JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
29 January 2002 *

In Case T-160/98,

Firma Léon Van Parys NV, established in Antwerp (Belgium),

Pacific Fruit Company NV, established in Antwerp,

represented by P. Vlaemminck, L. Van den Hende and J. Holmens, lawyers, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by H. van Vliet and L. Visaggio, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Dutch.

APPLICATION for the annulment of a decision allegedly taken by the Commission between 12 March 1998 and 5 August 1998 reducing the quantity of bananas marketed by the applicants in 1996 and taken into account in determining their reference quantity for 1998,

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

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

having regard to the written procedure and further to the hearing on 13 September 2001,

gives the following

Judgment

Legal framework

Regulation (EEC) No 404/93

1 Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1) introduced, with

effect from 1 July 1993, common arrangements for trade with non-member countries to replace the various national arrangements governing such trade. The first paragraph of Article 17 of Regulation No 404/93 provided that the importation of bananas into the Community was to be subject to the submission of an import licence issued by the Member States at the request of any party concerned. Under Article 19(2) of that regulation, each operator who had marketed bananas or had begun to market bananas in the Community was to obtain import licences on the basis of the average quantities of bananas which he had sold in the three most recent years for which figures were available.

Regulation (EEC) No 1442/93

2 On 10 June 1993 the Commission adopted Regulation (EEC) No 1442/93 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6).

3 Article 3(1) of Regulation No 1442/93 defined as 'operators' in Category A (having marketed bananas from non-member countries other than the African, Caribbean and Pacific (ACP) States and/or non-traditional ACP bananas) and/or Category B (having marketed Community bananas and/or traditional ACP bananas), for the purposes of Articles 18 and 19 of Regulation No 404/93, those economic agents or any other entities who had engaged in one or more of the following activities on their own account:

'(a) the purchase of green third-country and/or ACP bananas from the producers, or where applicable, the production, consignment and sale of such products in the Community;

(b) as owners, the supply and release for free circulation of green bananas and sale with a view to their subsequent marketing in the Community; the risks of spoilage or loss of the product [being] equated with the risk taken on by the owner;

...'

4 Operators carrying out activities (a) and (b) described in the preceding paragraph are referred to, in what follows, as 'primary importers' and 'secondary importers' respectively.

5 Article 4(1) of Regulation No 1442/93 provided:

'The competent authorities of the Member States shall draw up separate lists of operators in Categories A and B and the quantities which each operator has marketed in each of the three years prior to that preceding the year for which the tariff quota is opened, broken down according to economic activity as described in Article 3(1). Operators shall register themselves and shall establish the quantities they have marketed by submitting individual written applications on their own initiative in a single Member State of their choice.

...'

6 In accordance with Article 4(2) of Regulation No 1442/93, the operators concerned were required to notify the competent authorities each year of the overall quantities of bananas marketed by them in the reference years referred to in Article 4(1) broken down according to origin and economic activity as described in Article 3(1) of that regulation.

7 Article 4(5) of Regulation No 1442/93 required the competent authorities subsequently to forward the lists of operators referred to in Article 4(1) to the Commission together with the quantities which each operator had marketed. It added:

'As and when required, the Commission shall forward these lists to the other Member States with a view to detecting or preventing inaccurate declarations by operators.'

8 Article 5(1), first subparagraph, of Regulation No 1442/93 provided that the competent authorities of the Member States should each year establish, for each Category A and Category B operator registered with them, the average quantities marketed during the three years prior to the year preceding that for which the tariff quota was opened, broken down according to the economic activity engaged in by the operator, in accordance with Article 3(1) of that regulation. That average was referred to as the 'reference quantity'.

9 The second subparagraph of Article 5(1) of Regulation No 1442/93 provided:

'The reference quantities for Category A operators shall be determined on the basis of their trade in third-country and non-traditional ACP bananas, excluding

bananas imported under licences issued to operators in Categories B and/or C. The reference quantities of Category B operators shall be determined on the basis of their trade in Community and traditional ACP bananas.'

10 Article 5(2) of Regulation No 1442/93 provided that the quantities marketed were to be adjusted as follows by a weighting coefficient depending on the activities described in Article 3(1) of that regulation:

— activity (a): 57%,

— activity (b): 15%,

— activity (c): 28%.

11 Through the application of those weighting coefficients a given quantity of bananas could not count in the calculation of the reference quantity for an overall amount greater than that figure, whether it has been handled at all three stages corresponding to the activities defined in Article 3(1) of Regulation No 1442/93 by the same operator or by two or three different operators. According to the third recital in the preamble to Regulation No 1442/93, the purpose of those weighting coefficients was to take account of the scale of the business concerned and of the commercial risks incurred and to correct the negative effects of counting more than once the same quantities of product at various stages of marketing.

12 According to Article 5(3) of Regulation No 1442/93:

'The competent authorities shall notify the Commission ... each year ... of the total reference quantities weighted pursuant to paragraph 2 and the total quantities of bananas marketed in respect of each activity by operators registered with them.'

13 Article 6 of Regulation No 1442/93 was worded as follows:

'Depending on the annual tariff quota and the total reference quantities of operators as referred to in Article 5, the Commission shall fix, where appropriate, a single reduction coefficient for each category of operators to be applied to operators' reference quantities to determine the quantity to be allocated to each.

The Member States shall determine the quantities for each operator in Categories A and/or B registered with them and shall notify the latter thereof ...'.

14 Article 7 of Regulation No 1442/93 listed the documents which, at the request of the competent authorities of the Member States, might be submitted by Category A and B operators registered with them in order to establish the quantities marketed by each.

15 Article 8 of Regulation No 1442/93 required the competent authorities to conduct all necessary checks to verify the validity of applications and supporting documents submitted by operators.

Regulation (EC) No 1721/98

16 On 31 July 1998 the Commission adopted Regulation (EC) No 1721/98 fixing the reduction coefficients for the determination of the quantity of bananas to be allocated to each operator in Categories A and B from the tariff quota for 1998 (OJ 1998 L 215, p. 62).

17 Article 1 of that regulation provides:

'The quantity to be allocated to each operator in categories A and B in respect of the period 1 January to 31 December 1998 within the tariff quota provided for in Articles 18 and 19 of Regulation (EEC) No 404/93 shall be calculated by applying to the operator's reference quantity, determined in accordance with Article 5 of Regulation (EEC) No 1442/93, the following single reduction coefficients:

— for each category A operator: 0.860438,

— for each category B operator: 0.527418.'

Facts of the dispute

18 The applicants import bananas into the Community from non-member countries, principally as primary importers and, on a subsidiary basis, as secondary importers. At the material time, they were registered as Category A operators with the competent authority in Belgium, that is to say, the Bureau d'intervention et de restitution belge ('the BIRB').

19 Pursuant to Article 5(1), first subparagraph, of Regulation No 1442/93, the reference quantity of operators for the 1998 marketing year was determined on the basis of the average figure for quantities marketed in 1994, 1995 and 1996. The present dispute relates only to those quantities marketed by the applicants in 1996 which were used to determine their reference quantity for 1998.

20 In accordance with Article 4(2) of Regulation No 1442/93, the applicants notified the BIRB on 28 March 1997 of the quantities of bananas from non-member countries which they had marketed in 1996, that is to say, 347 832 362 kg as primary importers and 109 006 763 kg as secondary importers. They also sent to the BIRB a list of customers who had in 1996 purchased from them bananas released for free circulation within the Community. This information was subsequently forwarded by the BIRB to the Commission pursuant to Article 4(5) of Regulation No 1442/93.

21 By fax of 13 October 1997 the BIRB sent to the applicants a part copy of a 'worksheet' drawn up by the Commission and relating to the quantities of bananas which the applicants had allegedly imported and sold to secondary importers in 1996. On that 'worksheet', the Commission pointed out to the BIRB

that a number of undertakings which had purchased from the applicants bananas under cover of Category A licences and released them for free circulation were not known to its services and were not registered as operators in that category. The Commission further pointed out that a number of purchasers from the applicants, although themselves Category A operators, had declared to the Member State in which they were registered that they had not released for free circulation under Category A licences all of the quantities purchased from the applicants. The Commission stated that, in those circumstances, it had decided to reduce provisionally the applicants' reference quantities for 1998.

22 By letter of 31 October 1997 the BIRB informed the applicants that their provisional reference quantity for the 1998 marketing year was to be 89 993 888 kg. By letter of 9 March 1998 the BIRB forwarded to them a copy of a new 'worksheet' drawn up by the Commission and reducing by 190 903 727 kg the total volume of imported bananas which they had declared as primary importers. The BIRB requested the applicants to submit any comments on that sheet by 11 March 1998 at the latest.

23 During a meeting on 8 May 1998 between a Commission official, a BIRB representative and the applicants, the latter pointed out that their purchasers were under a contractual obligation to clear through customs the quantities of bananas purchased from the applicants in the European Union pursuant to a Category A licence. For its part, the Commission maintained that, according to the information at its disposal, the 190 903 727 kg of bananas which were the subject of the contested reduction had not been cleared through customs within the European Union on the basis of such a licence.

24 On 9 June 1998 the applicants sent a letter to the Commission stating *inter alia* as follows:

'We have informed your services that the proposed reduction which we believe we could infer from that "worksheet" is unacceptable as being totally at odds

with the contractual arrangements agreed between [the applicants] and their clients, under which the latter are obliged to clear through customs by means of a Category A licence all bananas which they purchase [from the applicants] for purposes of consumption within the EC.'

25 The applicants also complained in that letter that no useful documentation had been forwarded, that no clear and official reasons had been provided by the Commission, and that, in those circumstances, they were not in a position to 'defend themselves in the appropriate manner' against 'the proposed reduction'. They therefore formally called on the Commission to grant them access to the file, verify the declarations of their customers, thereupon adopt a reasoned decision regarding their reference quantity for 1996 by restoring to them the quantities withdrawn, and to notify them of that definitive decision.

26 By letter of reply dated 14 July 1998 the Commission informed the applicants that, while it played an important role in detecting and eliminating cases of double counting, decisions setting the quantities for each operator and notifying the latter thereof were the responsibility of the Member State in which the operator was registered. The Commission added that, under Articles 4(3) and 7 of Regulation No 1442/93 in particular, an operator applying for an import licence was under an obligation to forward the requisite supporting documentation to the competent national authority and to provide the latter with evidence as to the type of licence used by its purchasers for bananas released into free circulation within the Community. The Commission also expressed its willingness to allow the applicants to consult certain documents on its file concerning their application for Category A licences for 1998, subject to a number of provisos relating to the rules on confidentiality.

27 On 5 August 1998 the BIRB sent to the applicants a letter worded as follows:

'We are hereby pleased to inform you that the definitive quantity to be allocated to you under the 1998 tariff quota has been calculated by applying the provisions

of [Regulation No 1442/93] and the reduction coefficient determined for Category A operators by [Regulation No 1721/98].

This definitive quantity amounts to 99 571 115 kg in regard to your registration as a Category A operator.

This quantity has been calculated on the basis of your reference quantities, taking into account the reductions applied to your "Category A — activity (a)" reference quantity for the 1996 reference year, at the request of the services of the Commission, in order to eliminate instances of "double counting" identified by those services; the [BIRB] is obliged to apply this Commission decision, which was the subject of a working document ("worksheet", no reference given) of 25 May 1998.'

28 By letter of 18 August 1998 the applicants called on the Commission, *inter alia*, to forward to them the 'worksheet' of 25 May 1998 and a 'detailed account [of its] reasoning'. In that letter, the applicants alleged that the reduction in their reference quantity was the result of a decision taken by the Commission between 8 May 1998 and 14 July 1998 and addressed to the BIRB.

29 By fax of 8 September 1998 the applicants called on the Commission to arrange a meeting to enable them, in particular, to consult its file. This meeting was held on 16 September 1998. The applicants, by letter of 18 September 1998, informed the Commission that they had been unable to obtain access to any document during that meeting and renewed their request that the Commission forward to them the 'worksheet' of 25 May 1998.

30 On 5 October 1998 the applicants brought before the Belgian Conseil d'État an action seeking annulment of the BIRB's decision which formed the subject of the letter of 5 August 1998.

Procedure and forms of order sought by the parties

31 By application lodged at the Court Registry on 6 October 1998, the applicants brought the present action for annulment.

32 By way of separate document lodged at the Court Registry on 30 November 1998, the Commission raised an objection of inadmissibility pursuant to Article 114(1) of the Court's Rules of Procedure.

33 On 15 January 1999 and 15 September 1999 the applicants submitted their observations on that objection.

34 By order of the Court of 25 October 1999 the objection of inadmissibility was reserved to the final judgment.

35 Upon hearing the report of the Judge-Rapporteur the Court (Fifth Chamber) decided to open the oral procedure. By way of measures of organisation of procedure the Court requested that the parties reply in writing to certain questions and produce a number of documents. The parties complied with those requests.

36 The parties presented oral argument and replied to the questions put by the Court at the hearing on 13 September 2001.

37 The applicants claim that the Court should:

— dismiss the objection of inadmissibility;

— annul the decision taken by the Commission between 12 March 1998 and 5 August 1998 reducing the quantity of bananas marketed by the applicants in 1996 and taken into account in determining their reference quantity for 1998;

— order the Commission to pay the costs.

38 The Commission submits that the Court should:

— primarily, dismiss the action as being inadmissible;

— in the alternative, dismiss the action as being unfounded;

— order the applicants to pay the costs.

Admissibility

Arguments of the parties

39 The Commission submits that, inasmuch as no measure open to challenge exists, the present action is inadmissible. In the alternative, it argues that the action was brought out of time.

40 With regard to the main plea of inadmissibility raised, the Commission contends that it follows clearly from Articles 5(1) and 6, second paragraph, of Regulation No 1442/93 that it is the Member States who determine the reference quantities and the quantities to be allocated to operators registered with them. This operation is preceded merely by a simple exchange of information between the Member States and the Commission within the framework of informal collaboration.

41 The Commission acknowledges that, in its letters of 22 December 1995 and 26 February 1997 addressed to the Belgian Ministry of Agriculture and relating to the determination of reference quantities for operators registered in Belgium for the years 1993 to 1995, it referred to the judgment of 17 October 1995 in Case C-478/93 *Netherlands* v *Commission* [1995] ECR I-3081. It further acknowledges that, in the letter of 26 February 1997, it informed the Belgian authorities that it 'might find itself obliged to bring infringement proceedings against the Belgian State'. The Commission takes the view, however, that if the national authorities failed to make the necessary reductions in the quantities for allocation, it would have been in a position solely to confirm the failure of those authorities to conduct the checks required under Article 8 of Regulation No 1442/93 and/or reduce the reference quantities but would not have been in a position to confirm that the Member State in question had failed to implement any decision adopted by the Commission.

42 The Commission further points out that the College of Commissioners did not adopt any legal measure ordering the Belgian State to reduce the applicants' reference quantities. It submits that, according to established case-law, the working documents of its services have no legal effect and do not constitute decisions within the meaning of Article 230 EC (Case T-54/96 *Oleifici Italiani and Fratelli Rubino* v *Commission* [1998] ECR II-3377 and Case T-113/89 *Nefarma* v *Commission* [1990] ECR II-797, paragraph 79).

43 The Commission points out that if the Court were to take the view that, in situations such as that in the present case, the Commission had taken a decision, this would in practice have significant undesirable consequences.

44 In the alternative, the Commission submits that the action was brought out of time. It points out in this regard that, on the supposition that it had taken a decision in this case, that decision would consist of the 'worksheet' which the applicants confirm they received on 9 March 1998 (see paragraph 22 above).

45 With regard to the main plea alleging inadmissibility, the applicants argue in substance that it is the Commission which checks and revises the figures for individual operators and that the Member States carry out no more than simple executive tasks in that connection.

46 The applicants assert that, while it is true that, under the second paragraph of Article 6 of Regulation No 1442/93, it is the national authorities which notify individual operators of the quantity of bananas which they can import during a given marketing year, their role is none the less confined to performing certain

technical tasks on behalf and under the control of the Commission. They claim that, in this regard, the BIRB did not exercise any decision-making power of its own but confined itself to dealing with applications of operators in line with the Commission's instructions.

47 The applicants contend that this definition of the BIRB's role is corroborated by the above judgment in *Netherlands* v *Commission*. It follows from that judgment that the Commission is responsible for managing the common organisation of the market in bananas and that 'it may adopt measures to prevent reference quantities from being counted twice when it fixes the reduction coefficient'. The Member States, they argue, have been given no powers to take decisions in regard to management of the tariff quota. They submit that, contrary to what the Commission asserts, that judgment does not deal exclusively with the question of the overall reference quantities of certain Member States but also relates to the individual reference quantities of operators.

48 The applicants add that, by referring expressly to the judgment in *Netherlands* v *Commission* in its correspondence with the Belgian authorities, the Commission itself defined its powers in a manner entirely different to that which it is at present asserting. The applicants cite in particular the Commission's letter of 22 December 1995 (see paragraph 41 above), in which the Commission cites that judgment and requests the cooperation of the Belgian authorities for three specific cases in respect of which the Commission and those authorities had differing views. According to the applicants, that letter demonstrates that the Commission carries out a detailed analysis of the figures of operators, which results in its taking individual decisions.

49 The applicants submit that, in its letter of 26 February 1997, the Commission found that the measures taken in Belgium for the 1997 marketing year did not allow for uniform application of the Community rules governing the banana sector. The Commission, it is argued, also referred to specific difficulties

concerning *inter alia* documents produced by one of the applicants, namely Firma Léon van Parys. They point out that, after asking the Belgian Government to correct the operators' reference quantities, the Commission stated as follows in point 4 of that letter:

'If the Belgian authorities fail, within one month of receipt of the present letter, to comply with the aforementioned requests or fail to provide all appropriate justification for the measures taken, the Commission might find itself obliged to bring infringement proceedings against the Belgian State. Further, your Government will be liable for any loss to the Community's own resources resulting from imports which the undertakings concerned might effect, at the rate of ECU 75 per tonne, for quantities in excess of their annual entitlements determined in accordance with Community law.'

50 The applicants consider that the impression of the distribution of powers between the Member States and the Commission given by those two letters is difficult to reconcile with the position taken by the Commission in the present action, as they are diametrically opposed, the second being apparently inspired by the Commission's desire to avoid its responsibilities.

51 Referring in particular to the letter of 5 August 1998 from the BIRB (see paragraph 27 above), the applicants add that the BIRB took the view that it lacked any power to take decisions and was required to give proper effect to the Commission's instructions.

52 The applicants further submit that the Commission's position is scarcely logical inasmuch as it alone holds the information relating to all Member States and has a complete overview of the situation.

53 The applicants submit that an action brought before the Belgian Conseil d'État is not the only method of recourse open to them. They state that they chose to bring simultaneously an action before the Belgian Conseil d'État and the present action out of prudence, in particular because the national and Community authorities each claim that the others bear responsibility for management of the tariff quotas. The applicants submit that this choice was also dictated by reasons of legal certainty. They cite in this regard, in particular, the judgment of the Court of Justice in Case C-188/92 *TWD Textilwerke Deggendorf* v *Commission* [1994] ECR I-833.

54 The applicants argue that the judgment of the Court of Justice in Case C-73/97 P *France* v *Comafrica and Others* [1999] ECR I-185 has no bearing on the present case inasmuch as it does not concern the question of whether there is a Commission decision but rather that of whether the Commission's determination of the single reduction coefficient is a measure which is open to challenge by the operator concerned.

55 The applicants contend that the Commission's argument that there was no decision by the College of Commissioners must be rejected. The above judgment in *Oleifici Italiani and Fratelli Rubino* v *Commission* has, they submit, no bearing on the present case as the circumstances there differed from those relating to the centralised management of a tariff quota over which Member States have no decision-making power. In that judgment, moreover, the Court paid considerable attention to the wording of the letter forming the subject-matter of the action and stressed that this letter stated clearly that it came from 'the Commission's services', which were in that case making a proposal (paragraph 50 of *Oleifici Italiani and Fratelli Rubino* v *Commission*). In contrast, the letter of 22 December 1995 (see paragraph 48 above), which expressly mentions 'the Commission', and not its 'services', is binding and is not limited to making a proposal.

56 The applicants claim that the Commission's argument that they themselves were under an obligation to forward evidence of the types of licences used by purchasers to clear through customs the bananas which the applicants had

supplied is irrelevant to the issue of the admissibility of the present action. In any event, that argument, they claim, is unfounded, in particular because Article 7 of Regulation No 1442/93 imposes no such obligation on them.

57 In reply to the Commission's argument that a declaration that the present action is admissible might have undesirable practical consequences, the applicants submit that it is established case-law that 'a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time-limits laid down in Community directives' (Case 280/83 *Commission* v *Italy* [1984] ECR 2361, paragraph 4). That case-law applies generally to all Community law and the obligation to comply with Community law binds the Community institutions in the same way as it binds the Member States.

58 In conclusion, the applicants submit that the Commission's argument that the action was brought out of time, on the ground that the 'worksheet' was sent to them on 9 March 1998, cannot be accepted. They assert that this document was forwarded to them by the BIRB as a provisional document and that a single reduction coefficient was not fixed until 31 July 1998.

Findings of the Court

59 In the present action, the applicants are not seeking annulment of the decision contained in the letter of 5 August 1998 from the BIRB informing them that their definitive reference quantity for the 1998 marketing year amounted to 99 571 115 kg. That definitive reference was determined through application of the reduction coefficient fixed by Regulation No 1721/98 to the applicants' reference quantities

after reducing by 190 903 727 kg the quantities marketed by the applicants during the reference years forming the basis for the calculation of their reference quantity. The applicants argue that this latter figure results from a separate decision taken by the Commission at an unspecified date between 12 March 1998 and 5 August 1998. It is this alleged decision which forms the subject-matter of the present action.

60 It is settled case-law that measures which produce binding legal effects capable of affecting an applicant's interests by bringing about a significant change in his legal position are acts or decisions against which an action for annulment may be brought under Article 230 EC (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and *Oleifici Italiani and Fratelli Rubino* v *Commission*, paragraph 48). To ascertain whether an act or decision has effects of that kind, it is necessary to examine its substance.

61 In order to determine whether the present action is admissible, it is thus necessary to examine whether, in checking the quantities marketed by the applicants which had been notified to it by the BIRB, in fixing the figure of 190 903 727 kg and in subsequently forwarding that figure to the BIRB by way of a 'worksheet', the Commission adopted a measure having binding legal effects for the applicants and bringing about a significant change in their legal position.

62 It must first be noted in this regard that, under the system established by Title I of Regulation No 1442/93 for the issue of import licences for each marketing year, the operators, the competent authorities of the Member States and the Commission each had a specific role and specific obligations. Thus, each year, the process began, in accordance with Article 4(2) of Regulation No 1442/93, when the operators concerned notified the competent authorities of the quantities of bananas marketed over the course of the previous three years, and ended when

those authorities fixed the individual reference quantities and notified the operators accordingly, pursuant to the second paragraph of Article 6 of Regulation No 1442/93. During the intervening period, as is clear from Articles 4, 5 and 8 of Regulation No 1442/93, the competent national authorities, in conjunction with the Commission, carried out checks to determine the accuracy of the quantities of bananas which individual operators claimed to have marketed and the validity and adequacy of any supporting documentation supplied by those operators.

63 In order to detect and prevent inaccurate declarations and to eliminate instances of double counting on the market in bananas, the competent national authorities forwarded each year to the Commission, in accordance with Article 4(5) of Regulation No 1442/93, the lists of operators registered with them and the quantities marketed by each.

64 It follows from those provisions and from the very nature of the verification process that they provided that a measure producing binding legal effects capable of affecting the interests of the operator concerned could only come into being once that process had been concluded and a definitive reference quantity adopted. The establishment of figures at earlier stages of the verification process amounted to no more than an intermediary measure forming part of the preparatory work leading to determination, by the national authorities, of the quantity referred to in the second paragraph of Article 6 of Regulation No 1442/93, which, in the present case, was notified to the applicants by the letter of 5 August 1998. The Commission's reduction of 190 903 727 kg set out in a 'worksheet', or any other document, between 12 March 1998 and 5 August 1998 cannot therefore be treated as a measure against which an action may be brought.

65 It must be noted in this regard that a view expressed by the Commission to a Member State in a situation in which the Commission has no power to take a

decision is merely an opinion bereft of legal effects (Case 133/79 *Sucrimex* v *Commission* [1980] ECR 1299, paragraph 16, *Nefarma* v *Commission*, cited above, paragraph 78, and order in Case 151/88 *Italy* v *Commission* [1989] ECR 1255, paragraph 22). Further, the non-binding nature of a position taken by the Commission cannot be challenged on the ground that the national authority to which the act was addressed complied with it, as that is no more than the consequence of the cooperation between the Commission and the national bodies responsible for the application of Community law (*Sucrimex*, cited above, paragraph 22, and *Nefarma*, paragraph 79). In conclusion, as the Court of Justice confirms in paragraph 27 of its judgment in *France* v *Comafrica and Others*, cited above, it is the competent national authorities who, under the second paragraph of Article 6 of Regulation No 1442/93, were to determine the quantity to be allocated to each operator registered with them. The Commission therefore did not in any event have the power to take such a decision.

66 The facts of the present case confirm this analysis. It is clear from the wording of the BIRB's letter of 9 March 1998 to the applicants (see paragraph 22 above), by which the latter were for the first time informed of a reduction of 190 903 727 kg in respect of the quantities which they had marketed, that this figure was not definitive in nature but had been submitted to them so as to allow them to contest it by submitting any appropriate observations. Moreover, as the applicants acknowledged at the hearing, the meeting of 8 May 1998 (see paragraph 23 above) was designed to allow them to demonstrate, if appropriate, that this figure was incorrect. Finally, in their letter of 9 June 1998 (see paragraph 24 above), the applicants refer expressly to this figure as being a 'proposed reduction' and allege that they could not 'defend' themselves 'in the appropriate manner' against that proposed reduction unless provided with relevant information by the Commission. All of these factors demonstrate that the reduction of 190 903 727 kg amounted to no more than a proposal which could be altered by the BIRB on submission of appropriate supporting documents.

67 As the applicants failed to establish, prior to 5 August 1998, that the figure of 190 903 727 kg was incorrect, that figure was one of the factors which the BIRB

took into account when establishing the definitive reference quantity to be allocated to the applicants for 1998 pursuant to the second paragraph of Article 6 of Regulation No 1442/93. It was only through the adoption and notification of that decision by the BIRB, which was the subject-matter of the letter of 5 August 1998, that the applicants' legal position was affected through reduction of the marketed quantities which they had initially declared, resulting both from the reduction of 190 903 727 kg and from the application to the quantities thus reduced of the single reduction coefficient provided for under Regulation No 1721/98.

68 This conclusion is not brought into question by the fact that the BIRB stated, in its letter of 5 August 1998, that it was obliged to apply the 'decision' of the Commission contained in its 'worksheet' of 25 May 1998 or by the fact that, in its prior correspondence, the Commission had invoked the above judgment in *Netherlands* v *Commission* with a view to encouraging the national authorities to give effect to the results of verification by making the reduction of 190 903 727 kg.

69 First, the letter of 5 August 1998 must be read within the context in which it was sent, namely at the conclusion of a verification process in which, notwithstanding the various written and oral contacts between the applicants, the Commission and the BIRB, no supporting documentation was forwarded to the latter which would have permitted it to alter that reduction.

70 Second, the Commission indicated in its letter of 26 February 1997 and at the hearing that it requested the BIRB to adjust the reference quantity fixed after checks only on condition that the operators concerned provided appropriate supporting documentation, in accordance with Article 7 of Regulation No 1442/93. Moreover, the invitation to act which the Commission addressed to the Belgian authorities in that letter demonstrates that the definitive decision was a matter for those authorities.

71 It follows that only the definitive decision adopted by the BIRB under Article 6 of Regulation No 1442/93 and notified to the applicants on 5 August 1998 constitutes a measure producing binding legal effects capable of affecting the applicants' interests by bringing about a significant change in their legal position. The validity of that decision may, if necessary, be assessed by the competent national judicial authorities. It should be noted in this regard that the BIRB's decision forms the subject-matter of an action before the Belgian Conseil d'État (see paragraph 30 above).

72 The action must accordingly be declared inadmissible and it is not necessary to examine the arguments alleging that it was brought out of time.

Costs

73 In accordance with Article 87(2) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have failed in their claims and the Commission has asked for costs to be awarded against them, the applicants must be ordered to bear their own costs and those of the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

hereby:

1. Declares the action inadmissible;

2. Orders the applicants to bear their own costs and those of the Commission.

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 29 January 2002.

H. Jung J.D. Cooke

Registrar President