

Case 191/88 R

Co-Frutta SARL

v

Commission of the European Communities

(Protective measures — Authorization given to a Member State
to exclude from Community treatment products in free circulation
in the other Member States)

Order of the President of the Court, 19 August 1988 4551

Summary of the Order

*Application for interim measures — Suspension of operation — Conditions for granting —
Serious and irreparable damage*

(EEC Treaty, Arts 185 and 186; Rules of Procedure, Art. 83 (2))

ORDER OF THE PRESIDENT OF THE COURT

19 August 1988 *

In Case 191/88 R

Co-Frutta SARL, whose registered office is in Padua, Italy, represented by Wilma
Viscardini Donà, of the Padua Bar, with an address for service in Luxembourg at
the offices of Ernest Arendt, 4 avenue Marie Thérèse,

applicant,

* Language of the Case: French.

v

Commission of the European Communities, represented by its Legal Adviser, Marie-José Jonczy and by Pieter Jan Kuyper, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg, Luxembourg,

defendant,

APPLICATION principally for the suspension of operation of Commission Decision C(88) 1311 of 30 June 1988 authorizing the Italian Republic not to apply Community treatment to fresh bananas originating in certain non-member countries,

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 14 July 1988 Co-Frutta SARL (hereinafter referred to as 'Co-Frutta') brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision C(88) 1311 of 30 June 1988, adopted under Article 115 of the EEC Treaty and authorizing the Italian Republic not to apply Community treatment to fresh bananas falling within Code ex 0803 00 10 originating in certain non-member countries of the so-called dollar area and put into free circulation in another Member State, is void.
- 2 By an application lodged at the Court Registry on the same date, the applicant applied under Articles 185 and 186 of the EEC Treaty and Article 83 of the Rules of Procedure for an interim measure suspending the operation of the Commission's aforementioned decision of 30 June 1988 or alternatively declaring

that the contested decision was not to bar the grant of an import licence for 2 000 tonnes of bananas originating in Colombia and freely circulating in the Benelux countries, for which Co-Frutta applied on 1 July 1988.

- 3 The defendant submitted its written observations on 5 August 1988. As the parties' written pleadings supply the information necessary in order to give a decision on the application for interim measures, it did not appear necessary to hear their oral explanations.
- 4 Before the merits of this application are examined, the context and legal framework of the case should be briefly set out.
- 5 It appears from Council Regulation (EEC) No 288/82 of 5 February 1982 on common rules for imports (Official Journal 1982, L 35, p. 1) that, at the Community level, bananas are still subject to national quantitative restrictions on free circulation in France, Greece, Italy and the United Kingdom.
- 6 The State monopoly on trade in bananas was abolished in Italy with effect from 1 January 1965, in accordance with Article 37 of the EEC Treaty. However, the importation of bananas into Italy has remained subject to certain quantitative restrictions. Under the system in force at present, only restrictions on the importation of bananas originating in countries of the so-called dollar area remain.
- 7 Since 1985 the Commission has adopted, at the Italian Republic's request, several decisions authorizing the latter not to apply Community treatment to bananas put into free circulation in the Member States and originating in Colombia and other Central American countries. However, those authorizations do not cover a proportion, at present 10%, of the overall import quota opened by Italy for bananas originating in countries other than ACP States and French overseas territories and countries. That quantity is shared out on a monthly basis by the Italian authorities, which allocate at least 50% to businesses importing bananas in free circulation.

- 8 It also appears from the contested decision that each importer may apply for only one import licence per month and that this application must be made within the first five working days of the month. Finally, the application is considered only if it relates to a quantity not exceeding 20% of the monthly quota to be distributed during the month in which it is made and a security of LIT 500 per kg is provided.
- 9 The applicant, which is a cooperative association comprising some 15 banana traders/ripeners, claims in its main application that, owing to the number of applications for import licences which largely exceed the quota available, importers are in practice obliged to declare the bananas to the customs on the very day on which the quota is opened or else they find that the quota has already been exhausted by other importers. Moreover, recently each importer has been able to clear through customs only about 30 to 40% of the quantities declared.
- 10 The applicant also points out that, owing to a cargo deterioration occurring on board two vessels, it received delivery of bananas bought in Colombia only after the direct import quotas for the months of June and July 1988 had been exhausted. In order to supply its members, the applicant therefore made an application on 1 July 1988 to import into Italy 2 000 tonnes of bananas originating in Colombia and put into free circulation in the Benelux countries.
- 11 The competent Italian authorities, relying on the Commission's decision of 30 June 1988 adopted under Article 115 of the EEC Treaty, refused to issue a licence. According to the Commission, the Italian authorities did grant a licence to the applicant, but only for 161 tonnes of bananas originating in the dollar area and in free circulation in the other Member States.
- 12 According to Article 185 of the EEC Treaty, actions brought before the Court of Justice are not to have suspensive effect. The Court may, however, if it considers that the circumstances so require, order that the application of the contested act be suspended.

- 13 In order for interim measures such as those requested to be granted, Article 83 (2) of the Rules of Procedure requires that applications for such measures should state the circumstances giving rise to urgency and the factual and legal grounds establishing a prima-facie case for the interim measure applied for.
- 14 The Court has consistently held that the urgency of an application for interim measures, as referred to in Article 83 (2) of the Rules of Procedure, must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party requesting the interim measure.
- 15 In order to demonstrate the urgency of its application for interim measures, the applicant maintains that it is absolutely necessary for it to obtain supplies, since it has twice lost the opportunity of importing bananas directly from non-member countries on account of damage sustained by its vessels.
- 16 Those supplies are essential in order to enable the ripeners affiliated to the Co-Frutta cooperative to continue their business by making use of their refrigeration plant and in order to guarantee employment to their staff. Failing such supplies, the undertakings run the risk of ceasing business permanently.
- 17 The Commission observes that it is clear from the account of the facts given by the applicant itself in its main application that the losses which it claims to have sustained are mainly due to the late arrival of its two vessels. Therefore, it was not the contested decision which caused, or contributed to, the damage suffered by the applicant. In attempting to make good its losses by importing a quantity of bananas already in free circulation in other Member States the applicant fell foul of the condition contained in the contested decision whereby an application for a licence may not relate to a quantity exceeding 20% of the monthly quota.
- 18 The Commission adds that the fact that only a limited portion of the import quota was available has never been regarded by the applicant in the past as amounting to

irreparable damage, although the conditions preventing it from importing bananas in free circulation have appeared in the relevant Commission decisions since 1985. The purported urgency is therefore the result of the normal risks of international trade.

- 19 As regards the question of urgency, it is clear from the preamble to the contested decision that its essential objective is to prevent unlimited imports of bananas originating in countries of the so-called dollar area and put into free circulation in the other Member States from jeopardizing the traditional advantages enjoyed by ACP States, and in particular Somalia, on the Italian market. The conditions to which Article 1 of the contested decision is subject were introduced and maintained in order to afford traders better supplies of bananas in free circulation with a view to opening this trade to new and small traders.
- 20 In the light of the foregoing considerations, it must be stated that the applicant has not shown that the losses which it allegedly sustained during the months of June and July were caused or made worse by the contested decision.
- 21 It must also be observed that Co-Frutta has not adduced any objective evidence relating to recent developments on the Italian market in bananas, the volume of stocks held by ripeners or to their financial situation, which would indicate that its losses may recur in the future, or which shows that the damage resulting from the adoption or the application of the contested decision is irreparable.
- 22 It follows that the applicant has not demonstrated that it will suffer serious and irreparable damage by reason of the adoption or the application of Commission Decision C(88) 1311 of 30 June 1988. It has not therefore succeeded in proving the existence of circumstances giving rise to urgency which would establish a prima-facie case for suspending the operation of the decision.
- 23 Furthermore, it is necessary to express serious doubts about the admissibility of the main application made under the second paragraph of Article 173 of the EEC Treaty. In fact, according to Article 4 of the contested decision, the decision is

addressed to the Italian Republic and prima facie there is no evidence in the file to show that, on account of particular characteristics or circumstances which affect the applicant alone or which distinguish it from any other person, the applicant is directly and individually concerned by that decision.

- ²⁴ Finally, as regards the alternative claim, submitted in case the operation of the decision is not suspended, it need only be stated that the measure sought would interfere in the management of the Community's commercial policy in a manner which would widely exceed the jurisdiction of the Court in interlocutory matters.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

- (1) The application for interim measures is dismissed;**
- (2) The costs are reserved.**

Luxembourg, 19 August 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President