JUDGMENT OF THE COURT (Fifth Chamber)

14 October 1999 *

In Case C-104/97 P,

Atlanta AG, a company incorporated under German law, established at Bremen, Germany, represented by E.A. Undritz and G. Schohe, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the chambers of Marc Baden, 34B Rue Philippe II,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber, Extended Composition) of 11 December 1996 in Case T-521/93 *Atlanta and Others* v *European Community* [1996] ECR II-1707, seeking to have that judgment set aside,

the other parties to the proceedings being:

European Community, represented by

(1) **Council of the European Union**, represented by J. Huber, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of A. Morbilli, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

* Language of the case: German.

and

(2) **Commission of the European Communities**, represented by K.-D. Borchardt, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

defendants at first instance,

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

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

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

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

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

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

applicants at first instance,

French Republic, represented by K. Rispal-Bellanger, Deputy Director in the International, Economic and Community Law Directorate of the Ministry of Foreign Affairs, and G. Mignot, Foreign Affairs Secretary in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

and

United Kingdom of Great Britain and Northern Ireland,

interveners at first instance,

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida (Rapporteur), President of the Sixth Chamber, acting as President of the Fifth Chamber, L. Sevón, C. Gulmann, J.-P. Puissochet and M. Wathelet, Judges,

Advocate General: J. Mischo,

Registrar: H.A. Rühl, Principal Administrator

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 March 1999, at which Atlanta AG was represented by G. Schohe, the Council by J. Huber, the Commission by K.-D. Borchardt and the French Republic by C. Vasak, Assistant Secretary of Foreign Legal Affairs in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 6 May 1999,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 10 March 1997, Atlanta AG (hereinafter 'Atlanta') brought an appeal pursuant to Article 49 of

the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 11 December 1996 in Case T-521/93 *Atlanta and Others* v *European Community* [1996] ECR II-1707 (hereinafter 'the contested judgment'), in which the Court of First Instance dismissed its action seeking an order requiring the European Community, represented by the Council and the Commission, to pay compensation for damage alleged to have been incurred as a result of the adoption of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1).

Law

2 As regards the legal context, the Court of First Instance observed:

'1. Before a common organisation of the market in bananas was established, the consumption of bananas in the Member States was supplied from three sources: bananas produced in the Community (in particular, in the Canary Islands and the French Overseas Departments), representing approximately 20% of Community consumption (hereinafter "Community bananas"); bananas produced in some of the States with which the Community had concluded the Lomé Convention (in particular, certain African States and certain Caribbean Islands), representing approximately 20% of Community consumption (hereinafter "ACP bananas"); and bananas produced in other States (principally certain Central and South American countries, representing approximately 60% of Community consumption (hereinafter "third country bananas").

2 By virtue of the Protocol annexed to the Implementing Convention on the Association of the Overseas Countries and Territories with the Community, provided for in Article 136 of the EC Treaty (hereinafter "the Banana Protocol"), Germany enjoyed a special arrangement allowing it to import an annual quota of bananas free of customs duties, determined by reference to

the quantities imported in 1956. That base quota was to be progressively reduced as the realisation of the common market progressed.

Regulation No 404/93

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

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

".... so that the Community can respect Community Preference and its various international obligations, that common organisation of the market should permit bananas produced in the Community and those from the ACP States which are traditional suppliers to be disposed of on the Community market providing an adequate income for producers and at fair prices for consumers without undermining imports of bananas from other third country suppliers".

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

6 Article 18 of Regulation No 404/93 provides:

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

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

...

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

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

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

..."

7 Article 19(1) provides:

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

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

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

(c) 3.5% to the category of operators established in the Community who started marketing bananas other than Community and/or traditional ACP bananas from 1992.

..."

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

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

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

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

The situation of the applicants at first instance

3 Regarding the situation of the applicants at first instance, the Court of First Instance observed:

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

Procedure prior to the appeal

4 As regards the procedure pursued before the Community Courts, it can be seen from the contested judgment that:

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

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

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

16 By order of 21 June 1993, the Court of Justice dismissed the applicants' application as inadmissible in so far as they sought annulment of certain provisions of Regulation No 404/93 but allowed the claim for an order

requiring the European Community to make good the damage caused by the adoption of that regulation to continue. It also reserved costs (Case C-286/93, now Case T-521/93 — the present action).

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

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

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

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

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

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

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

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

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

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

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

The contested judgment

5 At paragraph 28 of the contested judgment the Court of First Instance found that, in view of the order made by the Court of Justice on 21 June 1993, dismissing the applicants' action as inadmissible in so far as it sought annulment of provisions of Regulation No 404/93, it would consider only the claims for damages submitted by the applicants.

6 Paragraph 34 of the contested judgment states that, in support of their claims for damages, the applicants advanced 14 pleas in law to show that the Council and Commission had acted unlawfully. The Court of First Instance added that, in their observations as to the consequences to be drawn from the judgment in Case C-280/93 *Germany* v *Council* and in their reply, the applicants had stated that they maintained all the pleas advanced in their application but had concentrated on the following four: breach of the principle of non-discrimination; breach of the principle of protection of legitimate expectations; breach of the fundamental freedom to pursue an economic activity and infringement of the rights of the defence. It can be seen also from the same paragraph of the contested judgment that, in their reply and in their observations of 16 January 1996 as to the consequences to be drawn from the judgment in Case C-466/93 *Atlanta Fruchthandelsgesellschaft*, the applicants had also submitted that, even if that Court were to hold that the provisions in question of Regulation No 404/93 were valid, Atlanta would nevertheless be entitled to damages under the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC).

7 The Court of First Instance, in the contested judgment, dismissed the applicants' action.

8 In its appeal Atlanta is essentially disputing the line of argument followed by that Court in relation to the pleas referred to below.

9 Dealing first with the plea alleging liability on the part of the Council for a lawful act, the Court of First Instance observed:

'39 Both Article 42(2) of the Rules of Procedure of the Court of Justice, before which the action was first brought, and Article 48(2) of the Rules of Procedure of this Court provide that no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. It is settled case-law that a judgment of the Court of Justice confirming the validity of an act of the Community institutions cannot be regarded as a factor allowing a new legal ground to be introduced, since such acts are presumed to be valid and the judgments in Case C-280/93 *Germany* v *Council* and Case C-466/93 *Atlanta Fruchthandelsgesellschaft* merely confirmed the law as known to the applicants at the time when they brought their action (see Case 11/81 *Dürbeck* v *Commission* [1982] ECR 1251, paragraph 17).

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

10 On the plea alleging breach of the principle of non-discrimination, the Court of First Instance observed:

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

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

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

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

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

11 In relation to the plea alleging breach of the principle of protection of legitimate expectations, the Court of First Instance found:

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

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

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

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

12 As regards the plea of breach of the fundamental freedom to pursue an economic activity, the Court of First Instance observed:

'62 It is settled case-law that freedom to pursue an economic activity is one of the general principles of Community law. It is not, however, an absolute prerogative and must be considered in relation to its social function. It confers the assurance that a trader will not be arbitrarily deprived of the right to pursue his activity but it does not guarantee him a particular volume of business or a specific share of a given market. The guarantees accorded to traders cannot in any event be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity (see Case 4/73 *Nold* v *Commission* [1974] ECR 491,

paragraph 14). It follows that restrictions may be placed on the freedom to pursue an economic activity, particularly in a common market organisation, provided that they are required in order to meet objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which entrenches upon the very substance of the right guaranteed (see Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraph 15).

63 In this regard, it should be noted that the Court of Justice has already held in Case C-280/93 *Germany* v *Council* that the restriction imposed by Regulation No 404/93 on the freedom of traditional traders in third country bananas to pursue their trade or business met objectives of general Community interest and did not impair the very substance of that right (paragraph 87). Again, it should be recalled that in Case C-466/93 *Atlanta Fruchthandelsgesellschaft* the Court observed that, while the applicants had referred to difficulties in applying Regulation No 404/93 and the resulting consequences for their activities, such circumstances could not affect the validity of the regulation (paragraph 11).

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

13 On the plea of breach of the rights of the defence, the Court of First Instance held:

'70 Contrary to the applicants' argument, the right to be heard in an administrative procedure affecting a specific person cannot be transposed to the context of a legislative process leading to the adoption of general laws. The judgment in *CB and Europay* v *Commission*, cited above, followed a line of settled authority in competition law, according to which undertakings

suspected of having infringed rules of the Treaty must be heard before any measures, and particularly sanctions, are taken against them. However, that case-law must be considered in its proper context and should not be extended to the context of a Community legislative process culminating in the enactment of legislation involving a choice of economic policy and applying to the generality of the traders concerned.

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

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

73 The Court considers that, contrary to the thesis advanced by the applicants, the Commission was under no further obligation to consult the various categories of traders concerned by the Community market in bananas. It is quite feasible for the Community legislature to take into consideration the particular situation of distinct categories of traders without hearing them all individually. The Court recalls in this regard that in Case C-280/93 *Germany* v *Council* the Court of Justice held that the applicant had not shown that the Council had adopted manifestly inappropriate measures or that it had carried out a manifestly erroneous assessment of the information available to it at the

time when the regulation was adopted (paragraph 95). Since Regulation No 404/93 contains provisions concerning traders marketing third country bananas, it follows that the Court of Justice implicitly recognised that the Community legislature had not failed to take into consideration the interests of this category of traders.

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

14 Finally, on the pleas of breach of provisions relating to the legislative procedure and breach of the provisions of the General Agreement on Tariffs and Trade (hereinafter 'GATT'), the Court of First Instance held, at paragraph 77 of the contested judgment, that these pleas had been dismissed in Case C-280/93 *Germany* v *Council*, at paragraphs 27 to 43 and 103 to 112 of the judgment respectively, leading it to hold, at paragraph 78 of the contested judgment, on the same grounds as those set out in the judgment of the Court of Justice, that all those pleas should be dismissed as unfounded.

15 The Court of First Instance concluded that:

'83 According to settled case-law, in order for the Community to incur non-contractual liability under the second paragraph of Article 215 of the Treaty and for the right to compensation to be enforceable, a number of conditions must be satisfied: the conduct alleged against the institutions must be unlawful, actual damage must have been suffered and there must be a causal link between that conduct and the damage alleged. Furthermore, in the case of legislative measures involving choices of economic policy, the Community can incur liability only if a sufficiently serious breach of a superior rule of law for the protection of individuals has occurred. In a legislative context such as this, the Community can incur liability only if the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers

(Joined Cases C-104/89 and C-37/80 *Mulder* v *Council and Commission*, cited above, paragraph 12).

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

The appeal

16 Atlanta submits seven pleas in law in support of its appeal. The first is based on a decision of the Dispute Settlement Body of the World Trade Organisation (hereinafter 'the WTO'), delivered on 25 September 1997 (hereinafter 'the WTO decision'). By its second plea, the appellant challenges the Court of First Instance's dismissal as inadmissible of the plea alleging liability for a lawful legislative act. The third, fourth and fifth pleas contend that the Court of First Instance erred as to the extent of the rights of the defence (third plea) and misapplied the principle of non-discrimination, the principle of freedom to pursue an economic activity (fourth plea) and the principle of protection of legitimate expectations (fifth plea). By its sixth plea, it alleges the Council unlawfully delegated its legislative power to the Commission. By its seventh plea, the appellant claims that the Court of First Instance failed to examine all the conditions giving rise to liability for an unlawful act.

The first plea

17 By its first plea, raised for the first time at the stage of the reply before the Court of Justice, the appellant submits that the WTO decision establishes once and for all that essential parts of the common organisation of the market in bananas (hereinafter 'common organisation of the market') are incompatible with WTO law, placing beyond doubt the illegality of the common organisation of the market under Community law.

18 The appellant states that it became aware of the illegality of Regulation No 404/93 on publication of the WTO decision, which was six months after the lodging of the appeal on 10 March 1997. This decision, it contends, is therefore a new matter for the purposes of Article 42(2) of the Rules of Procedure of the Court of Justice, applicable to appeals under Article 118 of those Rules. Atlanta argues on this point that the Court of Justice, when ruling on an appeal, does not make a finding on the facts, but undertakes a legal review of the contested judgment. It claims, as a result, that the Court of Justice should quash the contested judgment and refer the case back to the Court of First Instance.

19 There is in this regard an inescapable and direct link between the WTO decision and the plea of breach of the provisions of GATT, raised by the appellant before the Court of First Instance and not repeated by it in its pleas on appeal.

20 Such a decision could only be taken into consideration if the Court of Justice had found GATT to have direct effect in the context of a plea alleging the invalidity of the common organisation of the market.

21 As correctly pointed out by the Commission, the appellant could have maintained its plea and adduced in particular the dispute settlement mechanism set up within the WTO in 1995 in support of its argument that the provisions of GATT were of direct effect.

22 In these circumstances, to admit the plea based on the WTO decision would be tantamount to allowing the appellant to challenge for the first time at the stage of the reply the dismissal by the Court of First Instance of a plea which it had raised before that court, whereas nothing prevented it from submitting such a plea at the time of its application to the Court of Justice.

23 The first plea must therefore be dismissed as inadmissible.

The second plea

24 By its second plea, the appellant claims that the Court of First Instance wrongly dismissed as inadmissible, on the grounds that it was out of time, the plea of liability for a lawful legislative act.

25 In Atlanta's view, it had already advanced this argument in its application to the Court of First Instance in that it had claimed that it was subject to exceptional burdens ('Sonderopfer'). It considers this is not in any event a new plea but an argument in support of the plea of non-contractual liability on the part of the Community. Lastly, Atlanta contends that the prohibition on bringing a new plea in law should not apply in a case such as this, arguing that it could in any event bring a new action for non-contractual liability which, this time, would be based on the grounds of liability for a lawful act, and that, if the plea submitted at the time of the reply were to be admitted in these proceedings, this would not prejudice the rights of the defence of the parties who have been able effectively to put their case in relation to the plea.

26 As the Advocate General observes at paragraphs 35 to 37 of his Opinion, the question of exceptional burdens was raised in proceedings before the Court of First Instance only in relation to potential liability for an unlawful act.

27 Contrary to what the appellant argues, a submission which changes the very basis on which the Community could be held liable must be regarded as constituting a new plea in law which cannot be introduced in the course of proceedings. This is all the more so given that, as the French Government correctly points out, in the context of an action based solely on liability for an unlawful act, the prohibition on bringing a new plea of itself precludes a party from raising at the stage of the reply breach of a superior rule of law not referred to in the application (judgment in Joined Cases 279/84, 280/84, 285/84 and 286/84 *Walter Rau Lebensmittelwerke and Others* v *Commission* [1987] ECR 1069, paragraph 38). As the Council correctly points out, the fact that the plea, in common with a plea of liability for an unlawful act, is based on Article 215 of the Treaty does not make it any less a new plea in law.

28 Finally, contrary to the assertions of the appellant, considerations relating to economy of procedure or respect for the rights of the defence cannot justify extending the exceptions to the rule which prevents new pleas in law beyond those expressly provided for in the Rules of Procedure of the Court of Justice and those of the Court of First Instance.

29 In view of the foregoing, the Court of First Instance was correct in stating, at paragraph 39 of the contested judgment, that both Article 42(2) of the Rules of Procedure of the Court of Justice and Article 48(2) of the Rules of Procedure of the Court of First Instance provide that no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure, and in concluding from this, at paragraph 40 of that judgment, that the applicant was barred from raising in the reply a plea alleging liability for a lawful act.

30 The second plea is therefore unfounded.

The third plea

31 By its third plea, the appellant asserts that the Court of First Instance erred in finding that the right to be heard in an administrative procedure affecting a specific person could not be transposed to the context of a legislative process leading, as in the case of Regulation No 404/93, to the adoption of general laws. In the appellant's view, it does not matter to the individual concerned whether his legal situation is affected as a result of an administrative procedure or of a legislative procedure.

32 On this point, Atlanta cites Article 173(4) of the EC Treaty (now, after amendment, Article 230(4) EC) and the case-law of the Court of Justice, notably authorities on the adoption of anti-dumping regulations (see, in particular, Case C-49/88 *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company* v *Council* [1991] ECR I-3187, paragraphs 15 and 16), which, in its view, show that the absence of a Treaty provision requiring consultation in the context of the legislative procedure does not allow such a hearing to be dispensed with (see also, in particular, Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraph 39).

33 The appellant also claims that the Court of First Instance breached the general principle under which all courts must give reasons for their decisions, stating in particular the reasons which have led it not to entertain the complaint formally brought before it.

34 Under Article 173(4) of the Treaty, any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

35 Contrary to the claims of the appellant, no right to be heard prior to adoption of a legislative act can be deduced from this provision.

36 The case-law referred to by Atlanta relates to particular acts of direct and individual concern to the applicants, whereas, in the case before us, the order of the Court of Justice of 21 June 1993 referred to above held that Regulation No 404/93 was not of direct and individual concern to the applicant.

37 The Court of First Instance was therefore correct in finding, at paragraph 70 of the contested judgment, that this case-law cannot be extended to apply to the context of a Community legislative procedure culminating in the enactment of legislation involving a choice of economic policy and applying to the generality of the traders concerned.

38 In those circumstances, the Court of First Instance did not err in law when it went on to state, at paragraph 71 of the contested judgment, that, in the context of a procedure for the adoption of a Community act based on an article of the Treaty, the only obligations of consultation incumbent on the Community legislature are those laid down in the article in question.

39 In the light of the foregoing, the Court of First Instance, contrary to what is stated by the appellant, gave adequate reasons for dismissing the plea.

40 The third plea must therefore be dismissed.

The fourth plea

41 In the view of the appellant, the Court of First Instance, in upholding the validity of Regulation No 404/93 in general and abstract terms in relation to the principle of non-discrimination and the principle of freedom to pursue an economic activity, should have concluded, in the context of the action for damages, that application of that regulation to Atlanta's specific circumstances gave rise to an infringement of its rights.

42 It should be noted, first of all, that respect for fundamental rights is an obligation not only on the Community legislature but also on the authorities responsible for implementing legislative acts which it adopts (see, in particular, Case C-68/95 *T. Port* v *Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065, paragraphs 39 and 40).

43 However, contrary to the appellant's assertions, a finding by the Court of Justice that a legislative act is valid in terms of fundamental rights covers also the case of the specific and individual application of such an act, so that the validity of the act cannot therefore be called into question when it is applied in specific cases.

44 The Court of First Instance was therefore correct to point out, at paragraphs 49 and 63 of the contested judgment, that the Court of Justice had held in Case C-466/93 *Atlanta Fruchthandelsgesellschaft II* that difficulties in applying Regulation No 404/93 which the applicants had raised could not affect the validity of that regulation.

45 It is true, as the Commission has quite rightly observed, that, where general legislation requires implementing measures, the latter can be found to be invalid in relation to the same principles where a breach of fundamental rights is directly

attributable to such measures (see, in particular, Case C-68/95 *T. Port*, paragraphs 39 and 40).

46 In the present case, however, it is clear that the alleged breach relates directly to Regulation No 404/93, the validity of which in terms of the principles referred to has been confirmed by the Court of Justice in Case C-280/93 *Germany* v *Council* and Case C-466/93 *Atlanta Fruchthandelsgesellschaft.*

47 The Court of First Instance was therefore correct to rely on those judgments in dismissing the pleas concerning breach of the principle of non-discrimination and of the principle of freedom to pursue an economic activity.

48 The fourth plea should therefore be dismissed.

The fifth plea

49 By its fifth plea, the appellant claims that, contrary to the findings of the Court of First Instance at paragraphs 55 and 56 of the contested judgment, the Court of Justice has not yet had occasion to rule on the question whether Regulation No 404/93, in so far as it does not lay down appropriate transitional arrangements, infringes the principle of protection of legitimate expectations.

50 The appellant goes on to claim that the Court of First Instance erred in law in dismissing the plea of breach of this principle on the ground that, in the absence of 'specific assurances' from the administration, no one could claim a breach of the principle (paragraph 57 of the contested judgment). In its view, the Court of Justice has never upheld such a restrictive interpretation of this principle and the

Court of First Instance had until then accepted a requirement of 'specific assurances' only in relation to officials. In relation to other persons it had held 'reasonable expectations' to be sufficient (see, in particular, Case T-20/91 *Holtbecker* v *Commission* [1992] ECR II-2599, paragraph 53).

51 In any event, the Court of First Instance was, according to the appellant, wrong not to address its contention that it had suffered serious damage as the result of the absence of transitional arrangements.

52 It must be observed first of all that the Court of First Instance pointed out quite correctly, at paragraph 55 of the contested judgment, that according to settled case-law the principle of protection of legitimate expectations is one of the fundamental principles of the Community, but that traders are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained, particularly in an area such as that of the common organisation of the markets, the objective of which involves constant adjustment to reflect changes in economic circumstances.

53 The Court of First Instance also properly pointed out, at paragraph 55 of the contested judgment, that at paragraph 80 of the judgment in Case C-280/93 *Germany* v *Council* the Court of Justice had confirmed that a trader could not claim an acquired right or even a legitimate expectation regarding maintenance of an existing situation which was capable of being altered by decisions taken by the Community institutions within the limits of their discretionary power. The Court of First Instance also correctly stated, at paragraph 56 of the contested judgment, that in Case C-466/93 *Atlanta Fruchthandelsgesellschaft II* the Court of Justice, finding that the court making the reference had not raised any grounds of invalidity such as to affect the assessment of the validity of Regulation No 404/93, had found that there had been no such infringement.

54 The appellant's complaint that the Court of First Instance wrongly failed to take into consideration the extent of the damage which it suffered as a result of

Regulation No 404/93 is unfounded. The extent of the loss alleged cannot in any event cast doubt on the finding by that Court that the conduct of the competent authority had not given rise to a legitimate expectation on the part of the parties concerned that a particular situation would be maintained or that particular measures would be adopted.

55 Finally, inasmuch as the appellant has not advanced any evidence on the basis of which it could be concluded that the conduct of the legislature could have given rise in its mind to reasonable expectations that a particular situation would be maintained or that particular transitional arrangements would be adopted, it is not material to examine Atlanta's contention that the Court of First Instance erred in law in finding that, in order for the principle of protection of legitimate expectations to be applicable, the legislature must have given specific assurances, instead of confining itself to examining whether the conduct of the legislature had given rise to legitimate expectations in the minds of the parties concerned.

56 The Court of First Instance was therefore correct in concluding that the appellant had not established breach of the principle of protection of legitimate expectations.

57 This plea must accordingly be dismissed.

The sixth plea

58 By its sixth plea Atlanta complains that the Court of First Instance failed to address its submission that the Council had unlawfully delegated legislative power to the Commission in that, in Regulation No 404/93, the Council itself did not define the term 'operator' in relation to the common organisation of the market.

59 It can be seen from paragraph 75 of the contested judgment that, as stated by the Court of First Instance, the applicants maintained in substance that, in the procedure for the adoption of Regulation No 404/93, the Council failed to respect the Commission's right of initiative and the Parliament's right to be consulted. It cannot be concluded from this wording that the Court of First Instance took into consideration the complaint concerning unlawful delegation of legislative power to the Commission.

60 Furthermore, the Court of First Instance, in order to reject the complaints concerning breach of the provisions relating to the procedure for adoption of Regulation No 404/93, reiterated, at paragraphs 77 and 78 of the contested judgment, the grounds appearing at paragraphs 27 to 43 of the judgment in Case C-280/93 *Germany* v *Council*, and it is apparent from those paragraphs that they were in response solely to the argument that there had been a breach of the Commission's right of initiative, a failure to give reasons and lack of further consultation of the Parliament.

61 Finally, it can be seen from paragraph 34 of the contested judgment that the applicants before the Court of First Instance, whilst concentrating their arguments on various pleas, had not waived the right to rely on others, including that alleging unlawful delegation of legislative power to the Commission.

62 The appellant is therefore correct in asserting that the Court of First Instance failed to address the complaint concerning unlawful delegation of legislative power to the Commission.

63 This plea is therefore well founded.

The seventh plea

64 By its seventh plea, Atlanta criticises the Court of First Instance for failing to examine all the conditions for liability for an unlawful act, even though these conditions were indeed satisfied. The appellant asserts in this regard that Regulation No 404/93 entails a sufficiently serious breach of a superior rule of law for the protection of individuals, that the Community legislature seriously and manifestly exceeded its powers, that the damage suffered goes far beyond the economic risks ordinarily inherent in the marketing of bananas and that the damage, relating in the main to shipping contracts which have become redundant, was caused by the unlawful conduct of the Community legislature.

65 In response to that plea, it is sufficient to state that, according to settled case-law (see, in particular, Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 19), non-contractual liability on the part of the Community under the second paragraph of Article 215 of the Treaty is subject to a number of conditions relating to the illegality of the conduct alleged against the Community institutions, actual damage and the existence of a causal link between the conduct of the institution and the damage complained of. If any one of those conditions is not satisfied, the entire action must be dismissed and it is unnecessary to consider the other conditions for non-contractual liability on the part of the Community (Case C-146/91 *KYDEP* v *Council and Commission*, paragraph 81).

66 That being so, the Court of First Instance correctly applied this case-law when it held, at paragraph 84 of the contested judgment, that, in so far as no illegality such as would impose non-contractual liability on the Community could be found against the defendants, the action should be dismissed and it was unnecessary to examine whether the other conditions required for the Community to incur liability were satisfied.

67 The seventh plea must therefore be dismissed.

68 In view of the foregoing, the sixth plea should be held to be well founded and the contested judgment should therefore be set aside inasmuch as the Court of First Instance dismissed Atlanta's action without addressing the complaint of unlawful delegation of legislative power to the Commission.

69 According to the first paragraph of Article 54 of the EC Statute of the Court of Justice, if the appeal is well founded, the Court of Justice is to 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. Since the state of the case is sufficiently complete to enable the Court of Justice to give final judgment itself, it is unnecessary to refer the matter back to the Court of First Instance.

The action for damages

70 Atlanta alleges that the Council unlawfully delegated its legislative power to the Commission in so far as it left it to the latter to define the concept of operator in relation to the common organisation of the market.

71 In this regard, as the Council and the French Government correctly observed, Regulation No 404/93 contains significant stipulations relating to the operators covered by the common organisation of the market.

72 Firstly, the second subparagraph of Article 19(1) of Regulation No 404/93 states that operators within the meaning of these provisions must be 'established in the

Community' and have 'marketed on their own account a minimum quantity of bananas of the above origins, to be determined'.

73 As regards the origin of the bananas, the 13th recital in the preamble to Regulation No 404/93 provides that a distinction must be made when administering the tariff quota between, on the one hand, operators who have previously marketed third country bananas and non-traditional ACP bananas and, on the other, operators who previously marketed bananas produced in the Community and traditional ACP bananas while leaving a quantity available for new operators who have recently embarked on commercial activity or are about to embark on commercial activity in this sector.

74 'Marketing' is defined at Article 15(5) of Regulation No 404/93 as placing on the market, not including making the product available to the final consumer.

75 The 15th recital in the preamble to the regulation states that, in adopting additional criteria which operators should respect, the Commission is guided by the principle whereby the licences must be granted to natural or legal persons who have undertaken the commercial risk of marketing bananas and by the necessity of avoiding disturbing normal trading relations between persons occupying different points in the marketing chain.

76 Given those stipulations, and on the assumption that the concept of operator is one of the elements essential to the subject-matter in question and must, therefore, be a matter reserved for the Council (see, in particular, Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, paragraphs 35 and 36), it must be

found that the Council did define in sufficient detail the concept in question, so that it was able validly to delegate to the Commission the powers required for implementing the rules thus laid down, as it is authorised to do under Article 145 of the EC Treaty (now Article 202 EC).

77 The plea alleging unlawful delegation of legislative power to the Commission must therefore be dismissed.

78 In the circumstances, the action for damages must be dismissed.

Costs

79 Under Article 122(1) of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, that Court is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which apply to appeal proceedings under Article 118, the unsuccessful party is to be ordered to pay the costs if they have been asked for in pleadings. Paragraph 4 of that article provides, in the first sentence, that the Member States and institutions which intervene in the proceedings are to bear their own costs.

80 Since the action for damages brought by Atlanta has been dismissed, paragraphs 2 and 3 of the operative part of the contested judgment are to be upheld.

81 Since Atlanta has been unsuccessful as regards all its essential grounds of appeal, it must be ordered to pay the costs relating to these proceedings.

82 The French Republic shall bear its own costs in this application.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Sets aside the judgment of the Court of First Instance of 11 December 1996 in Case T-521/93 *Atlanta and Others* v European Community in so far as it dismissed the claim for damages of Atlanta AG without addressing the complaint concerning unlawful delegation of legislative power to the Commission;**

2. **Dismisses the claim for damages brought by Atlanta AG;**

3. **Upholds paragraphs 2 and 3 of the operative part of the judgment in Case T-521/93 *Atlanta and Others* v European Community;**

4. **Orders Atlanta AG to pay the costs relating to these proceedings;**

5. **Orders the French Republic to bear its own costs.**

Moitinho de Almeida Sevón Gulmann

Puissochet Wathelet

Delivered in open court in Luxembourg on 14 October 1999.

R. Grass D.A.O. Edward

Registrar President of the Fifth Chamber