

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

14 October 1996 *

In Case T-137/96 R,

Valio Oy, a company incorporated under Finnish law, established at Helsinki, represented by Francis Herbert and Daniel M. Tomasevic, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Carlos Zeyen, 67 Rue Ermesinde,

applicant,

v

Commission of the European Communities, represented by Xavier Lewis, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for suspension of operation of a Commission 'decision' contained in the letter of 25 June 1996 to the Permanent Representative of the Republic of Finland to the European Union and communicated to the applicant by the Finnish Elintarvikevirasto, in so far as it concerns the 'Voilevi' and 'Voimariini' trade marks,

* Language of the case: English.

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

makes the following

Order

Legal background, facts and procedure

- 1 The company Valio Oy (hereinafter 'Valio') produces compound fats, which it sells on the Finnish market under the trade marks 'Voimariini' and 'Voilevi', registered in 1979 and 1987 respectively and used by the company since then.
- 2 On 1 January 1996 Council Regulation (EC) No 2991/94 of 5 December 1994 laying down standards for spreadable fats (OJ 1994 L 316, p. 2, hereinafter 'the Regulation') entered into force. Based on Article 43 of the EC Treaty, it lays down marketing standards for solid fats intended for human consumption (butter, margarine and compound fats). According to its preamble, it aims to avoid confusion for the consumer by limiting the use of terms such as, *inter alia*, 'butter', 'margarine' and 'compound fats' to certain product categories with clearly defined compositions and fat contents.
- 3 To that end, the first subparagraph of Article 2(2) of the Regulation lays down that the sales descriptions of the products referred to in the Regulation are, in principle, to be those specified in the annex to the Regulation. Moreover, the second subparagraph provides that 'the sales descriptions in the Annex shall be reserved for the products defined therein'.

- 4 In particular, the Regulation reserves the description 'butter' for products with a milk-fat content of not less than 80%, while the descriptions 'margarine' and 'compound fats' are reserved for products obtained from vegetable and/or animal fats and products obtained from a mixture of vegetable and/or animal fats respectively.

- 5 However, the first indent of the third subparagraph of Article 2(2) provides that the above provisions are not to apply to 'the designation of products the exact nature of which is clear from traditional usage and/or when the designations are clearly used to describe a characteristic quality of the product'. Article 8 of the Regulation gives the Commission power to adopt detailed rules for the application of the Regulation in accordance with the management committee procedure laid down in Article 30 of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176) and Article 38 of Regulation No 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organization of the market in oils and fats (OJ, English Special Edition 1965-1966, p. 221). Under Article 8, those detailed rules for the application of the Regulation may in particular include the list of the products referred to in the first indent of the third subparagraph of Article 2(2), on the basis of the lists sent to the Commission by the Member States.

- 6 Article 10 of the Regulation states: 'Member States shall specify the effective penalties to be imposed in the case of breach of the provisions of this Regulation and, where appropriate, the national measures relevant to its enforcement. Member States shall inform the Commission of the penalties by 1 January 1997.'

- 7 In the present case, it is common ground that the products sold by Valio under the 'Voimariini' and 'Voilevi' trade marks do not satisfy the criteria for butter which are defined in the Regulation. Their packaging thus includes, in addition to the brand name, the sales description prescribed by the Regulation, namely 'blend' and 'half-fat blend', 'rasvaseos' and 'rasvaseos 40' in Finnish, and the composition of the product, as can be seen from the case-file.

- 8 The present dispute derives from the fact that the trade marks used by Valio include the word 'butter'. 'Voi' is the Finnish for 'butter'. The words 'voilevi' and 'voimariini' have no meaning.
- 9 It appears from the observations of the parties that there were a number of joint meetings of the management committee for milk and milk products and the management committee for oils and fats to discuss *inter alia* the interpretation and application of the Regulation. In the course of those meetings the Commission informed the national officials that trade marks also fell within the scope of the Regulation. The Finnish authorities thereupon sought the Commission's opinion on the compatibility of various Finnish trade marks, including 'Voilevi' and 'Voimariini', with the provisions of the Regulation.
- 10 In a letter of 25 June 1996 addressed to the Permanent Representative of the Republic of Finland to the European Union, the Commission informed him, in reply to his letter of 5 March 1996 and to the questions raised at the last management committee meeting, that the provision in Article 2(2) of the Regulation reserving certain sales descriptions, such as 'butter' or 'margarine', for products whose composition conformed with the precise definition in the annex to the Regulation could 'also apply to certain trade marks which include the term butter, margarine, etc., and which were registered before the Regulation. Their use may not continue. Such a practice would lead to complete confusion among consumers and would nullify the effect of [the Regulation].' It concluded that, having regard to the above facts, 'the Finnish trade marks "Voimariini", "Voilevi" [and three other marks not belonging to the applicant] may no longer be used'.
- 11 In a letter of 22 August 1996 addressed to the applicant and others, enclosing the Commission's letter of 25 June 1996, the Finnish Elintarvikevirasto (Food Office) noted that the Regulation had entered into force on 1 January 1996 and continued:

'The Elintarviketeollisuus ry (Food Industry Association), after discussing the matter with the Elintarvikevirasto, has notified the transitional periods regarded as possible in practice with respect to the changes to composition and labelling ... The Elintarvikevirasto will send the instructions for supervision of the Regulation to the municipal supervisory authorities during September.

The changes to the rules also relate to trade marks in which the word "butter" is used on products which are not butter according to the definition in the Regulation. Directorate-General VI of the European Commission has on 25 June 1996 taken a position on some Finnish product names which, in the Commission's opinion, may no longer be used.

The Elintarvikevirasto sends the Commission's letter (enclosed) for your information and requests producers and importers for an account by the end of September 1996 of what measures have been adopted on account of the letter.'

- 12 By application lodged at the Court Registry on 9 September 1996, the applicant sought the annulment of the 'decision' contained in the Commission's letter of 25 June 1996 to the Permanent Representative of the Republic of Finland to the European Union, in so far as it relates to the 'Voilevi' and 'Voimariini' trade marks.
- 13 By a separate document lodged at the Registry on 9 September 1996, the applicant sought suspension of operation of the contested act under Article 185 of the Treaty. The Commission lodged its written observations on the application for interim measures on 20 September 1996. The parties presented oral argument on 27 September 1996. At that hearing the applicant also asked for the Commission to be ordered to pay the costs of the proceedings for interim measures.

Law

- 14 Under the combined provisions of Articles 185 and 186 of the Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance (OJ 1988 L 319, p. 1), as amended by Council Decisions 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21) and 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 the operation of the contested act to be suspended or prescribe any necessary interim measures.
- 15 Article 104(1) of the Rules of Procedure provides that an application to suspend operation of a measure is admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. Article 104(2) provides that applications for interim measures 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. Such measures must be provisional in the sense that they do not prejudice the decision on the substance of the case (see the order of the President of the Court of First Instance in Case T-41/96 R *Bayer v Commission* [1996] ECR II-381, paragraph 13).

The allegation that the main application is manifestly inadmissible

Arguments of the parties

- 16 The applicant submits that it is settled law that the question of the admissibility of the main application should not be examined in proceedings relating to an application for interim measures, so as not to prejudice the substance of the case (see the orders of the President of the Court of Justice in Case 65/87 R *Pfizer v Commission* [1987] ECR 1691 and Case 160/88 R *Fédération Européenne de la Santé Animale and Others v Council* [1988] ECR 4121). In the present case the main application is for annulment of a decision which is of direct and individual concern to the applicant. It cannot be regarded as manifestly unfounded and the question of admissibility therefore does not arise in the context of these proceedings for interim measures.

- 17 The Commission contends that the application for interim relief is inadmissible on the ground that the main application is manifestly inadmissible. It submits, firstly, that the letter at issue produces no legal effects and cannot therefore be the subject of an action for annulment under Article 173 of the Treaty, in accordance with settled case-law (see in particular the judgment in Case 60/81 *IBM v Commission* [1981] ECR 2639). The letter is not a measure implementing the Regulation, that being a matter for the Member States. It is merely an answer to a question addressed to the Commission by a national authority concerning the Commission's interpretation of the Regulation, in the context of the cooperation between the Commission and the national authorities.
- 18 Secondly, the Commission argues that the legal effects which in the applicant's opinion follow from the letter in question, namely the prohibition of marketing its products under the trade marks it has registered, are produced by the Regulation itself. Any direct action against the Regulation would be out of time.
- 19 Thirdly, even if the letter in question constituted a decision with binding effects, which the Commission denies, it would not be of direct and individual concern to the applicant. It refers to all the trade marks known to be used in Finland containing the Finnish word 'voi', meaning 'butter'. At the very most, it could have the effect of binding the Finnish authorities in the interpretation of the Regulation.
- 20 At the hearing the applicant rejected the Commission's argument. It submitted that even if the letter at issue was not a decision implementing the Regulation but an information document relating to its application, as the Commission contends, the letter extended to registered trade marks the prohibition which the Regulation laid down specifically for sales descriptions. It thus went further than the Regulation, so that the question of admissibility raised by the Commission was linked with the substance, as in Case C-202/88 *France v Commission* (see the Opinion of Advocate General Tesauro [1991] ECR I-1223, at I-1239, point 6). In the present

case, the undertakings concerned could not have conceived, from reading the Regulation, that it might also apply to registered trade marks. There was thus no reason for those undertakings to envisage the possibility of bringing a direct action against the Regulation within two months from its publication. Furthermore, they would have been faced with the difficulty of showing that the Regulation was of direct and individual concern to them.

- 21 Moreover, contrary to the Commission's assertions, it was clear from the Finnish authorities' letter to the applicant of 22 August 1996 that those authorities considered that they were bound by the Commission's decision contained in the letter of 25 June 1996. That is why they requested the undertakings concerned to cease using certain registered trade marks which had been in use for many years. More precisely, in reply to a question by the President of the Court on the procedure for the implementation of the Regulation by the Finnish authorities, the applicant stated that no formal decision had yet been adopted, but the Finnish authorities had in their letter of 22 August 1996 asked the undertakings concerned what measures they intended to take in view of the Commission's letter of 25 June 1996.
- 22 In that context the applicant could be deprived of all judicial protection if the main application were to be declared inadmissible. Thus, on the basis of the judgment in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, which now constitutes firm authority, as may be seen from the Opinion of Advocate General Jacobs of 19 September 1996 in Case C-178/95 *Wiljo v Belgium* [1997] ECR I-585, at I-587, the applicant might not be allowed to bring its claims in the national courts, on the ground that it should have challenged the Commission's decision contained in the letter at issue.
- 23 Moreover, in reply to a question by the President on the power conferred on the Commission by the first indent of the third subparagraph of Article 2(2) and by Article 8 of the Regulation to allow in certain cases, in accordance with the management committee procedure, a derogation from the prohibition in the second subparagraph of Article 2(2), the applicant stated that in its opinion that derogation could not be used for trade marks. That possibility was intended for sales

descriptions, and meant that an undertaking seeking such a derogation informed the Commission of the precise specification and formula of manufacture of the products in question, which raises no problems in the case of generic sales descriptions. Conversely, the procedure was not designed for registered trade marks, in that it did not guarantee that commercial and manufacturing confidentiality was observed.

- 24 However, the applicant stated at the hearing that the grant of a derogation under the third subparagraph of Article 2(2) was not the only measure the Commission was empowered to take under Article 8 in the framework of the management committee procedure. It followed explicitly from the very content of the letter in question that its subject was the 'application of the Regulation'. That letter from the Commission did not address the question whether there could be a derogation for the trade marks used by the applicant. On the contrary, it clearly excluded any possibility of a derogation.
- 25 The Commission, at the hearing, contested the applicant's argument that the letter at issue constituted a measure adopted under Article 8 of the Regulation.
- 26 At the request of the President of the Court, the Commission also explained that the list of products benefiting from the derogation referred to in the third subparagraph of Article 2(2), which it is empowered to draw up under Article 8 of the Regulation on the basis of the lists sent to it by the Member States, is a single list which is to be established after examining all the lists communicated by the Member States. The Commission had received all the lists drawn up by the Member States, including that from the Finnish authorities, which did not include the 'Voilevi' and 'Voimariini' marks. The Commission was currently in the process of finalizing the first draft of the list which it would submit to the management committee.

Findings of the President

- 27 It is settled case-law that, in principle, the issue of the admissibility of the main action should not be examined in proceedings relating to an application for interim measures. It should be reserved for the examination of the main application, unless it is apparent at first sight that the latter is manifestly inadmissible, so as not to prejudice the Court's decision on the substance of the case (see the order of the President of the Court of Justice in Case C-117/91 R *Bosman v Commission* [1991] ECR I-3353, paragraph 7, and, as the most recent authority, the order of the President of the Court of First Instance in Case T-75/96 R *Söktas v Commission* [1996] ECR II-859, paragraph 16).
- 28 In the present case, having regard to the circumstances of the case and the arguments of the parties, the President must examine whether the main application for the annulment of the 'decision' contained in the Commission's letter of 25 June 1996 is to be considered as being at first sight manifestly inadmissible.
- 29 In particular, it is necessary to consider how that letter is to be characterized in law. In accordance with settled case-law, the letter may be regarded as a measure actionable under Article 173 of the Treaty only if it is capable of having legal effects, which is denied by the Commission (see, in particular, the judgment in Case 60/81 *IBM v Commission* [1981] ECR 2639 and the orders in Cases C-66/91 and C-66/91 R *Emerald Meats v Commission* [1991] ECR I-1143, paragraph 26, and in Cases T-492/93 and T-492/93 R *Nutral v Commission* [1993] ECR II-1023, paragraph 24).
- 30 It must be pointed out here that in the institutional system of the Community and according to the general principles which govern the division of powers between the Community and the Member States, it is for the Member States, in the absence of any contrary provision of Community law, to ensure that Community regula-

tions, especially those concerning the common agricultural policy, are implemented within their territory (see the judgment in Joined Cases 89/86 and 91/86 *Étoile Commerciale and CNTA v Commission* [1987] ECR 3005, paragraph 11).

- 31 It is clear from the Regulation that Article 8 empowers the Commission to adopt, in accordance with the management committee procedure, the detailed rules for the application of the Regulation. The Commission thus has exclusive competence to draw up the list of the products referred to in the first indent of the third subparagraph of Article 2(2) to which the prohibition of using reserved sales descriptions does not apply, and to determine the various technical rules for the application of the Regulation.
- 32 Unlike the definition of the detailed rules of application, the implementation of the provisions of the Regulation, in particular the prohibition of the use of the reserved sales descriptions for products which do not meet the corresponding requirements set out in the annex to the Regulation, falls within the exclusive competence of the Member States. That power of the Member States not only to take individual decisions in implementation of the Regulation but also to adopt general implementing measures is confirmed by Article 10 of the Regulation: 'Member States shall specify the effective penalties to be imposed in the case of breach of the provisions of this Regulation and, where appropriate, the national measures relevant to its enforcement. Member States shall inform the Commission of the penalties by 1 January 1997.'
- 33 In that legal context, it must be determined whether, under the system of the Regulation, the contested letter may *prima facie* be construed as constituting a decision adopted by the Commission under Article 8 of the Regulation, as the applicant suggests, or whether it is on the contrary *prima facie* merely a non-binding opinion on the interpretation of the Regulation, issued by the Commission at the request of the competent national authorities in the context of the cooperation required by Article 5 of the Treaty.

- 34 In the present case, neither the content nor the form nor the context of the contested letter suggests a Commission decision under Article 8 of the Regulation. The letter expressly states that its object is to give information to the Member State concerned, at the latter's request, for the application of the Regulation. It concerns in particular the interpretation of the second subparagraph of Article 2(2), which prescribes that 'the sales descriptions in the annex [are to] be reserved for the products defined therein'. It states that that provision also applies to certain trade marks which contain, for example, the word 'butter'. It concludes that the Finnish product names 'Voilevi' and 'Voimariini' may no longer be used.
- 35 The Commission's letter, addressed to the Permanent Representative of the Republic of Finland to the European Union, thus *prima facie* relates solely to the interpretation of the provision in the Regulation prohibiting the use of certain sales descriptions for products other than those for which they are reserved, with a view to the implementation of that provision, which is exclusively a matter for the Member State concerned, as is expressly confirmed by Article 10 of the Regulation. As the applicant moreover itself conceded at the hearing, the letter does not address the question whether the use of the names 'Voilevi' and 'Voimariini' for marketing compound fats might be the subject of a derogation from the above-mentioned prohibition under the first indent of the third subparagraph of Article 2(2) of the Regulation. It therefore cannot be understood as a decision linked to the adoption by the Commission of the list of products referred to in that provision in accordance with the procedure provided for in Article 8 of the Regulation. Nor is it connected with the determination of the detailed technical rules for the application of the Regulation, for which Article 8 likewise confers competence on the Commission.
- 36 In so far as the implementation of the provision in the Regulation on the interpretation of which the Commission expresses its opinion in the contested letter is a matter for the Member States, pursuant to Article 10 of the Regulation, the Commission is not competent to take decisions on interpretation. In accordance with established case-law, the Commission thus can only, in the contested letter, express an opinion which is not binding on the competent national authorities and does not affect the applicant's legal position (see the judgment in Case 133/79 *Sucrimex and Westzucker v Commission* [1980] ECR 1299, paragraph 16, and the order in *Nutral v Commission*, cited above, paragraphs 25 to 29).

- 37 It follows that the contested letter cannot be regarded as a decision capable of affecting the applicant's legal position.
- 38 Since it is for the competent national authorities to adopt the decisions in implementation in particular of the prohibition laid down in the second subparagraph of Article 2(2) of the Regulation, it will be for the applicant, if the national authorities adopt the non-binding interpretation suggested by the Commission in the letter at issue, to make use at the appropriate time of the remedies available in national law to challenge in the national courts the measures taken with respect to it.
- 39 The national court will then be able to refer, if appropriate, the question of the interpretation or validity of the Regulation to the Court of Justice.
- 40 In that respect, the present case may be distinguished from the situation in point in *TWD Textilwerke Deggendorf*, cited by the applicant at the hearing. Unlike that case, no decision in implementation of the prohibition laid down in the second subparagraph of Article 2(2) of the Regulation was adopted in the present case by the Commission — which had no competence to do so — with respect to the applicant's trade marks at issue here. Under those circumstances, the measures implementing that provision of the Regulation are not amenable to direct review by the Community judicature, since it is for the competent national court to review the validity of the national measures implementing the Regulation (see the judgment in Case T-271/94 *Branco v Commission* [1996] ECR II-749, paragraph 53).
- 41 In the light of all the above considerations, the main application for annulment of the Commission's letter of 25 June 1996 appears *prima facie* manifestly inadmissible, since there is no measure against which an action may be brought under Article 173 of the Treaty.

42 The present application for interim measures must therefore also be dismissed as inadmissible.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

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

Luxembourg, 14 October 1996.

H. Jung

Registrar

A. Saggio

President