# ORDER OF THE PRESIDENT OF THE COURT
15 April 1998 *

In Case C-43/98 P(R),

**Camar Srl**, a company incorporated under Italian law, having its registered office in Florence (Italy), represented by Wilma Viscardini Donà, Mariano Paolin and Simonetta Donà, of the Padua Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

appellant,

APPEAL against the order of the President of the Court of First Instance of the European Communities of 10 December 1997 in Case T-260/97 R *Camar* v *Commission and Council* [1997] II-2357, seeking to have that order set aside and to have the interim measures sought at first instance granted,

the other parties to the proceedings being:

**Commission of the European Communities**, represented by Hubert van Vliet and Francesco Ruggeri Laderchi, of its Legal Service, acting as Agents, assisted by Alberto Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

and

**Council of the European Union**, represented by Jan-Peter Hix and Antonio Tanca, Legal Advisers, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendants at first instance,

* Language of the case: Italian.

supported by

**French Republic**, represented by Kareen Rispal-Bellanger, Deputy Director in the Legal Directorate, Ministry of Foreign Affairs, and Christina Vasak, Assistant Foreign Affairs Secretary in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8 Boulevard Joseph II,

intervener at first instance,

and by

**Kingdom of Spain**, represented by Rosario Silva de Lapuerta, Abogado del Estado, of the State Legal Department, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

intervener on appeal,

THE PRESIDENT OF THE COURT,

after hearing Advocate General Mischo,

makes the following

## Order

1 By application lodged at the Registry of the Court on 20 February 1998, Camar Srl brought an appeal against the order of the President of the Court of First Instance of 10 December 1997 in Case T-260/97 R *Camar* v *Commission and Council* [1997] ECR II-2357 (hereinafter 'the order under appeal'), dismissing its application for interim measures.

2 The appellant seeks to have the order under appeal set aside and the forms of order sought at first instance allowed.

3 By application lodged at the Registry of the Court on 6 March 1998, the Kingdom of Spain applied for leave to intervene in these proceedings.

4 Pursuant to the first paragraph of Article 37 of the EC Statute of the Court of Justice, the Kingdom of Spain is granted leave to intervene.

5 By documents lodged at the Registry on 16 and 17 March 1998, the Commission, the Council, the French Republic and the Kingdom of Spain submitted their written observations to the Court.

## Facts and procedure

6 It is clear from the order under appeal that the facts of the main proceedings concern the common organisation of the market in bananas, established by Council Regulation (EEC) No 404/93 of 13 February 1993 (OJ 1993 L 47, p. 1), and in particular the procedure for granting, to operators who marketed Community or traditional ACP bananas ('traditional importers'), import licences for third-country and non-traditional ACP bananas ('Category B licences').

7 As pointed out in paragraph 4 of the order under appeal, pursuant to Article 19(2) of Regulation No 404/93, each traditional importer obtains Category B licences on the basis of the average quantities of Community or traditional ACP bananas that he has sold in the three most recent years for which figures are available ('reference quantities').

8 Article 30 of Regulation 404/93 provides: 'If specific measures are required after July 1993 to assist the transition from arrangements existing before the entry into force of this Regulation to those laid down by this Regulation, and in particular to overcome difficulties of a sensitive nature, the Commission, acting in accordance with the procedure laid down in Article 27, shall take any transitional measures it judges necessary.'

9 Paragraphs 8 to 15 of the order under appeal state, in substance, that, from 1993, Camar, who is a traditional importer of bananas from Somalia, repeatedly requested the Commission to grant it additional Category B licences, because the quantities of bananas that it had managed to import from Somalia during the years after 1990 and which had been taken into account, as reference quantities, for the purposes of calculating the Category B licences to which it was entitled were abnormally low as compared to the quantities that it had imported during the years 1988 to 1990.

10 For details of the dealings between Camar and the Commission and the actions for declaration of failure to act brought before the Court of First Instance, reference should be made to paragraphs 15 to 20 of the order under appeal.

11 On 17 July 1997, the Commission rejected the request that Camar had submitted on 27 January 1997 pursuant to Article 30 of Regulation No 404/93 and which concerned the calculation of the Category B licences to be issued to it in 1997 and subsequent years.

12 On 25 September 1997, Camar brought another action before the Court of First Instance seeking the annulment of the Commission decision and an order requiring the Community to pay compensation for the damage suffered by it following the refusal by the Commission to take into account, in calculating Category B licences, the quantities of bananas that it had imported prior to 1991 and, in the alternative, an order that compensation be paid to Camar for the failure to adopt a specific provision within the framework of Regulation No 404/93 allowing situations 'such as that' of the appellant to be resolved.

13 By separate document, lodged at the Registry of the Court of First Instance on 22 October 1997, Camar made an application for interim measures seeking (a) an order suspending the Commission's decision of 17 July 1997, and (b) an order requiring the Commission to calculate the number of Category B licences to which Camar was entitled in respect of 1998 on the basis of its reference quantity during the period from 1988 to 1990, and, in the alternative, to calculate the said licences on the basis of its reference quantity for the period from 1989 to 1991, or by applying the criteria indicated by the European Parliament in amendment No 8 to the proposal of the Commission, submitted on 8 March 1996, to amend Regulation No 404/93, and, in the further alternative, to grant to Camar financial aid equal to the market value of the Category B licences to be calculated according to one of the criteria set out above.

## The order under appeal

14 In the order under appeal, the President of the Court of First Instance dismissed the application for interim measures.

15 After rehearsing the conditions to be met in order to establish urgency justifying the adoption of interim measures, the order under appeal contains a detailed examination of the various circumstances invoked by Camar in that connection.

16 It is clear from the order under appeal that Camar claimed essentially that it was not of its choosing that its imports of bananas both from Somalia and from other ACP countries had decreased after 1990, causing a reduction in the Category B licences granted to it and thus compelling it also to reduce its imports from third countries. That reduction in its activity had thus forced it to incur debts with its principal shareholder and to halve its staff. According to Camar, that situation would, in due course, force it to close down its business, unless additional Category B licences were granted.

17 The President of the Court of First Instance examined separately Camar's claims relating to the changes in its turnover and those relating to the changes in its imports.

18 It was noted that Camar's turnover in recent years had risen in 1995 and 1996 and that Camar had made a profit in 1994 and 1995. As to the financial difficulties alleged by the appellant, it is clear from the order under appeal, first, that those difficulties were not substantiated by any evidence and, secondly, the fact that Camar had had to seek financial assistance in order to survive held, in any event, little relevance for the assessment of the appellant's economic circumstances and specific operational possibilities, since such assistance constituted a purely internal operation within the group to which it belonged.

19 As to the volume of banana imports effected by the appellant, it is clear from the order under appeal that, while Camar's business underwent a contraction in 1993, its imports none the less showed an improvement in 1995 and 1996 and reached 20 000 tonnes in 1997 (27 000 tonnes if imports of another undertaking belonging to the same group as Camar are included). It was also found that the reduction in imports during 1991 and the following years was partly explained by the loss of competitiveness of Somali bananas and that the increase in transport costs alleged by Camar had not been proved.

20 For all those reasons, it was held at paragraphs 54 and 55 of the order under appeal that there was no imminent risk of serious and irreparable damage to Camar, either in terms of survival or of serious jeopardy to its situation on the market, and that, since the circumstances giving rise to urgency had not been made out, the application for interim measures had to be dismissed, without there being any need to consider whether the main action appeared prima facie well founded.

## Arguments of the parties

21 In this appeal, the appellant relies solely on the plea that Article 30 of Regulation No 404/93 and Article 186 of the EC Treaty were wrongly applied.

22 The plea is presented in two parts.

23 In the first part, the appellant complains essentially about the way in which the judge hearing the application assessed its material circumstances in order to evaluate the urgency of its request. In the second part, it claims that the judge should himself have directly applied Article 30 of Regulation No 404/93, under which the conditions of urgency are less strict, instead of referring to the conditions for the application of Article 186 of the Treaty.

24 As to the first part of the plea, the appellant claims more specifically that the judge hearing the application did not confine himself, as he should have done, to taking into account the enormous contraction in the volume of its imports from third countries as a Category B importer, which occurred in 1997 because of an abnormal reference period, but also took into account all its other imports effected in the same year.

25 It is further claimed that the judge hearing the application was also wrong to take account of the imports of another company belonging to the same group as Camar. In this respect, the appellant refers to two judgments of the Corte di Cassazione (Italian Court of Cassation) which it considers relevant since this case concerns companies governed by Italian law and from which it appears that the fact that joint stock companies have common shareholders does not preclude separate legal personalities and distinct company articles.

26 In the second part of the plea, the appellant relies on Case C-68/95 *T. Port* v *Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065 to argue that, when, as in this case, the Commission refuses to act pursuant to Article 30 of Regulation No 404/93 and there is an application for interim measures to make good this failure, the judge hearing the application should take the place of the Commission in applying Article 30, even as a precautionary measure. In such a case, urgency cannot be assessed according to the usual criteria applied in granting interim measures, but automatically follows when an importer is faced with a reduction in the number of licences allocated to it for reasons unconnected with its own decisions or the uncertainties normally associated with business. The appellant insists in particular on the fact that, in this context, it is not necessary for the survival of the undertaking concerned to be in jeopardy. It also adds that such damage is by definition irreparable, since it results from unjust and discriminatory rules and relates to the field of fundamental freedoms.

27 The other parties to the appeal claim, first, that the appellant's arguments seeking to question the assessment of the facts by the judge hearing the application must be dismissed as inadmissible.

28 The Kingdom of Spain also considers the application to be inadmissible on the ground that, in pleading that Article 30 of Regulation No 404/93 was wrongly applied, the appellant raises the substantive question which is before the Court of First Instance in the main action.

29 Secondly, the parties are concerned to refute the appellant's argument that the judge hearing the application should have directly applied Article 30 of Regulation No 404/93. According to the Commission and the Council, the *T. Port* judgment did not change the conditions of application of Article 186 of the Treaty in the light of Article 30 of Regulation No 404/93. The Council adds that, if the appellant's argument were accepted, the admission of a prima facie case would automatically result in an admission of urgency.

30 The Council and the Kingdom of Spain also consider that, by applying Article 30 of Regulation No 404/93, the judge hearing the application would not be granting interim measures, but would be prejudging the main action. The Kingdom of Spain is furthermore of the view that such action by the judge would encroach upon the powers of the Commission under Article 30 of Regulation No 404/93, since the Commission enjoys broad discretion.

31 The Commission adds finally that, even if the judge hearing the application was obliged to apply Article 30 of Regulation No 404/93, it would be necessary to find that the conditions for the application of that provision were not in any case fulfilled.

32 Since the parties' written observations in this case provide sufficient information to decide the appeal, there is no need to hear oral argument.

## Assessment

33 It should be recalled at the outset that, under Article 168a of the Treaty and Article 51 of the EC Statute of the Court of Justice, an appeal is to be limited to points of law and may lie only on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant or the infringement of Community law by the Court of First Instance.

34 Those provisions apply equally to appeals brought under the second paragraph of Article 50 of the EC Statute of the Court of Justice (see the orders of the President in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 18, and in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 44).

35 Consequently, in so far as the first part of the plea put forward in support of the appeal calls into question the way in which the judge hearing the application assessed the appellant's material circumstances, it must be declared inadmissible.

36 As regards the serious and irreparable nature of the damage alleged, the assessment in the order under appeal of the material circumstances of Camar correctly took into consideration the characteristics of the group to which the appellant was linked by way of its shareholders (see the order of the President of the Court of Justice in Case C-12/95 P *Transacciones Marítimas and Others* v *Commission* [1995] ECR I-467, paragraph 12, and of the President of the Court of First Instance in Case T-18/96 R *SCK and FNK* v *Commission* [1996] ECR II-407, paragraph 35).

37 As to the argument founded on the case-law of the Corte di Cassazione, it is sufficient to state that it is clear from the passages cited by the appellant that those cases concern questions on the law governing liability and the law of bankruptcy which are in any event irrelevant in the context of the assessment of the urgency of the interim measures requested.

38 The second part of the plea put forward in support of the appeal, relating to Article 30 of Regulation No 404/93 and the *T. Port* case, does not establish any error of law in the order under appeal.

39 Indeed, it is apparent from paragraph 55 of the order that the application for interim measures was dismissed on the ground of lack of urgency of the measures sought, without any consideration of whether the main action, relating to the conditions of application of Article 30 of Regulation No 404/93, appeared prima facie well founded.

40 Under those conditions, pleas which relate to the existence of a prima facie case, but do not call into question the lack of urgency of the measures sought, cannot form grounds for setting aside, even partially, the order under appeal (see the order of the President in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 31).

41 As to the remainder, the arguments put forward in support of the appeal according to which, in a case of this kind, the judge hearing the application should in any event take the place of the Commission and apply Article 30 of Regulation No 404/93 cannot be accepted.

42 In the *T. Port* case, cited above, the Court essentially stated only that the right to judicial protection includes, in the context of an action for failure to act brought against an institution which has allegedly failed to adopt a measure, the possibility of requesting the Community judicature to take interim measures under Article 186 of the Treaty.

43 Contrary to what is claimed by the appellant, it does not follow from that decision that, in such a case, the conditions to which the adoption of interim measures by the judge hearing the application is subject would differ from the general conditions for interim relief.

44 While Article 30 of Regulation No 404/93 permits, and, in certain circumstances, requires the Commission to take definitive measures to regulate cases of unreasonable hardship, the judge hearing the application for interim measures in the context of a main application brought against the Commission for annulment or declaration of failure to act, must adopt only the interim measures which appear necessary in order to avoid, pending the Court's decision on the substance, the applicant suffering serious and irreversible damage which could not be made good by a judgment in the main proceedings in favour of the applicant.

45 The appellant's argument must thus be rejected in so far as it would lead the judge hearing the application to do more than adopt only the measures necessary to ensure that the final decision subsequently to be given in the main action will be fully effective.

46 Finally, the appellant's argument that the damage pleaded would be by definition irreparable 'since it is connected with the field of fundamental freedoms' cannot be accepted.

47 It is not sufficient to allege infringement of fundamental rights, in this case the right to property and the right to pursue a professional or trade activity, in the abstract, for the purposes of establishing that the harm which could result would necessarily be irreparable.

48 It follows from all the considerations set out above that the appeal must be dismissed.

## Costs

49 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the appellant has been unsuccessful, it must be ordered to pay the costs of these proceedings.

50 In accordance with Article 69(4) of the Rules of Procedure, the French Republic and the Kingdom of Spain, which intervened, are to bear their own costs.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

**1. The appeal is dismissed.**

**2. Camar Srl shall bear the costs.**

**3. The French Republic and the Kingdom of Spain are to bear their own costs.**

Luxembourg, 15 April 1998.

R. Grass — Registrar

G. C. Rodríguez Iglesias — President