



## Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

9 July 2015 \*

(Reference for a preliminary ruling — Agriculture — Common organisation of the markets — Bananas — Regulation (EC) No 2362/98 — Articles 7, 11 and 21 — Tariff quotas — Bananas originating in ACP countries — Newcomers — Import licences — Non-transferable nature of rights deriving from certain import licences — Abusive practice — Regulation (EC) No 2988/95 — Article 4(3))

In Case C-607/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Italy), made by decision of 10 July 2013, received at the Court on 25 November 2013, in the proceedings

**Ministero dell'Economia e delle Finanze,**

**Agenzia delle Dogane,**

**European Commission**

v

**Francesco Cimmino,**

**Costantino Elmi,**

**Diletto Nicchi,**

**Vincenzo Nicchi,**

**Ivo Lazzeri,**

**Euclide Lorenzon,**

**Patrizia Mansutti,**

**Maurizio Misturelli,**

**Maurizio Momesso,**

**Mirjam Princic,**

**Marco Raffaelli,**

\* Language of the case: Italian.

**Gianni Vecchi,**

**Marco Malavasi,**

**Massimo Malavasi,**

**Umberto Malavasi,**

**Carlo Mosca,**

**Luca Nicoli,**

**Raffaella Orsero,**

**Raffaello Orsero,**

**Erminia Palombini,**

**Matteo Surian,**

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Jürimäe (Rapporteur), J. Malenovský, M. Safjan and A. Prechal, Judges,

Advocate General: E. Sharpston,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 12 November 2014,

after considering the observations submitted on behalf of:

- Mr Lorenzon, Mrs Mansutti, Mr Misturelli, Mr Momesso, Mrs Princic, Mr Raffaelli and Mr Vecchi, by P. Rovatti, avvocato,
- Mrs Palombini, by W. Viscardini and G. Donà, avvocati,
- Mr Surian, by R. Bettiol and B. Cortese, avvocati,
- Mrs Orsero, by F. Munari, R. Dominici and U. De Luca, avvocati,
- the Italian Government, by G. Palmieri, assisted by A. Collabolletta, avvocato dello Stato,
- the European Commission, by B.-R. Killmann and P. Rossi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 February 2015,

gives the following

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 11 and 21 of Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32), as amended by Commission Regulation (EC) No 1632/2000 of 25 July 2000 (OJ 2000 L 187, p. 27) ('Regulation No 2362/98'), and Article 4(3) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).
- 2 The request has been made in proceedings between the Ministero dell'economia e delle finanze (Ministry for the Economy and Finance), the Agenzia delle dogane (Customs Authority) and the European Commission, the applicants in the main proceedings, and the legal representatives of companies importing bananas into the European Union from African, Caribbean and Pacific countries ('the ACP States) as well as from other third countries, including SIMBA SpA ('SIMBA') and Rico Italia srl ('Rico Italia'), concerning the amount of customs duty levied on those companies as a result of those imports.

### Legal context

#### *Regulation (EEC) No 404/93*

- 3 Title IV 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), as amended by Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ 1999 L 160, p. 80) ('Regulation No 404/93'), is entitled 'Trade with third countries'. Articles 16 to 20 of Regulation No 404/93, which are in Title IV, govern the tariff quotas applicable to bananas from third countries.

- 4 Article 16 of Regulation No 404/93 provides as follows:

'Articles 16 to 20 of this Title shall apply only to fresh products of CN code ex 0803 00 19.

For the purpose of this Title:

- (1) "Traditional imports from the ACP States" means imports into the [Union] of bananas originating in the States listed in the Annex hereto up to a limit of 857 700 tonnes (net weight) per year; these are termed "traditional ACP bananas";
  - (2) "non-traditional imports from the ACP States" means imports into the [Union] of bananas originating in ACP States but not covered by definition 1; these are termed "non-traditional ACP bananas";
  - (3) "imports from non-ACP third States" means bananas imported into the [Union] originating in third States other than the ACP States; these are termed "third State bananas".'
- 5 Article 18 of Regulation No 404/93 states as follows:

'1. A tariff quota of 2 200 000 tonnes (net weight) shall be opened each year for imports of third State and non-traditional ACP bananas.

Imports of third State bananas under this tariff quota shall be subject to duty of [EUR] 75 per tonne, while imports of non-traditional ACP bananas shall be free of duty.

2. An additional tariff quota of 353 000 tonnes (net weight) shall be opened each year for imports of third State and of non-traditional ACP bananas.

Imports of third State bananas under the tariff quota shall be subject to duty of [EUR] 75 per tonne, while imports of non-traditional ACP bananas shall be free of duty.

3. No duty shall be payable on imports of traditional ACP bananas.

...'

6 Article 19(1) of Regulation No 404/93 provides as follows:

'The tariff quotas indicated in Article 18(1) and (2) and imports of traditional ACP bananas shall be managed in accordance with the method based on taking account of traditional trade flows ("traditionals/newcomers").

...'

*Regulation No 2362/98*

7 Recitals 6, 8, 10 and 14 in the preamble to Regulation No 2362/98 state as follows:

'(6) Whereas a share of the tariff quotas and traditional ACP bananas must be reserved for "newcomers"; whereas that overall allocation should be sufficient to allow operators to participate in that import trade and encourage healthy competition;

...

(8) Whereas experience from several years of applying the Community banana import arrangements indicates the need to tighten the eligibility criteria for new operators so as to avoid the registration of purely fictitious agents and the grant of allocations in response to artificial or speculative applications; whereas, in particular, it is justifiable to demand a minimum of experience in importing comparable products — fresh products falling within Chapters 7, 8 and, under certain conditions, 9 of the Combined Nomenclature; whereas, also, to avoid applications for annual allocations which bear little relation to operators' actual capacities and which will not lead to applications for import licences for the corresponding quantities, submission of an application for an annual allocation should be subject to the requirement that a security in lieu of the import licence security be lodged ...;

...

(10) Whereas the provisions applying to the registration of operators and the determination of their reference quantities or annual allocations, as the case may be, should be adopted; whereas the verifications and checks to be carried out by the competent national authorities should be specified; whereas, lastly, the action to be taken in the event that certain obligations are not fulfilled, in particular as regards registration and declarations made for the purpose of obtaining reference quantities or allocations under the import arrangements, should also be specified;

...

- (14) Whereas the conditions for and the effects of transferring licences should be specified in the light of the definition of operator categories established by this Regulation; whereas a transfer restricted to a single transferee per licence or certificate or extract therefrom will allow trade relations to develop between the various registered operators; whereas, however, artificial trade, speculation or disturbance of normal trade should not be encouraged by permitting transfers from “newcomers” in favour of “traditional operators”.’
- 8 Article 2 of Regulation No 2362/98 provides that the tariff quotas and traditional ACP bananas, referred to in Article 18(1) and (2) and Article 16 of Regulation No 404/93 respectively, are to be made available at the rate of 92% to traditional operators, as defined in Article 3 of Regulation No 2362/98, and at the rate of 8% to ‘newcomers’, as defined in Article 7 of that regulation.
- 9 Article 7 of Regulation No 2362/98 is worded as follows:
- ‘For the purposes of this Regulation and as regards imports under the tariff quotas and as traditional ACP bananas, “newcomers” shall mean economic agents established in the European [Union] who, at the time of registration:
- (a) have been engaged independently and on their own account in the commercial activity of importing fresh fruit and vegetables falling within Chapters 7 and 8 of the Tariff and Statistical Nomenclature and the Common Customs Tariff, or products under Chapter 9 thereof, if they have also imported products falling within Chapters 7 and 8 in one of the three years immediately preceding the year in respect of which registration is sought; and
- (b) by virtue of this activity, have undertaken imports to a declared customs value of [EUR] 400 000 or more during the period referred to in point (a).’
- 10 The first subparagraph of Article 8(4) of Regulation No 2362/98 is worded as follows:
- ‘In order to have their registration renewed, operators shall provide the competent authorities with proof that they have actually imported on their own account at least 50% of the quantity allocated to them for the current year.’
- 11 Article 11(1) of Regulation No 2362/98 provides as follows:
- ‘The Member States shall be responsible for ensuring compliance with this section.
- In particular, they shall check that the operators concerned are commercially active for their own account as importers into the [Union] in the sector referred to in Article 7 and as independent economic units in terms of management, staffing and operations. Where there are grounds for suspecting that these conditions are not met, applications for registration and requests for annual allocations shall be accepted only subject to the operator’s providing evidence of compliance which is considered satisfactory by the national competent authorities.’
- 12 The rules for issuing import licences are governed by Articles 14 to 22 of Regulation No 2362/98. Article 21(1) and (2) of that regulation provides as follows:
- ‘1. Rights arising under import licences issued in accordance with this chapter shall be transferable to a single transferee operator on the terms and conditions laid down in Article 9 of [Commission] Regulation (EEC) No 3719/88 [of 16 November 1988 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (OJ 1988 L 331, p. 1)], without prejudice to paragraph 2 of this Article.

2. Rights may be transferred:

- (a) between traditional operators registered under Article 5;
- (b) from traditional operators to newcomer operators registered under Article 8;
- (c) between newcomer operators.

The transfer of rights from newcomers to traditional operators shall not be permitted.'

*Regulation No 2988/95*

<sup>13</sup> Article 4 of Regulation No 2988/95 is worded as follows:

'1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

- by an obligation to pay or repay the amounts due or wrongly received,
- by the total or partial loss of the security provided in support of the request for an advantage granted or at the time of the receipt of an advance.

2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat-rate basis.

3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the [Union] law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal.

4. The measures provided for in this Article shall not be regarded as penalties.'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

<sup>14</sup> During 1999 and 2000, bananas originating in ACP States and non-ACP third States were imported into the EU by companies which were 'newcomers' within the meaning of Article 7 of Regulation No 2362/98 and held the 'AGRIM' import licences necessary under the tariff quotas laid down by Regulation No 404/93. On that basis, the imports concerned were free of customs duty or, where appropriate, were subject to customs duty at a reduced rate of EUR 75 per tonne ('the preferential rate of duty').

<sup>15</sup> SIMBA, represented by Mr and Mrs Orsero, is a company which operates both on the banana import market as a traditional operator within the meaning of Article 3 of Regulation No 2362/98 and the market for the distribution of bananas within the EU. Rico Italia, represented by Mr Misturelli, is an importer registered as a newcomer.

<sup>16</sup> A tax inspection of SIMBA carried out by the Guardia di Finanza (customs and tax police) revealed the existence of commercial practices potentially classifiable as fraud between SIMBA, Rico Italia and the other newcomers involved in the main proceedings.

- 17 Those practices were carried out in such a way as to circumvent the prohibition laid down in the second subparagraph of Article 21(2) of Regulation No 2362/98 on the transfer of rights arising under import licences from newcomers to traditional operators, thereby enabling SIMBA to obtain unlawfully the benefit of the preferential rate of duty for the import of bananas by using ‘AGRIM’ import licences obtained by the newcomers involved in the proceedings before the national court.
- 18 It is apparent from the order for reference that the transactions at issue in the main proceedings operated along the following lines:
- first, SIMBA sold systematically to Rico Italia bananas which were outside EU customs territory;
  - second, Rico Italia sold the bananas on to the newcomers in the main proceedings, which held the import licences necessary to obtain the preferential rate of duty;
  - third, the newcomers in the main proceedings imported the bananas into the EU and subsequently, once they had cleared customs, sold them on to Rico Italia, and
  - fourth, Rico Italia sold the bananas to SIMBA.
- 19 Criminal proceedings were brought against the representatives of SIMBA, Rico Italia and the newcomers in the main proceedings, which were charged with smuggling and making false statements. The Ministero dell’economia e delle finanze, the Agenzia delle dogane and the Commission lodged a civil claim for damages in those proceedings.
- 20 At first instance, the Tribunale di Verona (District Court, Verona, Italy) found Rico Italia’s representative guilty of the charges brought against him and, ruling on the civil claims, ordered him to pay compensation to the civil parties for the damage suffered by them and to pay provisional damages to the Ministero dell’economia e delle finanze and to the Agenzia delle dogane. That court acquitted the other defendants.
- 21 Taking the view that the charges against Rico Italia’s representative had become time-barred, the Corte d’appello di Venezia (Appeal Court, Venice, Italy) found that there was no purpose in continuing the criminal proceedings but upheld the judgment at first instance in so far as it concerned the civil claims. That court also confirmed the acquittal at first instance of the newcomers in the main proceedings on the ground that, unlike Rico Italia, they were in fact actively engaged in the fresh fruit and vegetable import sector and fulfilled the requirements for classification as newcomers within the meaning of Regulation No 2362/98.
- 22 After an appeal was brought on a point of law before it by the civil parties against the judgment of the Corte d’appello di Venezia, the Corte suprema di cassazione (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) On a proper construction of Article 11 of Regulation No 2362/98, under which it is the responsibility of the Member States to check that operators are commercially active for their own account as importers into the Community and as independent economic units in terms of management, staffing and operations, is all import activity carried out on behalf of a traditional operator by persons who only formally satisfy the requirements laid down by that regulation in respect of “newcomers” to be excluded from the customs benefits normally granted to newcomers?
  - (2) Does Regulation No 2362/98 permit a traditional operator to sell bananas which are outside the European Union to a newcomer with which it has reached an agreement under which the bananas are to be imported into the European Union at a preferential rate of duty and are to be

sold to that traditional operator at a price agreed upon prior to the whole transaction, without the newcomer bearing any actual business risk or making any arrangements regarding the resources necessary for carrying out that transaction?

- (3) Does the agreement referred to in Question 2 constitute an infringement of the prohibition, laid down in Article 21(2) of Regulation No 2362/98, on the transfer of rights from newcomers to traditional operators, with the result that the transfer carried out remains ineffective and the duty is payable in full and not at a preferential rate, in accordance with Article 4(3) of Regulation No 2988/95?

### **The request to have the oral procedure reopened**

- 23 The oral procedure was concluded on 5 February 2015, following the presentation of the Advocate General's Opinion.
- 24 By letter of 19 March 2015, received at the Court the same day, Mr Surian requested the Court to order that the oral procedure be reopened and to submit to the Corte suprema di cassazione a request for clarification concerning the facts of the main proceedings as described by that court in the order for reference. A similar request was made by Mr and Mrs Orsero and by Mrs Palombini by letters of 20 and 26 March 2015, respectively, which were received by the Court on those days.
- 25 In support of their requests, those parties to the main proceedings maintain, in essence, as they also argued in the written observations which they submitted to the Court and at the hearing, that some of the facts set out in the order for reference do not correspond to the facts established at first instance and on appeal. Those parties submit that, as a result, the Advocate General's Opinion is based on incorrect facts connected with the inaccurate content of that order.
- 26 It should be noted in that regard that the Court may, at any time, after hearing the Advocate General, order that the oral procedure be reopened, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument that has not been debated by the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.
- 27 In the present case, the Court, having heard the Advocate General, takes the view that it has all the information necessary to answer the questions referred and that that information has been the subject of debate before it.
- 28 Similarly, the Court considers that there is no need to submit a request for clarification to the Corte suprema di cassazione.
- 29 Accordingly, the requests submitted by Mr Surian, Mr and Mrs Orsero and Mrs Palombini must be rejected.

### **Admissibility of the request for a preliminary ruling**

- 30 It should be noted that the facts of the main proceedings are disputed by the newcomers in those proceedings, as is apparent from the written observations which they have submitted to the Court and from the exchange of arguments and evidence at the hearing before the Court. Those objections relate, in particular, to the assumptions of fact on which the referring court based its questions; those assumptions do not, according to those operators, correspond to the facts established by the courts adjudicating on the substance.



- 31 In those circumstances, the newcomers submit that the request for a preliminary ruling is inadmissible.
- 32 It should be noted in that respect that, according to the Court's settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, judgment in *Genil 48 and Comercial Hostelera de Grandes Vinos*, C-604/11, EU:C:2013:344, paragraph 26 and the case-law cited).
- 33 The Court finds that that is not the situation in the present proceedings.
- 34 It is apparent from the request for a preliminary ruling that an interpretation of the provisions of Regulation No 2362/98 and, in particular, Articles 7, 11 and 21 of that regulation, is necessary for the resolution of the dispute in the main proceedings, in particular for the purpose of determining whether the transactions at issue in those proceedings constitute an abusive practice under EU law. In that regard, the appeal on a point of law before the Corte suprema di cassazione concerns whether the Corte d'appello di Venezia's interpretation of those articles is valid.
- 35 It must also be recalled that, within the framework of proceedings under Article 267 TFEU, the Court cannot resolve a dispute concerning the facts. Such a dispute, like any other assessment of the facts involved, is within the province of the national court (judgment in *CEPSA*, C-279/06, EU:C:2008:485, paragraph 30 and the case-law cited).
- 36 The request for a preliminary ruling is therefore admissible.

### Question 1

- 37 It should be observed as a preliminary point that, according to the Court's settled case-law, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. With this in mind, the Court of Justice may, where necessary, have to reformulate the questions referred to it (see, *inter alia*, judgment in *Douane Advies Bureau Rietveld*, C-541/13, EU:C:2014:2270, paragraph 18 and the case-law cited).
- 38 The Court may extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject-matter of the dispute (see, to that effect, judgment in *eco cosmetics and Raiffeisenbank St. Georgen*, C-119/13 and C-120/13, EU:C:2014:2144, paragraph 33 and the case-law cited).
- 39 In the present case, although the question referred concerns the interpretation of Article 11 of Regulation No 2362/98, it is apparent from the full wording of that question, and from information provided by the national court in the order for reference, that that court in fact entertains doubts concerning the requirement laid down in Article 7(a) of that regulation, read in the light of Article 11 thereof, that a 'newcomer' must have been engaged 'independently and on [his] own account' in the commercial activity of importing.

- 40 While it is common ground in the main proceedings that the newcomers in those proceedings fulfil that requirement when they register, the referring court seeks to ascertain whether, as a result of their involvement in the transactions at issue in the main proceedings, those operators may be regarded as having been engaged in the import business on the banana market as required under that regulation.
- 41 Accordingly, the first question must be understood as relating to whether Article 7(a) of Regulation No 2362/98, read in the light of Article 11 of that regulation, must be interpreted as meaning that the requirement that an economic agent must have been engaged ‘independently and on [his] own account’ in the commercial activity of importing relates only to the registration of that agent as a ‘newcomer’ within the meaning of Article 7(a) of Regulation No 2362/98, or whether that requirement must also be satisfied in order for such an agent to be able to maintain newcomer status for the purpose of importing bananas under the tariff quotas laid down by Regulation No 404/93.
- 42 It should be noted at the outset that, in so far as concerns the importation of bananas into the EU, Regulation No 404/93 establishes arrangements for trade with third countries based, inter alia, on the tariff quotas laid down in Article 18(1) and (2) of that regulation.
- 43 Those tariff quotas are managed, pursuant to Article 19(1) of Regulation No 404/93, in accordance with of the ‘traditionals/ newcomers’ method, based on taking account of traditional patterns of trade, although, as stated in the thirteenth recital in the preamble to that regulation, a quantity is left available for new operators who have recently embarked on commercial activity or are about to embark on commercial activity in that sector.
- 44 To that end, Article 2 of Regulation No 2362/98 provides that quantities of bananas available under those tariff quotas are to be allocated between traditional operators and newcomers. It is clear from recital 6 in the preamble to that regulation that the purpose of that allocation is to allow new operators to participate in the banana import trade and to encourage healthy competition.
- 45 Thus, Regulation No 2362/98 makes inclusion by operators in tariff quotas subject to certain specific conditions, so as to ensure that the allocation referred to in paragraph 44 above may be maintained.
- 46 Those conditions include that set out in Article 7 of Regulation No 2362/98, which relates to how the status of ‘newcomer’ is to be obtained. Under that provision, ‘newcomers’ are defined as economic agents established in the EU who, at the time of registration, inter alia, have been engaged independently and on their own account in the commercial activity of importing fresh fruit and vegetables falling within Chapters 7 and 8 Common Customs Tariff in one of the three years immediately preceding the year in respect of which registration is sought.
- 47 While it is apparent from the wording of Article 7 of Regulation No 2362/98 that, in order to qualify as a newcomer, an importer must satisfy ‘at the time of registration’ the requirements laid down in that article, it also follows from that wording that that status is granted ‘as regards imports under the tariff quotas’.
- 48 Accordingly, bearing in mind the purpose of the allocation of tariff quotas and of maintaining healthy competition on the banana import market, as mentioned in paragraph 44 above, the requirement that the activity of a newcomer should have been pursued ‘independently and on [his] own account’ cannot be interpreted as referring only to the activity which the newcomer was engaged in during the period before his registration, and extends beyond that period.
- 49 The consequence of the allocation of tariff quotas between traditional operators and newcomers is that genuine newcomers are able to act on the market and therefore deploy their economic activities fully (see, to that effect, judgment in *Di Lenardo and Dilexport*, C-37/02 and C-38/02, EU:C:2004:443, paragraphs 84 and 87). In that regard, as is apparent from recital 8 in the preamble to Regulation

No 2362/98, the purpose of the eligibility criteria for new operators, in the context of the administration of tariff quotas, is to avoid the registration of purely fictitious agents and thereby combat speculative and artificial practices.

- 50 Accordingly, the objective of the requirement laid down in Article 7(a) of Regulation No 2362/98 that newcomers should engage in commercial activity independently is to prevent a traditional operator who is already in receipt of part of the tariff quotas from being able to appropriate, through another operator, the share of tariff quotas that is reserved for newcomers.
- 51 It follows that that requirement must be interpreted as also covering the importation of bananas by newcomers under the tariff quotas. That interpretation is also borne out by the context of Article 7(a) of Regulation No 2362/98.
- 52 In the first place, in order to have their annual registration renewed, Article 8(4) of Regulation No 2362/98 provides that such operators are to provide the competent national authorities with proof that they have actually imported on their own account at least 50% of the quantity allocated to them individually for the current year. As the Advocate General observed at point 64 of her Opinion, that condition required of such operators a minimum use of their annual allocation in order to ensure that those operators in fact participate in the banana import trade and thereby make that market more competitive.
- 53 In the second place, Article 11(1) of Regulation No 2362/98 requires Member States to check that newcomers are commercially active for their own account as importers into the EU and as independent economic units, and, where there is doubt as to whether that condition is met, the operator concerned has to provide evidence of compliance which is considered 'satisfactory' by the national competent authorities in order to have their applications for registration and annual allocations accepted and prove their independent management (see, to that effect, judgment in *Di Lenardo and Dilexport*, C-37/02 and C-38/02, EU:C:2004:443, paragraph 86).
- 54 As a consequence, in the light of the foregoing considerations, the answer to Question 1 is that Article 7(a) of Regulation No 2362/98, in conjunction with Article 11 of that regulation, is to be interpreted as meaning that the requirement that an economic agent must have been engaged in commercial activity as an importer 'independently and on [his] own account' must be satisfied not only for the purpose of the registration of such an agent as a 'newcomer' within the meaning of that provision but also that of ensuring that the agent may maintain that status in order to import bananas under the tariff quotas laid down by Regulation No 404/93.

### **The second question and the first part of the third question**

- 55 By its second question and the first part of its third question, which it is appropriate to consider together, the referring court seeks to ascertain, in essence, whether Article 21(2) of Regulation No 2362/98 must be interpreted as precluding transactions, such as those at issue in the main proceedings, by which a newcomer purchases, through another operator registered as a newcomer, goods from a traditional importer before those goods are imported into the EU and then sells them to that traditional operator, via the same intermediary, after importing them into the EU.
- 56 Article 21(2) of Regulation No 2362/98 provides that rights arising under import licences issued in accordance with the regulation may not be transferred from newcomers to traditional operators.
- 57 In the transactions at issue in the main proceedings, it is common ground that, in the absence of any transfer of 'AGRIM' licences or rights arising under such licences by the newcomers in the main proceedings to the traditional operator SIMBA, Article 21(2) of Regulation No 2362/98 is not, in principle, applicable.

- 58 However, as regards transactions involving imports into the EU that are for all essential purposes comparable to those at issue in the main proceedings, the Court held in its judgment in *SICES and Others* (C-155/13, EU:C:2014:145, paragraph 40) that, while Article 6(4) of Commission Regulation (EC) No 341/2007 of 29 March 2007 opening and providing for the administration of tariff quotas and introducing a system of import licences and certificates of origin for garlic and certain other agricultural products imported from third countries (OJ 2007 L 90, p. 12), which prohibits the transfer of rights arising under import licences, does not, in principle, preclude such transactions, they none the less constitute an abuse of rights when they are artificially created with the essential aim of benefiting from the preferential rate of duty.
- 59 As the Advocate General observed at point 95 of her Opinion, the solution adopted in *SICES and Others* (C-155/13, EU:C:2014:145) may be transposed to the main proceedings.
- 60 In that regard, it should be made clear that although the Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the national court guidance in its interpretation, it is none the less for the national court to verify whether the factors constituting abuse are present in the case before it. In that context, checking for abuse requires the referring court to take into account all the facts and circumstances of the case, including the commercial transactions preceding and following the import at issue (judgment in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 34 and the case-law cited).
- 61 According to the Court's case-law, evidence of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions required for obtaining it (see, inter alia, judgments in *Eichsfelder Schlachtbetrieb*, C-515/03, EU:C:2005:491, paragraph 39, and, to that effect, *SICES and Others*, C-155/13, EU:C:2014:145, paragraphs 31 to 33).
- 62 As regards, in the first place, the purpose of Regulation No 2362/98, that regulation seeks, as observed inter alia at paragraph 44 above, by means of the allocation of tariff quotas, to enable genuine newcomers to operate on the banana import market, with a view to encouraging healthy competition on that market. Accordingly, it is apparent from recital 14 in the preamble to that regulation that the objective of the prohibition on the transfer of rights by newcomers to traditional operators laid down in the second subparagraph of Article 21(2) of that regulation is to prevent artificial trade, speculation and disturbance of normal trade on the banana import market.
- 63 It must therefore be concluded that the purpose of EU rules cannot be achieved if a series of transactions involving the purchase, importation and sale of bananas, such as the transactions at issue in the main proceedings — even though legally valid when considered individually — amount, in practice, to a prohibited transfer of import licences or rights arising under such licences by a newcomer to a traditional operator and allow the latter to extend its influence on the market beyond the quotas which were allocated to enable it to import bananas into the EU at the preferential rate of duty.
- 64 In the second place, as to the reason for those transactions, it must also be shown, in order to prove abuse, that the essential purpose of the transactions is to enable the traditional operator concerned to import his own bananas at the preferential rate of duty under the part of the tariff quotas reserved for newcomers.
- 65 In that regard, as the Court held in *SICES and Others* (C-155/13, EU:C:2014:145, paragraphs 37 to 39), for it to be possible to regard transactions such as those at issue in the main proceedings as being designed to confer an undue advantage on the purchaser in the European Union, it is necessary that the importers intended to confer such an advantage on that purchaser and that the transactions be

devoid of any economic and commercial justification for those importers, which it is for the referring court to establish. Even if such transactions are based on the desire of the purchaser to benefit from the preferential rate of duty and even if the importers concerned are aware of that, those transactions may not, a priori, be regarded as being devoid of economic justification for the importers. It cannot, however, be excluded that, in certain circumstances, such transactions were artificially created with the essential aim of benefiting from the preferential rate of duty.

- 66 With regard to the transactions at issue in the main proceedings, it is possible to determine whether those transactions were artificial in the light, in particular, of indications suggesting that the role of the newcomers in question in those transactions was in fact merely that of fictitious agent for the benefit of SIMBA. In the light of the considerations set out in response to the first question, that assessment also entails verifying whether those operators applied for registration as newcomers in order to obtain 'AGRIM' licences for the sole purpose of importing bananas into the EU at the preferential rate of duty on behalf of the traditional operator SIMBA.
- 67 For that purpose, the referring court may take into account all the legal, economic and/or personal links between the operators involved in those transactions (judgment in *Part Service*, C-425/06, EU:C:2008:108, paragraph 62) and, relying on the factors set out at paragraph 39 of the judgment in *SICES and Others* (C-155/13, EU:C:2014:145), take into consideration in particular the fact that the newcomer holding 'AGRIM' licences did not assume any commercial risk in the transactions at issue in the main proceedings, because that risk was in reality covered by the purchaser in the EU, which is also a traditional operator, or the fact that, in the light of the sale and resale price of the goods concerned, the newcomers' profit margin was insignificant.
- 68 On the other hand, as the newcomers in the main proceedings have argued in the written observations which they submitted to the Court, it should be made clear that, bearing in mind the particular nature of the banana import market, the fact that those operators may have had their own infrastructure which enabled them to store and transport imported bananas is not decisive for the purpose of establishing whether the transactions at issue in the main proceedings were artificial. Indeed, to require newcomers to have such infrastructure would be at odds with the objective of Regulation No 2362/98, which is to enable new operators to participate on the banana import market.
- 69 Moreover, as the Commission submitted in its observations, the systematic involvement in the transactions at issue in the main proceedings of an intermediary company, namely Rico Italia, which is registered as a newcomer, may also provide an indication that those transactions are artificial if it is established that the sole purpose of that involvement was to conceal the links between a traditional operator, such as SIMBA, and newcomers, such as those in the main proceedings, in order to circumvent the application of Article 21(2) of Regulation No 2362/98.
- 70 Therefore, the answer to the second question and the first part of the third question is that Article 21(2) of Regulation No 2362/98 must be interpreted as precluding transactions, such as those at issue in the main proceedings, whereby a newcomer purchases, through another operator registered as a newcomer, goods from a traditional operator before the goods are imported into the EU, then sells them to that traditional operator, through the same intermediary, after importing the goods into the EU, if those transactions constitute an abusive practice, which it is for the national court to establish.

### **The second part of the third question**

- 71 By the second part of its third question, the referring court raises the question as to the appropriate conclusions to be drawn from a finding of an abusive practice, if it were to be found that there is such a practice in the main proceedings.

- 72 Article 4(3) of Regulation No 2988/95 provides that '[a]cts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the [EU] law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case may be, either in failure to obtain the advantage or in its withdrawal'.
- 73 The obligation to give back an advantage improperly received by means of an irregular practice does not constitute a penalty, but is simply the consequence of a finding that the conditions required to obtain the advantage derived from the EU rules were created artificially, thereby rendering the advantage received a payment that was not due and thus justifying the obligation to repay it (see judgment in *Pometon*, C-158/08, EU:C:2009:349, paragraph 28 and the case-law cited).
- 74 It follows that the transactions involved in an abusive practice must be redefined by the national court so as to re-establish the situation that would have prevailed in the absence of the transactions constituting the abusive practice (see, by analogy, judgment in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 94).
- 75 Accordingly, an operator who has placed himself artificially in a situation enabling him to obtain unlawfully the benefit of the preferential rate of duty for the importation of bananas is obliged to pay the duties on the goods concerned, without prejudice, where appropriate, to any administrative, civil or criminal-law penalties provided for by national law (see, by analogy, judgment in *Christodoulou and Others*, C-116/12, EU:C:2013:825, paragraph 68).
- 76 The answer to the second part of the third question is therefore that Article 4(3) of Regulation No 2988/95 is to be interpreted as meaning that the finding of an abusive practice in circumstances such as those in the main proceedings means that an operator who has placed himself artificially in a situation enabling him to obtain unlawfully the benefit of the preferential rate of duty for the importation of bananas is obliged to pay the duties on the goods concerned, without prejudice, where appropriate, to any administrative, civil or criminal-law penalties provided for by national law.

### Costs

- 77 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 7(a) of Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community, as amended by Commission Regulation (EC) No 1632/2000 of 25 July 2000, in conjunction with Article 11 of that regulation, is to be interpreted as meaning that the requirement that an economic agent must have been engaged in commercial activity as an importer 'independently and on [his] own account' must be satisfied not only for the purpose of the registration of such an agent as a 'newcomer' within the meaning of that provision but also that of ensuring that the agent may maintain that status in order to import bananas under the tariff quotas laid down by Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas, as amended by Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations.**

2. **Article 21(2) of Regulation No 2362/98, as amended, must be interpreted as precluding transactions, such as those at issue in the main proceedings, whereby a newcomer purchases, through another operator registered as a newcomer, goods from a traditional operator before the goods are imported into the EU, then sells them to that traditional operator, through the same intermediary, after importing the goods into the EU, if those transactions constitute an abusive practice, which it is for the national court to establish.**
3. **Article 4(3) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests is to be interpreted as meaning that the finding of an abusive practice in circumstances such as those in the main proceedings means that an operator who has placed himself artificially in a situation enabling him to obtain unlawfully the benefit of the preferential rate of duty for the importation of bananas is obliged to pay the duties on the goods concerned, without prejudice, where appropriate, to any administrative, civil or criminal-law penalties provided for by national law.**

[Signatures]