JUDGMENT OF THE COURT (Sixth Chamber)
22 March 1990 *

In Case C-347/87

Triveneta Zuccheri SpA, whose registered office is in Verona,

Consorzio Maxi, whose registered office is in Laives,

Unionzuccheri SRL, whose registered office is in Albizzate,

Rader GEC SNC, whose registered office is at Altavilla Vicentina,

Riseria Toscana, of Italo Meneghetti,

Avez SpA, whose registered office is in Milan,

Seda SpA, whose registered office is in Modena,

Liguralcool SAS, whose registered office is in Genoa,

represented by Giovanni Maria Ubertazzi and Fausto Capelli, of the Milan Bar, and by Louis Schiltz of the Luxembourg Bar, with an address for service in Luxembourg at the latter's chambers, 83, boulevard Grande-Duchesse-Charlotte,

applicants,

v

Commission of the European Communities, represented by its Legal Adviser, Thomas F. Cusack, and by Enrico Traversa, a member of its Legal Department, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Italian.

APPLICATION for the annulment of Commission Decision 87/533/EEC of 8 April 1987 on an Italian Government aid scheme to support Italian sugar traders (Official Journal 1987, L 313, p. 24),

THE COURT (Sixth Chamber)

composed of: C. N. Kakouris, President of Chamber, F. A. Schockweiler, T. Koopmans, G. F. Mancini and T. F. O'Higgins, Judges,

Advocate General: W. Van Gerven, First Advocate General
Registrar: H. A. Rühl, Principal Administrator

having regard to the Report for the Hearing and further to the hearing on 22 November 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 11 January 1990,

gives the following

Judgment

1 By an application lodged at the Court Registry on 11 November 1987, Triveneta Zuccheri SpA, whose registered office is in Verona (Italy), together with seven other Italian undertakings, all sugar traders (hereinafter referred to as the 'applicant undertakings'), brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Commission Decision 87/533/EEC of 8 April 1987 on an Italian Government aid scheme to support Italian sugar traders (Official Journal 1987, L 313, p. 24).

2 In the contested decision, which was addressed to the Italian Republic, the Commission decided that the refund to Italian sugar traders of an amount of LIT 37.12 per kg on stocks of white sugar held by traders on 29 October 1984 constituted a State aid incompatible with the common market within the meaning of Article 92 of the EEC Treaty, and could not therefore be granted.

3 That refund, which was provided for in the decision of 11 October 1984 of the comitato interministeriale per la programmazione economica (Interministerial Committee for economic planning) and by Provvedimento Nos 39/1984 of 24 October 1984 and 41/1984 of 16 November 1984 of the comitato interministeriale dei prezzi (Interministerial Committee on prices), was granted to Italian sugar traders in order to compensate them for a reduction in their profit margin arising from a reduction in the maximum sale price for sugar of LIT 40.09 per kg as against the price previously in force, the reduction being provided for in Provvedimento No 39/1984 and entering into force on 30 October 1984.

4 The Commission raised an objection of inadmissibility against the application, in accordance with Article 91(1) of the Rules of Procedure of the Court, and requested the Court to rule on that objection before examining the merits.

5 In support of its objection of inadmissibility, the Commission contends that in challenging the contested decision the applicant undertakings are in reality seeking to sue the Commission for failure to act on the ground that, in breach of Community law, it omitted to bring an action against the Italian Republic for a declaration that the Italian system for fixing maximum prices for the sale of sugar was incompatible with Community law.

6 The applicant undertakings request the Court to reject the objection raised. In that connection, they maintain that the contested decision and the Italian system for fixing sugar prices are inextricably linked in such a way that it is impossible to challenge the lawfulness of the decision without at the same time raising the question of the compatibility with Community law of the Italian system for fixing maximum prices for sugar.

7 On 23 November 1988 the Court decided to join the examination of the questions relating to admissibility to the examination of the substance of the case.

8 As regards the substance of the case, the applicant undertakings, which are the recipients of the refund provided for by the Italian rules, dispute that the measure at issue constitutes aid incompatible with the common market. They submit first of all that it merely constituted restitution of the damage caused to Italian sugar traders by the application of national pricing rules, which are contrary to Community law. Next, the applicant undertakings claim that the refund decided upon was essential in order to avoid discrimination, prohibited by the second subparagraph of Article 40(3) of the EEC Treaty, as between traders who held stocks of sugar on 29 October 1984 and those who did not.

9 The Commission claims that the application is ill founded in any event. As regards the applicant undertakings' first submission, it maintains, in essence, that the lawfulness of the contested decision, apparent from the grounds on which it is based, and the alleged incompatibility with Community law of the Italian rules for fixing maximum prices for sugar, are two entirely separate problems. As regards the applicant undertakings' second submission, alleging an infringement of the second subparagraph of Article 40(3), the Commission contends that that provision is not applicable in the present case, since the alleged discrimination does not exist as between Community producers.

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

11 Without entering into an examination of the submissions and arguments of the parties it should be pointed out straightaway that the two submissions relied on by the applicant undertakings in the application and further developed at the hearing are based on the assumption that the Italian rules for fixing sugar prices are incompatible with Community law.

12 The first submission of the applicant undertakings is that national price rules which apply at all stages of the production and marketing of a product covered by a common organization of the markets must, in accordance with the Court's case-law (see for example the judgment of 23 January 1975 in Case 31/74 *Galli* [1975] ECR 47), be regarded as incompatible with that common organization because in the areas covered by it exclusive competence has been conferred on the Council and the Commission. According to the applicant undertakings, that principle applies *a fortiori* when, as in the present case, the common organization established by Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector (Official Journal 1981, L 177, p. 4) is based on a common system of prices preventing Member States from intervening in the price formation machinery of the common organization by means of unilaterally adopted national provisions. In the context of that submission, the applicant undertakings further argue that the Italian rules for fixing sugar prices are contrary to Article 30 of the EEC Treaty since they are likely to impede the free movement of goods.

13 In their second submission, which is based on the second subparagraph of Article 40(3), the applicant undertakings claim that the refund decided upon by the Italian authorities was essential in order to eliminate discrimination allegedly created against Italian traders as a result of intervention by the national authorities contrary to Community law.

14 At the hearing, the applicant undertakings further explained that the Italian measure in issue must be regarded as consisting of the reimbursement of a sum withheld from Italian sugar traders under national rules contrary to Community law, and in this connection they rely on the judgment of 10 July 1980 in Case 811/79 *Amministrazione delle finanze dello Stato* v *Ariete* [1980] ECR 2545, paragraph 15, in order to argue that that measure cannot therefore be treated as aid incompatible with the common market. In particular, they base their reasoning on the maxim *nemini licet venire contra factum proprium*, asserting that the Commission, having failed to obtain a declaration by the Court that the Italian rules on maximum sugar prices are incompatible with Community law, is not entitled to seek to prevent the refund decided upon by the Italian authorities.

15 In those circumstances, it should be stated that, in order to give a decision on the merits of the submissions made by the applicant undertakings, the Court would necessarily be required to rule on the question whether the Italian rules on the fixing of maximum sugar prices are compatible with Community law.

16 The Court has consistently held, however, that, except in the an action for a declaration of a failure to fulfil obligations, it is not for the Court to rule on the compatibility of a national provision with Community law. That competence belongs to the national courts, if necessary, after obtaining from the Court, by way of a reference for a preliminary ruling, such clarification as may be necessary on the scope and interpretation of Community law.

17 It follows that the Court cannot, except at the risk of prejudging, in an action for annulment brought against a Commission decision, the issue of the compatibility with Community law of the Italian system for fixing sugar prices, adjudicate on the submissions which the applicant undertakings put forward in order to challenge the classification of the Italian measure in question as aid and which are based on the alleged incompatibility with Community law of the rules on maximum sugar prices in Italy.

18 Since the applicant undertakings have made no other submission for the purpose of establishing the illegality of the contested decision, the application must be dismissed as inadmissible.

Costs

19 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant undertakings have failed in their submissions, they must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

(1) Dismisses the application as inadmissible;

(2) Orders the applicant undertakings jointly to pay the costs.

Kakouris Schockweiler

Koopmans Mancini O'Higgins

Delivered in open court in Luxembourg on 22 March 1990.

J.-G. Giraud
Registrar

C. N. Kakouris
President of the Sixth Chamber