

ORDER OF THE PRESIDENT OF THE COURT

10 June 1988 *

In Case 152/88 R

Sofrimport Sàrl, a company incorporated under French law, having its registered office in Paris, represented by H. J. Bronkhorst, an advocate with a right of audience before the Hoge Raad (Supreme Court) of the Netherlands, and E. H. Pijnacker Hordijk, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of J. Loesch, 8 rue Zithe,

applicant,

v

Commission of the European Communities, represented by P. Oliver, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the Chambers of G. Kremlis, a member of its Legal Service, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the adoption of an interim measure suspending the operation of Commission Regulations (EEC) Nos 962/88 and 984/88 of 12 and 14 April 1988, which suspended the issue of import licences for dessert apples originating in Chile (Official Journal L 95, p. 10, and L 98, p. 37), and of Commission Regulation (EEC) No 1040/88 of 20 April 1988 fixing quantities of imports of dessert apples originating in third countries, in particular Chile (Official Journal L 102, p. 23), with respect to 89 514 cartons of dessert apples originating in that country and at present stored in transit by the applicant in the port of Marseilles and for an order requiring an import licence to be issued for those consignments,

* Language of the Case: English.

THE PRESIDENT OF THE COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

- 1 By an application lodged at the Court Registry on 26 May 1988, Sofrimport Sàrl requested the Court:

first, pursuant to the second paragraph of Article 173 of the EEC Treaty, to declare void:

- (i) Commission Regulations (EEC) Nos 962/88 and 984/88 of the 12 and 14 April 1988, suspending the issue of import licences for dessert apples originating in Chile (Official Journal L 95, p. 10 and L 98, p. 37), and
- (ii) Commission Regulation (EEC) No 1040/88 of 20 April 1988 fixing quantities of imports of dessert apples originating in third countries and amending Regulation No 962/88

and secondly, pursuant to Articles 178 and the second paragraph of Article 215, to order the European Economic Community to compensate the applicant for the damage it claims to have suffered as a result of the adoption of those regulations, the damages to be quantified by the applicant at a later stage in the proceedings.

- 2 By an application for interim relief lodged at the Court Registry on the same day, the applicant requested the President of the Court, pursuant to Article 185 of the EEC Treaty and Article 83 of the Rules of Procedure:
 - (i) to suspend the application of Commission Regulations (EEC) Nos 962/88, 984/88 and 1040/88 with respect to 89 514 cartons of dessert apples originating in Chile and at present stored in transit by the applicant in the port of Marseilles and to order that an import licence be issued to the applicant in respect of those consignments;
 - (ii) to adopt any further interim measures that the President of the Court might deem necessary or appropriate.
- 3 The defendant submitted its written observations on 3 June 1988. The parties presented oral argument on 6 June 1988.
- 4 Before considering whether this application for interim measures is well founded, it may be helpful to provide a brief description of the factual and legal background to this case.
- 5 Sofrimport, which is an importer and wholesaler of fresh fruit, imports *inter alia* into the EEC fresh dessert apples originating in Chile. On 31 March 1988 it shipped from San Antonio (Chile) a cargo of 89 514 cartons of dessert apples, gross weight 2 172 460.8 kg, which were to be imported into the Community. Prior to the arrival, on 20 April 1988, of the vessel transporting that cargo at the port of Marseilles, Sofrimport lodged an application, on 12 April 1988, with the French intervention office (Oniflor) for import licences for those consignments. On 18 April 1988 the intervention agency refused to issue the licences on the ground that, following the adoption by the Commission of Regulation No 962/88, it could no longer grant the application. Consequently, from 20 April 1988 the cargo of dessert apples was blocked on board the vessel. Since 22 May 1988 the cargo has been stored in transit in the port of Marseilles.

- 6 Prior to Regulation No 962/88, the Commission adopted, on 3 February and 30 March 1988, Regulations (EEC) Nos 346/88 and 871/88 introducing special surveillance of imports of dessert apples from third countries (Official Journal L 34, p. 21, and L 87, p. 73). Under those two regulations, the release before 1 September 1988 for free circulation within the Community of such fruit was subject to the presentation of an import licence valid for 40 days from the date of issue. Article 3 (3) of Regulation No 346/88 further provided that import licences were to be issued on the fifth working day following the day on which the application was lodged unless protective measures were taken within that time.
- 7 When it discovered, in the light of those surveillance measures, that applications for import licences for dessert apples originating in Chile were exceeding the traditional quantity of imports of such products originating in that country and the continuation of such imports could lead to serious disturbance of the market such as to jeopardize the objectives of Article 39 of the EEC Treaty, the Commission, by Regulation No 962/88, which entered into force on 13 April 1988, first suspended, as a protective measure, the issue of import licences for dessert apples originating in Chile in the period from 15 to 22 April 1988 and provided that applications pending on 18 April 1988 for import licences for those products were to be rejected.
- 8 By Regulation No 984/88, which amended Regulation No 962/88 and entered into force on 15 April 1988, the Commission then replaced that period of suspension with the period 18 to 29 April 1988, on the ground that such an amendment was necessary for reasons of management and in order to enable an in-depth review of the overall situation of the market in dessert apples to be carried out.
- 9 By Regulation No 1040/88, the Commission fixed quantities of imports of dessert apples originating in third countries, country by country, for the period ending on 31 August 1988 and provided that the issue of import licences for those products was to be suspended where the quantities in respect of which import licences were applied for exceeded those quantities. The final recital in the preamble to this regulation states that quantities in import licences applied for in respect of Chile exceed, on 21 April 1988, the reference quantity allocated and the issue of import licences for dessert apples from that country should accordingly continue to be suspended until the end of the 1988 importing year.

- 10 Article 186 of the EEC Treaty provides that the Court of Justice may, in any cases before it, prescribe any necessary interim measures.
- 11 In order for an interim measure such as that requested to be adopted, Article 83 (2) of the Rules of Procedure requires that the application for its adoption should state the factual and legal grounds establishing a *prima-facie* case for the interim measure applied for and the circumstances giving rise to urgency.
- 12 In order to establish such a *prima-facie* case which would warrant the grant of the order sought, the applicant refers generally to the four submissions put forward in support of its main application. However, only two of those submissions are developed clearly, so that only those two submissions may be taken into consideration in these proceedings for interim relief.
- 13 The applicant maintains first of all that the Commission has infringed the first subparagraph of Article 3 (3) of Regulation (EEC) No 2707/72 of the Council of 19 December 1972 laying down the conditions for applying protective measures for fruit and vegetables (Official Journal, English Special Edition 1972 (28 to 30 December), p. 3), despite its clear wording. The Commission entirely omitted to take account of the position of goods already in transit to the Community on the date on which the protective measures entered into force by failing to exempt them from the application of its decision to suspend the issue of import licences.
- 14 The applicant then contends that the Commission suspended imports of dessert apples originating in Chile in order to review the overall situation of the market and not because of the occurrence of one of the events listed in Article 29 (1) of Regulation (EEC) No 1035/72 of 18 May 1972 on the common organization of the market in fruit and vegetables (Official Journal, English Special Edition 1972 (II) p. 437) as amended by Regulation (EEC) No 2454/72 of the Council of 21 November 1972 (Official Journal, English Special Edition 1972 (November) p. 60), namely that the market was experiencing or was threatened with serious disturbances which might have endangered the objectives set out in Article 39 of the EEC Treaty. It follows that the Commission exceeded its powers when it adopted such protective measures. Furthermore, the applicant believes that by

restricting the suspension of licences to imports of dessert apples originating in Chile, the Commission discriminated, in a manner lacking any objective basis between the various countries which export such fruit, especially if the purpose of the protective measures was to review the overall situation of the market.

- 15 The Commission submits that, when it adopted the contested regulations introducing protective and surveillance measures, it complied with the duty imposed in the first subparagraph of Article 3 (3) of Regulation No 2707/72, which is an expression of the principle of the protection of legitimate expectation. The purpose of Regulation No 346/88 was not only to enable the Commission to have up-to-date information on the volume of imports of dessert apples originating from non-member countries, but also to warn traders that there was a risk that imports would be suspended if they attained a critical level, as evidenced by Article 3 (3), which states that 'import licences shall be issued on the fifth working day following the day on which the application is lodged unless measures are taken within that time'. With the same consideration in mind, in Regulation No 871/88 the Commission also extended the period of validity of import licences from 30 to 40 days in order to take account of the time required to transport dessert apples to the Community from countries in the southern hemisphere, as can be seen from the sixth recital in the preamble. Those two details precluded traders from having any legitimate expectation with regard to the issue of import licences.
- 16 In view of those circumstances and the fact that traders had the possibility of obtaining import licences before the vessels left, the Commission believes that a prudent importer would have availed himself of that possibility, so that the Commission acted lawfully, without committing a breach of the first subparagraph of Article 3 (3) of Regulation No 2707/72, when suspending, by Regulation No 962/88, the issue of import licences for dessert apples originating in Chile in the period from 15 to 22 April without taking account of goods already in transit to the Community other than those for which import licences had already been issued.

- 17 In that regard, it should be pointed out that the first subparagraph of Article 3 (3) of Regulation No 2707/72 provides that:

‘The (protective) measures provided for in paragraph 1 shall take account of the special position of products in transit to the Community.’

- 18 It should also be borne in mind that in paragraph 41 of its judgment of 5 May 1981 in Case 112/80 *Firma Anton Dürbeck v Hauptzollamt Frankfurt am Main-Flughafen* [1981] ECR 1095 which concerned the validity of Commission regulations adopting protective measures to which exceptions were laid down only for goods which had left Chile bound for the Community, to the exclusion of those in the course of being loaded, the Court has already stated that that provision could not be interpreted widely by the Commission without putting at risk the efficacy of the protective measures decided upon.
- 19 It appears from the information obtained at the hearing that hitherto the Commission has considered it necessary, in order to comply with that provision, to insert into a regulation introducing protective measures a derogation which provides that the measures are not applicable to products which are proved to have left the supplier country before the date on which the regulation entered into force. The Commission stated that the insertion of such a derogating provision was justified in every case where a system of import licences had not already been established, so that traders had received no warning that protective measures might be adopted.
- 20 The Commission added that it departed from that practice in this case because the situation was completely different. By Article 3 (3) of Regulation No 346/88, which introduced an import-licence system as a surveillance measure, the Commission effectively warned traders, more than two months before the adoption of protective measures, that it was likely to adopt such measures if the state of the market rendered it necessary.

- 21 By giving such notice and by subsequently extending the period of validity of import licences from 30 to 40 days, the Commission clearly indicated to traders that it was in their interests to apply for such a licence as soon as possible and took adequate account of the special position of goods already in transit to the Community.
- 22 In this respect, although, in principle, it cannot be excluded that, in certain circumstances regarding the critical nature of the state of the market, the Commission may be able to comply with the first subparagraph of Article 3 (3) of Regulation No 2707/72 otherwise than by exempting goods in transit to the Community from the application of the protective measures, nevertheless, given the need for legal certainty, the Commission is under a duty in such a situation to warn traders clearly and precisely of its intention to depart from its previous practice in that respect if necessary, if it is not to breach the principle of protection of legitimate expectation.
- 23 In the present case, it should be pointed out that, although Article 3 (3) of Regulation No 346/88 mentions the possibility of protective measures being adopted, it is not apparent from a careful reading of that provision or of any other provision of that regulation or of Regulation No 871/88 that traders had to apply for an import licence before the departure of the vessel transporting the goods if they wished to be sure of being able to import their goods in transit to the Community in the event that protective measures were adopted, so that before the date on which Regulation No 962/88 entered into force traders did not have any clear and precise indication that the Commission was going to depart from its previous practice concerning the way in which goods in transit to the Community were treated.
- 24 In the light of the circumstances set out above and without its being necessary to examine the second submission, the applicant must be considered to have succeeded in putting forward a relevant factual and legal ground which constitutes a prima-facie case for granting the interim relief sought.

- 25 Even though it may be considered in this case that the applicant has put forward factual and legal grounds which are sufficient to establish a prima-facie case for granting the interim relief sought, the Court must still examine the circumstances giving rise to urgency.
- 26 The Court has consistently held that the urgency of an application for an interim measure, as referred to in Article 83 (2) of the Rules of Procedure, must be assessed in the light of the extent to which an interim order is necessary in order to avoid serious and irreparable damage to the party requesting the interim measure.
- 27 In order to demonstrate the urgency of its application for interim relief, the applicant points out first of all that it would suffer serious and irreparable damage likely to lead it into insolvency owing to the high cost of storing the consignments in question and the reduction in their value due to their loss of freshness if they had to be stored until the end of August, or even their total loss if the Commission decided to extend the application of the protective measures beyond that date.
- 28 At the hearing Sofrimport stated that, on the basis of invoices already received, the cost of storage until the end of August could be quantified at more than FF 1 million, a considerable sum compared with the purchase price of the goods in question, which was FF 4 374 000. Furthermore, the transport of the cargo to non-member countries is impossible, given that there are no outlets on those markets, and, at FF 4 047 000, it would also be very costly.
- 29 The Commission admits that the storage costs and the loss in value mentioned by Sofrimport make the situation an urgent one whilst pointing out that, owing to new refrigeration techniques, the consignments of dessert apples in question will still be in a saleable state at the end of August. However, it disputes that those losses can cause serious and irreparable damage because financial losses of that kind can be recovered by means of an action for damages brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty.

- 30 The Commission also points out that, even if the Court considered that Sofrimport might be forced to cease trading following the adoption of the protective measures, which it has not succeeded in proving, that consideration must be balanced against the serious and irreparable damage which the Community would suffer if the 2 172 tonnes of apples in question could be imported into the Community. Such a measure would be certain to lead to demands from other apple-exporting countries for a proportional increase in their reference quantities, which would be difficult to refuse, and to applications for the same interim relief from importers who find themselves in a situation identical to that of Sofrimport, which would be bound to cause serious disturbances of the market when the purpose of the protective measures is precisely to forestall such disturbances.
- 31 In that connection, in order to determine whether there is a risk of serious and irreparable damage to the applicant, it is necessary to take into consideration the fact that Sofrimport is a small undertaking, a *société à responsabilité limitée*, which employs three people and whose annual turnover amounts approximately to between FF 25 million and FF 30 million and that the transaction in question, involving a sum in the order of FF 10 million, represents slightly more than 35% of its annual turnover and more than 10 times its annual profit.
- 32 In those special circumstances, there are therefore serious grounds for believing that if Sofrimport were to suffer the losses mentioned above it might have to cease trading and thereby suffer serious and irreparable damage which would be aggravated if the Commission decided to extend the application of the protective measures beyond August in view of the market situation.
- 33 It is also reasonable to consider that the grant of the interim measure sought would not, on the other hand, be likely at first sight to cause a serious disturbance on the market in dessert apples, given the small quantity of apples to which it would relate.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

- (1) **The operation of Commission Regulations (EEC) No 962/88 of 12 April 1988, No 984/88 of 14 April 1988 and No 1040/88 of 20 April 1988 is suspended with respect to 89 514 cartons of dessert apples originating in Chile, shipped by Sofrimport from San Antonio on 31 March 1988 and presently stored in transit in the port of Marseilles by that undertaking pending the issue of an import licence by the French national authorities.**
- (2) **Costs are reserved.**

Luxembourg, 10 June 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President