article the Commission is required to take the situation of the traders concerned into consideration (*T. Port*, paragraph 37). Given that before 1991 the applicant was the sole importer of Somalian bananas into the Community, and was therefore the only one to suffer damage as a result of the civil war, its situation would have had to be taken into consideration by the Commission if it had taken action under Article 30. Thus the applicant's circumstances sufficiently differentiated it from all other banana traders, and it would therefore have had to be regarded as individually concerned if the Commission had adopted the measures sought (see Case 152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 11).

85 It is clear from the above findings that the action for declaration of failure to act must be held admissible.

*Admissibility of the action in Case T-117/98*

Arguments of the parties

86 The Commission alleges that the action for annulment is inadmissible on the ground that the contested letter is not a decision within the meaning of Article 173 of the Treaty, but purely a courtesy letter.

87 It asserts that a private operator is not entitled to ask it to apply Article 16(3). Therefore, if, as in the present case, the Commission replies to an application from an operator based on that provision, seeking the adjustment of the forecast balance and of the tariff quota, it does so purely as a matter of courtesy.

88 Furthermore, if the Commission had not replied, the operators would not have been able to bring an action for declaration of failure to act. Therefore, if it does reply, they cannot bring an action for annulment.

89 In any event, any measure taken in implementation of Article 16(3) would not be of direct and individual concern to Camar and Tico since it would have applied for the benefit of all importers who had suffered from the floods in Somalia. Those companies could not therefore dispute the refusal to take such a measure.

90 Furthermore, the context in which the applicants had written their letter of 5 March 1998 was not the same as that which, in the past, had led to the adoption of the measures sought. The Italian authorities had not officially submitted written documentation substantiating the applicants' allegations and

proving, *inter alia*, the damage which they had suffered. After tropical storms Debbie, Luis, Iris and Marilyn, on the other hand, the national authorities in question had hastened to inform the Commission.

Findings of the Court

91 It should be pointed out that, according to settled case-law, 'any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or a decision which may be the subject of an action under Article 173 [of the Treaty] for a declaration that it is void' (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9; Case C-395/95 P *Geotronics* v *Commission* [1997] ECR I-2271, paragraph 10; Case T-81/97 *Regione Toscana* v *Commission* [1998] ECR II-2889, paragraph 21).

92 Moreover, where a decision of the Commission amounts to a rejection, it must be appraised in the light of the nature of the request to which it constitutes a reply (Case 42/71 *Nordgetreide* v *Commission* [1972] ECR 105, paragraph 5, and Case T-330/94 *Salt Union* v *Commission* [1996] ECR II-1475, paragraph 32). In particular, a refusal constitutes an act in respect of which an action for annulment may be brought under Article 173 of the Treaty provided that the act which the Community institution refuses to adopt could itself have been contested under that provision (Joined Cases 97/86, 193/86, 99/86 and 215/88 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 17, and *Salt Union*, paragraph 32).

93 It follows that where, as in the present case, a rejection by the Commission relates to the adoption of a regulation, if they are to seek annulment of the decision, the persons concerned must demonstrate that, although the regulation in question would not have been addressed to them, it would have been of direct and individual concern to them.

94 Those conditions are satisfied in the present case. As to the nature of the contested act, it should be pointed out that the Commission's letter of 23 April 1998 is not merely a courtesy letter. It states that, having assessed the information at its disposal and the details supplied by the applicants, the Commission has decided not to increase the tariff quota pursuant to Article 16(3) of Regulation No 404/93. This act constitutes the Commission's clear and final position on the requests made to it by the applicants and is capable of affecting their legal position in that, by the mere fact of its adoption, they lose any real chance of obtaining licences to import third country bananas following the adjustment of the tariff quota.

95 Accordingly, the letter refusing the requests to increase the tariff quota itself produced binding legal effects and may therefore be the subject of an action for annulment.

96 On the question whether the regulation which the Commission refused to adopt would have been of direct and individual concern to the applicants, it should be pointed out that the regulation, in whose implementation the national authorities would have had no discretionary power, would have affected the applicants by reason of circumstances in which they are differentiated from all other persons. The purpose of the measures sought from the Commission was to allocate an additional quantity of import licences to those operators who had been victims of the floods in Somalia, in proportion to the damage they had suffered. It is apparent from the documents before the Court that until 1997 Camar was the main importer of Somalian bananas, and that from the fourth quarter of 1997 Tico temporarily took over that position. The reduction in the quantities of Somalian bananas available during the fourth quarter of 1997 and the first quarter of 1998 thus particularly affected the applicants, who would consequently have been the main ones to benefit from the increase in the tariff quota. Accordingly, the Commission's refusal to adjust the tariff quota clearly did not affect the applicants in the same way as any other importer of Somalian bananas, but affected them by reason of circumstances in which they were differentiated from all other operators trading on the same market.

97 In view of the above findings the action must be declared admissible.

*Merits of the actions in Cases T-79/96 and T-260/97*

98 As to the merits of Case T-79/96, the applicant advances two pleas in support of its action for declaration of failure to act, alleging, firstly, breach of the obligation to take action imposed by Article 30 of Regulation No 404/93 in order to assist the transition from the various national systems to the common organisation of the market established by that regulation, and secondly, that the Commission had an obligation to act in accordance with the principle of non-discrimination vis-à-vis operators who had traditionally marketed bananas from certain ACP countries and certain French overseas departments affected by the tropical storms.

99 As to the merits of Case T-260/97, the applicant advances seven pleas for annulment, alleging first, the Commission's infringement of Article 30 as a result of its incorrect interpretation of Regulation No 404/93; second, infringement of Article 30 as a result of an incorrect appraisal of the facts; third, misuse of powers as a result of an incorrect interpretation of Article 30 of Regulation No 404/93; fourth, misuse of powers as a result of an incorrect appraisal of the circumstances; fifth, infringement of the principle of non-discrimination; sixth, infringement of the principle of good administration, impartiality and transparency; and seventh, infringement of the traders' fundamental rights.

100 The Commission rebuts all the pleas put forward by the applicant on the merits of Cases T-79/96 and T-260/97.

101 The Council, while stating that it does not wish to express an opinion on the lawfulness of the Commission's decision which is contested in Case T-260/97, contests the plea alleging infringement of the principle of non-discrimination and requests that the action for annulment brought against that decision be dismissed. It states that the applicant has not shown that the Commission treated it differently from other operators in similar situations, since the situation of the operators who had suffered as a result of the tropical storms was different from that of Camar.

102 The Court finds, first of all, that both in its action for declaration of failure to act in Case T-79/96 and in its action for annulment in Case T-260/97, the applicant seeks a declaration that the Commission, by its failure to act in the first case and its express refusal to act in the second, failed to have regard to its obligation to act under Article 30 of Regulation No 404/93. It is therefore appropriate to examine the pleas relating to that article.

The first plea in Case T-79/96 and the first, second and third pleas in Case T-260/97 alleging infringement of Article 30 of Regulation No 404/93

— Arguments of the parties on the first plea in Case T-79/96

103 The applicant maintains that, in this particular case, the point was to achieve the same aims as those pursued by the measures adopted following tropical storms Debbie, Luis, Iris and Marilyn (namely, to guarantee adequate supplies for the Community market and to compensate operators who had suffered damage). The total or partial absence of Somalian bananas had repercussions on supplies to the Community market and resulted in damage for Camar, which, before the civil war, had been the sole Community operator importing these traditional bananas.

104 The applicant points out that it is apparent from the *T. Port* judgment cited above (paragraph 36) that Article 30 of Regulation No 404/93 places the Commission under an obligation to resolve problems arising after the introduction of the common organisation of the market but originating in the previous situation on the national markets.

105 In the present case, the introduction of Regulation No 404/93 made it impossible for Camar to replace Somalian bananas with bananas from other sources. Following the reduction in Somalian production during that period, it had not imported any Somalian bananas between 1991 and 1993, and once the common organisation of the market was in place, it was no longer able to replace bananas from Somalia with ACP or third country bananas.

106 The Italian Republic, intervening, observes that Camar's situation falls entirely within the scope of Article 30 of Regulation No 404/93 as interpreted by the Court in its *T. Port* judgment cited above.

107 In that judgment the Court held that the position of a single operator may require the Commission to intervene as provided for in Articles 16(3) and 30 of Regulation No 404/93, where it is established that the Commission's failure to act may cause damage to an entitlement which that operator holds under the Community legal order.

108 Furthermore, for the purposes of Article 30, in order to assess the need for measures under Regulation No 404/93 there does not have to be an analogy, between the situation of countries affected by the tropical storms and those affected by the crisis in Somalia based on the identical nature of the Italian national arrangements before the introduction of the common organisation of the market and the corresponding French and UK arrangements. Unlike Italy, the latter countries are producer countries, and it is therefore only to be expected that there should be differences between their earlier national arrangements.

109 The Commission claims that it was not obliged to act in the present case since the applicant's situation was not covered by Article 30 for a number of reasons.

110 It argues that the situations which led to the measures adopted following the tropical storms were not similar to those in the applicant's situation: first of all, those measures were necessary in order to ensure supplies to the Community market under exceptional circumstances in which large quantities of traditional ACP bananas were not immediately available. In the case of the civil war in Somalia, on the other hand, the operators concerned sought to obtain supplies of traditional ACP bananas in the medium and long term in order to overcome a crisis that was dragging on. Secondly, as is clear from the second and fifth recitals of the regulations cited as examples and the legal bases used for them (Articles 16(3), 20 and 30 of Regulation No 404/93), the measures were justified by the fact that the existing national market organisations included provisions safeguarding the interests of operators who were victims of exceptional events; in the Italian organisation, on the other hand, there was no such provision.

111 The defendant also argues that the applicant's problems are similar to those encountered in the past by all companies operating on the free market. The applicant could have solved its problems by purchasing traditional ACP bananas elsewhere, which, contrary to its assertions, are not reserved for traditional importers.

112 In this context the defendant maintains that it was possible to purchase traditional ACP bananas to replace Somalian bananas because imports of traditional ACP bananas during 1993 and 1994 were lower than the traditional quantities fixed by the regulation, and various non-traditional operators, not just the multinationals, started to export from the ACP countries during that period. For example, in 1994, when imports of Somalian bananas resumed in Italy, the multinational Dole began to import such bananas.

113 The French Republic, intervening, observes that Article 30 of Regulation No 404/93 cannot be used as a legal basis for taking interim measures to overcome problems originating in a war situation. In its judgment in Cases C-9/95, C-23/95 and C-156/95 *Belgium and Germany* v *Commission* [1997] ECR I-645, the Court of Justice ruled that Article 30 of that regulation does not apply to climatic problems, since they were factors which had nothing to do with the establishment of the common organisation of the market. The same criterion should be applied to the problems caused by the civil war in Somalia.

114 Furthermore, Camar's problems resulted from the continuation of the civil war in Somalia and were not linked to the introduction of the common organisation of the market. Article 30 of Regulation No 404/93, as interpreted in the *T. Port* judgment, cited above, therefore does not apply in this case.

— Arguments of the parties on the first plea in Case T-260/97

115 The applicant contends that, in adopting the contested decision, the Commission misconstrued the 'basic philosophy' of Regulation No 404/93 and therefore infringed Article 30.

116 The infringement of Article 30 is shown by the eighth recital of the decision, from which the applicant infers that, according to the Commission, only category A operators may obtain additional licences to import third country bananas under the tariff quota where the licences allocated to them have been excessively reduced because of their exceptionally low reference quantities. The applicant observes that, again according to the Commission, although category B operators are also allocated third country licences on the basis of a reference quantity, an unusual reduction in that quantity does not lead to problems associated with the

transition from the existing arrangements to the Community system, but merely deprives the operators concerned of a 'potential advantage' created by the new organisation of the market.

117 The Commission accepts that Article 30 of Regulation No 404/93 is applicable only in cases of 'hardship' affecting either category A or category B operators. However, it states that Article 30 must not be applied in the same way to both categories of operators, since category B operators, unlike category A, are free to import ACP bananas until the traditional quantities are used up, and, moreover, they enjoy an objective advantage in that 30% of the tariff quota is reserved for them.

— Arguments of the parties on the second plea in Case T-260/97

118 The applicant claims that the Commission adopted the contested decision on the basis of an incorrect appraisal of the facts, thus infringing Article 30.

119 That incorrect appraisal of the facts can be seen from the sixth, seventh and ninth recitals of the decision of 17 July 1997. In particular, the applicant claims that, contrary to the Commission's assertions, the civil war in Somalia, which began in late 1990, is not an event 'considerably prior to' the establishment of the common organisation of the market in bananas, since Regulation No 404/93 took the 1989 to 1991 period into consideration as the first reference period. The effects of the civil war on the production and export of Somalian bananas thus influenced Camar's reference quantity from the moment when the regulation came into force.

120 Consequently, even if its problems stem from the civil war, they are the result of the transition from the national arrangements to the Community system.

121 Furthermore, the fact that the Community's imports from the ACP countries are lower than the traditional quantities does not mean that there are traditional quantities available. This could be the result of a number of meteorological, environmental or logistical factors, or of bureaucratic difficulties such as those imposed by Article 14 of Regulation No 1442/93.

122 The judgments in *T. Port* and *Belgium and Germany*, cited above, confirm that, at the time in question, it was impossible to find quantities of traditional ACP or Community bananas available on the market.

123 The applicant also contends that the statement that various companies began importing traditional ACP bananas into the Community as soon as the common organisation of the market came into force is not based on accurate information. If it actually happened, it involved only importers who had acquired shares in existing companies or had replaced local producers, or else multinationals with investments in several countries, who were easily able to overcome their logistical problems.

124 The fact that Dole began to import bananas from Somalia is irrelevant in the present case, since it is a multinational which has considerable capital and which established itself in Somalia in the chaos following the civil war.

125 The Commission maintains that its appraisal of the facts of the case was correct and that the conditions for application of Article 30 are not satisfied. In particular it points out that Camar's problems in obtaining supplies are not inherent in the transition from the national arrangements to the Community system, but result from its own strategic choices and, moreover, occurred in 1991, when the national arrangements were still in force.

126 It points out that there is nothing in the common organisation of the market which prevents Camar from replacing its Somalian bananas.

127 Furthermore, the administrative formalities of the Community system have never created any problems in obtaining supplies since the common organisation of the market came into force.

128 Therefore, the judgment in *Belgium and Germany* v *Commission,* cited above, which establishes that the Commission is obliged to take action in certain circumstances, cannot apply in the applicant's case, since that obligation relates only to the need to supply the Community market if an exceptional situation arises after the common organisation of the market comes into force.

— Arguments of the parties on the third plea in Case T-260/97

129 The applicant submits that the contested decision constitutes a misuse of powers since, in the fifth recital, the Commission gives an incorrect interpretation of Article 30 when it states that the application of that provision is only warranted where the operators' difficulties threaten their existence. The applicant contends that, on the contrary, it follows from the judgment in *T. Port* that the only conditions for application of Article 30 relate to the existence of difficulties

associated with the transition from the national arrangements to the Community system, and to the need that those difficulties should not be ascribable to a lack of care on the part of the operators involved.

130 The Court of Justice used the expression 'difficulties threatening their existence' with reference to the operators in question because it was replying to a question referred for a preliminary ruling by the national court and, quite logically, used the same terms that the national court had used.

131 Furthermore, in the present case, the risk to the company's existence would have been a condition for the adoption of possible emergency measures and not for the application of Article 30.

132 Moreover, the existence of earlier national arrangements safeguarding the interests of traditional ACP banana operators in the event of a disaster is not a condition for the application of Article 30 of Regulation No 404/93.

133 In the present case, the Commission should apply Article 30 according to the same principles of fairness which inform its proposed amendment of Regulation No 404/93 (COM/96/82 final, OJ 1996 C 121, p. 15), in which it makes no mention of any risk to the company's existence.

134 The Commission contends that it has been consistently held that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated (Case T-586/93 *Kotzonis* v *ESC* [1995] ECR-SC I-A-61 and II-665, at paragraph 73).

135 None of the observations put forward by the applicant has provided any evidence of the purposes which the decision is alleged to have unlawfully pursued.

136 As regards the conditions for application of Article 30, the Commission, supported by the French Government, maintains that it is clear from the judgment in *T. Port* and from the order in *Camar* cited above (paragraphs 46 and 47), that risk to the existence of a company is a prerequisite for the application of Article 30, since failure to satisfy that requirement would have the effect of altering the entire system of banana imports into the Community.

— Findings of the Court

137 In these four pleas the applicant argues, in essence, that the Commission infringed Article 30 of Regulation No 404/93 in the present case by failing to take the measures provided for in that article, even though it was obliged to do so since the conditions for its application were satisfied.

138 First of all it should be pointed out that the court has already ruled on the interpretation of Article 30 in the judgment in *T. Port* (paragraphs 35 to 41):

'Application of Article 30 is subject to the condition that the specific measures which the Commission must adopt are intended to assist transition from national arrangements to the common organisation of the market and that they are necessary for that purpose.

Those transitional measures must address difficulties encountered after establishment of the common organisation of the market but originating in the state of national markets prior to adoption of the Regulation.

The Commission must in this regard also take into account the situation of traders who, under national legislation in force prior to... Regulation [No 404/93], took certain action without being able to foresee the consequences of such action after establishment of the common organisation of the market.

When assessing whether transitional measures are necessary, the Commission has a broad discretion, which is to be exercised in accordance with the procedure provided for in Article 27 of the Regulation. As the Court held in its order in Case C-280/93 R *Germany* v *Council* [[1993] ECR I-3667], paragraph 47, the Commission, or the Council, as the case may be, are, however, obliged to take action if the difficulties associated with the transition from national arrangements to the common organisation of the market so require.

It is for the Court of Justice to review the lawfulness of the Community institutions' action or failure to act.

The Community institutions are required to act in particular when the transition to the common organisation of the market infringes certain traders' fundamental rights protected by Community law, such as the right to property and the right to pursue a professional or trade activity.

When the transitional difficulties are due to action taken by traders prior to the entry into force of the Regulation, that action must be capable of being seen as displaying ordinary care, with regard both to the prior national arrangements and

to the prospect of establishment of the common organisation of the market, in so far as the traders concerned could have been aware of this.'

139 Given that paragraph 35 of the judgment in *T. Port* merely sets out the characteristics of the measures to be taken by the Commission (they must be necessary and functional), and that it is not disputed that the applicant's difficulties are not the result of action it took before the regulation came into force (paragraph 41), then, in accordance with the guidance given in paragraphs 36 and 38 of that judgment, the conditions for application of Article 30 of Regulation 404/93 may be regarded as satisfied in the present case if the applicant encountered difficulties associated with the transition from national arrangements to the Community system and if the intervention of the Commission is required in order to resolve those difficulties.

140 As for the supply problems pleaded by the applicant, it should be pointed out first of all that, as regards the possibility of interchanging sources of banana supplies, the Italian arrangements before Regulation No 404/93 came into force were considerably more flexible than the Community system. As the applicant stresses, without being disproved by the Commission, the Italian arrangements allowed unlimited quantities of ACP bananas to be imported free of customs duties. Furthermore, as regards the import of third country bananas, even though the Italian arrangements provided for a quota, operators could obtain such a quota without reference to the quantities and origin of the bananas they had imported in previous years. The common organisation of the market in bananas, on the other hand, which was established by Regulation No 404/93, provides that ACP bananas may enter the Community market free of customs duties only until the traditional quantities or the tariff quota have been used up, and that each operator may obtain import licences only according to the origin of the bananas (Community, traditional ACP countries, third countries and non-traditional ACP countries) and on the basis of the average quantities imported over a reference period. Clearly, the introduction of the common organisation of the market limited the scope for imports which existed under Italian legislation prior to Regulation No 404/93.

141 Furthermore, as Advocate General Elmer pointed out in his Opinion in *Belgium and Germany* v *Commission,* cited above (point 35), it 'may... be difficult for an operator who has lost his usual suppliers of Community or traditional ACP bananas to replace them by other suppliers of Community or traditional ACP bananas'. Community and traditional ACP banana producers may give preference to their traditional distribution channels before selling to operators who wish to buy them because of exceptional circumstances but who are usually linked to a competing producer. Consequently, operators who have suffered damage following the loss of their traditional sources of ACP bananas have to procure third-country and non-traditional ACP bananas. They are unable to do so, however, unless they can obtain import licences which correspond to the import quantities which have become impossible (point 35 of the Opinion). The Court specifically took those considerations into account and concluded that, in the case in question, it would have been difficult for the operators to obtain supplies of Community or traditional ACP bananas (see paragraph 52 of the judgment).

142 Finally, in order to allow the traditional quantities or tariff quota of ACP bananas and Community bananas to be sold, the regulation introduced rules encouraging trade in those bananas. The rules make it considerably more difficult for an operator to source traditional ACP bananas from suppliers with which he is not already connected. By virtue of Article 19(1)(b) of Regulation No 404/93 operators importing traditional ACP bananas have an interest in establishing links with producers and in ensuring that they obtain the maximum available quantity of that type of banana each year since, having regard to the traditional quantities imported into the Community, they are entitled to 30% of the tariff quota for imports of third country or non-traditional ACP bananas. At the hearing the Commission accepted that Camar might have experienced difficulties as a result of the introduction of the Community system.

143 Consequently, even if the applicant's difficulties in obtaining supplies of bananas were associated with the civil war which occurred in Somalia at the end of 1990,

they are a direct consequence of the introduction of the common organisation of the market because the system in fact significantly reduced the scope provided under the previous Italian arrangements for Camar to replace the shortfall in Somalian bananas. Those difficulties thus had very serious consequences for the viability of Camar's economic activity and could have endangered the continuation of that activity. They therefore constituted 'difficulties of a sensitive nature' which, for the purposes of Article 30 of Regulation No 404/93 as explained in paragraph 38 of the judgment in *T. Port*, give rise to an obligation on the Commission to take any measures it judges necessary.

144 It therefore remains to be established whether the measures requested by the applicant in response to those difficulties were necessary or if the difficulties could have been overcome in some other way.

145 First of all, as the Court of Justice pointed out in paragraph 38 of its judgment in *T. Port*, the Commission has a broad discretion when assessing whether transitional measures are necessary. Therefore, when examining the lawfulness of the exercise of those powers, the Court must confine itself to considering whether there was a manifest error or a misuse of power, or whether the administrative authority in question manifestly exceeded the limits of its discretion.

146 In that regard the defendant claims that there was an alternative to the measures requested by the applicant. It contends that the applicant could resolve its difficulties within the framework of the operation of the market by buying traditional ACP bananas of different origin and thus taking advantage of the lack of customs duties. In its opinion, the applicant could have imported traditional ACP bananas into the Community, since imports from the ACP countries after 1 July 1993 were below the traditional quantities laid down in the Annex to Regulation No 404/93. This possibility is confirmed, it claims, by the fact that other operators began importing that type of bananas after the regulation came into force.

147 As to the argument concerning the failure to use up the traditional quantities, it is evident that the fact that imports from the ACP countries after 1 July 1993 were below the quantities laid down in the Annex to Regulation No 404/93 does not mean that there were traditional ACP bananas available that could have been imported into the Community by the applicant. It should be remembered that the traditional quantities allowed for import were determined on the basis of the greatest quantity exported during the years prior to 1991 by each ACP country that was a traditional supplier to the Community. They are therefore not an indication of the actual level of production in those ACP countries and thus of the quantities actually available for import during 1994-1996. What is more, as the applicant has pointed out, banana imports always depend on circumstances affecting production or export, such as climatic events and logistical problems.

148 As to the argument concerning the appearance of new operators, the Commission named the following operators in reply to a written question from the Court of First Instance: Del Monte, Diprosol, Ibanema, Select A (importing from the Ivory Coast), Exodom (importing from Cameroon), Fyffes (importing from the Windward Isles), Tico (importing from Somalia) and Dole (importing from Jamaica and, under the name Comafrica, from Somalia). It also stated that, according to its estimates, those operators had imported from ACP countries some 25% of the Community's total imports in 1997. It should be stressed that the observation that some operators actually began importing bananas from the ACP countries after Regulation No 404/93 came into force does not invalidate the finding that an operator who, like the applicant, loses his usual sources of supplies of traditional ACP bananas will have difficulty in replacing them. It should also be noted that the figures for 1997 supplied by the Commission are not relevant for assessing the scope for imports from the ACP countries during the period in which the applicant encountered difficulties of a sensitive nature, in other words during 1994, 1995 and 1996.

149 It follows from the above that the Commission committed a manifest error of appraisal in considering that Camar was capable of overcoming the difficulties caused by the transition from the Italian national arrangements to the Community system by relying on the operation of the market. In point of fact,

the only way to enable the applicant to deal with the difficulties it faced was for the Commission to adopt transitional measures as provided for in Article 30. The adoption of such measures was therefore manifestly necessary.

150 This conclusion is not invalidated by the Commission's argument that Article 30 of Regulation No 404/93, as interpreted by the Court of Justice in its judgment in *T. Port*, requires the Commission to take action only where banana importers encounter difficulties which are not just inherent in the transition from the national arrangements to the Community system, but which also threaten their existence.

151 It should also be pointed out that in paragraph 43 of the judgment in *T. Port* the Court of Justice stated that Article 30 may require the Commission 'to lay down rules catering for cases of hardship arising from the fact that importers of third-country bananas or non-traditional ACP bananas meet difficulties threatening their existence'. However, this statement cannot be understood to mean that the Commission is under an obligation to take action only in such cases. Such an interpretation would conflict with the wording of Article 30, which, as has already been stressed, provides that the Commission must take any measures necessary to overcome 'difficulties of a sensitive nature', and it would be incompatible with the principles of sound administration and protection for the right to pursue a professional or trade activity. Furthermore, the reference to the threat to the operator's existence followed from the specific wording of the question referred for a preliminary ruling (see judgment in *T. Port*, paragraph 23).

152 In the light of all these considerations, the first plea in Case T-79/96 and the first, second and third pleas in Case T-260/97 must be upheld.

153 It follows that, without it being necessary to rule on the other pleas advanced, the applications for a declaration, in Case T-79/96, that the Commission unlawfully

failed to take the necessary measures as provided for in Article 30 of Regulation No 404/93 and, in Case T-260/97, that the Commission's decision of 17 July 1997 refusing to take the measures applied for was unlawful, are well founded.

*Merits of the action in Case T-117/98*

154 The applicants put forward four pleas, three of which allege infringement of Article 16(3) of Regulation No 404/93 in that, first, the Commission breached the conditions for application of that article; second, it failed to consider the effects of the exceptional circumstances referred to in that article; and third, it failed to apply the procedure provided for in Article 27 of that regulation. The fourth plea alleges breach of the principle of non-discrimination.

The first plea, alleging breach of the conditions for application of Article 16(3) of Regulation No 404/93

— Arguments of the parties

155 The applicants claim that the contested decision is unlawful in that it infringes Article 16(3) of Regulation No 404/93. According to them, the conditions for applying Article 16(3), namely risk of a shortfall in supplies to the Community market and existence of an unforeseeable event affecting the production of Community and traditional ACP bananas, are satisfied in the present case.

156 They contend that the climatic phenomenon known as 'El Niño', which has been described in the international press, in a report by the FSAU (Food Security Assessment Unit For Somalia), a body supported by the FAO (Food and Agriculture Organisation), and by the banana importing company Somalfruit, amounts to an unforeseeable event.

157 The risk of a shortfall in supplies to the Community market is demonstrated by the fact that during the second half of 1997 and the first half of 1998 one half of Somalia's production, which had by now reached the level of the traditional quantity, was lost because of this serious and unforeseeable climatic event. Only 1 970 tonnes of bananas were imported from Somalia in the fourth quarter of 1997, whereas operators had applied for licences for 9 000 tonnes. In the 1997 forecast supply balance the Commission had taken account of an estimated production of 60 000 tonnes for Somalia. That estimate was confirmed by the Commission in the case which led to the order of 21 March 1997 in *Camar* v *Commission*, cited above. The forecast for imports from Somalia for 1998 was 30 000 tonnes.

158 The defendant contends that the conditions for application of Article 16(3), namely the risk of a shortfall in supplies to the Community market and the existence of an unforeseeable event affecting the production of Community and traditional ACP bananas, are not satisfied.

159 As regards supplies to the Community market, the Commission contends that the floods in Somalia during 1997 had no effect on the situation on the Community market.

160 As for the second condition, the defendant states that it is impossible to distinguish between the damage caused by climatic problems and other difficulties associated with the export of Somalian bananas, particularly the unreliable loading and transport structures.

— Findings of the Court

161 In this plea the applicants claim that during the last quarter of 1997 and the first two quarters of 1998 the conditions for application of Article 16(3) of Regulation No 404/93 were satisfied having regard to the impact which 'El Niño' had on production in Somalia.

162 As regards the conditions for application of the provision in question, it should be remembered that, as interpreted by the Court of Justice, the provision requires the institutions to adjust the tariff quota where this is found to be necessary during the marketing year in order to take account of exceptional circumstances affecting import conditions (judgment in *T. Port*, paragraph 27, and order of the Court in Case C-280/93 R *Germany* v *Council* [1993] ECR I-3667, paragraph 44). Furthermore, the quota must be reviewed during the marketing year only if, as a result of exceptional circumstances, production of Community bananas and imports of traditional ACP bananas do not reach the levels forecast or if the actual consumption of bananas in the Community exceeds the forecast (see judgment in *T. Port*, paragraph 31).

163 It follows from the above that two conditions must be satisfied at the same time if Article 16(3) is to be applied: there must be an exceptional circumstance affecting the production of Community bananas or imports of traditional ACP bananas, and there must be a risk of a shortfall in banana supplies to the Community market.

164 As regards the first condition, it is not disputed that exceptional floods occurred in Somalia from 1997 to 1998 as a result of the climatic phenomenon known as 'El Niño'. That event must be deemed to satisfy the first condition for application of Article 16(3).

165 The Commission cannot claim that it is impossible to distinguish damage caused by climatic problems from other difficulties associated with the export of Somalian bananas, particularly the unreliable loading and transport structures.

166 It suffices to point out that this argument goes to the quantitative estimate of the shortfall in supply and not to the existence of the risk of such a shortfall; furthermore, as the applicants rightly observe, it appears that the Commission could have distinguished between the damage caused by climatic problems and other difficulties by looking at the imports from Somalia in 1996, when the loading and transport structures were the same but the climatic problems did not exist.

167 As for the second condition, it should be pointed out, first of all, that the applicants do not need to prove that there was an actual shortfall in supplies to the Community market, they simply need to demonstrate that there was a risk of such a shortfall. The applicants' claim, not disproved by the Commission, that there was a significant drop in imports of Somalian bananas during the last quarter of 1997 and the first half of 1998 supports their contention that there was such a risk to the Italian market overall, and therefore to a substantial section of the Community market. The Commission did not provide any information to refute that claim when, in reply to a written question from the Court of First Instance, it explained that supplies to the Community market in 1997 could be regarded as adequate given that, faced with a 94 000 tonne reduction in imports of traditional ACP bananas (including 3 522 tonnes from Somalia) and an increase in Community demand of 86 000 tonnes, Community production had increased by some 126 000 tonnes and imports from third countries by some 64 000 tonnes compared with 1996.

168 First, as regards the increase in the production of Community bananas in 1997, the Commission has not explained how that increase could compensate for

reductions in Somalian imports in 1998. Second, as regards the increase in imports from third countries in 1997 compared with 1996, it is clear from the figures supplied by the Commission itself that the imports in 1997 did not use up the tariff quota fixed in the forecast supply balance; it therefore cannot be claimed that there was an increase, compared with the forecast, which was capable of supplementing any shortfall in supply.

169 Furthermore, if, as the Commission's reply appears to suggest, the Commission actually based its assessment of the risk of a shortfall in supplies to the market in 1998 on the 1997 production figures for Community bananas, it would have committed an error of law in the application of Article 16 of Regulation No 404/93. As the Court of Justice explained in its judgment in *T. Port* (paragraph 31), if an increase in the production of Community bananas is to be taken into account in order to compensate for a reduction in imports of traditional ACP bananas which has occurred during a particular year, it must be an increase compared with the forecast supply balance for the same year rather than with production in the previous year.

170 Finally, the fact that, as the Commission accepted at the hearing, it receives figures relating to the situation of the banana market every week makes it difficult to understand why it has never, at any stage in the proceedings, provided figures for supplies to the Community market in 1998 in response to the applicants' claims. In those circumstances, by using only figures for 1997, the Commission gave further weight to the evidence provided by the applicants concerning the market situation in 1998.

171 It is clear from the above that, in the present case, the second condition for application of Article 16(3) is also satisfied.

172 It follows that this plea must be upheld.

173 Having upheld the first plea in Case T-117/98, the application for annulment must be declared well founded, and it is not necessary to deal with the other pleas.

## Claims for compensation

*Case T-79/96*

Arguments of the parties

174 In its application the applicant seeks an order that the Community pay compensation, in accordance with 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), for the damage it has suffered as a result of the Commission's failure to take the necessary measures pursuant to Article 30 of Regulation No 404/93.

175 It contends that the arguments put forward in support of its claim that the action for declaration of failure to act was admissible and well founded demonstrate that the action for compensation is well founded.

176 In particular, the causal link between the damage suffered by the applicant and the Commission's conduct follows from the fact that the Commission was obliged to find a solution to the applicant's difficulties in replacing its imports of Somalian bananas, which were solely the result of the transition from the national arrangements to the Community system.

177 The Commission, supported by the French Government, claims that the applicant has not satisfactorily proved any of the conditions for establishing the Community's non-contractual liability, namely unlawful conduct, actual damage and a causal link between them.

178 As regards the unlawfulness of the institution's alleged conduct, the Commission claims that, since the alleged failure to take action concerned an act of a legislative nature and, moreover, an act to be adopted in the common agricultural policy sector, the Community could incur liability only in restricted circumstances (Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209 and Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955; Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379). In any event, those conditions were not satisfied in the present case since it had neither infringed Article 30 of Regulation No 404/93 nor breached the principle of non-discrimination.

179 As for the condition of actual damage, the Commission states that in its application the applicant has provided no quantification or proof whatsoever of the alleged damage.

180 As for the causal link, the defendant claims that the link has not been proved to exist, since the applicant's difficulty in replacing Somalian bananas could be related to a wide range of factors; the applicant could have overcome those

difficulties as other operators did who began to import ACP bananas, and in particular Somalian bananas, after Regulation No 404/93 came into force.

Findings of the Court

181 According to Article 19 of the EC Statute of the Court of Justice, which applies to proceedings before the Court of First Instance pursuant to the first paragraph of Article 46 of that Statute, and according to Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, an application must state the subject-matter of the dispute and give a summary of the pleas advanced. In order to satisfy those requirements, an application seeking compensation for damage allegedly caused by a Community institution must state the evidence from which the conduct alleged against the institution may be identified, the reasons why it considers that a causal link exists between that conduct and the damage which it claims to have suffered, and the nature and extent of that damage. A claim for any unspecified form of damages, however, is not sufficiently concrete and must therefore be regarded as inadmissible (see Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 9, and Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 73).

182 Under Article 113 of the Rules of Procedure the Court of First Instance may at any time and of its own motion examine an absolute bar to proceedings, such as that arising from the insufficiency of an application (*Automec,* cited above, paragraph 74).

183 In its application the applicant has merely stated that the damage it has suffered resulted from the fact that, since the common organisation of the market in bananas came into force, it had been unable to replace Somalian bananas with

bananas of other origin and it has had only limited opportunities to obtain category B import licences. Nor has it received any import licences since 1995.

184 Those statements do not allow an evaluation to be made of the extent of the damage allegedly suffered by the applicant.

185 Accordingly, the action for compensation in Case T-79/96 must be declared inadmissible.

*Case T-260/97*

Admissibility

— Arguments of the parties

186 In its application the applicant seeks an order that the Community pay compensation, in accordance with Article 178 and the second paragraph of Article 215 of the Treaty, for the damage it has suffered as a result of the Commission's decision of 23 April 1998 refusing to consider, pursuant to Article 30 of Regulation No 404/93, the years 1988 to 1990 as the reference period for determining the quantity of category B import licences for third country and non-traditional ACP bananas.

187 However, as it has not been possible until now to quantify the alleged damage, in particular because it is still continuing, the applicant has asked the Court to adjudicate only on the existence of the damage, leaving it to be evaluated in an out-of-court settlement between itself and the Commission and/or Council, or, failing that, by the Court of First Instance in a subsequent action.

188 According to the Commission, supported by the Council, this plea is inadmissible since the applicant has neither specified the nature of the damage allegedly suffered, nor provided an evaluation of that damage, nor demonstrated the causal link between the Commission's conduct and the alleged damage (Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 97).

— Findings of the Court

189 As pointed out in paragraph 181, an application for compensation for damage allegedly caused by a Community institution must state evidence identifying the nature and extent of the alleged damage.

190 The applicant claims that the damage results from the allocation, for 1997 and subsequent years, of a smaller number of category B import licences than it would have received if the Commission had taken the years 1988 to 1990 as the reference period after applying Article 30 of Regulation No 404/93.

191 The applicant has thus adequately identified the institution's alleged conduct, namely the Commission's refusal to adjust its reference quantity for 1997 and subsequent years in breach of Article 30 of Regulation No 404/93, and also the

reasons why it considers that there is a causal link between the damage which it alleges it has suffered and the conduct of the Commission, which alone had the power and the duty to take action to resolve its difficulties.

192 As for the scale of the damage, it should be recalled as the Court of Justice stated in its judgment in Cases 56/74 to 60/74 *Kampffmeyer and Others* v *Commission and Council* [1976] ECR 711, paragraph 6:

'... Article 215 of the Treaty does not prevent the Court from being asked to declare the Community liable for imminent damage foreseeable with sufficient certainty, even if the damage cannot yet be precisely assessed;

... To prevent even greater damage it may prove necessary to bring the matter before the Court as soon as the cause of damage is certain.'

193 The Court of Justice therefore held that, where damage that could result from the factual situation and the rules is imminent, the applicant may refrain from specifying the amount of damage for which the Community might have to pay compensation and merely ask for the Community to be found liable (*Kampffmeyer,* cited above, paragraph 8).

194 In the present case, it is apparent from the documents before the Court that the alleged damage results from the fact that the number of category B licences allocated to the applicant for 1997 was five times lower than the number it would have received if the period before the civil war had been taken into account, and that this situation is likely to continue until it is given an adjusted reference quantity. Furthermore, in its reply the applicant added, without rebuttal by the

Commission, that the purchase price in respect of category B licences is around ECU 200 per tonne. Finally, it should be pointed out that, so far, the applicant has not been given an adjusted reference quantity. By virtue of Regulation No 2362/98 the years 1994 to 1996 were chosen as the reference period for imports to be carried out in 1999 under the tariff quotas or as part of the quantity of traditional ACP bananas. Furthermore, under Regulations Nos 2268/99, 250/2000 and 1077/2000, the same reference period applies for the first, second and third quarters of the year 2000.

195 Accordingly, the Court considers that, although the applicant has not quantified the amount of the alleged damage, it has nevertheless adduced evidence enabling its extent to be foreseen with sufficient certainty.

196 It follows that the applicant's claims seeking a declaration of the Community's liability is admissible.

Merits of the action for compensation

— Arguments of the parties

197 The applicant states that the fact that the conditions rendering the Commission non-contractually liable are satisfied is apparent from its arguments on the merits of the action for annulment. However, given that the current unlawful situation is continuing to cause further damage and that it is therefore impossible to quantify the damage exactly, the Court should adjudicate only on the existence of the damage. The damage is the result, it claims, of the fact that, for 1997, 1998 and subsequent years until an adjusted reference quantity is established, the number of category B licences allocated is five times lower than the number it would have

been allocated if the period before the civil war had been taken into account. The minimum damage is the price of category B licences, which, according to the statement of the Commission representative in the 'bananas' group of the Special Committee on Agriculture, is around ECU 200 per tonne (annex to the interim report adopted by the Special Committee on Agriculture at its meeting of 9 and 10 February 1998).

198 In the alternative, the applicant maintains that, if it found that the Commission does not have the necessary powers to resolve the situation, it must be inferred from this that Regulation No 404/93 is unlawful in having left such a gap in the law; therefore the Council, as the institution which adopted the regulation, should pay compensation for the damage which the applicant suffered.

199 The Commission asserts that, in the present case, none of the conditions for rendering the Community liable is satisfied, since the applicant has not proved either the unlawfulness of its conduct, the reality of the alleged damage or the existence of a causal link between the conduct in question and the alleged damage.

200 In particular, the Commission points out, first of all, that the Court has already been called upon to give a ruling, in a case concerning non-contractual liability, on the breach of the principle of non-discrimination which is alleged to have resulted from Regulation No 404/93, and that it found the regulation to be lawful (Case T-521/93 *Atlanta and Others* v *Council and Commission* [1996] ECR II-1707, paragraphs 46 to 50). Secondly, the applicant has not given any explanation of the exact nature of the breach from which it claims to have suffered.

201 The Council claims that the conditions for incurring non-contractual liability are not satisfied. It points out that, according to settled case-law, in the case of

legislative acts involving economic policy choices, the Community incurs liability only if there is a sufficiently serious breach of a superior rule of law for the protection of the individual. In particular, in a legislative context such as in the present case, which concerns the implementation of the common agricultural policy, the Community incurs liability only if the institution in question manifestly and seriously failed to observe the limits on the exercise of its powers.

202 According to the Council, the applicant has not advanced any argument to show that the adoption of Regulation No 404/93, and in particular Articles 19(2) and 30 thereof, or the absence of special provisions on adjusting the reference quantities for operators in difficulty, constitute a serious and manifest breach of the limits of the Council's discretion.

203 In any event, the applicant has not put forward any factual elements concerning the reality of the damage allegedly suffered or the existence of a causal link between the Council's conduct and that damage.

— Findings of the Court

204 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 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-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44, Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30, Case

T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20, and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 54).

205 As regards the condition requiring the existence of unlawful conduct, it should be remembered that, in the field of administrative action, any infringement of law constitutes illegality which may give rise to liability on the part of the Community (Case T-390/94 *Schröder and Others* v *Commission* [1997] ECR II-501, paragraph 51).

206 In the present case, the decision of 17 July 1997, in which the Commission refused to take provisional measures to allow the annual quantity allocated to the applicant in order to obtain import licences for traditional ACP bananas to be calculated on the basis of the quantities which it marketed in 1988, 1989 and 1990 — even if it was based on Article 30 of Regulation No 404/93, which gives the Commission broad discretionary power (*T. Port*, cited above, paragraph 38) — was nevertheless an individual decision and therefore administrative in nature. It follows that, since that decision was taken in breach of Article 30, the first condition required to render the Commission liable is satisfied.

207 As regards the second condition for the Community to incur liability, relating to the existence of actual damage, it should be remembered that, as stated in paragraph 192 above, the case-law of the Court of Justice allows an action for declaration of liability to be based on sufficiently certain future damage. Therefore, for the purpose of an action seeking, as in the present case, a declaration that the Community is obliged to pay compensation for future damage, it is sufficient that the cause of the damage in question exists at the time when the action is brought and that the damage is imminent and foreseeable with sufficient certainty, even if it cannot yet be precisely assessed.

208 In the present case those conditions are satisfied. The cause of the damage alleged by the applicant, namely the Commission's infringement of Article 30 of Regulation No 404/93, existed at the time when the action was brought, and the harmful consequences of that infringement, namely the allocation to the applicant of a smaller number of import licences than it would have been allocated if Article 30 of Regulation No 404/93 had been correctly applied, were both imminent and foreseeable at the time, on the basis of the existing situation in law and in practice. It follows that the second condition for the Community to incur liability is also satisfied.

209 Finally, as regards the causal link between the infringement of law committed by the Commission and the damage which the applicant suffered, that condition is satisfied since, if the Commission had adopted transitional measures pursuant to Article 30 of Regulation No 404/93, Camar could have obtained a greater number of import licences and would not have suffered the damage which it alleges.

210 It follows that the Commission's decision of 17 July 1997 rendered the Community non-contractually liable and that the application for compensation in Case T-260/97 must therefore be declared well founded.

211 In those circumstances, it is appropriate to ask the parties to reach an agreement, within six months, in the light of this judgment, on the amount of compensation for all the damage eligible for compensation. In the event of failure to reach agreement, the parties shall submit their quantified claims to the Court within that period (see Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595, paragraph 145).

212 Having declared the Community liable by virtue of the Commission's action, there is no need to adjudicate on liability of the Council, which the applicant alleged in the alternative.

*Case T-117/98*

Arguments of the parties

213 In their application the applicants seek an order that the Community pay compensation, in accordance with Article 178 and the second paragraph of Article 215 of the Treaty, for the damage which they suffered as a result of the Commission's decision of 23 April 1998 rejecting their application, submitted under Article 16(3) of Regulation No 404/93, for adjustment of the tariff quota following the floods in Somalia.

214 The applicants allege that the unlawfulness of the Commission's conduct is apparent from the same arguments as those advanced on the merits of the action for annulment. Regarding the causal link, the damage suffered by the applicants is a direct result of the Commission's decision not to take action in a situation where it was required to do so. As for the damage, given that the current unlawful situation will continue to cause further damage and that it is therefore impossible to give a precise estimate, the Court should adjudicate only on the existence of the damage.

215 The Commission disputes that the conditions rendering the Community non-contractually liable are satisfied, since, first of all, it has not committed any of the alleged infringements; second, there is no causal link between its conduct and the

damage allegedly suffered by the applicants, since the damage to which they refer was caused by the floods, which the Commission is unable to rectify; and finally, the applicants have not quantified the damage and have not clearly stated the reasons which prevented them from doing so, at least up to the time when they brought the action (order in Case T-505/93 *Osório* v *Commission* [1994] ECR-SC I-A-179 and II-581).

Findings of the Court

216 As has been pointed out in paragraph 181 above, an application for compensation for damage allegedly caused by a Community institution must state the evidence from which the conduct alleged against the institution may be identified, the reasons why it considers that a causal link exists between that conduct and the damage which it claims to have suffered, and the nature and extent of that damage. A claim for any unspecified form of damages, however, is not sufficiently concrete and must therefore be regarded as inadmissible.

217 Furthermore, under Article 113 of the Rules of Procedure the Court of First Instance may at any time and of its own motion examine an absolute bar to proceedings, such as that arising from the insufficiency of an application.

218 First of all, it should be pointed out that the applicants allege both current damage, in that they are unable to import the desired quantity of bananas because they do not have the licences to do so, and future damage, in that the quantities

refused in 1998 cannot be taken into account in the reference periods for the allocation of future import licences.

219 As regards compensation for the current damage caused by the Commission's refusal to adjust the tariff quota during the first half of 1998, it must be stated that the applicants' application is incomplete. Their action was lodged at the Registry of the Court of First Instance on 14 July 1998, by which time the extent of the damage should have been determinable. The Commission is therefore right to point out that the applicants have not quantified the damage already suffered at the time when the action was brought and have failed to state the reasons which prevented them from doing so.

220 It follows that, in accordance with Article 113 of the Rules of Procedure, the action for compensation must be dismissed as inadmissible in so far as it relates to the immediate harmful effects of the contested decision.

221 As for the future damage, it should be pointed out that, according to the case-law of the Court (*Kampffmeyer*, cited above, paragraph 6), only imminent damage which is foreseeable with sufficient certainty on the basis of the existing factual situation and rules may be relied on before the Community judicature. In the present case those conditions are not satisfied. The year 1998, during which the applicants were unable to import the desired quantity of bananas because they did not have the licences to do so, is not currently included in the reference period for the allocation of import licences for 2000.

222 Accordingly the future damage invoked by the applicants cannot be regarded as either imminent or foreseeable with sufficient certainty, and the action for compensation, in so far as it relates to that damage, must therefore also be declared inadmissible.

## Costs

223 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

224 Since the parties have applied for costs, and since the Commission has been unsuccessful in all essential respects in Cases T-79/96 and T-117/98, the Commission must be ordered to pay the costs.

225 Since the Commission and the Council have been unsuccessful in Case T-260/97, they must be ordered to pay 90% and 10% of the costs respectively.

226 Under Article 87(4) the Member States which have intervened in the dispute are to bear their own costs. The Italian Republic, intervener in Case T-79/96, and the French Republic, intervener in Cases T-79/96 and T-260/97, must therefore bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. In Case T-79/96, declares that, by failing to take the necessary measures provided for in Article 30 of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas with respect to the applicant, the Commission has failed to fulfil its obligations under that article;

2. In Case T-260/97, annuls the Commission's decision of 17 July 1997 rejecting the application which the applicant submitted on the basis of Article 30 of Regulation No 404/93;

3. In Case T-117/98, annuls the Commission's decision of 23 April 1998 rejecting the application which the applicants submitted on the basis of Article 16(3) of Regulation No 404/93;

4. In Cases T-79/96 and T-117/98, dismisses the action for compensation as inadmissible;

5. In Case T-260/97, orders the Commission to pay compensation for the damage suffered by the applicant as a result of the decision of 17 July 1997 rejecting the application submitted by the applicant on the basis of Article 30 of Regulation No 404/93;

Orders the parties to inform the Court, within six months of the date on which this judgment is delivered, of the sums to be paid, determined by common accord;

Orders that, in the event of failure to reach agreement, they shall submit their quantified claims to the Court within that period;

6. Orders the Commission to pay the costs in Cases T-79/96 and T-117/98;

7. Orders the Commission to pay 90% of the costs in Case T-260/97;

8. Orders the Council to pay 10% of the costs in Case T-260/97;

**9. Orders the Italian Republic and the French Republic to bear their own costs.**

Moura Ramos Tiili Mengozzi

Delivered in open court in Luxembourg on 8 June 2000.

H. Jung V. Tiili

Registrar President