

ORDER OF THE COURT (Third Chamber)

14 December 2004^{*}

In Case C-1/04 SA,

APPLICATION for authorisation to serve an interim garnishee order on the Commission of the European Communities, brought on 15 March 2004,

Tertir-Terminais de Portugal SA, established in Terminal do Freixieiro (Portugal), represented by G. Vandersanden, C. Houssa and L. Levi, *avocats*, and by F. Gonçalves Pereira, *advogado*, with an address for service in Brussels (Belgium),

applicant,

^{*} Language of the case: French.

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Commission of the European Communities, represented by I. Martinez del Peral Cagigal and F. Clotuche-Duvieusart, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, S. von Bahr (Rapporteur), J. Malenovský and A. Ó Caoimh, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By its application, Tertir-Terminais de Portugal SA ('Tertir-Terminais'), a company incorporated under Portuguese law, seeks authorisation from the Court to serve an interim garnishee order on the Commission of the European Communities in

respect of sums due from the European Community to the Republic of Guinea-Bissau as compensation under Council Regulation (EC) No 249/2002 of 21 January 2002 concerning the conclusion of the Protocol establishing the fishing opportunities and the compensation provided for in the Agreement between the European Economic Community and the Government of the Republic of Guinea-Bissau on fishing off the coast of Guinea-Bissau for the period 16 June 2001 to 15 June 2006 (OJ 2002 L 40, p. 1).

The facts

- 2 Tertir-Terminais sets out, in its application, that a contract was concluded between the Republic of Guinea-Bissau and itself, relating to the right to operate the port of Bissau within the framework of a public service concession.

- 3 The performance of that contract gave rise to a dispute between the parties. That dispute was referred to an arbitration tribunal which made an award that the Republic of Guinea-Bissau owed Tertir-Terminais various sums, the principal totalling about EUR 6 000 000. The award was made in France.

- 4 Tertir-Terminais served the Commission with an interim order in respect of the sums due from the Community to the Republic of Guinea-Bissau under Regulation No 249/2002.

- 5 The Commission informed Tertir-Terminais that it did not intend to give effect to the garnishee order since it considered that its execution would prejudice the

functioning and independence of the Communities which Article 1 of the Protocol on the Privileges and Immunities of the European Communities (hereinafter 'the Protocol') is intended to prevent.

The application to the Court

- 6 Tertir-Terminais asks the Court to authorise it, under Article 1 of the Protocol, to serve an interim garnishee order on the Commission in respect of the sums due from the Community to the Republic of Guinea-Bissau as compensation under Regulation No 249/2002.

- 7 Tertir-Terminais submits that the Court's construction hitherto of Article 1 of the Protocol goes beyond the immunity from execution recognised by international law and prejudices the fundamental right to a fair hearing under Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950, and the right to property under Article 1 of the First Protocol to that Convention.

- 8 In the alternative, Tertir-Terminais submits that the garnishee order in question is not such as to prejudice the functioning or independence of the Communities. It argues that the compensation referred to in Regulation No 249/2002 is merely payment for a service, namely the fishing opportunities provided by the Republic of Guinea-Bissau. Even if that compensation formed part of a Community policy the interim garnishee order could not prejudice the Communities' functioning and independence.

- 9 The Commission asks the Court to dismiss Tertir-Terminais's application.

Findings of the Court

- 10 Article 1 of the Protocol provides that '[t]he property and assets of the Communities shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice'. That provision has been construed by the Court as being intended to ensure that there is no interference with the functioning and independence of the Communities (orders in Case 1/88 SA *Générale de Banque v Commission* [1989] ECR 857, paragraph 2; Case C-1/00 SA *Cotecna Inspection v Commission* [2001] ECR I-4219, paragraph 9; and Case C-1/02 SA *Antippas v Commission* [2003] ECR I-2893, paragraph 12).
- 11 It follows from that construction of Article 1 of the Protocol that the Communities' immunity is not absolute and that a measure of constraint such as a garnishee order may be authorised if it is not liable to interfere with the Communities' functioning (see, for example, the garnishee order authorised by the order in *Générale de Banque v Commission*).
- 12 Such a construction complies with the rules of general international law applicable in the area of the immunity of States and international organisations.

- 13 It follows that a decision of the Court refusing to authorise a measure of constraint and adopted in accordance with that construction cannot be regarded as an unlawful or disproportionate interference with the exercise of the human rights protected by the various international treaties and, more particularly, the right to property or the right of access to a court which is an integral part of the right to a fair hearing.
- 14 As is clear from the Court's case-law, the functioning of the Communities may be impeded by measures of constraint which affect the financing of common policies or the implementation of action programmes established by the Communities (*Générale de Banque v Commission*, paragraphs 9 and 13; *Cotecna Inspection v Commission*, paragraph 12; and *Antippas v Commission*, paragraph 15).
- 15 Under Article 3(1)(e) EC, the activities of the Community include a common policy in the sphere of fisheries, the objectives of which are set out in Articles 32 EC to 38 EC.
- 16 The Community has concluded a large number of fishing agreements, on the basis, particularly, of Article 37 EC, with non-member countries, which provide for fishing opportunities for the Member States in the territorial waters of those countries in exchange for compensation.
- 17 Such an agreement, concluded between the Community and the Republic of Guinea-Bissau on 27 February 1980 on fishing off the coast of that State, was approved by Council Regulation (EEC) No 2213/80 of 27 June 1980 (OJ 1980 L 226, p. 33).

- 18 By Regulation No 249/2002, the Council approved the conclusion of a protocol establishing the fishing opportunities and the compensation for the period from 16 June 2001 to 15 June 2006.
- 19 Tertir-Terminais's application targets the European Community's funds intended to be paid to the Republic of Guinea-Bissau as compensation under that regulation.
- 20 It must be held that a garnishee order, even an interim one, is capable of affecting the functioning of the common fisheries policy.
- 21 First, such a measure of constraint could lead to the suspension of the fishing agreement with the Republic of Guinea-Bissau. Under Article 6 of the protocol approved by Regulation No 249/2002, the Republic would be entitled to suspend the application of that protocol if the Community failed to make the payments prescribed as compensation for the fishing opportunities.
- 22 Secondly, such an interim garnishee order might adversely affect relations between the Community and non-member countries in the sphere of fisheries, particularly as regards the Community's ability to conclude fishing agreements with those countries.
- 23 In those circumstances, it must be held that authorisation to serve an interim garnishee order on the Commission might prejudice the functioning and independence of the European Communities.

24 It follows that Tertir-Terminais's application must be dismissed.

Costs

25 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Tertir-Terminais has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby orders:

- 1. The application is dismissed.**
- 2. Tertir-Terminais de Portugal SA shall pay the costs.**

Signatures.