ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
14 August 1998 *

In Case T-43/98 R,

Emesa Sugar (Free Zone) NV, a company incorporated under the law of Aruba, established at Oranjestad, Aruba, represented by Gerard van der Wal, Advocate with a right of audience before the Hoge Raad der Nederlanden, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Council of the European Union, represented by Jürgen Huber and Guus Houttouin, Legal Advisers, acting as Agents, 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,

defendant,

supported by

Commission of the European Communities, represented by Thomas van Rijn, Legal Adviser, 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,

* Language of the case: Dutch.

Kingdom of Spain, represented by Rosario Silva de Lapuerta and Mónica López-Monis Gallego, Abogados del Estado, of the Community Proceedings Service, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

and

French Republic, represented by Claude Chavance, Secretary for Foreign Affairs, with an address for service in Luxembourg at the French Embassy, 8 B Boulevard Joseph II,

APPLICATION for partial suspension of the operation of Council Decision 97/803/EC of 24 November 1997 amending at mid-term Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community (OJ 1997 L 329, p. 50).

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

makes the following

Order

Legal context

1 The island of Aruba is one of the overseas countries and territories ('OCTs') associated with the Community. The association of the OCTs with the Community is regulated by Part Four of the EC Treaty and by Council Decision 91/482/EEC of

25 July 1991 on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1, 'the OCT decision'), adopted pursuant to the second paragraph of Article 136 of the Treaty.

2 Article 133(1) of the Treaty provides that customs duties on imports into the Member States of goods originating in the OCTs are to be completely abolished in accordance with the provisions of the Treaty.

3 The original version of Article 101(1) of the OCT decision read as follows:

'Products originating in the OCTs shall be imported into the Community free of customs duties and charges having equivalent effect.'

4 Article 102 of the same decision provided as follows:

'The Community shall not apply to imports of products originating in the OCTs any quantitative restriction or measure having equivalent effect.'

5 Article 108(1), first indent, of the OCT decision refers to Annex II thereof ('Annex II') for the definition of the concept of originating products and the methods of administrative cooperation relating thereto.

6 Under Article 1 of Annex II, a product is considered to originate in the OCTs, the Community or the African, Caribbean and Pacific States ('the ACP States') if it has been either wholly obtained or sufficiently worked or processed there.

7 Article 6(2) of the same annex provides that, when products wholly obtained in the Community or in the ACP States undergo working or processing in the OCTs, they are to be considered as having been wholly obtained in the OCTs. Under this rule, known as 'ACP/OCT cumulation of origin', sugar originating in the ACP States which had undergone some degree of working or processing in the OCTs could be imported into the Community free of customs duties.

8 Article 240(1) of the OCT decision states that the decision is to apply for a period of 10 years from 1 March 1990. However, Article 240(3)(a) and (b) provides that before the end of the first five years the Council, acting unanimously on a proposal from the Commission, is, in addition to the financial assistance from the Community for the second five-year period, to establish, where necessary, any amendments to the OCT decision following notification to the Commission by the relevant authorities of the OCTs or proposed by the Commission in the light of its own experience or as a result of amendments under negotiation between the Community and the ACP States.

9 In a communication to the Council on the amendment at mid-term of the association of the OCTs with the European Community [document COM(94) 538 final, of 21 December 1994], the Commission recommended various adjustments to the association.

10 On 16 February 1996 it presented to the Council a proposal for a Council decision amending at mid-term the OCT decision (OJ 1996 C 139, p. 1). In the sixth and seventh recitals of the proposal the Council stated that free access for all products

originating in the OCTs and the maintenance of ACP/OCT cumulation of origin had given rise to the risk of conflict between two Community policy objectives, namely the development of the OCTs and the common agricultural policy.

11 Concerned to resolve this risk of conflict, the Council adopted decision 97/803/EC of 24 November 1997 amending at mid-term Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community (OJ 1997 L 329, p. 50, 'the contested decision').

12 In the seventh recital of that decision the Council observed as follows:

'... fresh disruption should be avoided by taking measures to create a framework conducive to regular trade flows and at the same time compatible with the common agricultural policy'.

13 For that purpose, the contested decision added Articles 108a and 108b to the OCT decision, allowing the ACP/OCT cumulation of origin for rice and sugar respectively, for a specified annual quantity.

14 Accordingly, Article 108b(1) and (2) of the OCT decision reads as follows:

'1. The ACP/OCT cumulation of origin referred to in Article 6 of Annex II shall be allowed for an annual quantity of 3 000 tonnes of sugar ...

2. For the purposes of implementing the ACP/OCT cumulation rules referred to in paragraph 1, forming sugar lumps or colouring shall be considered as sufficient to confer the status of OCT-originating products.'

15 The contested decision also amended Articles 101(1) and 102 of the OCT decision, which now reads as follows: :

'Article 101

1. Products originating in the OCTs shall be imported into the Community free of import duty.

...

Article 102

Without prejudice to Articles 108a and 108b, the Community shall not apply to imports of products originating in the OCTs any quantitative restriction or measure having equivalent effect.'

Facts and procedure

16 Since April 1997 the applicant has operated a sugar factory on the island of Aruba and has exported sugar to the Community.

17 As sugar is not produced in Aruba, the applicant purchases white sugar from cane sugar refineries in ACP States. The purchased sugar is transported to Aruba, where it undergoes working and processing operations, after which the product is considered finished. These operations consist in purifying the sugar, milling it (which means bringing it to the grade required by the customer's specifications) and packaging it. The applicant states that its factory has a minimum processing capacity of 34 000 tonnes of sugar per year.

18 By application lodged at the Court Registry on 10 March 1998, the applicant brought an action under the fourth paragraph of Article 173 of the Treaty for the partial annulment of the contested decision.

19 By separate document registered at the Court Registry on 10 April 1998, the applicant also initiated proceedings under Article 185 of the Treaty for suspension of the operation of Article 1, points 28, 30, 32 and 60, of the contested decision until the Court gives judgment on the substance of the case and, in the alternative, proceedings under Article 186 of the Treaty for appropriate interim measures.

20 The Council submitted written observations on the application for interim measures on 5 May 1998.

21 By applications received by the Court Registry on 23 April, 4 June and 12 June 1998 respectively, the Kingdom of Spain, the Commission and the French Republic sought leave to intervene in the proceedings in support of the form of order sought by the defendant. By orders of 12 May, 15 June and 16 June 1998 the President of the Court of First Instance granted leave to intervene in the proceedings for interim measures.

22 By application registered at the Court Registry on 8 May 1998, the Government of Aruba, represented by P. V. F. Bos and M. M. Slotboom, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe, sought leave to intervene in these proceedings in support of the form of order sought by the applicant.

23 The last-mentioned application was served on the parties to the main proceedings in accordance with Article 116(1) of the Rules of Procedure.

24 By letter lodged at the Court Registry on 12 May 1998, the applicant stated that it had no objection to the application in question. The Council lodged no observations on the application within the time allowed for the purpose.

25 By fax of 27 May 1998 the Court Registry requested the Government of Aruba to attend the hearing, but did not state any view on the application for leave to intervene. A copy of the application for interim measures was served on the Government, together with the Council's observations.

26 The parties presented oral argument to the Court on 22 June 1998.

Law

The application for leave to intervene

27 Aruba is expressly mentioned in Annex IV to the Treaty in connection with the OCTs to which the provisions of Part Four of the Treaty apply.

28 On this point, Articles 132(1) and 133(1) of the Treaty provide as follows:

'Article 132

1. Member States shall apply to their trade with the [OCTs] the same treatment as they accord each other pursuant to this Treaty.

...

Article 133

1. Customs duties on imports into the Member States of goods originating in the [OCTs] shall be completely abolished in conformity with the progressive abolition of customs duties between Member States in accordance with the provisions of this Treaty.'

29 It should be observed that, in its judgment in Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 92, now the subject of an appeal to the Court of Justice (C-390/95 P), the Court of First Instance found that the implementation of the association arrangements between the OCTs and the Community, described in Articles 131 to 135 of the Treaty, was a 'dynamic process' the detailed rules for the application of which were, under the second paragraph of Article 136 of the Treaty, to be defined by a decision of the Council.

30 The Court stressed (paragraph 93) that the implementing provisions thus adopted by the Council must serve to strengthen the association of the OCTs in order to increase trade and to promote jointly economic and social development, without, however, hindering the adoption of a common policy in the sphere of agriculture.

31 Finally, the Court added (paragraph 94) that the OCT decision had enacted for the first time as a principle that there should be free access to the Community for agricultural products originating in the OCTs.

32 However, Article 108b of the OCT decision, which was inserted by the contested decision, lays down a quantitative restriction on imports into the Community of sugar from the OCT States, by fixing the annual quantities which may be covered by the ACP/OCT cumulation of origin rule.

33 Since Aruba, as an OCT, can benefit from the trade regime established by the provisions of Part Four of the Treaty and by the OCT decision, and since, according to the applicant, the contested decision infringed Articles 132 and 133 of the Treaty, it must be accepted that Aruba has an interest in the result of the case within the meaning of the second paragraph of Article 37 of the EC Statute of the Court of Justice, which is applicable to the Court of First Instance pursuant to Article 46 of that Statute.

34 The application of the Government of Aruba for leave to intervene in support of the form of order sought by the applicant in these proceedings for interim measures must therefore be allowed.

The application for interim measures

35 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 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), the Court may, it if considers that the circumstances so require, order that the operation of a contested act be suspended or prescribe any necessary interim measures.

36 Article 104(1) of the Rules of Procedure states that an application to suspend the operation of any 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. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is not fulfilled (order of 14 October 1996 in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30).

37 In the present case it seems expedient to consider the requirement of urgency first.

Arguments of the parties

38 The applicant contends that suspension of the operation of the contested decision is necessary to prevent serious and irreparable damage to itself.

39 The annual quantity of sugar which enjoys the benefit of the ACP/OCT cumulation of origin rule, fixed by the contested decision as 3 000 tonnes for the entire sugar industry of the OCTs (see paragraph 14 above) is equivalent to the monthly production worked and processed in the applicant's factory and does not even assure the profitability of a single sugar factory in the OCTs.

40 The operation of the OCT decision, as amended by the contested decision, has already led to the cessation of the applicant's trading operations in Aruba and the closure of its factory. This is a consequence of the quantitative restriction introduced by the contested decision and of the exclusion of the milling operation (see paragraph 17 above) from the list of working or processing operations judged sufficient for ACP sugar to be deemed to have originated in the OCTs.

41 The cessation of the applicant's business also led to the dismantling of its factory because the machines were 'mothballed'.

42 Basing itself *inter alia* on the orders made on 17 October 1997 (Case 97/1405) and 19 December 1997 (Case 97/1657) by the President of the Arrondissementsrechtbank 's Gravenhage, the applicant contends that the damage it is now suffering as a result of the contested decision is serious and irreparable. It observes that, according to the orders, it was found to be 'threatened by serious and totally irreparable damage'.

43 According to the applicant, the damage suffered by it is serious because the total cessation of its business activities will lead to the cancellation of the contracts with its buyers, the loss of its market share, the premature termination of supply contracts with the cane sugar producer in Trinidad and Tobago, a loss of confidence by its investors, the loss of loan facilities, and redundancies. Consequently, substantial financial loss can be envisaged for the applicant and its shareholders.

44 Since the opening of the Aruba factory in April 1997, approximately 7 500 tonnes of sugar from ACP States has been processed by the applicant and exported to the Community. However, since 1 December 1997 the contested decision has made exports to the Community impossible and reduced the applicant's turnover to zero.

45 The nature of the investments made and the under-utilisation of the factory mean that the applicant cannot await the outcome of the main proceedings. The applicant claims that, as its business activities have been suspended, the fact that loans it obtained to finance its business will fall due for repayment will in all probability cause it to become insolvent unless its application for interim measures is granted.

46 The damage suffered by the applicant is also irreparable. First, it is particularly difficult to assess the present damage. Second, the reparation which it could obtain could hardly restore it to the position it held on the market in 1997 (order of 12 July 1990 in Case C-195/90 R *Commission* v *Germany* [1990] ECR I-3351).

47 Even should it be shown, at this stage of the proceedings, that the damage suffered by the applicant is purely pecuniary in nature, which it is not, this would not mean that its application for interim measures must be dismissed on that ground.

48 It is clear from the case-law that the judge hearing an application for interim measures must consider, on the basis of the particular circumstances of each case, the question whether the person concerned risks suffering damage which cannot be made good when the judgment in the main proceedings is given.

49 This question must also be considered when the alleged damage is purely pecuniary (order of 29 September 1993 in Case T-497/93 R II *Hogan* v *Court of Justice* [1993] ECR II-1005). The possibility of bringing an action for damages under Article 215 of the Treaty does not mean that the alleged damage is neither serious nor irreparable (order of the President of the Court of Justice in Case 232/81 R *Agricola Commerciale Olio and Others* v *Commission* [1981] ECR 2193).

50 The applicant claims that, as it is threatened with insolvency (order of 26 October 1994 in Joined Cases T-231/94 R, T-232/94 R and T-234/94 R *Transacciones Marítimas and Others* v *Commission* [1994] ECR II-885, paragraph 42) or, at least, has to bear an exceptionally heavy financial burden pending a judgment on the merits in the main proceedings (order of 25 August 1994 in Case T-156/94 R *Aristrain* v *Commission* [1994] ECR II-715, paragraph 33), the urgency criteria must be held to be satisfied in the present case.

51 The Council contends that the applicant has not proved that the condition of urgency has been satisfied.

52 First, the alleged damage is purely financial. It cannot therefore be regarded as irreparable because financial compensation may be awarded at a later date.

53 Second, the applicant has not sufficiently clarified and substantiated its financial situation for the judge hearing this application for interim measures to grant its application for suspension.

54 Finally, the applicant has not proved to the requisite legal standard that there is a causal link between the contested decision and the alleged serious and irreparable damage. The damage in the present case is attributable entirely — or at least in large measure — to the choice made by the applicant because, according to the Council, the applicant knew or should have known the potential consequences of its conduct (judgments in Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, and Joined Cases C-13/92 to C-16/92 *Driessen en Zonen and Others* [1993] ECR I-4751).

Findings of the President

55 The judge hearing an application for interim measures must consider whether annulment of the contested act by the Court would make it possible to reverse the situation brought about by the immediate operation of that act and conversely whether suspension of its operation would be such as to prevent it from being fully effective in the event of the main application being dismissed (see the order of 11 May 1989 in Joined Cases 76/89 R, 77/89 R and 91/89 R *Radio Telefis Eireann and Others* v *Commission* [1989] ECR 1141, paragraph 15).

56 It has been consistently held that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for those measures. It is for the party seeking suspension of the operation of a contested decision to prove that it cannot wait for the outcome of the main proceedings without suffering damage that would entail serious and irreparable consequences (see the order of 12 May 1995 in Joined Cases T-79/95 R and T-80/95 R *SNCF and British Railways* v *Commission* [1995] ECR II-1433, paragraph 36).

57 For the purpose of determining the requirements concerning evidence in the present case, it must be observed that Articles 108a and 108b, which introduce annual tariff quotas for rice and sugar exports to the Community, amend the OCT decision which, before it was amended by the contested decision, laid down no restrictions on the application of the ACP/OCT cumulation of origin rule so far as rice and sugar were concerned.

58 It is clear from the seventh recital of the contested decision that the Council inserted the new articles in the OCT decision in order to avoid a risk of conflict between two objectives of the Treaty, namely the development of the OCTs and the common agricultural policy. The establishment by the OCT decision of free access for all products of OCT origin and of ACP/OCT cumulation of origin had resulted in serious disturbances on the Community market, which had on several occasions led to the adoption of safeguard measures.

59 As the Council and the French Government pointed out at the hearing, the tariff quotas in question were introduced in order to keep imports into the Community of sugar from the OCT within limits compatible with the equilibrium of the Community sugar market. The absence of any quantitative restriction whatsoever could jeopardise that equilibrium to the detriment of Community producers. The Commission and the French Government also stated that any quantity of sugar imported in excess of the present import limits would create a surplus on the Community market, and this was not contested by the applicant. That being so, equilibrium could only be restored by reducing the production quota of Community producers.

60 In the present case it should also be pointed out that, save in a situation of manifest urgency, the judge hearing an application for interim measures may not, without running the risk of encroaching upon the Council's power of assessment,

override that institution's assessment as to the choice of the most appropriate measure to prevent disruption of the Community market for sugar, whilst still taking account of the requirements imposed by the association of the OCTs with the Community (order of 2 March 1998 in Case T-310/97 R *Government of the Netherlands Antilles* v *Council* [1998] ECR II-455, paragraph 64).

61 It follows that the applicant's request cannot be granted unless the urgency of the measures sought appears undeniable (order of 21 March 1997 in Case T-179/96 R *Antonissen* v *Council and Commission* [1997] ECR II-425, paragraph 22, and the order in the case of *Government of the Netherlands Antilles* v *Council*, cited above, paragraph 65).

62 That is not, at first sight, the situation here.

63 The damage alleged by the applicant is purely financial.

64 According to the applicant, it is made up of three components.

65 First, there is a loss of earnings connected with the introduction of quantitative restrictions as regards the application of the ACP/OCT cumulation of origin rule. Second, the contested decision entails a loss in investment terms. If the Court annuls the decision, the second head of damage would however be limited to depreciation for the duration of the interruption of production and sales.

66 The applicant also claims 'other damage' connected with the adoption of the contested decision. This consists in particular of costs connected with the termination or suspension of the sugar supply contract concluded by the applicant with its supplier for the period 1997 to 2002, costs connected with the termination of contracts for the sale of sugar to buyers, costs connected with the termination of financing agreements and the costs of maintaining the undertaking during the interim period, such as rents, maintenance expenses and wages and salaries, totalling ECU 11 415 per month.

67 In reply to a question put to it by the President of the Court at the hearing, the applicant confirmed, moreover, that the problems connected with the possible resumption of sugar production are purely of a practical nature.

68 However, the applicant added that there could be a legal problem in that connection, that is to say, a possible decision by the Council to change the relevant legal framework when it reviews its OCT decision, which will cease to apply on 1 March 2000 at the latest.

69 However, as this is merely a hypothesis based on uncertain future events, it cannot justify the grant of interim measures at the present moment.

70 In the light of the foregoing considerations, it must be found that the damage alleged can in principle be quantified and can be later made good if the applicant is successful in the main proceedings.

71 It is clear from the case-law that purely financial damage cannot, save in exceptional circumstances, be regarded as irreparable since it can be made good by pecuniary compensation (see the order of 18 October 1991 in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 24).

72 It has been consistently held that the existence of exceptional circumstances may be found where it appears that, without the interim measure sought, the party concerned could be placed in a situation liable to endanger its very existence or to alter its market share irreversibly (order of 7 November 1995 in Case T-168/95 R *Eridania and Others* v *Council* [1995] ECR II-2817, paragraph 42).

73 With regard to the economic survival of the undertaking, the applicant states that the implementation of the contested decision has led to the immediate cessation of trading and the complete closure of its undertaking. According to the applicant, the employees have already left the factory and the machines have been 'mothballed', while the supply and sales contracts have been provisionally suspended.

74 The applicant states that it runs the risk of having to file a statement of its affairs and that, if the application for interim measures is dismissed, it may be adjudged insolvent within weeks of the order dismissing the application.

75 However, the applicant has adduced no evidence to substantiate the last-mentioned assertion. Neither the documents in the file nor the numerous documents submitted scarcely one week before the hearing — which were rejected as no reason was given for their belated submission — contain sufficient information on the applicant's assets and liabilities to enable the President of the Court to assess its

financial situation and to decide whether there are serious grounds for believing that, without interim measures, the applicant cannot survive until the Court gives judgment in the main proceedings.

76 Furthermore, the applicant has furnished no information on the profitability of its undertaking and, in particular, has not shown what annual quantity of sugar would be absolutely necessary to ensure its survival until the outcome of the main proceedings. The statement in its pleadings that it must be able to export 34 000 tonnes of sugar a year to remain viable is merely an unproven assertion and therefore no conclusions can be drawn from it.

77 It follows that the applicant has not discharged the burden, which falls upon it, of proving that it is threatened with insolvency.

78 In any event, even assuming that the applicant were put into compulsory liquidation before the Court gives judgment in the main proceedings, it must be said that, in the present case, the forced dissolution of the company and, consequently, the forced realisation of its assets can only lead, in relation to its present situation, to additional damage of a purely financial nature for which reparation may be obtained later.

79 As the applicant has itself stated, the implementation of the contested decision has already led to the temporary cessation of trading and the closure of its undertaking, resulting in the technical redundancy of its employees (see paragraph 73 above). In those circumstances, the forced dissolution of the applicant would not entail the same social and economic consequences as the closure of an undertaking still operating on the market, consequences which the grant of interim measures is designed to prevent.

80 In view of the very special circumstances of this case, the President of the Court therefore considers, having regard to the case-law cited in paragraph 71, that even the threat of insolvency, assuming it to be established, could not justify suspension of the operation of the decision.

81 As regards the alleged risk of an irreversible change in its market share, it is sufficient to observe that the applicant has put forward nothing to suggest that, if the contested decision were annulled, it would be unable to find new outlets in the Community and to recover its market share there.

82 It follows that the applicant has not shown that it risks suffering serious and irreparable damage.

83 The requirement of urgency has therefore not been satisfied in the present case.

84 The application for interim measures must therefore be dismissed and it is unnecessary to examine the other pleas and arguments put forward by the applicant in order to justify suspension of the operation of the contested decision.

85 Finally, for the same reasons as those set out above, the application for such (unspecified) interim provisional measure as may be appropriate must also be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The Government of Aruba is granted leave to intervene in these proceedings for interim measures in support of the form of order sought by the applicant.**

2. **The application for interim measures is dismissed.**

3. **The costs are reserved.**

Luxembourg, 14 August 1998.

H. Jung — B. Vesterdorf

Registrar — President