

OPINION OF ADVOCATE GENERAL

RUIZ-JARABO COLOMER

delivered on 12 April 2005<sup>1</sup>

**I — Introduction**

1. This is an appeal against the judgment of the Court of First Instance of 10 April 2003 in Joined Cases T-93/00 and T-46/01 *Alessandrini and Others v Commission* [2003] ECR II-1635 dismissing the actions for annulment brought against letters of that Institution refusing the requests made by several traditional importers of bananas originating in Latin America to use licences issued for imports of bananas from African, Caribbean and Pacific (ACP) countries in order to import them from other third countries.

2. This case concerns certain aspects of the common organisation of the market in bananas subsequent to its amendment by the Council in 1998. That amendment, once implemented by the Commission, led to the removal of the distinction on the basis of origin (ACP or third countries) previously drawn for the purposes of managing import licences.

3. Before the Court of First Instance, the appellants complained, in essence, that the detailed implementing rules adopted by the Commission infringed the basic legislation, that those rules had caused them financial loss and that the Commission had not adopted the necessary transitional measures.

Before the Court of Justice, the appellants seek only compensation for the harm which they claim to have sustained.

**II — Legal background**

*Regulation (EEC) No 404/93*

4. Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisa-

<sup>1</sup> — Original language: Spanish.

tion of the market in bananas,<sup>2</sup> implemented, in Title IV, with effect from 1 July 1993, a common arrangement for trade with third countries in place of the various national arrangements. Bananas were classified as follows: 'Community bananas' harvested in the Community, 'bananas originating from the ACP countries' and 'third-country bananas originating from third countries other than the ACP countries'.<sup>7</sup> Within the second category, the term 'traditional ACP bananas' referred to the quantities of bananas exported by the ACP countries which did not exceed the usual quota, as laid down in the Annex to Regulation No 404/93, whereas 'non-traditional ACP bananas' referred to the quantities of bananas exported by the ACP countries which exceeded that usual limit.

5. Under the first paragraph of Article 17 of Regulation No 404/93, the importation of bananas into the Community is to be subject to the submission of an import licence issued by the Member States at the request of any party concerned, irrespective of his place of establishment within the Community, without prejudice to the special provisions made for the implementation of Articles 18 and 19.

6. The original version of Article 18(1) of Regulation No 404/93 provided for an annual tariff quota of two million tonnes (net weight) for imports of third-country bananas and non-traditional ACP bananas. Within the framework of the tariff quota, imports of third-country bananas were to be

subject to a duty of ECU 100 per tonne and imports of non-traditional ACP bananas were to be subject to a zero duty. The original version of Article 18(2) of that regulation provided that imports of non-traditional ACP bananas and imports of third-country bananas imported apart from the tariff quota were to be subject to duties of ECU 750 per tonne and ECU 850 per tonne respectively.

7. Article 19(1) of Regulation No 404/93 broke down the tariff quota, opening it as to 66.5% to operators who had marketed third-country or non-traditional ACP bananas (Category A), 30% to operators who had marketed Community or traditional ACP bananas (Category B), and 3.5% to operators established in the Community who had started marketing bananas other than Community or traditional ACP bananas from 1992 (Category C).

8. Article 19(2) of Regulation No 404/93 provides:

'On the basis of separate calculations for each of the categories of operators [A and B],

<sup>2</sup> — OJ 1993 L 47, p 1.

each operator shall obtain import licences on the basis of the average quantities of bananas that he has sold in the three most recent years for which figures are available.’

*Regulation (EEC) No 1442/93*

9. On 10 June 1993, the Commission adopted Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community<sup>3</sup> (‘the 1993 arrangement’). That arrangement remained in effect until 31 December 1998.

10. In accordance with Article 5(1) of Regulation No 1442/93, the competent authorities of the Member States were to establish each year for each Category A and Category B operator registered in their territory the average quantities marketed during the three years prior to the year preceding that for which the quota was opened, broken down by economic activity in accordance with Article 3(1) of that regulation. That average was termed the ‘reference quantity’.

11. Article 14(2) of Regulation No 1442/93, as amended by Commission Regulation (EC) No 2444/94 of 10 October 1994 (OJ 1994 L 261, p. 3), provided: ‘Import licence applications shall be lodged with the competent authorities of any Member State during the first seven days of the last month of the quarter preceding that in respect of which the licences are issued.’

*Regulation (EC) No 1637/98*

12. Council Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation (EEC) No 404/93 (OJ 1998 L 210, p. 28) introduced, with effect from 1 January 1999, important amendments to the common organisation of the market in bananas. In particular, it revised Articles 16 to 20 of Title IV of Regulation No 404/93.

13. Article 18(1) of Regulation No 404/93, as amended by Regulation No 1637/98, provided for the opening of an annual tariff quota of 2 200 000 tonnes (net weight) for imports of third-country and non-traditional ACP bananas. Within the framework of this tariff quota, imports of third-country bananas were to be subject to duty of ECU 75 per tonne, while imports of non-traditional ACP bananas were to be free of duty.

14. Article 18(2) of that regulation, as amended by Regulation No 1637/98, pro-

3 — OJ 1993 L 142, p. 6.

vided for an additional annual tariff quota of 353 000 tonnes (net weight) to be opened each year for imports of third-country and of non-traditional ACP bananas. Within the framework of this tariff quota, imports of third-country bananas were to be subject to duty of ECU 75 per tonne while imports of non-traditional ACP bananas were to be free of duty.

repealed Regulation No 1442/93 as from 1 January 1999. The new provisions on the management of import licences within the framework of the tariff quotas are found in Titles I, II and IV of Regulation No 2362/98 ('the 1999 arrangement').

15. Under Article 20(d) of Regulation No 404/93, as amended by Regulation No 1637/98, the Commission was empowered to adopt provisions, in accordance with the Management Committee system provided for in Article 27, for the management of the tariff quotas referred to in Article 18, including 'any specific provisions needed to facilitate the switch from the import arrangements applying on and after 1 July 1993 to the present arrangements of ... Title IV [of Regulation No 404/93].'

17. The 1999 arrangement introduces a number of innovations by reference to the 1993 arrangement:

- (a) it removes any distinction based on the functions carried out by operators;
- (b) it takes account of the quantities of bananas imported;

*Regulation (EC) No 2362/98*

16. On 28 October 1998, the Commission adopted Commission Regulation (EC) No 2362/98 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community,<sup>4</sup> Article 31 of which

- (c) it provides for the management of import licences without reference to the origin (ACP or third countries) of the bananas;
- (d) it increases the tariff quotas and the share attributed to new operators.

<sup>4</sup> — OJ 1998 L 293, p. 32

18. Article 2 of Regulation No 2362/98 divides the tariff quotas and the traditional ACP bananas referred to in Article 18(1) and (2) and Article 16, respectively, of Regulation No 404/93, as amended by Regulation No 1637/98, as follows:

- 92% to ‘traditional operators’ as defined in Article 3;
  
- 8% to ‘newcomers’ as defined in Article 7.

19. Article 4(1) of Regulation No 2362/98 states that each traditional operator registered in a Member State is to receive, for each year and for all the origins listed in Annex I to that regulation, a *single reference quantity* based solely on the quantities of bananas imported during the reference period. According to Article 4(2) of that regulation, for imports carried out in 1999, the reference period was to be made up of the years 1994, 1995 and 1996.

20. Article 6(1) provides that ‘[b]y 30 September at the latest each year, after making the necessary checks and verifica-

tions, the competent authorities shall determine, in accordance with Articles 3, 4 and 5, a single, provisional reference quantity for each traditional operator, on the basis of the average quantities of bananas imported by them from the origins listed in Annex I during the reference period’. The reference quantity is based on a three-year average, even where the operator has not imported bananas for part of the reference period. According to Article 6(2) of Regulation No 2362/98, the competent authorities are to provide the Commission each year with a list of traditional operators they have registered and the total provisional reference quantities determined.

21. The rules for issuing import licences are laid down in Articles 14 to 22 of Regulation No 2362/98.

22. Article 14(1) of that regulation provides that ‘[f]or the first three quarters of the year, an indicative quantity expressed as the same percentage of available quantities from each of the origins listed in Annex I may be fixed for the purposes of issuing import licences’.

23. Article 15(1) of that regulation provides that ‘[f]or each quarter of the year, applications for import licences shall be submitted to the competent authorities of the Member State in which operators are registered

during the first seven days of the month preceding the quarter in respect of which the licences are being issued'.

24. Article 17 provides that where, for a given quarter and for any one or more of the origins listed in Annex I, the quantities applied for appreciably exceed any indicative quantity fixed under Article 14, or exceed the quantities available, a percentage reduction to be applied to the amounts requested is to be fixed.

25. Article 18 of Regulation No 2362/98 is worded as follows:

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

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

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

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

26. Article 19(1) provides that '[t]he competent authorities shall issue import licences for the following quarter not later than the 23rd day of the last month of each quarter'.

27. Article 20(1) states that 'u[n]used quantities covered by a given licence shall be re-allocated to the same operator — whether holder or transferee — upon application, for use in a subsequent quarter but still within the year of issue of the original licence. The security shall be retained in proportion to the quantities not used up'.

28. Title V of Regulation No 2362/98 contains a number of transitional provisions for 1999. Under Article 28(1), applications for registration for 1999 were to be submitted by 13 November 1998 at the latest, together with, in the case of traditional operators, a figure for the total quantity of bananas actually imported in each of the years of the reference period 1994 to 1996 and the serial numbers of all the import licences and licence extracts used for those imports, and also the references of all the documentary evidence showing that duties had been paid.

31. The rules for applying Title IV of Regulation No 404/93 as thus amended were defined by Commission Regulation (EC) No 896/2001 of 7 May 2001 laying down detailed rules for applying Regulation No 404/93 as regards the arrangements for importing bananas into the Community.<sup>6</sup> Those provisions applied as from 1 July 2001, in accordance with Article 32 of Regulation No 896/2001.

### III — Facts

29. Annex I to Regulation No 2362/98 indicates the distribution of the tariff quotas referred to in Article 18(1) and (2) of Regulation No 404/93 and the traditional ACP quantity (857 700 tonnes).

32. The appellants are undertakings which import bananas originating in Latin America. The competent national authorities with which the appellants are registered as traditional operators (Italy and, for London Fruit Ltd, the United Kingdom) allocated them provisional individual reference quantities for 1999. The appellants thus obtained import licences for third-country bananas for the first three quarters of that year.

#### *The 2001 arrangement*

30. The Council adopted Council Regulation (EC) No 216/2001 of 29 January 2001, Article 1 of which amended Articles 16 to 20 of Regulation No 404/93.<sup>5</sup>

33. The facts of Case T-93/00 relate to the fourth quarter of 1999. For that period, the appellants sought import licences before the competent national authorities for the bal-

<sup>5</sup> — OJ 2001 L 31, p. 2.

<sup>6</sup> — OJ 2001 L 126, p. 6.

ance of their provisional individual reference quantities, which were granted up to the limits of the available quantities for imports of third-country bananas.<sup>7</sup> Arpigi SpA KG 757

Bestfruit Srl KG 2 637

34. For the part of the applications which could not be granted, the appellants still had the possibility of applying for import licences for a quantity of 308 978.252 tonnes of traditional ACP bananas.<sup>8</sup> They thus applied for import licences for ACP bananas within the limits of the remaining quantities, in accordance with Article 18(1) of Regulation No 2362/98, the respective reference quantities being broken down as follows: Co-Frutta SpA KG 209 392

Co-Frutta Soc. coop. arl KG 30 207

Alessandrini Srl KG 2 050

Dal Bello Sife Srl KG 1 533

Frigofrutta Srl KG 2 990

Anello Gino di Anello Luigi & C. Snc KG 1 859

Garletti Snc KG 4 419

<sup>7</sup> — Published in the annex to Commission Regulation (EC) No 1824/1999 of 20 August 1999 amending Regulation (EC) No 1623/1999 fixing quantities for imports of bananas into the Community for the fourth quarter of 1999 under the tariff quotas or as part of the quantity of traditional ACP bananas (OJ 1999 L 221, p. 6)

<sup>8</sup> — A quantity fixed by Commission Regulation (EC) No 1998/1999 of 17 September 1999 on the issuing of import licences for bananas under the tariff quotas and the quantity of traditional ACP bananas for the fourth quarter of 1999 and on the submission of new applications (OJ 1999 L 247, p. 10)

London Fruit Ltd KG 286 004

35. On 13 October 1999, the competent national authorities issued to the appellants import licences for ACP bananas for the entire quantity applied for, but, in spite of numerous attempts, the appellants did not succeed in obtaining supplies.

7 January 2000 and requested the Commission to take a decision in respect of their requests.

36. Faced with that situation, on 18 November 1999, the appellants, relying on Article 232 EC, requested the Commission:

38. By letter No 02418 of 26 January 2000, addressed to the appellants' counsel, the Commission replied as follows:

(1) to take the necessary measures to enable them to use the fourth-quarter licences issued for imports from ACP countries to import bananas from Latin American or other third countries;

'In your letter of 22 December 1999, you referred to difficulties encountered by certain operators in using the banana import licences issued for the fourth quarter of 1999, in particular for the import of bananas originating from ACP countries.

(2) in any event, to order the release of the securities for those licences, since they were not being used and the non-use was not attributable to their holder.

First of all, the nature of those problems is essentially commercial and, therefore, may be attributed to the activities of economic operators. The problem raised concerns the search for commercial partners for the purchase and transport of certain products and, specifically in the present case, of bananas from ACP countries. Although it is regrettable, the fact that your clients were unable to conclude contracts for the supply of ACP bananas is part of the commercial risk which is normally assumed by operators.

37. Not having received a response to that request, the appellants, by fax of 22 December 1999, drew the Commission's attention to the fact that the licences would expire on

Lastly, we note that those difficulties concern only certain operators not described in detail,

and that intervention on the part of the Commission would risk favouring some operators to the detriment of others who have assumed the risks associated with the obligations they have taken on.’

Arpigi SpA KG 5 792

Bestfruit Srl KG 7 290

39. The competent national authorities kept the security lodged by the appellants, after taking the view that the grounds relied on by the appellants to recover that security did not constitute force majeure, the only scenario which would allow for release.

Co-Frutta SpA KG 236 746

Co-Frutta Soc. coop. arl KG 80 301

40. The facts of Case T-46/01 relate to the fourth quarter of 2000. For that period, the remainder of the available individual reference quantity for each of the appellants was as follows:

Dal Bello Sife Srl KG 4 110

Frigofrutta Srl KG 8 226

Alessandrini Srl KG 5 667

Garletti Snc KG 7 329

Anello Gino di Anello Luigi & Cie snc KG 5 140 London Fruit Ltd KG 324 124

41. Since the licence applications for third-country bananas exceeded the unallocated quantities, the Commission specified in Regulation (EC) No 1971/2000<sup>9</sup> the quantity of bananas still available for import for the fourth quarter of 2000. According to the annex to that regulation, import licences could still be issued for traditional ACP bananas up to 329 787.675 tonnes, although the appellants did not apply for them.

42. On 10 October 2000, the appellants, relying on Article 232 EC, requested the Commission, primarily, to take measures pursuant to Article 20(d) of Regulation No 404/93 in order to grant them, for the fourth quarter of 2000, import licences for third-country bananas for the remainder of the individual reference quantities which had been allocated to them. In the alternative, they claimed damages for loss of earnings owing to the fact that they were unable to import and market those bananas.

43. By letter No AGR 030905 of 8 December 2000, addressed to the appellants' counsel, the Commission rejected those claims as follows:

<sup>9</sup> — Commission Regulation (EC) No 1971/2000 of 18 September 2000 on the issuing of import licences for bananas under the tariff quotas and for traditional ACP bananas for the fourth quarter of 2000 and on the submission of new applications (OJ 2000 L 235, p. 10).

'In your letter of 10 October 2000, you informed the Commission of difficulties encountered by certain operators in obtaining bananas in order to make full use of the reference quantities granted to them for 2000, within the framework of the tariff import quotas arrangement.

The difficulties to which you refer are essentially commercial in nature. We regret to inform you that Community law does not confer any power in these matters on the Commission. You recognise this situation yourself when you state that operators who do not have regular contact with ACP banana producers encounter difficulties in obtaining the goods in question.

You also state that the operators you represent are not able to make full use of all the reference quantities allocated to them.

We must point out to you that, from a legal standpoint, the reference quantities merely open up opportunities for operators and are determined on the basis of their previous business, pursuant to Community regulations; they confer on the parties concerned

no more than the right to submit applications for import licences with a view to carrying out commercial operations which they have agreed on with suppliers in producing countries.

Lastly, we must add that, on the basis of the information you have supplied to the Commission, it appears that the difficulties to which you refer are not “transitory in nature” in that they may be attributed to the transition from the arrangement which applied prior to 1999 to the one which applied as from then. Accordingly, the provision of Article 20(d) of Regulation ... No 404/93 does not allow the Commission to adopt the specific measures which you request.’

#### **IV — The action for annulment before the Court of First Instance**

44. The undertakings concerned each brought actions before the Court of First Instance against the Commission’s letters of 26 January 2000 (Case T-93/00) and 8 December 2000 (Case T-46/01).

45. Invoking the plea of illegality provided for in Article 241 EC, in each action they put forward three pleas in law, alleging infringement of Regulation No 404/93, infringement of the right of property and free enterprise, and infringement of the principle of non-discrimination.

#### **V — The judgment under appeal**

46. The judgment of the Court of First Instance of 10 April 2003 began by considering the plea of inadmissibility raised by the Commission on the ground that the appellants did not have *locus standi*.

47. Although each of the contested letters responded to requests of a different nature,<sup>10</sup> the Court held that both referred to the possibility that the Commission would adopt measures pursuant to Article 20(d) of Regulation No 404/93. The decision not to exercise that power was of direct and individual concern to the addressees, because it affected their interests by bringing about a distinct change in their legal position.<sup>11</sup>

10 — In the first request, the appellants in the present proceedings asked to use their licences in order to import bananas from non-member countries in the fourth quarter of 1999 and for the corresponding unused securities to be released (paragraph 34 of the judgment under appeal); in the second, they asked to be issued with licences to import bananas from non-member countries for the fourth quarter of 2000, for the remainder of the individual reference quantities which had been allocated to them; in the alternative, they asked to be compensated for loss of earnings (paragraph 41 of the judgment under appeal).

11 — Paragraph 65 of the judgment of the Court of First Instance.

48. After dismissing the plea of inadmissibility, the Court of First Instance examined the three pleas put forward by the applicants in those proceedings in support of their claim that Commission Regulation No 2362/98 is unlawful, alleging, respectively, infringement of Regulation No 404/93, infringement of the right of property and free enterprise, and infringement of the principle of non-discrimination.

49. The judgment under appeal rejected those pleas on the ground that the appellants had not established a direct legal link between the letters of 26 January 2000 and 8 December 2000, on the one hand, and the provisions of Regulation No 2362/98, on the other.<sup>12</sup>

50. The appellants submitted that, under Article 20(d) of Regulation No 404/93, the Commission was required to take note of the practical impossibility of obtaining ACP bananas and to allow them to import third-country bananas up to their individual reference quantities.<sup>13</sup>

The Court of First Instance assessed the Commission's broad discretion when adopt-

ing 'specific provisions needed' to facilitate the transition from the 1993 arrangement to the 1999 arrangement, and limited its review of the legality of the exercise of that discretion to examining whether there had been a manifest error. According to the Court of First Instance, however, the losses which the appellants might claim to have suffered were not the direct result of that transition, but of their inability to obtain ACP bananas in the fourth quarter of 1999 (in respect of Case T-93/00) or of their refusal to obtain import certificates for ACP bananas in respect of the fourth quarter of 2000 (in connection with Case T-46/01).<sup>14</sup>

In those circumstances, the judgment held that the Commission had not exceeded the limits of its discretion by refusing to adopt any provision pursuant to Article 20(d) of Regulation No 404/93, and therefore rejected the plea in its entirety.<sup>15</sup>

51. However, the Court of First Instance acknowledged, however, in respect of Case T-93/00, that, although the appellants' line of argument *could be construed as attributing the impossibility of finding commercial partners to the entry into force of the 1999 arrangement*, they had not demonstrated to the requisite legal standard that the Commission had made a manifest error of

12 — *Ibid.*, paragraph 81.

13 — *Ibid.*, paragraph 83.

14 — *Ibid.*, paragraphs 86 to 95.

15 — *Ibid.*, paragraphs 91, 96 and 97.

assessment in refusing to grant their request for measures under Article 20(d) of Regulation No 404/93.<sup>16</sup>

52. Finally, the Court of First Instance considered the claims for compensation made by the appellant undertakings, which maintained that, by providing for the combined management of the third-country and ACP tariff quotas and, in particular, for the merging of the reference quantities and by failing to take action to mitigate the harmful effects thereof, the Commission's conduct was illegal.

53. The judgment now under appeal accepted the Commission's argument that there is no causal link between the changes brought about by Regulation No 2362/98 and the difficulties experienced by the appellants in obtaining ACP bananas.

54. The Court of First Instance held that, 'in Case T-93/00, the cause of the damage alleged relates to the fact that the appellants were unable to find suppliers willing to supply them with ACP bananas in the fourth quarter of 1999. In Case T-46/01, the lost earnings complained of by the appellants is directly attributable to their lack of diligence. They did not apply for import licences for

ACP bananas for the fourth quarter of 2000 in conformity with Regulation No 1971/2000 once the quantity of third-country bananas was exhausted. In addition, despite the problems encountered during the fourth quarter of 1999, they did not seek to foster contacts with suppliers of ACP bananas in 2000 so as to be able to obtain banana supplies in the fourth quarter of that year.'<sup>17</sup>

## VI — Analysis of the appeal

55. The appellants claim that the Court should:

- set aside the judgment under appeal in part is so far as it deals with the application for damages;
- order the Commission to pay the appellants damages for the losses sustained as a result of the Commission's failure to grant licences for third-country bananas;

<sup>16</sup> — Ibid., paragraph 92. Emphasis added.

<sup>17</sup> — Ibid., paragraph 108.

— order the Commission to pay the costs of the entire proceedings.

56. The Commission contends that the appeal should be declared inadmissible and, failing that, that it should be dismissed. If the judgment under appeal is set aside in part, the Commission asks that the case be referred back to the Court of First Instance for judgment on the merits, and that the appellants be ordered to pay the costs.

57. The plea of inadmissibility is based on the alleged *mutatio litis* made by the appellants, who, in contrast to the forms of order which they sought before the Court of First Instance, now request the Court of Justice to make a direct determination of the Commission's non-contractual liability.

58. In the light of the circumstances in which this appeal arises, it seems appropriate that the admissibility of the action to establish liability and the merits of the case be dealt with together.

59. The appellants criticise the Court of First Instance for having failed to take account of the arguments submitted in support of their

application for damages and claim that it erred because, by attributing the loss which they sustained to their inability to import ACP bananas, it did not acknowledge that it was impossible for them to obtain import licences for the third-country reference quantities to which they were entitled; they add that if the Commission had not made provision for the combined tariff quotas and the merging of the reference quantities, they would have been able to obtain those licences.

They submit that the main purpose of their action was to establish that Regulation No 2362/98 was the direct source of the losses which they had sustained.

60. Finally, they criticise paragraphs 56 and 58 of the judgment under appeal — in which the parties' claims are summarised — in that they incorrectly insinuate that the losses sustained are attributable to the letters of 26 January 2000 and 8 December 2000.

61. The Commission maintains that the appeal should be dismissed in its entirety, since it is limited to the claim for compensation and does not challenge the Court of First Instance's finding in respect of the alleged illegality of Regulation No 2362/98.

62. With regard to the part annulment of the judgment under appeal, the Commission maintains that the appellants confuse certain aspects of the alleged loss — namely, the fact that they had not made full use of their reference quantities — with the causal link required between that loss and the allegedly unlawful conduct giving rise to it.

63. As regards the complaint that the wording of paragraphs 56 and 57 of the judgment at first instance is defective, the Commission maintains that they correctly summarise the content of the dispute between the parties in the light of the pleadings submitted, both in writing and at the hearing.

64. The Commission also submits that if the Court of First Instance had considered that the claim for compensation was based exclusively on the two letters in question, the legality of which it had previously recognised, it would not have been concerned about the causal link because, as no unlawful conduct could be attributed to it, there would be no liability.

65. The appellants concentrate on establishing that the Court of First Instance, when considering their claims for compensation, should have examined the legality of Regulation No 2362/98, since it not only infringed the terms of Council Regulation No 404/93 but also infringed the fundamental right of

property and free enterprise and the principle of non-discrimination.

66. They maintain, with reference to the infringement of the obligation laid down in Article 20(d) of Regulation No 404/93, that the change in the arrangement introduced in 1999 reduced their possibilities of obtaining bananas from third countries for the whole of their reference quantities.

67. The judgment under appeal, after attributing the losses sustained by the appellants to their own conduct, fails to check the accuracy of their claims that their inability to find suppliers of ACP bananas was a consequence of the implementing rules of the 1999 arrangement. The decision at first instance correctly describes the immediate causes of the economic loss sustained by the appellants, namely, the inability to attain the supplies and the import licences, in the last quarters of 1999 and 2000 respectively. However, it fails to address the remote cause of those difficulties: the impact of Regulation No 2362/98 on the business practices of operators.

68. The European Court of Human Rights has declared, in connection with the concept

of a fair hearing, that Article 6(1) of the Rome Convention of 4 November 1950 does not require the courts to give a detailed answer to every argument put forward by litigants. However, if, depending on the circumstances of each case, a plea or an objection is formulated in a sufficiently clear and precise manner, reliable evidence is adduced to support it and it matters to the outcome of the dispute, it must be accounted for; otherwise, there will be uncertainty about those arguments, in particular as to whether the court has forgotten to deal with them, whether it has rejected them and, above all, what its reasons were for so deciding.<sup>18</sup>

69. In addition to placing emphasis on the alleged illegality of Regulation No 2362/98, the appellants explain the impact of that legislation on economic activity in the sector and on the ability of undertakings which have traditionally imported bananas from third countries to obtain supplies of ACP bananas.

70. According to the appellants, the introduction of the combined management of the tariff quotas and the merging of the reference quantities had maintained and reinforced the privileged position enjoyed by importers of ACP bananas. Whereas, under the 1993

arrangement, operators specialising in third countries had free access to the ACP banana market, the new system requires them to use their reference quantities.

71. In their view, the fact that more than a third of the quantity of traditional ACP bananas has not been used proves that the new arrangement favours ACP operators, to the detriment of importers of third-country bananas.

72. The appellants' arguments do not stand out for their clarity or their persuasiveness. It appears that the new rules providing for shared reference quantities and the combined management of the tariff quotas caused a transfer of the demand for imports of ACP bananas to those from third countries and that the third-country quota was therefore exhausted prematurely.

The appellants provide no further information as to the nature of the problems they encountered in attempting to obtain supplies of ACP bananas in the fourth quarter of 1999. Paragraph 33 of the judgment under appeal states that the plaintiffs, 'despite repeated attempts', were unable to obtain supplies of ACP bananas.

18 — See the judgments of the European Court of Human Rights of 9 December 1994 in *Ruiz Torija v Spain* (Series A, No 303 A), paragraphs 29 and 30, and *Hiro Balani v Spain* (Series A, No 303 B), paragraphs 27 and 28.

That fact — which suggests that there was no negligence on the part of the undertakings concerned — ought to have encouraged the Court of First Instance to ascertain whether the other explanations regarding the origin of the loss were accurate and, if so, to consider whether Regulation No 2362/98 was unlawful.

73. If it is agreed, if only for the sake of argument, that the appellants displayed proper diligence but were unable to find suppliers of ACP bananas for the fourth quarter of 1999, they may be forgiven for not resuming such futile efforts for the last quarter of the following year.

It should also be borne in mind that it is difficult to prove a negative fact, such as the absence of a reasonable expectation of finding a trading partner at a particular time.

74. I therefore conclude that, in Case T-93/00 and also, although less strongly, in Case T-46/01, the appellants had raised a plea which was sufficiently clear and precise and which merited, at least, express rejection by the Court of First Instance.

75. Since that did not happen, the judgment under appeal contains an error of law consisting in an infringement of one of the requirements of a fair hearing. I therefore consider that it should be set aside in so far as, in paragraph 108, it simply held the appellants' conduct to be the sole cause of the loss invoked, without considering the consequences of the application of the new arrangement introduced after Regulation No 2362/98 came into force.

## VII — Analysis of the substance of the case

76. Article 54 of the EC Statute of the Court of Justice provides that, 'if the appeal is well founded, the Court of Justice shall quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.' One of the situations to which the opportunity offered by this provision applies is that of error in the judgment, provided that the account of the facts is complete and sufficient for final judgment to be given and that there is no need to take any evidence. This appears to be the view taken in the case-law of the Court of Justice, although the Court has never stated the reason why the state of the proceedings permits it to give judgment itself, but had merely made the succinct assertion, for example, that 'this is the case'.<sup>19</sup> In short, it is appropriate for the Court of Justice to

<sup>19</sup> — Case C-345/90 P *Parliament v Hanning* [1992] ECR I 949 et seq., especially I-989; and Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, paragraph 55.

adjudicate on the substance when it is apparent from the documents before it that the case is ready for judgment; it is therefore necessary to analyse, at least briefly, the main arguments in the action for compensation brought by the appellants and, for the purposes of the present case, to consider the specific grounds of annulment raised against Regulation No 2362/98. Furthermore, in the interest of safeguarding the appellants' procedural rights, the parties were requested to concentrate their arguments, at the hearing, on the possible illegality of that regulation.

77. Referring to the pleadings submitted in connection with the plea of illegality which they raised at first instance, the appellants put forward three separate grounds of annulment.

78. They claim that Regulation No 2362/98 is illegal, not only because it is inconsistent with Regulation No 404/93, as amended by Regulation No 1637/98 (first ground of annulment) but also because it infringes the fundamental rights of property and free enterprise (second ground) and the principle of non-discrimination (third ground).

79. In the context of the first ground of annulment, they criticise the fixing of the three-year period 1994-1996 as a reference period for the allocation of the quotas.

80. The choice of the period in issue affects the calculation of the individual amounts authorised, since each operator is granted the corresponding quota according to the average of his imports during the three years under the consideration. However, the claim for compensation in these proceedings is based on the fact that it was impossible to obtain import licences for the amounts granted to the appellants, as their counsel acknowledged at the hearing. The dispute concerning the rules for the previous distribution of the reference quantities is unconnected with the matter at issue. This claim should therefore be rejected as manifestly irrelevant.

81. The appellants also criticise the adoption of the system of combined management of the tariff quotas which, together with the merging of the reference quantities, strengthened the privileged position of importers of ACP bananas.

82. According to the Commission, the fact that there is only one quota favours trade

and increases the freedom of operators. Since it makes no distinction between importers of ACP bananas and importers of third-country bananas, it gives both types of importer the opportunity to obtain supplies of fruit from any source.

85. None of the evidence adduced by the appellants leads to the conclusion that, by selecting the management method which harmonises the objectives pursued, the Commission manifestly exceeded the limits of the discretion conferred on it by the Council.

83. It need only be pointed out that Article 19 of Regulation No 404/93, as amended, gives the Commission a wide discretion to implement the basic regulation, with the sole proviso that the method chosen is to take account of traditional trade flows. Apart from that, Article 20(e) of that regulation, as amended, requires the Commission to adopt the measures needed to ensure respect for obligations stemming from agreements concluded by the Community under Article 228 of the Treaty (now, after modification, Article 30 EC).

86. Secondly, the appellants complain that the impossibility of obtaining import licences for bananas from third countries constituted an infringement of their right of property and free enterprise.

84. It should be remembered that, in matters relating to agriculture, the Commission is authorised to adopt all the implementing measures which are necessary or appropriate for the implementation of the basic legislation, provided that they observe the relevant criteria for validity.<sup>20</sup>

87. In the common organisation of the market in bananas, reference quantities represent only authorisation to import. Although both the right of property and the freedom to pursue a trade or profession form part of the general principles of Community law, they do not constitute an unfettered prerogative, but must be viewed in the light of the social function which they perform. Consequently, they may be restricted, particularly in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon

<sup>20</sup> — Case C-478/93 *Netherlands v Commission* [1995] ECR I 3081, paragraph 31, and Case C-239/01 *Germany v Commission* [2003] ECR I-10333, paragraph 55.

the very substance of the rights guaranteed.<sup>21</sup>

duct has infringed the very essence of the fundamental rights invoked.

88. The introduction of the Community quota and of the rules for apportioning it do not question the operators' right of property in respect of bananas from third countries, since no operator may claim such a right of property over a market share which he had at a time prior to the creation of a common organisation of markets, because that market share represents only a momentary economic situation which is exposed to the vagaries of a change in circumstances.

91. Thirdly and lastly, the appellants complain that the system introduced by the regulation discriminates between importers who traditionally obtained supplies from third countries and those who obtained them from ACP countries, to the detriment of the former.

92. This claim should be rejected without any detailed analysis, because the appellants have not explained how the alleged unequal treatment gave rise to the liability for compensation which they claim.

89. Likewise, traders are unable to claim a vested right even to a legitimate expectation that an existing situation will be maintained, since it is capable of being altered by decisions taken by the Community institutions within the limits of their discretion.<sup>22</sup>

93. In short, none of the appellants' claims is capable of establishing that Regulation No 2362/98 is illegal; it is therefore unnecessary to consider whether the other pre-conditions for the Community's non-contractual liability are satisfied.

90. None of the appellants' claims supports the conclusion that the Commission's con-

## VIII — Costs

94. Under Article 69(2) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Although the judgment under appeal should be set aside, the appellants' action should be dismissed on the merits. They should therefore be ordered to pay all the costs.

21 — Judgments in Case 265/87 *Schwaeder* [1989] ECR 2237, paragraph 15, and Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 18.

22 — Case 52/81 *Faust v Commission* [1982] ECR 3745, paragraph 27.

## **IX — Conclusion**

95. In the light of all of the foregoing, I propose that the Court of Justice should:

- (1) Set aside the judgment of the Court of First Instance of 10 April 2003 in Joined Cases T-93/00 and T-46/01;
- (2) Dismiss the action;
- (3) Order the appellants to pay the costs.