JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
17 January 2002 *

In Case T-47/00,

Rica Foods (Free Zone) NV, established in Oranjestad (Aruba), represented by G. van der Wal, advocaat, with an address for service in Luxembourg,

applicant,

supported by

Kingdom of the Netherlands, represented by H. Sevenster, acting as Agent, with an address for service in Luxembourg,

intervener,

* Language of the case: Dutch.

Commission of the European Communities, represented by T. van Rijn and C. Van der Hauwaert, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of Commission Regulation (EC) No 2423/1999 of 15 November 1999 introducing safeguard measures in respect of sugar falling within CN code 1701 and mixtures of sugar and cocoa falling within CN codes 1806 10 30 and 1806 10 90 originating in the overseas countries and territories (OJ 1999 L 294, p. 11),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: J. Azizi, President, K. Lenaerts and M. Jaeger, Judges,
Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 5 July 2001,

gives the following

Judgment

Legal background

1 On 25 July 1991 the Council adopted Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1, 'the OCT Decision').

2 Article 101(1) of the OCT Decision provides:

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

3 Article 102 of the same decision provides:

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

4 The first indent of Article 108(1) of the OCT Decision refers to Annex II thereto (hereinafter 'Annex II') for definition of the concept of originating products and the methods of administrative cooperation relating thereto. Under Article 1 of Annex II, a product is to be considered as originating in the OCT, 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.

5 Article 6(2) of Annex II lays down the rules known as 'the EC/OCT cumulation of origin rule' and 'the ACP/OCT cumulation of origin rule':

'When products wholly obtained in the Community or in the ACP States undergo working or processing in the OCT, they shall be considered as having been wholly obtained in the OCT.'

6 Council Decision 97/803/EC of 24 November 1997 amending at mid-term the OCT Decision (OJ 1997 L 329, p. 50) inserted a new Article 108b in the OCT Decision. The first paragraph of that article provides:

'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 ...'

7 Decision 97/803 did not, however, limit the application of the EC/OCT cumulation of origin rule.

8 Article 109(1) of the OCT Decision authorises the Commission to take 'the necessary safeguard measures' if, 'as a result of the application of [the OCT] decision, serious disturbances occur in a sector of the economy of the Community or one or more of its Member States, or their external financial stability is jeopardised, or if difficulties arise which may result in a deterioration in a sector of the Community's activity or in a region of the Community ...'. Under Article 109(2) of the OCT Decision, the Commission must choose 'such measures as would least disturb the functioning of the association and the Community'. Moreover, '[those] measures shall not exceed the limits of what is strictly necessary to remedy the difficulties that have arisen'.

The contested regulation

9 By Commission Regulation (EC) No 2423/1999 of 15 November 1999 the Commission introduced safeguard measures on the basis of Article 109 of the OCT Decision in respect of sugar falling within CN code 1701 and mixtures of sugar and cocoa falling within CN codes 1806 10 30 and 1806 10 90 originating in the overseas countries and territories (OJ 1999 L 294, p. 11, 'the contested regulation').

10 The Commission considered that 'increasing quantities of sugar imported from 1997 onwards under the EC/OCT cumulation of origin procedure and in the form of mixtures of sugar and cocoa ... originating in the [OCTs]' might result in 'a serious deterioration in the operation of the common organisation of the

market in the sugar sector and have highly detrimental effects on Community sugar operators' (first and second recitals in the preamble to the contested regulation).

11 For sugar qualifying for EC/OCT cumulation of origin, the safeguard measure imposed takes the form of a minimum price. Accordingly, Article 1(1) of the contested regulation provides:

'Products with EC-OCT cumulation of origin falling within CN code 1701 shall be released for free circulation in the Community free of import duties only if the import price cif of unpacked goods of standard quality as laid down by Council Regulation (EEC) No 793/72 (OJ, English Special Edition 1972 (I), p. 299) fixing the standard quality for white sugar is not less than the intervention price of the products in question'.

12 As regards mixtures of sugar and cocoa (products falling within CN codes 1806 10 30 and 1806 10 90) originating in the OCTs, Article 2 of the contested regulation provides that they are to be released for free circulation in the Community 'subject to Community surveillance in accordance with the rules laid down in Article 308d of Commission Regulation (EEC) No 2454/93' of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1).

Background to the dispute, procedure and forms of order sought by the parties

13 The applicant, which is established in Aruba, a territory belonging to the OCTs, imports sugar from the Community, processes it, and then exports it to the

Community. It also produces mixtures of sugar and cocoa from sugar imported from the Community, which it exports to the latter.

14 By application lodged at the Registry of the Court of First Instance on 28 February 2000 the applicant brought an action under the fourth paragraph of Article 230 EC for annulment of the contested regulation.

15 By applications lodged at the Registry of the Court of First Instance on 22 June and 7 July 2000 respectively, the Governments of the Kingdom of Spain and of the Kingdom of the Netherlands applied, pursuant to Article 115 of the Rules of Procedure of the Court of First Instance, for leave to intervene in support of the forms of order sought by the Commission and the applicant respectively. By order of 5 September 2000 the President of the Third Chamber of the Court of First Instance granted those applications.

16 The Kingdom of Spain submitted a statement in intervention on 23 October 2000, on which the parties to the main proceedings were requested to submit their observations.

17 The Kingdom of the Netherlands has not submitted a statement in intervention.

18 The applicant claims that the Court should:

— annul the contested regulation;

— order the Commission to pay the costs.

19 The Commission and the Kingdom of Spain contend that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

20 The Commission claims that the action is inadmissible. It points out that the applicant is not individually concerned by the contested regulation. The contested regulation does not affect the applicant by reason of certain attributes which are peculiar to it or by reason of circumstances which distinguish it from all other undertakings now or in the future producing sugar or mixtures of sugar and cocoa in the OCTs (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107; Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 66).

21 When the contested regulation was adopted the applicant, unlike the applicants in the cases giving rise to the judgment in Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477 and to the judgment in *Antillean Rice Mills* (cited in the previous paragraph), had no goods in transit to the Community. Furthermore, unlike certain applicants in the case giving rise to the judgment in Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, the applicant had not entered into contracts the performance of which was wholly or partly prevented by the adoption of the contested regulation.

22 Lastly, it maintains that the fact that the applicant wrote letters to the Commission during the procedure prior to the adoption of the contested regulation is not sufficient for the applicant to be regarded as individually concerned by that regulation.

23 The applicant contends that the contested regulation produces binding legal effects such as to affect its interests (Case T-154/94 *CSF and CSME* v *Commission* [1996] ECR II-1377; Case T-120/96 *Lilly Industries* v *Commission* [1998] ECR II-2571, and Joined Cases T-125/96 et T-152/96 *Boehringer* v *Council and Commission* [1999] ECR II-3427).

24 According to the applicant, the contested regulation is in fact a decision addressed to it under the guise of a regulation. The real purpose of the contested regulation is to put an end to the applicant's imports into the Community. In support of its argument, it notes that it was on the basis of a price-list wrongly attributed to the applicant that the Commission found that sugar qualifying for EC/OCT cumulation of origin had been imported into the Community at a price lower than the intervention price, thus creating unfair competition.

25 The applicant maintains that the contested regulation is of direct and individual concern to it within the meaning of the fourth paragraph of Article 230 EC.

26 The contested regulation is of direct concern to the applicant because it leaves no discretion to the national authorities of the Member States responsible for implementing it (Case C-404/96 P *Glencore Grain* v *Commission* [1998] ECR I-2435).

27 In order to demonstrate that it is individually concerned by the contested regulation, the applicant refers in particular to the judgments in *Piraiki-Patraiki* and *Sofrimport* (cited in paragraph 21 above), and Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraphs 25 to 28, and Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills* (cited in paragraph 20 above), paragraphs 59 to 80.

28 The applicant points out that it is, with Emesa Sugar, the only producer of sugar and mixtures of sugar and cocoa in Aruba and one of the major producers of those products in the OCT and that it was already exporting sugar to the Community before the contested regulation was adopted. It claims to be individually concerned by the contested regulation because it belongs to the closed part of a mixed circle of undertakings, in part open and in part closed (*Codorniu* and Case C-390/95 P *Antillean Rice Mills*, cited in paragraph 27 above). The undertakings individually concerned are those which, before the contested regulation was adopted, were exporting those products which are the subject of the safeguard measures.

29 Furthermore, it adds that it was involved in the administrative procedure leading to the adoption of the contested regulation. For that purpose it refers to various letters annexed to the application.

30 Since the Commission must take into consideration the negative effects which a safeguard measure might have on the economy of the OCT in question as well as on the undertakings concerned (Case C-390/95 P *Antillean Rice Mills*, cited in paragraph 27 above), the applicant, as an undertaking exporting the products covered by the contested regulation, must be considered to be individually concerned by that measure, especially as the Commission was aware of the consequences which the safeguard measure in question would have for the applicant.

31 The applicant also observes that the Court of Justice recognised, in *Codorniu* (cited in paragraph 27 above) and in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, that an undertaking which suffers disastrous economic consequences as a result of a legislative measure is individually concerned by the latter. At the hearing, it pointed out that its situation is comparable to that of the applicant in the case giving rise to the judgment in *Extramet Industrie*.

Findings of the Court

32 The fourth paragraph of Article 230 EC gives individuals the right to challenge, *inter alia*, any decision which, although in the form of a regulation, is of direct and individual concern to them. The particular objective of that provision is to prevent the Community institutions from being able, merely by choosing the form of a regulation, to preclude an individual from bringing an action against a decision which concerns him directly and individually and thus to make it clear that the nature of a measure cannot be changed by the form chosen (Joined Cases 789/79 and 790/79 *Calpak and Società Emiliana Lavorazione Frutta* v *Commission* [1980] ECR 1949, paragraph 7; orders in Case T-12/96 *Area Cova*

and Others v *Council and Commission* [1999] ECR II-2301, paragraph 24, and Case T-45/00 *Conseil National des Professions de l'Automobile and Others* v *Commission* [2000] ECR II-2927, '*CNPA*', paragraph 15).

33 The criterion for distinguishing between a regulation and a decision is whether the measure at issue is of general application or not (Case 307/81 *Alusuisse* v *Council and Commission* [1982] ECR 3463, paragraph 8, and the order in *CNPA*, cited in the previous paragraph, paragraph 15).

34 The contested regulation must be regarded as being of general application. The safeguard measures in the contested regulation apply in a general manner to imports into the Community of sugar eligible for EC/OCT cumulation of origin and of mixtures of sugar and cocoa from the OCTs.

35 Even if the Commission made a finding of unfair competition on the basis of a price-list wrongly attributed to the applicant — of which there is absolutely no evidence (see paragraph 53 below) — the contested regulation is addressed to all undertakings involved, now or in the future, in importing the products covered by the contested regulation.

36 None the less, the fact that the contested regulation is of general application does not prevent it from being of direct and individual concern to certain natural or legal persons (see *Codorniu*, cited in paragraph 27 above, paragraph 19, Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills*, cited in paragraph 20 above, paragraph 66, and Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 50).

37 The contested regulation is of direct concern to the applicant because it leaves no discretion to the national authorities of the Member States responsible for implementing it (Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills*, cited in paragraph 20 above, paragraph 63).

38 As regards the question whether the contested regulation is of individual concern to the applicant, it must be borne in mind that natural or legal persons can be considered to be individually concerned by a measure of general application only if the measure in question affects them because of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons (*Plaumann*, cited in paragraph 20 above, p. 107; orders in Case T-122/96 *Federolio* v *Commission* [1977] ECR II-1559, paragraph 59, and *CNPA*, cited in paragraph 32 above, paragraph 20).

39 The fact that the applicant is one of the major producers of sugar and mixtures of sugar and cocoa in the OCTs and that there are only two undertakings operating in that sector in Aruba is not sufficient to distinguish the applicant for the purposes of the fourth paragraph of Article 230 EC. The applicant is in an objectively determined situation which is comparable to that of any other undertaking which might now or at some time in the future be active on the sugar market (order in *Federolio*, cited in the previous paragraph, paragraph 67).

40 The applicant maintains, nevertheless, that the Commission was bound by law to examine its specific situation before adopting the contested regulation.

41 It must be noted that where the Commission is, by virtue of specific provisions, under a duty to take account of the consequences of a measure which it envisages adopting for the situation of certain individuals, that fact distinguishes them individually (*Piraiki-Patraiki* and *Sofrimport*, cited in paragraph 21 above, Case C-390/95 P *Antillean Rice Mills*, cited in paragraph 27 above, paragraphs 25 to 30, and Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills*, cited in paragraph 20 above, paragraph 67).

42 The Court of Justice and the Court of First Instance have held that Article 109(2) of the OCT Decision makes it clear that, when the Commission envisages taking safeguard measures on the basis of Article 109(1) of the OCT Decision, it must, in so far as circumstances permit, inquire into the negative effects which its decision might have on the economy of the OCT in question as well as on the undertakings concerned (Case C-390/95 P *Antillean Rice Mills*, cited in paragraph 27 above, paragraph 25, and Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills*, cited in paragraph 20 above, paragraph 70). The specific protection which Article 109(2) of the OCT Decision affords to the undertakings concerned differentiates them within the meaning of the fourth paragraph of Article 230 EC.

43 The Court must therefore consider whether or not the applicant is an undertaking concerned within the meaning of Article 109(2) of the OCT Decision.

44 The case-law makes it clear that undertakings having goods in transit to the Community when a safeguard measure is adopted do possess that status (*Sofrimport*, cited in paragraph 21 above, paragraphs 11 and 12, and Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills*, cited in paragraph 20 above,

paragraph 76). More generally, it has been held that undertakings which have entered into contracts the performance of which will be wholly or partly prevented by the safeguard measure must be deemed to be undertakings concerned within the meaning of Article 109(2) of the OCT Decision (*Piraiki-Patraiki*, cited in paragraph 21 above, paragraph 28, and Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills*, cited in paragraph 20 above, paragraph 74).

45 However, the applicant does not claim to have had goods in transit to the Community when the contested regulation was adopted. Furthermore, in the circumstances of this case the contested regulation in no way prevents the performance of contracts entered into by the applicant. It imposes no quota, but merely establishes a minimum price lower than that charged by the applicant (see paragraph 49 below) for sugar with EC/OCT cumulation of origin (Article 1) and Community surveillance for mixtures of sugar and cocoa originating in the OCTs (Article 2).

46 It remains to be considered whether, on the basis of other evidence, the applicant may be regarded as an undertaking concerned for the purposes of Article 109(2) of the OCT Decision (Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills*, cited in paragraph 20 above, paragraph 74) or whether, if that is not the case, the applicant has put forward other circumstances which might differentiate it from any other trader.

47 In that connection, the applicant mentions in its reply the 'impact of the [contested] regulation on [its] position' and even the 'disastrous economic consequences' caused by it, referring to *Extramet Industrie*, cited in paragraph 31 above.

48 It must, however, be noted that the contested regulation in no way prevents the performance of the contracts entered into by the applicant (see above, paragraph 45).

49 Replying to a written question asked by the Court of First Instance, the applicant stated that during the period leading up to the adoption of the contested regulation the price of the sugar it exported to the Community under the EC/OCT cumulation of origin system exceeded the intervention price for that product by about 10%. That being so, the applicant has not established that Article 1 of the contested regulation, which provides that 'products with EC-OCT cumulation of origin falling within CN code 1701 shall be released for free circulation in the Community free of import duties only if the import price is not less than the intervention price of the products in question', could have had an adverse effect on its economic activities. Article 2 of the contested regulation, which makes mixtures of sugar and cocoa originating in the OCTs subject to the Community surveillance procedure and for that purpose imposes obligations of a statistical nature on the authorities of the Member States, could not have affected the applicant's exports of those products to the Community.

50 At the hearing, in response to a question put by the Court, the applicant was in any case unable to furnish the slightest evidence of any damage that the contested regulation could have caused it.

51 In the circumstances, the applicant has not adduced evidence to the effect that the contested regulation had any 'negative effects' on its situation which the Commission ought to have taken into consideration (Case C-390/95 P *Antillean Rice Mills*, cited in paragraph 27 above, paragraph 25, and Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills*, cited in paragraph 20 above, paragraph 70), still less to the effect that the contested regulation had caused it

exceptional damage such as to differentiate it from all other traders within the meaning of *Extramet Industrie*, cited in paragraph 31 above (see, to that effect, Case T-597/97 *Euromin* v *Council* [2000] ECR II-2419, paragraph 49).

52 The applicant goes on to point out that the contested regulation is based on matters, in particular a price-list, wrongly attributed to it. That fact is, in its submission, such as to differentiate it within the meaning of the fourth paragraph of Article 230 EC.

53 It must first be observed that the applicant's assertion is categorically rejected by the Commission. In any event, the contested regulation does not show that the evaluation of the difficulties, which, according to the Commission, made it necessary to adopt safeguard measures, was based on information relating to the applicant's activities. The applicant's argument, which is not supported by any evidence in the documents before the Court, must therefore be rejected for lack of proof (to that effect, see *Euromin*, cited in paragraph 51 above, paragraphs 46 to 49).

54 Finally, the applicant refers to an exchange of correspondence between it and the Commission between the end of June and the end of October 1999.

55 However, the fact that a person is involved in some way or other in the procedure leading to the adoption of a Community measure is capable of distinguishing that person individually in relation to the measure in question only if the applicable Community legislation grants him certain procedural guarantees (orders in Case T-585/93 *Greenpeace and Others* v *Commission* [1995] ECR II-2205, paragraphs 56 and 63, and *Area Cova*, cited in paragraph 32 above, paragraph 59).

56 No provision of Community law requires the Commission, before adopting safeguard measures pursuant to Article 109(1) of the OCT Decision, to follow a procedure during which undertakings established in the OCT would be entitled to claim certain rights or even to be heard (*Area Cova*, cited in paragraph 32 above, paragraph 60, and Joined Cases T-38/99 to T-50/99 *Sociedade Agrícola dos Arinhos and Others* v *Commission* [2001] ECR II-585, paragraph 48).

57 It follows from all those considerations that the applicant cannot be regarded as individually concerned by the contested regulation. Since the applicant does not satisfy one of the conditions for admissibility laid down by the fourth paragraph of Article 230 EC, the action must be dismissed.

Costs

58 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

59 Pursuant to Article 87(4) of the Rules of Procedure, the Kingdom of Spain and the Kingdom of the Netherlands, which have intervened in support of the form of order sought by the Commission and the applicant respectively, must be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to bear its own costs and also those incurred by the Commission;**

3. **Orders the interveners to bear their own costs.**

Azizi Lenaerts Jaeger

Delivered in open court in Luxembourg on 17 January 2002.

H. Jung
Registrar

M. Jaeger
President