

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
9 August 1999 *

In Joined Cases T-38/99 R, T-39/99 R, T-40/99 R, T-41/99 R, T-42/99 R, T-45/99 R and T-48/99 R,

Sociedade Agrícola dos Arinhos Lda, a company incorporated under Portuguese law, established in Lisbon,

Sociedade Agrícola do Monte da Aldeia Lda, a company incorporated under Portuguese law, established in Lisbon,

António José da Veiga Teixeira, farmer, residing at Coruche, Portugal,

Sociedade Agrícola do Monte da Senhora do Carmo SA, a company incorporated under Portuguese law, established in Almeirim, Portugal,

Sociedade Agrícola de Perescuma SA, a company incorporated under Portuguese law, established in Almeirim,

José de Barahona Nuncio, businessman, residing at Evora, Portugal, and

Francisco Luís Pinheiro Caldeira, farmer and businessman, residing at Campo Maior, Portugal,

represented by Carlos Botelho Moniz and Júlia Rôla Roque, of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicants,

* Language of the case: Portuguese.

V

Commission of the European Communities, represented by Ana Maria Alves Vieira and Gérard Berscheid, of its Legal Service, acting as Agents, assisted by Vasco Airão, of the Porto Bar, 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, first, for suspension pursuant to Article 185 of the EC Treaty (now Article 242 EC) of operation of Article 2(a) of Commission Decision 98/653/EC of 18 November 1998 concerning emergency measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal (OJ 1998 L 311, p. 23), inasmuch as it prohibits the dispatch from Portugal to Spain and France of fighting bulls intended for cultural and sporting events held in those two Member States, and, second, for the grant of authorisation pursuant to Article 186 of the EC Treaty (now Article 243 EC), subject to certain conditions, for the dispatch of those animals from Portugal to Spain and France,

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

makes the following

Order

Facts and procedure

- 1 The applicants are Portuguese breeders of fighting bulls. Those bulls are intended for cultural and sporting events which are organised only in Portugal, Spain and France. That breed of bulls is therefore found only in those three Member States.
- 2 On 18 November 1998, the Commission adopted Decision 98/653/EC concerning emergency measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal, which is addressed to the Member States (OJ 1998 L 311, p. 23; 'the contested decision').
- 3 In recital 3 in the preamble to the contested decision, the Commission states that missions on issues related to bovine spongiform encephalopathy ('BSE') were carried out in Portugal in 1996, from which it was apparent that not all risk factors were adequately managed. In addition, a follow-up mission, conducted by the Food and Veterinary Office from 28 September to 2 October 1998, confirmed certain continued shortcomings in the enforcement of the measures to control the risk factors. According to the Commission, the sharp increase in the incidence of BSE, in particular since June 1998, raises serious concerns with regard to the development of the disease in the near future. On the basis of that mission, the Commission concluded that due to deficiencies thus found to exist in the implementation of Community legislation on prevention, surveillance and eradication of the disease, no adequate guarantees can be provided regarding the BSE history of the herds of origin and herds through which bovine animals pass and regarding the dams of bovine animals.

- 4 It is evident from recital 6 in the preamble to the contested decision that the level of risk of propagating or introducing the disease from live cattle to uninfected animal populations is deemed to be considerable.

- 5 Article 2 of the contested decision provides:

‘Portugal shall ensure that the following are not dispatched from its territory to other Member States or to third countries:

(a) live bovine animals and bovine embryos;

...’

- 6 Article 16(1) of the contested decision states:

‘This decision shall be reviewed within 18 months after its adoption at the latest, pending an overall examination of the situation, in particular in view of the development of the incidence of the disease and the effective enforcement of the relevant measures, and in the light of new scientific information.’

- 7 By applications lodged at the Registry of the Court of First Instance on 12 February 1999, 13 applicants brought before the Court of First Instance actions for annulment of Article 2(a) of the contested decision, inasmuch as it prohibits the dispatch from Portugal of fighting bulls intended for cultural and sporting events held in Spain and France.
- 8 Those actions were joined when they were registered, in order to form only one single case to which was given the number T-38/99 to T-50/99.
- 9 By separate document lodged at the Registry of the Court of First Instance on 19 April 1999, seven of the applicants in the main proceedings brought, pursuant to Articles 185 and 186 of the EC Treaty (now Articles 242 EC and 243 EC) and Article 104 et seq. of the Rules of Procedure of the Court of First Instance, an application for interim measures. They claim that the judge hearing the application should:
- suspend the operation of Article 2(a) of the contested decision, inasmuch as it prohibits the dispatch from Portugal to Spain and France of fighting bulls intended for cultural and sporting events held in those two Member States;
 - adopt any other interim measure which he deems appropriate;
 - order the Commission to pay the costs in their entirety.

- 10 The Commission lodged its observations on the present application for interim measures on 6 May 1999. It contends that the judge hearing the application should:

— dismiss the application for interim measures as inadmissible or, in the alternative, unfounded;

— order the applicants to pay the costs.

- 11 By letter of 31 May 1999, the applicants requested that the draft report which was drawn up by the inspectors from the Commission Directorate-General for Consumer Policy and Consumer Health Protection (DG XXIV), following the inspection visit conducted in Portugal from 22 February to 3 March 1999, and entitled ‘Report of a veterinary mission to Portugal with regard to certain prospective measures against BSE, in particular, implementation of Commission Decision 98/653/EC (22 February — 3 March 1999)’, be placed before the Court.

- 12 As regards the system of control applicable to fighting bulls, that draft report (p. 18) states:

‘As regards fighting bulls, according to the information provided on breeding and feeding, there appear to be minimal risks that these animals have been exposed to significant quantities of contaminated [mammalian meat and bone meal], although compounds are usually provided to bulls at least several months before fighting.... On this basis, the mission had a favourable approach on the possible exemption of fighting bulls from the export ban.’

- 13 On 3 June 1999, the judge hearing the application for interim measures granted the applicants' request of 31 May 1999. The draft report was immediately sent to the Commission which was invited to submit its observations.
- 14 In its observations lodged at the Registry of the Court of First Instance on 4 June 1999, the Commission requested that that document be withdrawn from the file or, in the alternative, that it be declared as of no relevance.
- 15 The oral submissions of the parties were heard on 14 June 1999. At the end of that hearing, the judge hearing the application for interim measures granted to the parties a period of three weeks for them to commence negotiations with a view to reaching an arrangement enabling the implementation of a system of control to ensure the effective and complete destruction of the animals in question after the cultural and sporting events.
- 16 On 30 June 1999, the Commission stated that no arrangement had been found with the applicants.
- 17 On 5 July 1999, the applicants lodged their observations on the negotiations with the Commission. They apply, first, for suspension of operation of Article 2(a) of the contested decision, inasmuch as it concerns fighting bulls, and, second, for authorisation to dispatch those animals from Portugal to Spain and France, subject to the strict conditions laid down in the document which is annexed to their observations and entitled 'Guarantees relating to the dispatch of fighting bulls from Portugal to Spain and France'.
- 18 That document, drawn up by the applicants, lays down rules, compliance with which should, in their view, ensure that the dispatch of those animals does not carry any risk to public health.

- 19 On 13 July 1999, the applicants sent to the Registry of the Court of First Instance a supplementary document.
- 20 By decision of the judge hearing the application for interim measures of 21 July 1999, the production in evidence of that new document was denied so that it was neither placed in the file nor sent to the defendant.

Law

- 21 Under Articles 185 and 186 of the Treaty in conjunction 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), the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.
- 22 Article 104(2) of the Rules of Procedure provides that an application for the adoption of interim measures must state the circumstances giving rise to the urgency and the pleas of fact and law establishing a *prima facie* case for the measures applied for. Those requirements are cumulative, so that an application for interim measures must be dismissed if one of them is absent (order of the President of the Court of First Instance of 15 July 1998 in Case T-73/98 R *Prayon-Rupel v Commission* [1998] ECR II-2769, paragraph 25).

Arguments of the parties

Admissibility

- 23 The Commission contends that the applicants have not shown that the contested decision is of individual concern to them, within the meaning of Article 173 of the EC Treaty (now, after amendment, Article 230 EC). Consequently, if the application in the main proceedings is inadmissible, on the ground that the applicants do not have locus standi, the application for interim measures will also be inadmissible, in accordance with settled case-law.

Prima facie case

- 24 The applicants claim that the prohibition on dispatching live bovine animals from Portugal to Spain and France is unlawful in so far as it applies to fighting bulls. In support of their challenge to the validity of the contested decision, the applicants put forward four pleas in law alleging, first, an error on the part of the Commission in that the contested decision is based on mistaken presuppositions, second, infringement of Article 190 of the EC Treaty (now Article 253 EC), third, infringement of Articles 30, 34 and 36 of the EC Treaty (now, after amendment, Articles 28 EC, 29 EC and 30 EC respectively) and fourth, breach of the principle of proportionality.
- 25 In connection with their first plea, the applicants assert that no case of BSE has ever been detected amongst fighting bulls in Portugal. Furthermore, none of the inspection missions undertaken by the Commission in Portugal before the adoption of the contested decision concerned those animals and the specific system of control to which they are subject. Finally, the systems of control ante and post mortem which are applied in Spain and France are absolutely reliable and guarantee the effective destruction of the carcasses if it is justified on health grounds.

- 26 By their second plea, the applicants claim that, as regards the reasons which may justify the application to fighting bulls of the prohibition on dispatching bovine animals from Portugal, the reasoning on which the contested decision is based is inconsistent and inappropriate. The Commission has taken no account of the particular situation of bulls of that breed in its analysis.
- 27 In connection with their third and fourth pleas, the applicants claim that the prohibition on dispatching fighting bulls from Portugal with the aim of preventing the risks of propagating BSE is an ineffective and disproportionate measure. The objective of protecting public health does not require, in the particular case of fighting bulls, the adoption of a measure as restrictive as the absolute prohibition on dispatching those animals from Portugal.
- 28 The applicants submit that, in any event, the risks of propagating BSE are prevented in a completely effective way by the mere destruction of the carcasses of fighting bulls originating in Portugal. In this respect, the applicants claim that compliance with the rules laid down in the document entitled 'Guarantees relating to the dispatch of fighting bulls from Portugal to Spain and France' which they have drawn up and annexed to their observations will be such as to ensure that the dispatch of those animals does not carry any risk to public health.
- 29 The Commission contends that none of the pleas in law put forward by the applicants in support of their action in the main proceedings is well founded.
- 30 First, it contends that, according to the information at its disposal at the beginning of May 1999, the number of cases of BSE in Portugal was 212. Furthermore, the systems of health control and transport are designed solely for the purpose of bull-fights. They do not in any way guarantee that the animal does not carry BSE. Finally, the risks of propagating the disease are particularly high for that type of bovine animals since they are intended to enter the food chain after the fight.

- 31 As regards the applicants' argument that no case of BSE has ever been detected amongst fighting bulls in Portugal, the Commission points out that it takes about five years for the symptoms of that disease to be detected (to that effect, Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265). Inasmuch as the bulls fight in the arena and are slaughtered when they are three or four years old, that argument is not conclusive.
- 32 Second, the Commission denies that the reasoning on which the contested decision is based is inadequate.
- 33 Third, the Commission points out that the purpose of the contested decision is to protect public health, a requirement in the general interest of which it must take account in the exercise of its powers. Furthermore, it would be contrary to the principle of proportionality to provide for a derogation in favour of fighting bulls, since they fulfil the same conditions as those which prompted the adoption of the contested decision.

Urgency

- 34 The applicants claim that, at the time when they lodged the present application for interim measures, all the agreed and/or planned sales for the 1999 bull-fighting season, in France and Spain, were already jeopardised. Moreover, if the operation of the contested decision were not suspended, the applicants would also have their sales of fighting bulls jeopardised for the 2000 season.

- 35 The amount of the damage caused by the contested decision is calculated for each of the applicants as follows:

‘Amount of sales affected by the decision in 1999 (X) + damage resulting from the loss of market shares (Y) (account was taken of the fact that it will be necessary, during the first three years after the ban is lifted, to sell at a price 20% below the market price, in order to regain the positions lost in Spain and France) — residual value from the sale in Portugal of the meat of the animals not exported (Z) (that value corresponds to a price of PTE 250 per kg of meat, in respect of an average weight of 260 kg of meat per bull, namely PTE 65 000, to be multiplied, for each applicant, by the number of bulls affected by the prohibition on dispatch to Spain and France) = total of the direct damage (W).’

- 36 The damage suffered is irreparable for two reasons. First, since the corrida is a unique spectacle, if the applicants’ fighting bulls are excluded from it, that opportunity is lost once and for all. Second, the applicants have not received, and it is not planned that they will receive, financial compensation for the losses resulting from the operation of the contested decision.

- 37 The Commission contends that the damage alleged is of a purely financial nature. Since damage of that kind can always be compensated for if the application in the main proceedings is declared to be well founded, it should not be regarded as serious or irreparable damage, or even as damage which is reparable only with difficulty.

- 38 Moreover, the applicants have at their disposal a substitutable market on the internal market. The Commission also points out the ineffectiveness of the protective measures applied for, since some of the bull-fighting spectacles referred to have already taken place.

The balance of interests

- 39 The applicants claim that the measures applied for do not in any way affect the applicability of the strict regimes of control established in Portugal, Spain and France, in so far as they effectively prevent any risk of disease. They conclude that those measures, if they were granted, would not in any way undermine the public interest.
- 40 The Commission denies that the interests of the applicants may prevail over the objective of the protection of public health.

Findings of the judge hearing the application for interim measures

- 41 It is necessary to examine, first, whether the requirement as to urgency is met.
- 42 In this respect, according to settled case-law, 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 interests of the party applying for those measures. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that kind (order in *Prayon-Rupel v Commission*, cited above, paragraph 36).
- 43 Furthermore, damage of a pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation (order of

the President of the Court of Justice in Case C-213/91 R *Abertal and Others v Commission* [1991] ECR I-5109, paragraph 24; and order of the President of the Court of First Instance in Case T-168/95 R *Eridania and Others v Council* [1995] ECR II-2817, paragraph 42).

- 44 According to the figures put forward by the applicants relating to the total production of fighting bulls in Portugal in 1998, 75% of that production was sold in that country alone for the purpose of sporting and cultural events. The applicants, in their capacity as Portuguese producers of fighting bulls, are not, therefore, at first sight, prevented by the contested decision from releasing the majority of their production for that purpose onto the national market.
- 45 Moreover, it can be inferred from the arguments of the parties that the meat of fighting bulls which would not be exported outside Portugal could, if necessary, be sold in that State, even if that solution is financially less profitable.
- 46 Finally, it should be noted, first, that the damage invoked by each of the applicants is financially quantifiable, in accordance with the method of calculation set out in their application for interim measures, and, second, that the elements which they included in that method of calculation clearly presuppose that their economic survival is not at stake and that the positions lost on the French and Spanish markets can be regained. The damage which they invoke is not, therefore, irreparable.
- 47 It follows that the applicants have not succeeded in proving that the requirement as to urgency was met.

48 Accordingly, the application for interim measures must be dismissed, without its being necessary to rule on the admissibility of the application or to examine whether the other requirements for the grant of the measures applied for are met.

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, 9 August 1999.

H. Jung
Registrar

B. Vesterdorf
President