ORDER OF THE PRESIDENT OF THE COURT
17 December 1998 *

In Case C-364/98 P(R),

Emesa Sugar (Free Zone) NV, a company incorporated under the law of Aruba, established at Oranjestad (Aruba), represented by G. van der Wal, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

appellant,

supported by

Government of Aruba, represented by P. V. F. Bos and M. M. Slotboom, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

intervener at first instance,

APPEAL against the order of the President of the Court of First Instance of the European Communities of 14 August 1998 in Case T-44/98 R *Emesa Sugar* v *Commission* [1998] ECR II-3079, seeking to have that order set aside, judgment in the terms sought in the application at first instance or, alternatively, referral of the case back to the Court of First Instance for a fresh decision, and an order for costs against the Commission,

* Language of the case: Dutch.

the other parties to the proceedings being:

Commission of the European Communities, represented by T. van Rijn, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant at first instance,

supported by

Council of the European Union, represented by J. Huber and G. Houttouin, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of A. Morbilli, Director-General of the Department for Legal Affairs of the European Investment Bank, 100 Boulevard Konrad Adenauer,

Kingdom of Spain, represented by M. López-Monís Gallego, Abogado del Estado, of the State Legal Service, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

and

French Republic,

interveners at first instance,

THE PRESIDENT OF THE COURT OF JUSTICE,

after hearing the views of Advocate General Ruiz-Jarabo Colomer,

makes the following

Order

1 By application lodged at the Court Registry on 9 October 1998, Emesa Sugar (Free Zone) NV brought an appeal, pursuant to the second paragraph of Article 50 of the EC Statute of the Court of Justice, against the order of the President of the Court of First Instance of 14 August 1998 in Case T-44/98 R *Emesa Sugar* v *Commission* [1998] ECR II-3079 ('the contested order') dismissing the appellant's request for interim measures.

2 The appellant asks that the contested order be set aside and, primarily, that its application be granted in the terms sought at first instance or, alternatively, that the case be referred back to the President of the Court of First Instance for a fresh decision, and that the Council be ordered to pay the costs at first instance and on appeal.

3 By documents lodged at the Registry on 30 October and 10 November 1998 the Council and the Kingdom of Spain submitted their written observations to the Court. The Commission and the Government of Aruba did likewise by documents lodged on 17 November 1998. The French Republic submitted no observations within the time it allowed for the purpose.

Legal background, facts and procedure

4 The legal background and the facts underlying the dispute are set out in the contested order as follows:

'1 The island of Aruba is one of the overseas countries and territories ("OCT") associated with the Community. The association of the OCT with the Community is regulated by Part Four of the EC Treaty and by Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1, "OCT decision"), adopted pursuant to the second paragraph of Article 136 of the Treaty.

2 Article 133(1) of the Treaty provides that customs duties on imports into the Member States of goods originating in the OCT are to be completely abolished in accordance with the provisions of the Treaty.

3 The original version of Article 101(1) of the OCT decision read as follows:

"Products originating in the OCT shall be imported into the Community free of customs duties and charges having equivalent effect."

4 Article 102 of the same decision provided as follows:

"The Community shall not apply to imports of products originating in the OCT any quantitative restriction or measure having equivalent effect."

5 Article 108(1), first indent, of the OCT decision refers to Annex II thereof ("Annex II") for the definition of the concept of originating products and the methods of administrative cooperation relating thereto.

6 Under Article 1 of Annex II, a product is considered to originate in the OCT, the Community or the African, Caribbean and Pacific States ("ACP States") if it has been either wholly obtained or sufficiently worked or processed there.

7 Article 6(2) of the same annex provides that, when products wholly obtained in the Community or in the ACP States undergo working or processing in the OCT, they are to be considered as having been wholly obtained in the OCT. Under this rule, known as "ACP/OCT cumulation of origin", sugar originating in the ACP States which had undergone some degree of working or processing in the OCT could be imported into the Community free of customs duties.

8 Article 240(1) of the OCT decision states that the decision is to apply for a period of ten years from 1 March 1990. However, Article 240(3)(a) and (b) provides that before the end of the first five years the Council, acting unanimously on a proposal from the Commission, is, in addition to the financial assistance from the Community for the second five-year period, to establish, where necessary, any amendments to the OCT decision following notification to the Commission by the relevant authorities of the OCT or proposed by the Commission in the light of its own experience or as a result of amendments under negotiation between the Community and the ACP States.

9 In a communication to the Council on the amendment at mid-term of the association of the OCT with the European Community [document COM(94) 538 final, of 21 December 1994], the Commission recommended various adjustments to the association.

10 On 16 February 1996 it presented to the Council a proposal for a Council decision amending at mid-term the OCT decision (OJ 1996 C 139, p. 1). In the sixth and seventh recitals of the proposal the Council asserted that free access for all products originating in the OCT and the maintenance of cumulation for ACP and OCT originating products had given rise to the risk of conflict between two Community policy objectives, namely the development of the OCT and the common agricultural policy.

11 Concerned to resolve this risk of conflict, the Council adopted Decision 97/803/EC of 24 November 1997 amending at mid-term Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community (OJ 1997 L 329, p. 50, hereinafter "Decision 97/803").

12 In the seventh recital of that decision the Council observed as follows:

> "... fresh disruption should be avoided by taking measures to create a framework conducive to regular trade flows and at the same time compatible with the common agricultural policy".

13 For that purpose, Decision 97/803 inserted Articles 108a and 108b in the OCT decision, allowing the ACP/OCT cumulation of origin for rice and sugar respectively, for a specified annual quantity.

14 Accordingly Article 108b(1) and (2) of the OCT decision reads as follows:

> "1. 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 ... .

2. For the purposes of implementing the ACP/OCT cumulation rules referred to in paragraph 1, forming sugar lumps or colouring shall be considered as sufficient to confer the status of OCT-originating products."

15 Decision 97/803 also amended Articles 101(1) and 102 of the OCT decision, which now read as follows:

"Article 101

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

[...]

Article 102

Without prejudice to Articles 108a and 108b, the Community shall not apply to imports of products originating in the OCTs any quantitative restriction or measure having equivalent effect."

16 On 17 December 1997 the Commission adopted Regulation (EC) No 2553/97 on rules for issuing import licences for certain products covered by CN codes 1701, 1702, 1703 and 1704 and qualifying as ACP/OCT originating products (OJ 1997 L 349, p. 26, "the implementing regulation"). Although this regulation entered into force on 19 December 1997, it did not take effect until 1 January 1998.

17 Transitional arrangements were laid down by Article 8(3) of the said regulation which provides:

"Import licences applied for between 10 and 31 December 1997 shall be issued by the competent authorities of the Member States, after prior authorisation has been granted by the Commission departments, in the order in which the applications are submitted and for quantities not exceeding the total maximum of 3 000 tonnes for the Community."

Facts and procedure

18 Since April 1997 the applicant has operated a sugar factory on the island of Aruba and has exported sugar to the Community.

19 As sugar is not produced in Aruba, the applicant purchases white sugar from cane sugar refineries in ACP States. The purchased sugar is transported to Aruba, where it undergoes working and processing operations, after which the product is considered finished. These operations consist in purifying the sugar, milling it (which means bringing it to the grade required by the customer's specifications) and packaging it. The applicant states that its factory has a minimum processing capacity of 34 000 tonnes of sugar per year.

20 On 19 December 1997 the applicant submitted to the competent national authority an application for the issue of import licences for 3 010 tonnes of sugar pursuant to Article 8(3) of the implementing regulation. The application was forwarded to the Commission on 22 December 1997.

21 By decision of 23 December 1997 (VI/51329, "the contested decision") addressed to the competent national authority, the Commission rejected the application as

inadmissible on the ground that it related to a quantity greater than the maximum specified by Article 8(3) of the implementing regulation.'

5 By application lodged at the Registry of the Court of First Instance on 10 March 1998, the appellant brought an action for the partial annulment of the contested decision.

6 By separate document lodged at the Registry of the Court of First Instance on 10 April 1998, the appellant also initiated proceedings under Article 185 of the EC Treaty for suspension of the operation of the contested decision until the Court of First Instance had given judgment on the substance of the case, and under Article 186 of the Treaty for interim measures prohibiting the Commission from applying, during the same period, the provisions of the implementing regulation and/or Article 108b of the OCT decision in so far as those provisions have the effect of limiting imports into the Community of sugar from the OCT.

The contested order

7 By the contested order the President of the Court of First Instance, after examining the condition of urgency, dismissed the application for interim measures.

8 First of all, '[F]or the purpose of determining the requirements concerning evidence in the present case' (paragraph 63 of the order), the President of the Court of First Instance referred to the purpose and general context of the contested decision. He then stated, in paragraph 66, that 'the Council, in adopting Decision 97/803, exercised its discretion with regard to the choice of the most appropriate measure for preventing disruption of the Community market for sugar'.

9 According to paragraph 67 of the contested order, '[In] order to ensure that the President of the Court does not interfere with that discretion in granting suspension of the operation of the contested decision implementing the provisions of Article 108b of the OCT decision, the applicant's request can be granted only if the urgency of the measures sought appears undeniable'.

10 Starting from this premiss, the judge hearing the application for interim measures went on to consider the damage allegedly suffered by the appellant. He found that the damage was purely financial. He therefore held that the damage alleged could in principle be quantified and could later be made good, so that it could not be regarded as irreparable, save in exceptional circumstances.

11 The contested order shows that, in order to determine whether such circumstances existed in the present case, the judge then went on to consider whether the party concerned could be placed in a situation liable to endanger its very existence or to alter its market share irreversibly.

12 With regard to the economic survival of the undertaking, in paragraph 78 of the contested order the judge stated that neither in the documents in the file nor in the 'numerous documents submitted scarcely one week before the hearing — which were rejected as no reason was given for their belated submission' had the appellant provided sufficient information on its assets and liabilities and on its profitability. In paragraph 80 the judge concluded that the applicant had not discharged the burden, which fell upon it, of proving that it was threatened with insolvency.

13 In paragraphs 81 to 83 the judge added that in any event the forced dissolution of the company and the forced realisation of its assets could only lead to additional damage of a purely financial nature because the operation of the contested decision

had already led to the temporary cessation of trading and the closure of the undertaking resulting in the technical redundancy of its employees, so that even the threat of insolvency, assuming it to be established, could not justify suspension of the operation of the decision.

14 As regards the risk of an irreversible change in market share, according to paragraph 84 of the contested order the appellant had put forward nothing to suggest that, if the contested decision were annulled, the appellant would be unable to find new outlets in the Community and to recover its market share there.

15 Having concluded that the condition of urgency had not been fulfilled in the present case, in paragraph 87 the judge dismissed the application without examining the other pleas and arguments put forward by the appellant in order to justify the measures sought.

Arguments of the appellant and of the Government of Aruba

16 In addition to a number of preliminary observations on the various proceedings concerning the substance of the case now pending before the Community and national courts, and an account of the damage which it claims it is sustaining by reason of the adoption of the contested decision, the appellant put forward 11 different pleas in law in support of its appeal, grouped into four pleas on procedural grounds and seven on substantive grounds. The Government of Aruba supports the appellant's submissions, in particular with regard to the second plea.

Pleas on procedural grounds

17 According to the appellant, the procedure at first instance was vitiated by serious defects which infringed the principle of the proper administration of justice, the principle of fair trial and the principle of *inter partes* proceedings. Those defects also constitute, in the applicant's submission, an infringement of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and are so serious that they provide sufficient grounds for setting aside the contested order.

18 In the first plea, the appellant contends that the parties granted leave to intervene in the proceedings were not given an opportunity to set out in writing the pleas on which they based their claims, whereas in the orders granting leave to intervene to the Council, the Kingdom of Spain and the French Republic, the President of the Court of First Instance stated that they would be allowed a period in which to make their written submissions. According to the appellant, this omission was incompatible with its interests because it risked being caught unawares by the interveners' arguments at the hearing.

19 In the second plea, the appellant claims that, unlike what occurred with regard to the applications to intervene in support of the form of order sought by the Commission no decision was given before the oral procedure on the application to intervene submitted by the Government of Aruba, and the President did not order a period to be prescribed for the submission of its written observations. Such unequal treatment was unacceptable and it kept the Government of Aruba out of the proceedings not only in the legal sense, but also in practical terms because it was unable to lodge a written statement or explain its position at the hearing, during which no questions were put to it.

20 The third plea is based on the allegedly unlawful way in which the President of the Court of First Instance treated the written evidence produced or offered by the appellant. The documents which the applicant had sent to the Registrar of the

Court of First Instance under cover of letters of 15 and 16 June 1998 were initially returned without having been entered in the register. After the appellant's protests, the Registrar indicated that the documents could be submitted at the hearing and that it would then be decided whether they could still be produced, if appropriate. Finally, the President of the Court of First Instance stated for the first time in the contested order that the documents had been rejected 'as no reason was given for their belated submission' (paragraph 78). That manner of proceeding was not based on a (mandatory) rule of any kind or justified for reasons to do with the proper conduct of the proceedings. Consequently, the legal protection which the appellant was entitled to claim was impaired.

21 In the last plea on procedural grounds, the appellant claims that the conduct of the oral procedure was unacceptable from the viewpoint of the legal protection which it was entitled to claim because the *inter partes* principle and the principle of fair trial were infringed. According to the appellant, the oral procedure was limited to questions and answers because the parties were not in principle allowed to give their reaction to each other's replies and were not in a position to do so. In particular, no questions were put to the two interveners, the other parties were not allowed to go beyond the context of the questions asked, no immediate ruling was given on the production of the documents referred to by the appellant and the parties had no opportunity to submit final observations. The appellant had therefore no opportunity to respond orally to the written observations of the Commission.

Pleas on substantive grounds

22 The fifth plea in the appeal relates to paragraphs 63 to 66 of the contested order in which, '[F]or the purpose of determining the requirements concerning evidence in the present case' (paragraph 63), the President of the Court of First Instance examined the aims pursued by Decision 97/803 and the power vested in the Council in that regard. The appellant submits, first, that the requirements concerning evidence of urgency cannot vary according to the aims pursued by the contested act or according to the consequences of granting interim relief. The President was therefore mistaken in measuring by the yardstick of the Community interest and the

aims pursued by the Community the requirements which the appellant had to satisfy in the matter of evidence of urgency.

23 The appellant also challenges the accuracy of the observations in paragraphs 64 and 65 of the contested order concerning the sugar market and OCT sugar imports into the Community. In support of its submissions, the appellant sets out in detail the reasons for which it considers that it is incorrect to say that OCT sugar imports lead to an increase in expenditure in terms of export refunds, that they affect the Community's obligations arising from Schedule CXL to the General Agreement on Tariffs and Trade (GATT) and from the World Trade Organisation (WTO) and that they disrupt the Community sugar market.

24 Regarding the Council's power of assessment referred to in paragraph 66 of the contested order, the appellant contends, first, that that power is independent of the requirements in the matter of evidence which it has to satisfy in order to show that there is a risk of irreparable damage and, second, that it is not unlimited and must in particular observe the principle of proportionality. So far as this last point is concerned, the Council has no authority to adopt structural restrictions on OCT sugar imports in breach of that principle.

25 According to the sixth plea, the President of the Court of First Instance was incorrect in stating, in paragraph 67 of the contested order, that by reason of the Council's power of assessment the urgency of the measures sought must appear undeniable. According to the appellant, the reference made in this connection to the order of the Court of First Instance in Case T-179/96 R *Antonissen* v *Council and Commission* [1997] ECR II-425 is unfounded for the reason that in that case 'undeniable' urgency was required only because the matter in point was the obtaining of an advance on compensation for damage. According to the appellant, if the legal protection guaranteed by the procedure for interim relief is made subject to excessively strict requirements there is a risk that it will lose all substance.

26 In the seventh plea the appellant contends that the President of the Court of First Instance wrongly, and in legal terms incomprehensibly, characterised the alleged damage as financial damage which could in principle be quantified and be made good later, adding that purely financial damage could not be regarded as irreparable. According to the appellant, this is an incorrect legal assessment of the facts. Furthermore, the case-law based on the possibility of compensation for damage under Article 215 of the EC Treaty disregards the difference between the criteria governing the Community's financial liability and those governing the annulment of a contested Community measure. A breach of Community law entailing the annulment of a measure or a ruling that it is unlawful does not always constitute a serious breach of Community law giving rise to a right to the compensation which the second paragraph of Article 215 of the Treaty enables to be granted.

27 According to the eighth plea, it is incorrectly stated in paragraph 76 of the contested order that the appellant merely stated that the implementation of the contested decision and that of Decision 97/803 and the implementing regulation had led to immediate cessation of trading and the complete closure of its undertaking.

28 The appellant then contends, in its ninth plea, that it is incorrectly stated in paragraphs 78 and 80 of the contested order, on the basis of an assessment of evidence the production of which was not accepted, that the appellant had not shown that it was threatened with insolvency. Referring to its pleas on procedural grounds, the appellant maintains that the evidence was assessed in a legally incorrect manner. Furthermore, according to the appellant, in a case such as its own it would appear to be essentially pointless to produce economic or accounting data because the undertaking concerned has been compelled by the contested measures to cease trading altogether for the time being. The parties are in agreement on this.

29 According to the tenth plea, paragraph 79 of the contested order incorrectly charges the appellant with having furnished no information on the profitability of its undertaking in order to establish the annual volume of sugar exports which would be

necessary for its survival. It was also wrong to refuse to accept the figure of 34 000 tonnes on the ground that it was merely an unproven assertion. On this point, the appellant makes some additional observations on the wish expressed at first instance by the Council and the Commission that any interim measure which might be granted should be subject to the condition that the appellant furnish a guarantee in the amount of 50% of the customs duties and the agricultural levy.

30 Finally, in the eleventh and last plea, the appellant states that in paragraphs 81 to 83 of the contested order it was wrongly held, in substance, that the insolvency of an undertaking which, pending an order for interim measures, has had to suspend production, sales and exports as the result of a Community measure is purely financial damage which can be made good later. The appellant refers in particular to the different approach taken in the order of the Court of Justice in Case 152/88 R *Sofrimport* v *Commission* [1988] ECR 2931.

Arguments of the other parties to the proceedings

Pleas on procedural grounds

31 The Council begins by affirming, without disputing the reference to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, that, although everyone has a right to a fair trial, this does not mean that the Community courts have no autonomy in procedural matters.

32 With regard to the first plea, the Council states that, in the field of the procedure for interim relief, there are numerous precedents where the other parties had no opportunity to submit written observations, a fact which is explained by the urgency which characterises that procedure. The Commission points out that the parties were invited to attend the hearing and therefore had an opportunity to make oral observations. According to the Commission, although no action was taken on the orders allowing the interventions, in that they prescribed a period for lodging a statement in intervention, this was not, having regard to the circumstances, a procedural irregularity. The Kingdom of Spain adds that the purpose of its intervention was to defend the validity of Decision 97/803 and was therefore not relevant to the issue of urgency.

33 With regard to the application by the Government of Aruba for leave to intervene, which is the subject of the second plea, the Council and the Kingdom of Spain observe that the different treatment of the Government of Aruba arises from the fact that it was not one of the interveners referred to by the first paragraph of Article 37 of the EC Statute of the Court of Justice. They also point out that the Government of Aruba attended the hearing, during which it was treated in the same way as the other parties. Finally, the Commission stresses that Article 116(1) of the Rules of Procedure of the Court of First Instance does not lay down a time-limit within which the President must decide on an application to intervene.

34 As regards the third plea, which concerns the treatment of the written evidence submitted by the applicant, the Council observes that it is for the President to assess the value to be attached to the evidence submitted to him and that it is for him to choose the evidence on which he will base his order. Excessive restriction of that discretionary power might encroach upon the President's autonomy in procedural matters. According to the Commission, no reason had been given for the belated submission of documents and the President had a discretion to reject documentary evidence. The Kingdom of Spain draws attention to paragraph 78 of the contested order, which shows that the documents in question were in fact taken into consideration.

35 The final plea on procedural grounds relates to the conduct of the hearing. The Council observes that the oral procedure is not mandatory in proceedings for interim measures and that the President was therefore entitled to take the view that, on the basis of the documents produced and the replies to the questions put at the hearing, he had all the information necessary to give a decision. According to the Commission, the hearing in this case cannot be described as an oral procedure within the meaning of Article 18 of the EC Statute of the Court of Justice, but must be regarded as a measure of inquiry in respect of which the President has a discretion.

Pleas on substantive grounds

36 With regard to the pleas on substantive grounds of the appeal, the Kingdom of Spain concentrates on the question of the validity of Decision 97/803.

37 The Council and the Commission, for their part, first deal jointly with the fifth and sixth pleas. According to the Council, the requirement of undeniable urgency where the measure at issue is adopted on the basis of a power of assessment is affirmed by settled case-law. On this point, the Council refers to the order of the Court of First Instance in Case T-310/97 R *Government of the Netherlands Antilles* v *Council* [1998] ECR II-455, paragraph 65, and the order of Court of Justice in Case C-110/97 R *Netherlands* v *Council* [1997] ECR I-1795, paragraphs 32 and 33, also cited by the Commission. The latter institution also argues that the connection made between the existence of a power of assessment and the degree of urgency cannot be regarded as wrong in law. It would perhaps be more correct to say that this reasoning goes to the question of the balancing of interests, but in the final analysis that amounts to the same thing and means that, for measures based on a power of assessment, the President must maintain a certain caution.

38 According to the Council, the seventh plea, which relates to the purely financial nature of the damage, is manifestly inadmissible because it concerns the finding of the facts by the President of the Court of First Instance.

39 With regard to the eighth plea, the Council and the Commission agree that the finding in paragraph 76 of the contested order accurately reflects the essential aspects of the appellant's position.

40 The ninth plea, which, according to the Commission, constitutes the essential issue in these proceedings, is inadmissible, in the submission of that institution, for the same reasons as the tenth and eleventh pleas because it challenges grounds of the contested decision given merely for the sake of completeness or relates to findings of fact.

41 As the parties' written observations contain all the information necessary for judgment to be given on the appeal, there is no need to hear oral argument from the parties.

Findings

42 The fifth, sixth, ninth and eleventh pleas should be examined together because, taken together, they call into question the criteria adopted in the contested order for the purpose of assessing the condition of urgency.

43 As a preliminary point, it should be observed that it is settled case-law that it is open to the judge hearing the application to order the suspension of the operation of an act, or other interim measures, only if it is established that such an order is justified prima facie in fact and in law and that it is urgent in that, in order to avoid serious and irreparable damage to the applicant's interests, it must be made and produce its effects before the decision is given in the main proceedings. Such an order must further be provisional inasmuch as it must not prejudge the points of law or fact in issue or neutralise in advance the effects of the decision subsequently

to be given in the main action (order in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22).

44 In the context of that overall examination, the judge hearing the application has a wide discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed (order in *Commission* v *Atlantic Container Line and Others*, cited above, paragraph 23).

45 In the present case, only the condition relating to urgency was examined and the parties' arguments concerning the prima facie justification of the application are not mentioned in the order. Having found in paragraph 85 of the contested order that the applicant had not shown that it risked suffering serious and irreparable damage and, in paragraph 86, that therefore the requirement of urgency was not satisfied, the President of the Court of First Instance, in paragraph 87, dismissed the application for interim measures without examining the other pleas and arguments put forward by the appellant to justify suspension of the operation of the contested decision.

46 For the purpose of determining the requirements concerning evidence of urgency, the President of the Court of First Instance, after examining, in paragraphs 64 and 65, the aims of Decision 97/803, concluded in paragraph 66 that 'the Council, in adopting Decision 97/803, exercised its discretion with regard to the choice of the most appropriate measure for preventing disruption of the Community market for sugar'. According to paragraph 67 of the contested order, it followed that the appellant's request could be granted only if the urgency of the measures sought appeared undeniable.

47 In this connection, it is common ground that, as the conditions for suspension of operation or for any other interim measure are cumulative, the application could properly have been dismissed on the single ground that the condition of urgency was not satisfied.

48 However, the contested order is wrong in law in so far as, in the context of an examination confined to the issue of the urgency of the measures sought, it establishes a connection between the existence of a power of assessment vested in the Council and the degree of urgency to be proved as a condition for the grant of an interim measure.

49 Admittedly, the fact that the Council has a power of assessment may be a relevant factor in the analysis of the degree of urgency in the context of balancing the interests involved. Similarly, the requirement of manifest urgency, in conjunction with a particularly strong prima facie case, may be justified by the nature of the interim measure sought or the effects which it may produce (see, to that effect, the order in Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441, paragraph 41, which refers to a type of measure which is in fact more likely than others to produce irreversible effects, and the order in *Netherlands* v *Council*, cited above, paragraphs 28 and 33, which envisages the situation where a decision of the judge hearing the application for interim measures taken in circumstances of urgency would in practice have more or less definitive effects.

50 However, the mere fact that a discretionary power is vested in the author of the contested act cannot in itself, in the absence of any consideration whether there is a prima facie case and of any balancing of the interests involved, determine what are the requirements relating to the condition of urgency.

51 The approach taken in the contested order would amount to excluding, or, at least, reducing considerably, the effectiveness of interim judicial protection where a measure adopted in the exercise of a broad power of assessment is concerned. In particular, it may lead, solely on the ground that urgency is not undeniable, to the refusal of interim measures which might appear necessary in order to ensure the effectiveness of the judgment in the main action in situations where there is a particularly strong prima facie case and where the balance of interests inclines in favour of the party seeking the measure.

52 The objections of the Council and the Commission to the admissibility of the ninth and eleventh pleas must be examined in the light of these considerations.

53 In this connection, it is true, as the Council and the Commission point out, that an appeal must be limited to points of law, and may not call into question the findings of fact by the judge hearing the application for interim relief (order in *Commission* v *Atlantic Container Line and Others*, cited above, paragraph 18). Moreover the Court of Justice does not as a rule have jurisdiction to examine evidence which the Court of First Instance has accepted in support of its findings or its assessments of the facts (order in Case C-159/98 P(R) *Netherlands Antilles* v *Council* [1998] ECR I-4147, paragraph 68).

54 However, in the present case the error of law in the contested order is, in so far as it entails a requirement of undeniable urgency, such as to affect the conclusion reached by the judge hearing the application in his assessment of the serious and irreparable nature of the damage claimed by the applicant.

55 In this connection, the reasoning of the contested order confirms that that assessment was determined by the requirement of evidence of undeniable urgency.

56 Thus, it is clear from paragraph 78 of the order (see paragraph 12 of the present order) that the finding that there was no urgency is partly based on the conclusions drawn from various documents submitted by the appellant although those documents were not admitted in evidence and could therefore have been the subject only of a necessarily very cursory examination.

57 Finally, it would also appear from the contested order that the criterion of undeniable urgency was the reason for the particularly strict application of the case-law concerning the serious and irreparable nature of the damage which an undertaking might sustain in a case such as the present one. This applies particularly to the reasoning in paragraphs 81 to 83 of the order, according to which, essentially, the appellant could no longer obtain suspension of the operation of the contested decision on the sole ground that that decision had already led to the temporary cessation of trading and the closure of its undertaking, entailing the technical redundancy of its employees.

58 The appeal must therefore be allowed and the contested order set aside.

59 Under the first paragraph of Article 54 of the EC Statute of the Court of Justice, if the appeal is well founded, the Court is to set aside the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

60 The state of the present proceedings does not permit judgment to be given. The case must therefore be referred back to the Court of First Instance for judgment.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. The order of the President of the Court of First Instance of 14 August 1998 in Case T-44/98 R *Emesa Sugar* v *Commission* is set aside.

2. The case is referred back to the Court of First Instance.

3. The costs are reserved.

Luxembourg, 17 December 1998.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President