ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
15 March 1995 *

In Case T-6/95 R,

Cantine dei Colli Berici coop. arl, a cooperative established under Italian law, with its registered office at Lonigo (Italy), represented by Ivone Cacciavillani, of the Venice Bar, with an address for service in Luxembourg at the Chambers of Alain Lorang, 51 Rue Albert 1er,

applicant,

v

Commission of the European Communities, represented by Eugenio de March, Legal Adviser, acting as Agent, assisted by Alberto Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for suspension of the operation of Article 1(1) of Commission Regulation (EC) No 3151/94 of 21 December 1994 introducing a further deroga-

* Language of the case: Italian.

tion from the detailed rules for the delivery by producers of the table wine they are required to deliver for compulsory distillation in respect of the 1993/1994 wine year (OJ 1994 L 332, p. 32),

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

makes the following

Order

Facts

1 By application lodged at the Registry of the Court of First Instance on 19 January 1995, Cantine dei Colli Berici coop. arl brought an action under the fourth paragraph of Article 173 of the Treaty establishing the European Community (the 'EC Treaty') for the annulment of Article 1(1) of Commission Regulation (EC) No 3151/94 of 21 December 1994 introducing a further derogation from the detailed rules for the delivery by producers of the table wine they are required to deliver for compulsory distillation in respect of the 1993/1994 wine year (OJ 1994 L 332, p. 32; 'Regulation No 3151/94'), together with a claim for the annulment of all other measures connected therewith and/or preparatory thereto, challenging in the course of the action, in accordance with Article 184 of the Treaty, the legality of Article 39(4) of Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organization of the market in wine (OJ 1987 L 84, p. 1; 'Regulation No 822/87') and of the fourth indent of Article 4(2) of Commission Regulation (EEC) No 441/88 of 17 February 1988 laying down detailed rules for applying compulsory distillation as referred to in Article 39 of Council Regulation (EEC) No 822/87 (OJ 1988 L 45, p. 15; 'Regulation No 441/88').

2 By a separate document lodged at the Court Registry on the same day, the applicant also applied, under Article 185 of the EC Treaty, for suspension of the operation of Article 1(1) of Regulation No 3151/94. At the hearing, however, it requested by way of subsidiary plea that its initial application be amended so as to apply for suspension of the operation of Article 1(1) only in so far as it limited to 140 days the extension of the period allowed for producers to deliver table wine to a distillery.

3 The Commission submitted its written observations on the application for interim measures on 26 January 1995. By a separate document, lodged at the Court Registry on 8 February 1995, it raised an objection of inadmissibility in the main proceedings under Article 114(1) of the Rules of Procedure.

4 The parties presented oral argument concerning the application for interim measures on 10 February 1995.

5 The legislative and factual background to the dispute, as it emerges from the pleadings and other documents lodged by the parties and from the oral argument presented at the hearing, may be summarized as follows.

6 Article 1(1) of Regulation No 3151/94, which the applicant requests should be suspended, provides, as amended by the corrigendum to that regulation published in the *Official Journal of the European Communities* of 30 December 1994 (OJ 1994 L 341, p. 76):

'For the 1993/1994 wine year and by way of derogation from Regulation (EC) No 343/94, the second subparagraph of article 12(4) and Article 12(5) of Regulation (EEC) No 441/88, persons subject to the obligation to deliver for compulsory distillation as provided for in Article 39 of Regulation (EEC) No 822/87 may deliver

the table wine to a distillery at the latest 140 days after 11 September 1994 under the following conditions:

— purchase price of table wines: ECU 0, 42/%/vol/hl,

— amount of aid for which the distiller qualifies: Nil

— price to be paid to the distiller by the intervention agency for the raw alcohol subject to compulsory delivery: ECU 0, 75/%/vol/hl.'

7 The circumstances in which producers are subject to the obligation to distil table wine are defined in general terms by Article 39 of Regulation No 822/87, the first paragraph of which provides as follows:

'Where, in respect of a given wine year, the market in table wine and wine suitable for yielding table wine is in a state of serious imbalance, compulsory distillation of table wine shall be decided on.'

8 Under Article 1(6) of Regulation No 822/87, as amended by Council Regulation (EEC) No 1734/91 of 13 June 1991 (OJ 1991 L 163, p. 6), a 'wine year' is defined as the period beginning on 1 September each year and ending on 31 August of the following year.

9 On 15 February 1994 the Commission adopted Regulation (EC) No 343/94 opening compulsory distillation as provided for in Article 39 of Council Regulation (EEC) No 822/87 and derogating for the 1993/1994 wine year from certain detailed rules for the application thereof (OJ 1994 L 44, p. 9; 'Regulation No 343/94').

10 Article 1(2) of Regulation No 343/94 fixed the total quantity of table wine to be distilled throughout the Community for the 1993/1994 wine year at 18 200 000 hectolitres. Article 1(3) provided that the quantity to be distilled in Region 4 was to be 12 150 000 hectolitres. Under Article 4(2) of Regulation No 441/88, which designates the production regions referred to in Article 39(3) of Regulation (EEC) No 822/87, Region 4 corresponds to Italy. The quantity for distillation is shared between the various table wine producers in each production region in accordance with the rules laid down in Article 39(4) and (5) of Regulation No 822/87. For each producer subject to the obligation to distil, the quantity for distillation is to be equal to a determined percentage of their table wine production, obtained from a progressive scale based on the yield per hectare.

11 Article 12(4) of Regulation No 441/88 provides that:

'Deliveries of table wine must be made not later than:

— 31 July if delivery is made to a distillery,

— 15 July if delivery is made to a fortifier of wine for distillation.

Deliveries may be made in the fortnight after the above dates. In that case the purchase price for the quantities concerned shall be reduced by an amount equal to 50% of the aid fixed for the wine year in question. Both the aid and the price of the alcohol which is produced and delivered to the intervention agency shall be reduced by the same amount.'

Under Article 12(5), the distillation operations may not be carried out after the end of the wine year in question, namely 31 August.

12 On 29 April 1994, together with 42 other producers of the Veneto region, the applicant brought an action before the Court of First Instance for the annulment, amongst other provisions regulating compulsory distillation in the wine industry, of the fourth indent of Article 1(3) of Regulation No 343/94. That case, registered at the Court Registry under Case No T-183/94, is still pending and is the subject of an objection of inadmissibility lodged by the Commission under Article 114(1) of the Rules of Procedure. On 24 May 1994 the applicants lodged an application for suspension of the provisions they were seeking to have annulled in the main action. On 25 May 1994 the same applicants obtained from the national court (the Tribunale Amministrativo Regionale del Lazio, the Regional Administrative Tribunal for the Lazio Region) a decision ordering suspension of the national provisions on compulsory distillation for the wine year 1993/1994. Although, on 16 July 1994, the Supreme Administrative Court of Italy (Consiglio di Stato) allowed the appeal by the Italian authorities against that order, the applicants had in the meantime withdrawn their application for interim measures before the Court of First Instance. On 11 July 1994 the President of the Court of First Instance ordered that Case T-183/94 R be removed from the register.

13 An initial extension of the period for delivering table wine to a distillery was allowed by Commission Regulation (EC) No 1960/94 of 27 July 1994 derogating from the detailed rules for the delivery by producers of the table wine they are required to deliver for compulsory distillation and support distillation in respect of the 1993/1994 wine year (OJ 1994 L 198, p. 96; 'Regulation No 1960/94'). In derogation from the first indent of the first subparagraph of Article 12(4) of Regulation No 441/88, Regulation No 1960/94 extended the time-limit for delivery until 27 August 1994. It was also possible, by virtue of the second subparagraph of Article 12(4) of Regulation No 441/88, to deliver table wine to a distillery in the fortnight after the specified date, in the present case by 11 September, subject to a reduction of the purchase price by an amount equal to 50% of the aid fixed for the distillation. The applicant has not challenged Regulation No 1960/94 in the courts.

14 Regulation No 3151/94, Article 1 of which forms the subject-matter of these proceedings, was adopted by the Commission on 21 December 1994 in order to take

account of difficulties peculiar to certain wine-producing regions in which it had not been possible to satisfy delivery obligations by the prescribed time-limit. It further extends the time-limits for the delivery of table wine by producers subject to the compulsory distillation requirement and for the carrying out of the distillation operations decided upon for the wine year 1993/1994, and is accompanied by appropriate sanctions for non-compliance. The applicant states that the wine producers of the Veneto region have also applied to the national courts for the operation of that regulation to be suspended.

Law

15 Under the combined provisions of Articles 185 and 186 of the EC 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 of First Instance may, if it considers that circumstances so require, order that application of contested acts be suspended or prescribe any necessary interim measures.

16 Article 104(2) of the Rules of Procedure provides that applications for interim measures as envisaged under Articles 185 and 186 of the Treaty 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. Such measures must be provisional in the sense that they do not prejudge the decision on the substance of the case (see, most recently, the order of the President of the Court of First Instance in Case T-239/94 R *EISA* v *Commission* [1994] ECR II-703, paragraph 9).

The arguments of the parties

17 The applicant considers the present application for interim measures to be admissible because, although adopted in the form of a regulation, the contested provision concerns it directly and individually. It argues that the purpose of that provision was to introduce a special derogation from the detailed rules for applying Article 39 of Regulation No 822/87, as laid down by Article 12 of Regulation No 441/88, and to extend the effect of the regulations imposing compulsory distillation on producers for the wine year 1993/1994. The applicant considers that, in so far as it is subject to the distillation obligation for that wine year, it is directly and individually affected by a provision concerning the execution of that obligation. Moreover, the provision in question was adopted by the Commission precisely in order to deal with the situation of those producers, including the applicant, who brought an action challenging the obligation for the wine year 1993/1994, as is demonstrated, in the applicant's submission, by the reference in the fifth recital of the preamble to Regulation No 3151/94 to reasons peculiar to certain wine-producing regions, where it had not been possible to satisfy the delivery obligations by the time-limit laid down.

18 Concerning the amendment made at the hearing of 10 February 1995 to the interim relief sought, the applicant explains that the suspension which it seeks should be understood as the extension of the period granted to it by the Community legislation for fulfilling its distillation obligations until the Court's judgment in the main action. The effect of granting that interim measure would be to protect the applicant against sanctions which might be imposed upon it in the meantime by the Italian authorities for failure to fulfil the obligations in question. The interest of the applicant in the granting of such measure was obvious.

19 Concerning the existence of a prima facie case, the applicant essentially makes three pleas in support of its action for the annulment of the contested provision. First, the provision is invalid for failure to fulfil the statutory requirement that the pur-

pose of compulsory distillation must be the remedying of an imbalance in respect of the current wine year, as required by Article 39(1) of Regulation No 822/87. Since the extension granted by the contested provision allowed the distillation obligation for the wine year 1993/1994 to be carried out after that wine year and well into the wine year 1994/1995, the applicant submits that that measure cannot be regarded as an appropriate instrument for stabilizing the market in the context of the wine year to which it relates. It was thus a breach of the Community rules on the common organization of the market in wine for the contested provision to require the distillation obligation for the wine year 1993/1994 to be carried out in January 1995, since that measure could no longer fulfil its purpose, namely the elimination of the excess of supply over demand forecast for that wine year. Secondly, the applicant argues that the distillation obligation in question has been imposed in breach of the principles of non-discrimination and the protection of legitimate expectations, by reason both of the inequitable division of the quantities to be distilled by the producers concerned and of the inaccuracy and unlawfulness of the underlying calculations, which contained an error of 8 239 000 hl between the level of table wine stocks forecast for 1993 and the quantity actually stocked. In the applicant's submission, the quantity assigned to Italy was disproportionate in relation to the total quantity of table wine to be distilled in the Community. Moreover, by taking into consideration for the wine year 1993/1994 quantities that a number of Italian wine producers had illegally failed to distil for the wine year 1992/1993, the regulation seriously discriminated against producers like the applicant which had fulfilled their obligations. Finally, the estimates used to calculate the distillation obligations imposed on Italian producers were distorted by the lack of appropriate mechanisms for assessing and measuring the yield per hectare for Region 4 (Italy). Thirdly, the applicant argues that the rules in question infringe the principle of proportionality. Since the distillation obligation does not appear to be 'appropriate and necessary' to attain the stabilization of the market in wine for 1993/1994, and is therefore unlawful, the contested measure, which extends the same Community obligation, is unlawful also.

20 As for the question of urgency, the applicant argues that, if it were now obliged to procure the total quantity of wine which the Community rules require it to deliver for distillation, it would incur very heavy expenses capable of threatening the very

existence of its wine business. Since, due to the quality of the wine produced, it was able to sell all its production on the market during the wine year 1993/1994, it would now be obliged, in order to fulfil the obligations arising from the rules in question, to buy mediocre wine from the producers of the excess on a market subject to continuous and abnormal price rises. At the hearing of 10 February 1995, the applicant added that, in addition to the difficulties caused by the need to find financing for wine purchases of six thousand million lire, it would suffer irreparable damage through losing the Community benefits it stood to gain for the current wine year, by reason of the sanction provided for in Article 22 of Regulation No 441/88.

21 As for the balancing of the interests at stake, the applicant considers that the Court's granting of the suspension requested, thereby enabling the applicant to benefit from a further extension of the period allowed by Regulation No 3151/94, would not harm the Community interest or the common organization of the market in wine, since the current extension, as fixed by the provision in dispute, already extends the period for carrying out the distillation obligation during the new wine year. It also considers that such suspension would not disturb market conditions, since the producers of wine destined for distillation would be likely to hold back their produce until judgment in the main action, the quality of that wine not being sufficient for it to be sold normally on the market. By contrast, suspension of the provision in question would allow the applicant to procure the necessary means of fulfilling its obligations and relieve it of having to buy wine at abnormally high prices.

22 The Commission considers that the application for interim measures is prima facie inadmissible, since the action for annulment in the main proceedings on which it is based is manifestly inadmissible. Both from the procedural and the substantive point of view, the measure in question is a regulation laying down provisions of general scope, applicable to a category of economic operators which are capable of abstract and objective definition as wine producers.

23 The Commission maintains, moreover, that both the action and, therefore, the application for suspension are inadmissible by reason of the applicant's manifest lack of interest in bringing proceedings. The sole purpose of Regulation No 3151/94 was to give operators which, like the applicant, had not carried out distillation by the time-limit of 11 September 1994 the possibility of fulfilling their obligation before 29 January 1995, subject to a moderate penalty but without incurring the sanctions laid down by Article 22 of Regulation No 441/88 or by the relevant national provisions. If Regulation No 3151/94 were annulled, the time-limit for carrying out the obligation to distil would be 27 August 1994, as laid down by Regulation No 1960/94, which the applicant did not challenge. The Commission considers, moreover, that, if the applicant's aim were not the suspension of the time-limit fixed by Regulation No 3151/94, but the suspension of the distillation obligation itself and a declaration that that obligation was unlawful, its claim would be inadmissible for having the same subject-matter as Cases T-183/94 and T-183/94 R, the first of which is still pending before the Court of First Instance.

24 As for the applicant's arguments in support of its claims that the contested provision was unlawful, the Commission considers that they lack prima facie foundation. In the first place, it disputes that extending the time-limit for carrying out compulsory distillation for the wine year 1993/1994 will result in that distillation being carried out with the produce of the 1994/1995 harvest. On the contrary, the purpose of Regulation No 3151/94 was to exhaust the quantities to be distilled for the wine year 1993/1994 by absorbing the excess of wine existing for that year. Secondly, the divergence between the provisional forecast and actual production was due not to an error in calculation but merely to normal variation having regard to a number of factors, from various sources, which had to be taken into consideration. The Commission points out in that respect that it is for the Member States to verify the data in question, as the applicant appears to acknowledge. In so far as, on the basis of estimates which have proved partially inaccurate, Italian producers have distilled insufficient quantities, those producers must necessarily bear the burden of extra distillation the following year in order to attain the objective of compulsory distillation, namely the maintenance or creation of normal market conditions. Thirdly, concerning the alleged discriminatory character of the regulation in question, the Commission considers that the quantity of wine to be distilled by Italy is objectively justified by the fact that almost all its wine production consists of table wine, and that the criterion of yield per hectare, applicable to the allocation of quantities to be distilled between producers in the same region, is also based

on a criterion of equality. As for the discrimination allegedly suffered by producers who had fulfilled their obligations compared with those who had not, the Commission points to the heavy sanctions to which the defaulting producers are liable under the relevant national and Community provisions. Finally, the Commission emphasizes that it is imperative to take into account for the following wine year quantities of wine which, illegally, were not distilled during the previous year, in order to withdraw that wine from the market and to prevent producers who had fulfilled their compulsory distillation obligations from being deprived of the benefit of that mechanism in terms of improvement of the market.

25 As for the existence of serious and irreparable damage, the Commission argues that any damage the applicant may suffer will be purely financial and that its amount has yet to be ascertained. The Commission points to the case-law of the Court, according to which financial damage cannot be regarded as serious and irreparable unless it appears that it would be impossible to obtain full reparation in the event of the main action being successful.

Findings of the President of the Court of First Instance on the application for interim measures

26 The President must first determine the admissibility of this application to suspend the operation of the contested provision in the light of the Commission's arguments that the action for annulment is inadmissible; it is settled case-law that 'although the issue of the admissibility of the main application should not, in principle, be examined in proceedings relating to an application for interim measures, so as not to prejudge the substance of the case, none the less, if the manifest inadmissibility of the main action is pleaded, it is for the judge hearing the application

for interim measures to establish that the main application reveals prima facie grounds for concluding that there is a certain probability that it is admissible' (see, in particular, the orders of the President of the Court of Justice in Cases C-117/91 R *Bosman* v *Commission* [1991] ECR I-3353 and C-64/93 R *Donatab* v *Commission* [1993] ECR I-3955, and the order of the President of the Court of First Instance in Case T-96/92 R *CCE Grandes Sources* v *Commission* [1992] ECR II-2579).

27 Neither in its pleadings nor at the hearing has the applicant produced any evidence to rebut the conclusion that, prima facie, its application in the main action is manifestly inadmissible.

28 Article 173 of the Treaty and the case-law relating thereto prohibit individuals in principle from bringing actions against measures which are general in scope and affect those to whom they are addressed only in their objective capacity as economic operators in the sector with which the relevant rules are concerned. Not only has the provision at issue here been adopted in the form of a regulation, but, prima facie, it is general and abstract in content and affects the applicant only in so far as the latter is a wine producer falling within a category of economic operators who are definable on the basis of objective circumstances and thus 'in the same way as any other economic operator in the same situation' (see the order of the Court of First Instance in Case T-476/93 *FRSEA and FNSEA* v *Council* [1993] ECR II-1187, paragraph 24). Moreover, as the case-law has established, 'the character of a measure as a regulation is not cast into doubt by the possibility of determining the number or even the identity of the persons to which it applies at any given moment, so long as it indisputably applies by reason of an objective legal or factual situation, defined by the measure in relation to the purpose of the latter' (see the order in *FRSEA and FNSEA* v *Council*, cited above, paragraph 19). Finally, it follows from the case-law that 'the fact that a legal provision may have different specific effects on the various persons to whom it applies is not inconsistent with its nature as a regulation when that situation is objectively defined' (see the judgment of the

Court of First Instance in Case T-472/93 *Campo Ebro* v *Council* [1995] ECR II-421, paragraph 36). In those circumstances, the judge hearing the application for interim measures cannot conclude that the provision at issue in this case is prima facie one which concerns the applicant individually and that the applicant may apply for its annulment under the fourth paragraph of Article 173 of the Treaty.

29 Nor has the applicant successfully demonstrated to the Court that it has an interest in challenging a provision which extends the period for fulfilling the distillation obligation imposed upon it by other regulations and which, therefore, does not appear to affect it adversely. If suspension of the operation of the contested provision were granted, the relevant time-limit would be that laid down in Regulation No 1960/94, namely 27 August 1994.

30 As for the request by the applicant's counsel at the hearing to amend the scope of the suspension sought so as to affect only the precise time-limit laid down by the measure granting extension, that request must be dismissed in any event. First, contrary to what the applicant alleges, such amendment would not reduce the scope of the initial application for interim measures but would extend it, in that the new measure applied for would allow the applicant to continue enjoying the extension granted by the provision of which suspension was initially requested until the adoption of the decision terminating the main proceedings. Secondly, the application thus amended contradicts the applicant's argument in so far as it pleads that the extension of the distillation obligation for the wine year 1993/1994 was unlawful. The applicant argues that the contested regulation is unlawful, in particular, because of the impossibility of remedying in 1995 the market imbalance which arose during the wine year 1993/1994. However, granting the suspension requested by the applicant would only exacerbate the alleged unlawfulness, by allowing the distillation obligation to be carried out during one of the subsequent wine years. Finally, as the case-law has consistently shown, an application for an interim measure is in principle admissible only if such measure falls within the scope of the final

decision which the Court is capable of making by virtue of the combined provisions of Articles 173 and 176 of the EC Treaty, which is not the case with an application to maintain a measure granting extension that is itself the subject-matter of the main action for annulment (see the orders of the President of the Court of First Instance in Cases T-543/93 R *Gestevisión Telecinco* v *Commission* [1993] ECR II-1409 and T-322/94 R *Union Carbide* v *Commission* [1994] ECR II-0000).

31 Moreover, and in any event, the requirement that there be a risk of serious and irreparable damage has not been satisfied; the damage alleged by the applicant is purely financial in character. The applicant, which states that it is the largest Italian wine cooperative, has not produced any prima facie evidence that the damage would be such as to threaten its survival and could not therefore be fully compensated for in the event of the main action succeeding (see the order of the President of the Court of Justice in Case C-358/90 R *Compagnia Italiana Alcool* v *Commission* [1990] ECR I-4887 and the order of the President of the Court of First Instance in Case T-185/94 R *Geotronics* v *Commission* [1994] ECR II-519).

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, 15 March 1995.

H. Jung

Registrar

J. L. Cruz Vilaça

President