

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
21 January 2004 *

In Case T-252/03 R,

Fédération nationale de l'industrie et des commerces en gros des viandes (FNICGV), established in Paris (France), represented by P. Abegg, lawyer, with an address for service in Luxembourg,

applicant,

supported by

French Republic, represented by G. de Bergues and F. Million, acting as Agents, with an address for service in Luxembourg,

intervener,

v

Commission of the European Communities, represented by P. Oliver and F. Lelièvre, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

APPLICATION for suspension of operation of Commission Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/C.38.279/F3 — French beef) (OJ 2003 L 209, p. 12) inasmuch as it imposed on the applicant a fine of EUR 720 000 and required it to establish a bank guarantee as a condition for the non-enforcement of that fine,

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

makes the following

Order

Facts and procedure

- ¹ By Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/C.38.279/F3 — French beef) (OJ 2003 L 209, p. 12, hereinafter the ‘Decision’) the Commission found that the applicant had infringed Article 81(1) EC by participating — with the Fédération Nationale de la Coopération Bétail et Viande (FNCBV), which like the applicant represents

cattle slaughterers, and with four federations representing farmers, namely the Fédération Nationale des Syndicats d'Exploitants Agricoles (FNSEA), the Fédération Nationale Bovine (FNB), the Fédération Nationale des Producteurs de Lait (FNPL) and the Jeunes Agriculteurs (JA) — in an agreement aimed at suspending beef imports into France and setting a minimum purchase price for certain categories of beef (Article 1 of the Decision).

- 2 It is apparent from the Decision that on 24 October 2001, during a crisis caused by bovine spongiform encephalopathy (BSE), termed a 'mad cow crisis', the applicant and the FNCBV on the one hand and the FNSEA, the FNB, the FNPL and the JA on the other reached an agreement under which they set minimum prices and undertook to suspend or at least to limit beef imports into France. At the end of November and the beginning of December 2001 the same federations allegedly concluded a verbal agreement with a similar purpose.
- 3 In the Decision the Commission considers that the conclusion of these two agreements constitutes a serious infringement of Article 81 EC. It imposes a fine of EUR 720 000 on the applicant (Article 3 of the decision).
- 4 Article 4 of the Decision lays down that the fine is payable within three months of the date of notification of the decision. The letter of notice, dated 9 April 2003, stated that if the applicant brought an action before the Court of First Instance the Commission would take no recovery measure, provided that the claim bore interest from the date of expiry of the payment period and that an acceptable bank guarantee were provided by that date at the latest.

- 5 By application lodged at the Registry of the Court of First Instance on 7 July 2003, the applicant instituted proceedings for annulment of the fine or, in the alternative, for reduction thereof.
- 6 By separate document lodged at the Registry of the Court of First Instance on the same date, the applicant applied for interlocutory relief in the form of an order suspending the operation of the Decision and of the obligation to provide a bank guarantee as a condition for the non-enforcement of the fine imposed.
- 7 By a document lodged at the Registry of the Court of First Instance on 17 July 2003, the Commission raised a plea of inadmissibility against the main application and against the application for interim measures.
- 8 After having received, on 21 July 2003, the applicant's observations on the plea of inadmissibility raised by the Commission, the President of the Court of First Instance decided to resume the proceedings.
- 9 The Commission submitted its written observations on the application for interim measures on 8 August 2003.
- 10 By application lodged at the Registry on 7 October 2003, the French Republic applied to intervene in support of the form of order sought by the applicant. By order of 14 October 2003 the President of the Court of First Instance granted the French Republic leave to intervene and requested it to present its observations at the hearing.

- 11 The hearing before the President of the Court of First Instance was held on 17 October 2003.
- 12 At the hearing the President of the Court of First Instance authorised the applicant to examine the possibility of paying the fine in instalments and to make a proposal to the Commission in this regard. The parties notified the outcome of their discussions on 7 November 2003.

Law

- 13 By virtue of the combined provisions of Articles 242 EC and 243 EC on the one hand and Article 225(1) EC on the other, 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 other necessary interim measures.
- 14 Under Article 104(2) of the Rules of Procedure of the Court of First Instance, an application 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 absent (order of the President of the Court of Justice in Case C-268/96 P(R) *SCK and FNK v Commission* [1996] ECR I-4971, paragraph 30). Where appropriate, the judge hearing such an application must also weigh up the interests involved (order of the President of the Court of Justice in Case C-445/00 R *Austria v Council* [2001] ECR I-1461, paragraph 73).

Admissibility

Arguments of the parties

- 15 The Commission contends that the main application is manifestly inadmissible in that it was out of time. It states that the decision was notified to the applicant on 10 April 2003 and that the main application was not brought until 7 July 2003, in other words after expiry of the time-limit of two months and ten days laid down in the fifth paragraph of Article 230 EC in combination with Article 102 of the Rules of Procedure.
- 16 In this regard, according to the Commission, the applicant cannot claim that its action falls under the unlimited jurisdiction of the Court within the meaning of Article 229 EC and is thus exempt from the time-limit laid down in the fifth paragraph of Article 230 EC. In its opinion, in contrast to other articles such as Articles 226 EC, 230 EC and 232 EC, Article 229 EC does not create an independent legal remedy. That provision merely gives the Community legislator the possibility of conferring unlimited jurisdiction on the Court of Justice in respect of penalties laid down in regulations, as the Council did in Article 17 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962 (I), p. 87). According to the Commission, the Court exercises that unlimited jurisdiction in actions based on other provisions of the Treaty, in this instance Article 230 EC.
- 17 On any view, according to the Commission, the applicant is asking in reality for annulment of Article 3 of the Decision by requesting, as the main issue, the annulment of the fine imposed.

- 18 By letter dated 18 July 2003, registered at the Registry on 21 July 2003, the applicant explained that by its action it was not contesting the reality of the agreement but merely disputing the fine imposed. Accordingly, in its opinion, the action came under the unlimited jurisdiction of the Court and consequently was subject to no time-limit.

Assessment by the President of the Court of First Instance

- 19 It is settled case-law that in principle the issue of the admissibility of the main action should not be examined in relation to an application for interim measures so as not to prejudge the substance of the case. Nevertheless, where, as in this case, it is contended that the main action to which the application for interim measures relates is manifestly inadmissible, it may prove necessary to establish whether there are any grounds for concluding *prima facie* that the main action is admissible (orders of the President of the Court of First Instance in Case T-1/00 R *Hözl and Others v Commission* [2000] ECR II-251, paragraph 21, and in Case T-155/02 R *VVG International and Others v Commission* [2002] ECR II-3239, paragraph 18).
- 20 In the present case, the Commission contends that the main action is manifestly inadmissible in that it was brought after expiry of the time-limit laid down in the fifth paragraph of Article 230 EC, increased by the extension on account of distance laid down in Article 102(2) of the Rules of Procedure.
- 21 At the hearing the applicant maintained that a distinction had to be made between an action for annulment referred to in Article 230 EC and an action under the unlimited jurisdiction of the Court referred to in Article 229 EC. It stated that in the present case it would confine itself to contesting the fine on the basis of Article 17 of Regulation No 17, which makes reference to Article 229 EC. It contended that in the context of such an action any natural or legal person on whom a fine has been imposed in accordance with that regulation may bring an

action for annulment or amendment of the fine without being subject to any time-limit. Lastly, the applicant observes that, under French law, there is a so-called ‘four-year’ rule, under which the parties must bring actions under the unlimited jurisdiction of the court within a period of four years from the date on which the damage arose.

- 22 Under Article 229 EC, ‘regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of this Treaty, may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in such regulations’.
- 23 Pursuant to Article 17 of Regulation No 17, ‘the Court of Justice shall have unlimited jurisdiction within the meaning of Article [229 EC] to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed’.
- 24 In the present case, the action is directed solely at annulling or reducing the fine imposed by the Commission under Article 17 of Regulation No 17, which makes reference to Article 229 EC.
- 25 As a consequence, the problem consists in determining whether Article 229 EC establishes an independent legal remedy or relates only to the scope of judicial review carried out in the context of an action, such as an action for annulment referred to in Article 230 EC. The period of time within which an application for annulment or cancellation of a fine must be brought will depend on the reply to that question.

- 26 However, it is not for the judge hearing the application for interim measures to rule on a question of principle that has not yet been decided by the Community court. It will therefore be for the court adjudicating on the substance to adopt a definitive position on the time-limits applicable in the present case. There is all the less reason for this question to be assessed by the judge hearing the application for interim measures since, in the present instance, the application must be dismissed for lack of urgency.

Urgency

Arguments of the parties

- 27 The applicant considers that the condition as regards urgency is met in the present case.

- 28 It maintains that the fine imposed corresponds to nine months' worth of activity and therefore constitutes a particularly heavy burden. It states that it has seven permanent employees, whose job security would be imperilled by the payment of such a large fine. In addition, it observes that its trade union activity is an everyday operation that can brook no interruption. In that regard, it asserts that if it were to pay the fine it would no longer be able to represent the interests of its members in relation to the professions and the public authorities, which would seriously impair its freedom of action as a trade union.

- 29 The Commission considers that the applicant has not proved satisfactorily that the condition as to urgency is met in the present case.

Assessment by the President of the Court of First Instance

- 30 It is settled case-law that an application for an exemption from the obligation to provide a bank guarantee as a condition for the fine not being recovered immediately will only be granted in exceptional circumstances (orders of the President of the Court of Justice of 6 May 1982 in Case 107/82 R *AEG v Commission* [1982] ECR 1549, paragraph 6, and in Case C-7/01 P(R) *FEG v Commission* [2001] ECR I-2559, paragraph 44). The possibility of requiring the provision of a financial guarantee is expressly provided for with regard to applications for interim relief by the Rules of Procedure of the Court of Justice and of the Court of First Instance and is a general and reasonable way for the Commission to act (order of the President of the Court of First Instance in Case T-79/03 R *IRO v Commission* [2003] ECR II-3027, paragraph 25).
- 31 The existence of such exceptional circumstances may, in principle, be regarded as established where the party seeking exemption from providing the requisite bank guarantee adduces evidence that it is objectively impossible for it to provide such guarantee or where such provision would imperil its existence (order in *IRO v Commission*, cited above, paragraph 26).
- 32 In this instance, the applicant maintains that the amount of the fine represents a heavy burden for it, but without claiming that it is impossible for it to provide the requisite bank guarantee. That was expressly stated by the applicant at the hearing.
- 33 In these circumstances it cannot be considered that it is objectively impossible for the applicant to provide the requisite bank guarantee.

- 34 Moreover, the applicant adduces no evidence to support its assertion that the provision of the bank guarantee would imperil its existence, in particular in that it would prevent it from representing its members' interests in relation to the professions and the public authorities.
- 35 As the applicant has not proved that exceptional circumstances exist, the present application must be dismissed.

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, 21 January 2004.

H. Jung

Registrar

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B. Vesterdorf

President