

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

12 February 1996 *

In Case T-228/95 R,

S. Lehrfreund Ltd, a company governed by English law, established in London, represented by Nicholas Forwood QC and Mark Hoskins, Barrister, of the Bar of England and Wales, with an address for service at Brick Court Chambers, 8 Avenue de la Joyeuse Entrée, Brussels,

applicant,

v

Council of the European Union, represented by Jürgen Huber and Guus Houttuin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

and

* Language of the case: English.

Commission of the European Communities, represented by Frank Benyon, Legal Adviser, and Lucio Gussetti, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

APPLICATION for suspension of the operation of Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards (OJ 1991 L 308, p. 1),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts and procedure

- 1 By application lodged at the Registry of the Court of First Instance on 15 December 1995, the applicant, a company established in London which has been engaged in buying, processing and selling furs since 1963, requested the Court to order

the Council and the Commission to pay it damages. It did so on the basis of complaints regarding both the adoption of Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards (OJ 1991 L 308, p. 1) and the conduct of the defendants following its adoption.

- 2 By separate document lodged at the Registry on the same day, the applicant requested the President of the Court of First Instance, pursuant to Articles 185 and 186 of the EC Treaty, to order suspension of the operation of Regulation No 3254/91 and any further interim measure that he might deem necessary or appropriate.

- 3 The legislative and factual background to the main and interlocutory applications may be summarized as follows.

- 4 Article 2 of Regulation No 3254/91 prohibits the use of leghold traps, as defined in Article 1, in the Community as from 1 January 1995. Article 3 provides as follows:

'1. The introduction into the Community of the pelts of the animal species listed in Annex I and of the other goods listed in Annex II, inasmuch as they incorporate pelts of the species listed in Annex I, shall be prohibited as of 1 January 1995,

unless the Commission, in accordance with the procedure laid down in Article 5, has determined that, in the country where the pelts originate:

- there are adequate administrative or legislative provisions in force to prohibit the use of the leghold trap; or

- the trapping methods used for the species listed in Annex I meet internationally agreed humane trapping standards.

The Commission shall publish in the *Official Journal of the European Communities* a list of the countries which meet at least one of the conditions set out in the first paragraph.

2. The prohibition referred to in paragraph 1 shall be suspended for one year, expiring on 31 December 1995, if the Commission, in accordance with the procedure laid down in Article 5, has determined before 1 July 1994, as a result of a review undertaken in cooperation with the competent authorities of the countries concerned, that sufficient progress is being made in developing humane methods of trapping in their territory.'

- 5 Article 4 requires certification of the origin of exports or re-exports to the Community after 1 January 1995 of any of the goods listed in Annex II, in a form to be determined by the Commission under the procedure laid down in Article 5.

- 6 Annex I, to which Article 3(1) refers, lists 13 animal species, including musk rat.
- 7 Under the power conferred upon it by Article 3(2), the Commission adopted Regulation (EC) No 1771/94 of 19 July 1994 laying down provisions on the introduction into the Community of pelts and manufactured goods of certain wild animal species (OJ 1994 L 184, p. 3). Article 1 of that regulation provides as follows:

'1. The prohibition on the introduction into the Community of the pelts of the animal species listed in Annex I to Council Regulation (EEC) No 3254/91 and of the other goods listed in Annex II to that Regulation, shall enter into force on 1 January 1996.

2. The Commission shall, in accordance with the procedure laid down in Article 5 of Council Regulation (EEC) No 3254/91, determine before 1 September 1995:

- (a) which countries meet the condition of Article 3(1) of that regulation and
- (b) the appropriate forms for certification referred to in Article 4 thereof.'

- 8 After examining the situation with respect to trapping in the various non-member countries concerned, the Commission submitted a draft regulation containing a list of the countries which meet the criteria in Article 3(1) of Regulation No 3254/91

and laying down detailed rules concerning the certification provided for in Article 4 thereof. A revised version ('rev5') of that draft, dated 28 September 1995, has been produced by the applicant (Annex 1 to the application for interim relief). It is stated in the explanatory memorandum to that draft that the internationally agreed humane trapping standards referred to in Article 3 of Regulation No 3254/91 have not yet been drawn up. In the draft itself, a number of countries, including the United States and Canada, are not included on the list of countries whose production may be imported into the Community, because they do not prohibit the use of leghold traps. However, that draft regulation has not as yet been adopted.

- 9 By letter of 8 December 1995, the Commission informed the Member States that, in its opinion, implementation of the prohibition of importation provided for in Regulation No 3254/91 was for the time being impracticable. It therefore requested them to ensure that, even after 31 December 1995, the competent authorities should refrain from taking any customs action likely to disrupt trade in the goods concerned. In the same letter, the Commission stated that it had decided to submit to the Council a proposal for an amendment of that regulation.

- 10 That proposal, presented on 15 December 1995 (COM(95) 737 final) seeks to replace the provisions of Article 3 of Regulation No 3254/91 by the following system. The Community would enter into or pursue negotiations with non-member countries in order to achieve a framework agreement on humane animal trapping standards, in particular for the animal species listed in Annex I to the regulation, together with a timetable for its implementation (new Article 3). After reviewing the progress of those negotiations no later than 31 December 1996, the Commission would regularly determine for each of those species the list of countries which have not met certain conditions with regard to trapping. If no framework agreement had been reached, the list would include countries which either have not made sufficient individual progress in the development of humane trapping methods or have not prohibited the use of leghold traps. If such an agreement had been reached, the list would include countries which either have not committed themselves formally to implementation of the framework agreement within an agreed timeframe or have not prohibited the use of leghold traps. Introduction of the

goods concerned into the Community would be prohibited if they originated in a country included on the list published in the *Official Journal of the European Communities* (new Article 4(1) and (2)). The new system further provides for certain exceptions to that prohibition and for rules allowing account to be taken of regulations enacted at 'subfederal' level (new Article 4(3) to (6)).

- 11 The defendant institutions submitted their written observations on this application for interim measures on 8 January 1996. They claimed that the Court should dismiss it as inadmissible or, in the alternative, as unfounded. The Council further asked the Court to make 'a declaratory order regarding the interpretation of Article 3(1) of Regulation (EEC) No 3254/91 stating that — in the absence of Commission implementing legislation pursuant to Articles 3(1) and 4 of Regulation 3254/91 — the regulation does not require Member States to implement import restrictions under its Article 3(1)'.
- 12 Oral argument was heard from the parties on 19 January 1996. At the hearing, the applicant stated that a declaration such as that sought by the Council (see the preceding paragraph) would satisfy its interest in obtaining clarification of the legal position, inasmuch as the underlying interpretation was now shared by both defendants. However, in case the President of the Court should consider himself unable to make such a declaration, the applicant maintained its request for suspension of operation. The Council stated that its reference in its written pleadings to the possibility of such a declaration does not constitute a formal request for interim measures but merely a proposal.

Law

- 13 Under Articles 185 and 186 of the Treaty, taken together with Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended

by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21) and Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), the Court may, if it considers that circumstances so require, order that the application of the contested act be suspended or prescribe any necessary interim measures.

- 14 Article 104(1) of the Rules of Procedure of the Court of First Instance specifies that an application for such suspension is admissible only if the applicant is challenging the measure in question in proceedings before the Court of First Instance. Under Article 104(2), applications for any of the interim measures referred to in Articles 185 and 186 of the Treaty must state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. The measures sought must be provisional in that they must not pre-judge the decision on the substance (see the order of 12 December 1995 in Case T-203/95 R *Connolly v Commission* [1995] ECR II-2919, paragraph 16).

Arguments of the parties

— Admissibility

- 15 The Council challenges the admissibility of the application for suspension of operation of Regulation No 3254/91. Contrary to the requirements laid down in the case-law (Case T-6/95 R *Cantine dei Colli Berici v Commission* [1995] ECR II-647, paragraph 30), it points out, such suspension would go beyond the scope of the final decision which the Court is capable of taking in the main action, which in this case seeks compensation for the damage allegedly suffered by the applicant. Since the main application does not seek annulment of Regulation No 3254/91 under Article 173 of the EC Treaty but only an award of damages, the Court's judgment will have only *inter partes* effects. Furthermore, if an application for interim measures which may deprive a legislative provision of its effect is to be held admissible,

the applicant must prove in a particularly clear fashion that he is concerned directly and individually by it (Case 44/75 R *Könecke v Commission* [1975] ECR 637, paragraph 3).

- 16 In the Council's opinion, the application for any further interim measures that the President might deem necessary or appropriate is also inadmissible because, contrary to Article 44(1)(d) of the Rules of Procedure, it does not state 'the form of order sought'.
- 17 The Commission also considers that both the heads of claim set out in the application for interim measures are inadmissible.
- 18 The request for suspension of application does not, it considers, meet the requirements of Article 104(1) of the Rules of Procedure, since the applicant is not challenging Regulation No 3254/91 in proceedings before the Court but is simply seeking damages. Moreover, any action brought by the applicant for the annulment of Regulation No 3254/91 would be inadmissible both because the time-limit laid down in the fifth paragraph of Article 173 of the EC Treaty has expired and because the applicant is not individually concerned by the regulation, as required by the fourth paragraph of Article 173 (Case C-257/93 *Leon van Parijs and Others v Council and Commission* [1993] ECR I-3335). If the application for suspension were accepted as admissible, the applicant would be in a position to obtain a result equivalent to that which it might obtain by an action for annulment, since suspension *erga omnes* would have — admittedly for a certain period only — effects comparable to those of annulment. The Commission shares the Council's views as regards the quite different effects of a judgment awarding damages, and adds that in *Könecke*, cited above, the President of the Court of Justice expressed a similar concern.
- 19 As regards the application for any other interim measure, the Commission shares the Council's views (see paragraph 16 above).

— Prima facie case in the main action and urgency

(a) Preliminary arguments on the interpretation of Article 3 of Regulation No 3254/91

- 20 The applicant considers that there are two possible interpretations of the consequences of the failure to adopt, by 1 January 1996, the implementing measures mentioned in Article 1(2)(a) of Regulation No 1771/94 (see paragraph 7 above).

The first is that a total import ban for all the relevant species comes into effect on that date for all non-member countries, irrespective of whether or not a particular country satisfies the conditions of Article 3(1) of Regulation No 3254/91 (an 'absolute ban').

The second is that no ban comes into effect in the absence of implementing measures. It will only do so once the Commission has adopted the measures provided for, that is to say once it has determined the countries from which imports are authorized, and will only apply to countries not on that list (a 'deferred ban').

- 21 In the applicant's view, there are strong arguments that the second interpretation is the correct one. It is clear from the wording and general scheme of the regulation that it was intended to set up a system in which imports are not banned absolutely but, on the contrary, permitted from countries identified by the Commission in accordance with the criteria laid down in Article 3(1).

- 22 The applicant concedes, however, that such an interpretation is its own. Having regard to the undeniable legal uncertainty in that respect, it is impossible to predict what approach will be adopted by the authorities of the Member States applying the provision in issue. At the hearing, it stated that the United Kingdom, although it had recently announced that an absolute ban was to come into effect from 1 January 1996 (see the periodical *European Report* of 22 November 1995), seems to have since come round to the interpretation advocated by the applicant (see *The Observer* weekly newspaper of 14 January 1996). In those circumstances, the applicant considers that it cannot take the risk of making large purchases of pelts unless the legal situation has been clarified in an interim order.
- 23 The Council, after pointing out that, in interpreting a provision of Community law, it is necessary to consider in particular the context in which it occurs and its objective (Case 292/82 *Merck v Hauptzollamt Hamburg-Jonas* [1983] ECR 3781, paragraph 12), submits that there are 'convincing reasons' for following the interpretation put forward by the applicant, since it is the 'most likely' one. To interpret Article 3(1) as implying an absolute ban would run counter to the Council's aim, set out in both the preamble and the provisions of the regulation, of setting up different regimes for non-member countries on the basis of the criteria laid down therein.
- 24 The Commission also interprets Regulation No 3254/91 as setting up only a deferred ban. It puts forward essentially the same arguments as the Council, citing in particular the second and fourth recitals in the preamble to the regulation and adding that to interpret the provision in issue as introducing an absolute ban would be inconsistent also with the internal conservation means prescribed by Article 2 of the regulation, which does not prohibit the placing of furs on the Community market. Such an interpretation would, moreover, render the second paragraph of Article 3(1), requiring the Commission to publish a list of countries which meet at least one of the conditions set out in the first paragraph, and Article 4, providing for certification of origin, redundant.

(b) Prima facie case

- 25 In order to establish that there is a prima facie case for its main action, the applicant points out that its grounds for complaint are that the Council unlawfully adopted the import ban in Regulation No 3254/91, that the Commission has failed to adopt implementing legislation in respect of that regulation and that both institutions have failed to rectify the situation of legal uncertainty which they have created.
- 26 In the context of its claim that the import ban in Regulation No 3254/91 was unlawfully adopted, the applicant alleges, first, that the Council lacked competence to act on the legal bases cited in the preamble.

The reference to Article 130s of the EC Treaty relates in reality solely to the ban on the use of leghold traps within the Community and, in any event, the aim of protecting animals in non-member countries is not itself covered by that article.

As regards Article 113 of the EC Treaty, there are a number of indications that what prompted the adoption of the contested ban was not the need to harmonize external trade measures but solely the other objective referred to in the third recital in the preamble to the regulation, namely that of protecting species of wild fauna from inhumane treatment. Such protection is not an independent objective of the Community.

Nor can the Berne Convention, referred to in the first recital in the preamble to Regulation No 3254/91, serve as a legal basis for that prohibition, since it concerns only two of the thirteen species affected by the regulation and covers only possible conservation measures taken by the contracting parties within their own territories.

The Washington Convention, which is applicable to the Community by virtue of Council Regulation (EEC) No 3626/82 of 3 December 1982 on the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora (OJ 1982 L 384 p. 1, referred to in the second recital in the preamble to Regulation No 3254/91), affects only four of the thirteen species, not including the musk rat, which is treated as a pest in many countries and trade in whose pelts forms a substantial part of the applicant's business.

- 27 Secondly, the import regime in issue runs counter in several respects to the principle of proportionality, since it takes no account of bans on leghold traps confined to certain species or of rules which may be enacted by competent regional or local authorities. It applies even to furs from farmed animals which, by definition, are not exposed to trapping. Furthermore, if the regime were to involve an absolute ban, it would affect even imports from countries which the Commission has already identified as fulfilling the requirements of Article 3 of Regulation No 3254/91. In any event, the objectives of the contested ban could have been achieved by a licensing system such as that provided for by the Washington Convention.
- 28 Thirdly, the contested ban is incompatible with Article XI of the General Agreement on Tariffs and Trade (GATT), 1947, an integral part of the World Trade Organization (WTO) Agreement (Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ 1994 L 336, p. 1). To the extent that it seeks to protect animals outside the Community, it is not justified under Article XX(b) or (g) of GATT. The applicant considers itself entitled to rely on the provisions of GATT, since the rules in the WTO Agreement on safeguards and dispute settlement have removed the premiss on which the Court of Justice had based its rulings that GATT did not have direct effect. That entitlement cannot be called into question by the last recital in the preamble to Decision 94/800.

- 29 As regards the complaint that no implementing measures have been adopted with respect to Regulation No 3254/91, the applicant submits that the Commission has determined neither the countries from which imports of furs would be permitted nor the forms required for certification of origin, despite its obligation to do so under Articles 3 and 4 of that regulation and its undertaking to do so in Article 1(2) of Regulation No 1771/94.
- 30 In its third complaint, the applicant submits that the ban contained in Regulation No 3254/91 and the absence of implementing measures have given rise to a situation of legal uncertainty, as a result of which it has lost and is continuing to lose orders. Neither of the defendant institutions, however, has fulfilled its obligation, based on a general principle, to eradicate that uncertainty.
- 31 The applicant considers, moreover, that the principles laid down in Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975 do not preclude an award of damages in the present case since the legislation in issue does not involve a choice of economic policy nor is the area concerned characterized by the exercise of a wide discretion (Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *HNL and Others v Council and Commission* [1978] ECR 1209). In any event, the Council and the Commission have committed a sufficiently serious breach of a superior rule of law for the protection of the individual.
- 32 The Council denies that the main action is well founded. In so far as it is brought against the Council, it is based essentially on the hypothesis, which the Council rejects (see paragraph 23 above), of an 'absolute' ban on imports. The complaint that the Commission has not adopted implementing measures with respect to Regulation No 3254/91 implies, moreover, that the applicant considers the ban legitimate as regards Canada and the United States.

- 33 With regard to the 'deferred ban' hypothesis, the Council considers that the mere possibility that the Commission may adopt implementing measures does not suffice to justify an application for interim relief (order of 22 November 1995 in Case T-395/94 R II *Atlantic Container Line and Others v Commission* [1995] ECR II-2893). It rejects, moreover, the applicant's pleas, which, it considers, should be examined in the light of the principles laid down in *Schöppenstedt*, since the Council had a wide discretion.
- 34 In response to the argument that it lacked the necessary powers, the Council submits that the choice of Article 113 of the Treaty as the legal basis for the import regime in issue cannot be called into question merely because when that regime was established environmental considerations were borne in mind (see Article 130r(2) of the EC Treaty and Case C-62/88 *Greece v Council* [1990] ECR I-1527).
- 35 With regard to the alleged breach of the principle of proportionality, the Council submits that, in view of the extent of the discretion which it enjoys in the sphere concerned, the lawfulness of the measure in issue can be affected only if it is manifestly inappropriate having regard to the objective pursued.
- 36 The provisions of GATT cannot be relied on to establish the existence of a prima facie case in the main action, since the contested measure was not adopted to implement an obligation under GATT, nor does it make any reference thereto (see, in particular, Case C-280/93 *Germany v Council* [1994] ECR I-4973).
- 37 With regard to the allegation of failure to remedy a situation of legal uncertainty, the Council considers that the only irregularity of which it could be accused is that it has not brought an action for failure to act against the Commission under Article 175 of the EC Treaty. Such a plea cannot, however, be relied on in either an action for damages or an application for interim relief. In any event, the applicant

does not claim that the conditions in *Schöppenstedt* are met with regard to that allegation.

- 38 Finally, the Council denies that there is any direct causal link between the deferred ban in Regulation No 3254/91 and the damage alleged by the applicant. It considers that the loss of custom which the applicant claims it has suffered may be ascribed to press campaigns harmful to the economic sector in question or to competition in that sector. Furthermore, the applicant's continued dependence, despite the existence of alternative sources of supply, on imports from countries which do not meet at least one of the requirements of Article 3(1) of Regulation No 3254/91 is not the normal behaviour of a prudent trader. In any event, the applicant would still be able to buy from such sources even if imports from the United States and Canada were to be prohibited under any implementing measures adopted by the Commission.
- 39 The Commission, too, considers the arguments put forward in support of the main action to be ill founded, particularly those directed against Regulation No 3254/91, which the Commission examines from the viewpoint of a deferred import ban.
- 40 With regard to the plea alleging that the Council lacked competence to adopt the contested import regime, the Commission shares the view of the Council and adds that, since the aim and the content of the regime concern both environmental protection and trade with non-member countries, Articles 113 and 130s of the EC Treaty must be applied concurrently.
- 41 In response to the plea alleging a breach of the principle of proportionality, the Commission points out that the measures which it is empowered to adopt under Article 3 of Regulation No 3254/91 do not exceed what is necessary to achieve the objective which that article seeks to attain, in particular with regard to the date of

entry into force of those measures and the possibility for the non-member countries concerned to opt for a solution other than a complete ban on leghold traps.

- 42 The Commission also denies that the provisions of GATT apply directly. In its view, the premiss on which the abovementioned case-law ruling out such direct application was based has not been called into question by the new factors introduced by the WTO Agreement. The relevant declaration in the preamble to Decision 94/800 has been endorsed both by the Commission, which negotiated the WTO Agreement, and by the Community legislature.
- 43 In the Commission's view, the conditions laid down in *Schöppenstedt* are not met. An import ban, which is a legislative measure by reason of its general application, involves a choice of economic policy, more specifically one of commercial policy. By establishing a balance between the interests of animal protection and those of the fur trade, the Community did not flagrantly or gravely disregard the limits imposed by the principle of proportionality on the exercise of the discretion inherent in that policy, and there is no authority for the contention that the choice of an incorrect legal basis constitutes a breach of a superior rule of law for the protection of the individual.
- 44 The allegation of a failure to adopt implementing measures in respect of Regulation No 3254/91, the Commission submits, is incapable of justifying a request for suspension of the operation of Article 3 thereof, *a fortiori* since such failure does not prevent the applicant from continuing to import from its normal sources until such measures are adopted.
- 45 Whilst not conceding that it is under any obligation in that regard, the Commission considers that it has taken the measures necessary to eradicate the legal uncertainty of which the applicant complains, by means of the letter of 8 December 1995 (see paragraph 9 above), a recent declaration made to the European Parliament by

the member of the Commission responsible for environmental matters (see the periodical *European Voice* for the week of 14 to 20 December 1995), and the proposal to amend Regulation No 3254/91 (see paragraph 10 above).

- 46 In the Commission's view, the applicant has not succeeded in establishing a prima facie case that the alleged losses are caused by the conduct of the Community. As regards the current loss (loss of custom), the Commission essentially shares the Council's view. The future loss, it submits, will remain purely speculative until such time as the Commission has adopted implementing measures in respect of Regulation No 3254/91. In any event, even if the Commission were in due course to prohibit imports from the United States and Canada of the goods covered by the regulation, the applicant could use other sources of supply for its musk rat business. Any other damage affecting its commission business in North America, in so far as the goods concerned are imported into the Community, does not go beyond the bounds of the risks inherent in such an activity (see the judgment in *HNL*, cited above).

(c) Urgency

- 47 The applicant states that in the event of an absolute ban on imports it would lose 75 to 80% of its business, which would be highly likely to force it into liquidation. That percentage represents two of its three activities, namely the importation and processing of musk rat furs and the commission business in pelts in North America which, together with a similar commission business in Europe, make up the essential part of its business.
- 48 The musk rat business comprises the purchase of pelts at auctions in the United States and Canada (beginning, in 1996, on 16 February), and their shipment to

dressings factories in Belgium, Germany and Italy, where they are cured and tanned prior to further processing operations carried out mainly at the applicant's premises. The finished products are then sold in various countries both within the Community and elsewhere. In a 12-month period (1994/95), the applicant claims to have made a profit of around £150 000. A further £45 000 profit was made on the purchase and processing of musk rat pelts on behalf of another company. If the applicant were obliged to give up that business as a result of an import ban, it would lose its skilled workers, making it doubtful whether it could re-establish the business if and when the Court were to find the ban illegal.

- 49 The applicant's North American commission business, it states, provided it with earnings of around £45 500 over a comparable period. At the hearing, the applicant specified that the business in question is carried out exclusively on behalf of purchasers established within the Community and therefore depends on the ability to import the pelts concerned.
- 50 Under its European commission business, the applicant explains, it purchases furs in Scandinavian countries, including Norway, on behalf of third parties. During the 1994/95 season, it received around £58 800 from that business.
- 51 The applicant states that even in the deferred ban hypothesis its first two activities will disappear since, as is clear from the proposed implementing measures in respect of Regulation No 3254/91, the Commission considers that neither the United States nor Canada satisfy the conditions set out in Article 3 of the regulation. Those measures are likely to come into force in the near future. Given the average length of proceedings before the Court of First Instance, the applicant would be almost certain to be forced into liquidation before the financial loss suffered could be recovered by an award of damages.

- 52 In the Council's view, urgency is not established in the present case. The losses which the applicant claims to have suffered as a result of the alleged legal uncertainty cannot be prevented by means of an interim measure. With regard to the future loss which it claims to fear, the applicant's assumption is purely hypothetical in the light of the interpretation of Regulation No 3254/91 put forward by the Council (see paragraph 23 above). The deferred ban set up by Article 3 of that regulation does not at present give rise to any situation of urgency. The Council reiterates, finally, its view that the applicant could if necessary find other sources of supply (see paragraph 38 above).
- 53 As regards the difficulty of recruiting skilled workers if the Court were to declare the provision illegal, the Council points out that the applicant merely doubts whether such recruitment would be possible. In any event, the problem concerns only the musk rat fur business.
- 54 The Commission, too, denies that the applicant has proved a risk of serious and irreparable harm or, consequently, the urgency of the present application for interim relief. As regards the current loss, it shares the Council's views and adds that the applicant has not alleged that loss to be irreparable. The future damage, more particularly that which might result from the loss of the North American commission business (see paragraph 46 above), is purely financial, whereas in principle damage of that nature is not considered to be serious and irreparable (Case 229/88 R *Cargill and Others v Commission* [1988] ECR 5183). The applicant's statement that the loss of profits would be highly likely to force it into liquidation does not, in the Commission's view, establish that the present case forms an exception to that principle. It could avoid that consequence by exploiting its European commission business and by taking up alternative sources of supply. Furthermore, the information and documents produced for 1994 cannot provide evidence of the future development of the applicant's business, which might be affected by factors unconnected with the problems raised in the present application for interim relief.

Finally, since the applicant has not produced a balance sheet, it is not possible to judge whether its assets, in particular its stocks of furs, together with a reorientation of its business, might enable it to await the outcome of the action for damages.

— Balance of interests

- 55 At the hearing, the applicant submitted that the defendant institutions have not established a Community interest in applying an absolute ban. On the contrary, it can be inferred from their arguments that such a ban would be unlawful.
- 56 The Council reiterates its view that the legislation in issue contains only a deferred ban which does not cause the applicant serious and irreparable damage. Since the threat of such damage is the first element in the balance of interests, the Council considers that a suspension cannot be envisaged, particularly since in adopting the ban account was taken of the efforts already made by all the groups concerned and suspension might jeopardize further progress by fur-exporting countries towards the abolition of leghold traps and/or the development of humane trapping standards.
- 57 The Commission considers that, even on the assumption that the applicant had established the urgency of its application for interim relief, a suspension *erga omnes* of the operation of the contested provision would be disproportionate in view of the nature of the main action and the various competing interests. On the latter point, the Commission points out that the discussions held with non-member countries and the adjustments made by operators within the Community have been carried out on the basis that Regulation No 3254/91 is valid. Within the Community the use of leghold traps has been prohibited since 1 January 1995 at the latest and all interested parties have acted accordingly. Finally, the suspension sought would jeopardize the Community's attempts to ensure the fulfilment by non-member countries of the conditions imposed by Article 3(1) of the regulation in relation to imports.

Findings of the President

— The forms of order sought

58 It is clear from its explanations at the hearing that the forms of order which the applicant is now seeking are, primarily, a declaration to the effect, essentially, that Article 3(1) of Regulation No 3254/91 is to be interpreted as laying down a 'deferred ban'. In the alternative, it maintains its application for a suspension of operation. In the light of the arguments put forward in the application for interim measures (in particular in paragraph 2) and of what was said at the hearing, the request for suspension of operation is to be understood as referring solely to Article 3(1) in so far as it prohibits certain imports of pelts and processed goods on the conditions laid down therein. By reformulating its claims in that manner, the applicant is to be deemed to have abandoned its initial, general request for the adoption of any further interim measures which the President might deem necessary or appropriate. In any event, without further details as to its subject-matter, such a request would not meet the criteria laid down in Article 44(1)(d) of the Rules of Procedure (see Article 104(3) of those rules) and would thus be inadmissible.

59 The form of order sought by the Council in the application for interim measures is to be considered, in the light of its explanations at the hearing (see paragraph 12 above), as confined to the dismissal of the applicant's request.

— The applicant's request for a declaration as to interpretation

60 This request must be dismissed as inadmissible because it is incompatible with both the specific nature of interim proceedings and, more generally, the system of remedies of which it forms a part.

61 The EC Treaty distinguishes between direct actions before the Community judicature and the procedure for seeking a preliminary ruling under Article 177. Only in the latter case may the Court of Justice be asked to give a decision whose operative part itself relates directly to the interpretation of a rule of Community law. Such a decision cannot, therefore, be obtained in interim proceedings, which are necessarily an adjunct to a direct action (see Articles 185 and 186 of the Treaty and Article 104 of the Rules of Procedure of the Court of First Instance; see also Article 168a(1) of the EC Treaty). As regards the imports envisaged by the applicant, moreover, the rules contested in the present case are applied not by the defendants but by the authorities of the Member States. There is thus no legitimate interest for the applicant's main claim since the effects of any order granting it would, *prima facie*, be confined to the parties to the present interim proceedings. An interpretation by the Court of Justice, on the other hand, could be obtained in the context of proceedings before a national court and apply by virtue of a decision of that court to the relations between the applicant and a national authority which had issued a decision on the basis of the ban in issue.

— The application for suspension of the operation of Regulation No 3254/91

62 The application for interim measures alleges several types of damage which the applicant has suffered or may suffer.

63 The applicant has not put forward the damage which it claims to have suffered already, and to be likely to suffer in the future, as a result of the legal uncertainty which it alleges, as constituting serious and irreparable harm and thus giving rise to a situation of urgency requiring the ordering of interim measures before judgment is given in the main action (see the order in *Connolly*, cited above, paragraph 41). In any event, the requested suspension could not remedy damage which has already occurred. The damage referred to above cannot, therefore, justify the adoption of such an interim measure.

64 As regards the future damage which the applicant claims it will suffer because the contested ban will prevent it from importing certain products, a distinction must be drawn, as proposed by the applicant itself on the basis of the two possible interpretations in that regard, between the hypothesis of an absolute ban and that of a deferred ban (see paragraphs 20 and 47 to 51 above).

65 All the parties to these interim proceedings interpret the provision as laying down only a deferred ban. Although the arguments put forward in support of that interpretation do not appear *prima facie* to be clearly unfounded, nevertheless, as the applicant itself points out at paragraphs 3 and 120 of its main application, a literal analysis of Article 3 of Regulation No 3254/91 might lead to the conclusion that the ban is absolute. The President cannot, therefore, give a decision on such a complex question without prejudging the decision of the Court on the substance and in particular cannot accept as settled the interpretation put forward by the parties. In any event, he cannot be bound either by their interpretation or by that applied by the Member States. It is therefore appropriate in the present circumstances to assess the legal and factual issues alternatively in the light of the two possible interpretations.

66 If Article 3(1) is assumed to lay down a deferred ban, in principle it cannot itself place the applicant in a situation of urgency until the Commission adopts the implementing measures for which provision is made. The applicant has not produced any *prima facie* evidence that such measures — the content of which will necessarily depend on the state of the national and international rules applicable at the time of their adoption — would have irreversible effects as soon as they came into force, before any judicial decision could be obtained (for a comparable situation, see the order in *Atlantic Container Line and Others*, cited

above, paragraph 49). In any event, even if it were established that such a situation were imminent, that would not justify suspending the operation of Article 3(1) as the legal basis for such implementing measures but merely, at most, adopting interim measures regarding the operation of those provisions themselves.

67 If Article 3(1) is to be interpreted as laying down an absolute ban, it must first be considered what effects would ensue from a suspension of its operation, in order to define more precisely the legal conditions on which the granting of an order for suspension is dependent. The suspension requested would irremediably deprive the contested ban of its effect for as long as the interim order remained valid, and to the extent that goods of the kind referred to in Regulation No 3254/91 were brought into free circulation in the Community by the applicant or any other importer. It cannot therefore be granted unless there are exceptional circumstances which demonstrate that, despite the effects identified above, it would be disproportionate to dismiss the applicant's request. However, such a conclusion, regardless of whether it may be justified in the present circumstances by the applicant's individual situation alone, is in any event not supported by the arguments and evidence put forward as regards either the applicant's statements seeking to establish the urgency of the application for interim measures or the *prima facie* case in the main action.

68 On the first point, the applicant states that the contested ban, if applied, would affect 75 to 80% of its business (that is to say the musk rat fur business and the North American commission business) and would be 'highly likely' to force it into liquidation. Its accountants have further declared, in a document dated 15 January 1996 produced to the Court by the applicant, that the company could not continue to trade if it were to lose 60% of its overall business — the proportion accounted for by its musk rat fur business. Finally, the applicant has produced a copy of a letter sent on 16 January 1996 by the Belgian Fur Trade Federation to the International Fur Trade Federation, which refers to the trapping of musk rats in various Member States of the Community and which doubts whether 'needs' could be satisfied without deliveries from the United States and Canada (Russia, which is also

mentioned, does not at present supply the Community market to any significant extent — see the letter of 11 January 1996 from the Copenhagen Fur Center, produced by the applicant). However, without there being any need at this stage to analyse those technical and accounting assessments, the applicant has not sufficiently established that it is likely to be forced into liquidation before judgment is given in the main action.

- 69 First, if it is accepted that, during the 1994/95 period to which the applicant refers, a certain proportion of the types of business mentioned above involved importing pelts of species or in quantities which could not, even if the applicant had made every effort, have been found in the Community, it is by no means impossible that the demand satisfied by that part of its business should now turn towards furs which are available in the Community. This applies in particular to consumer demand in the Community, which appears to be decisive in part of the applicant's musk rat fur business and all of its North American commission business. In the event of an absolute ban, Community consumers would have no access to other products, and no evidence has been produced that the applicant, which employs skilled staff and has been active in the sector concerned for over 30 years, would be unable to react appropriately to such a change. It must be borne in mind that ever since the adoption of Regulation No 3254/91, operators in that sector may be deemed to have been aware of the risk that supplies of pelts from non-member countries, or at least from those (including the United States and Canada) which do not prohibit the use of leghold traps, might become impossible from 1 January 1996 at the latest.

- 70 Secondly, if the proposed amendments to Regulation No 3254/91 (see paragraph 10 above) were adopted, the new rules replacing the present Article 3 would constitute not an absolute but a deferred ban, inasmuch as imports would not be prohibited unless the Commission were to take the specific step of preventing them by including the name of the country of origin on the list applicable to the animal

species in question. Such rules would eliminate any possible urgency for operators in that sector (see paragraph 66 above). Furthermore, the Commission estimated at the hearing that the proposal might be adopted within nine months.

- 71 In the absence of more detailed information on the applicant's financial and economic situation, therefore, it is not possible to conclude at present that the threat of its being forced into liquidation is so serious and pressing as to justify, exceptionally, granting the relief sought.
- 72 Nor do the pleas in law and arguments put forward in support of the main action establish the existence of an exceptional situation justifying such relief. No obvious conclusions can be drawn from them in these interim proceedings as to the lawfulness of the measure in question or the liability of the Community. In particular, the arguments concerning the choice of legal basis and the alleged direct effect of GATT raise complex questions which cannot be examined here without prejudging the decision of the Court on the substance. Similar considerations apply to the arguments relating to the principle of proportionality, since they involve applying that principle to a measure of Community legislation and it is necessary to determine precisely to what extent each of the alleged breaches is capable of affecting the applicant's position. This latter observation applies also to the extent that the applicant, manifestly assuming that the law at present lays down an absolute ban, accuses the Commission of having failed in its duty to adopt implementing provisions in respect of Regulation No 3254/91. In that regard, it may be concluded from the applicant's explanations concerning urgency in the hypothesis of a deferred ban that, following the adoption of such provisions in line with the draft submitted by the Commission, that prohibition would have appreciably the same effects for the applicant as an absolute ban, since it would prevent imports from the United States and Canada (see paragraph 51 above). In the absence of specific information from which it might be concluded that, on the basis of the present text of Regulation No 3254/91, the Commission should have authorized imports from

those countries, even though they do not prohibit the use of leghold traps and there are as yet no internationally agreed humane trapping standards, it is not possible in these proceedings to discern in what way the Commission's failure could have affected the applicant.

- 73 The application for interim measures must therefore be dismissed, without there being any need to examine the question of admissibility raised by the defendant institutions.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.
2. Costs are reserved.

Luxembourg, 12 February 1996.

H. Jung

Registrar

A. Saggio

President