ORDER OF THE PRESIDENT OF THE COURT
OF 22 MAY 1978 [1]

Simmenthal S.p.A.
v Commission of the European Communities

Case 92/78 R

In Case 92/78 R

SIMMENTHAL S.P.A., having its registered office in Aprilia (Italy), represented and assisted by Emilio Cappelli and Paolo de Caterini, Advocates of the Rome Bar, with an address for service in Luxembourg at the Chambers of Charles Turk, 4 Rue Nicolas Welter,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Kalbe, acting as Agent, assisted by Guido Berardis, a member of the Legal Department, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser to the Commission, Jean Monnet Building, Kirchberg,

defendant,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

has made the following

ORDER

Facts and Issues

The facts giving rise to the dispute may be summarized as follows:

1. (a) Pursuant to Article 13 (1) of Regulation No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187), "A levy shall be charged on imports into the Community of frozen meat".

However, according to Article 14 of the said regulation as originally worded, under certain conditions the levy was

1 — Language of the Case: Italian.

totally suspended in respect of imports of meat intended for the production of preserved foods not containing characteristic components other than beef and jelly — hereinafter referred to as "beef and jelly preserves".

On 14 February 1977 the Council adopted Regulation No 425/77 (Official Journal L 61, p. 1), amending *inter alia* Article 14 of Regulation No 805/68. In substance, the amendments, in so far as they are relevant to the present case, were prompted by the fact that, in view of the collapse of prices which had occurred within the Community as a result of massive imports from third countries, it had become necessary to adjust the import arrangements, and in particular "certain special systems", in order to avoid a recurrence of similar situations (cf. the second to the fifth recitals of the preamble to Regulation No 425/77). Accordingly, that regulation provides, in particular, that:

— Meat intended for the manufacture of beef and jelly preserves now also benefits from the total suspension of the levy only "under the conditions laid down in this article" (Article 14 (1) (a) of the new version of the regulation);

— Importation under total suspension of the levy "shall be made conditional on production of an import licence issued for a quantity falling within the limits laid down each quarter" and may be made conditional "on production of a purchase contract for frozen meat held by an intervention agency" (Article 14 (3) of the new version of the regulation);

— The Commission shall fix, each quarter, the quantities which may be imported under total suspension of the levy and shall determine "detailed rules for the application of this article" (Article 14 (4) (a) and (c) of the new version of the regulation).

(b) The Commission laid down the above-mentioned detailed rules of application in Regulation No 585/77 of 18 March 1977 (Official Journal L 75, p. 5). That provision, as later amended and supplemented by Commission Regulations Nos 1384/77 of 27 June 1977 (Official Journal L 157, p. 16) and 2901/77 of 22 December 1977 (Official Journal L 338, p. 9), lays down the following, *inter alia*, in its present wording:

— In order to qualify for the said total suspension of the levy, "the application for a licence or licences lodged by any one applicant shall relate to a quantity corresponding to not less than five tonnes of bone-in meat and not more than 10 % of the quantity fixed" by the Commission pursuant to the new Article 14 of Regulation No 805/68, "for the quarter during which the application for a licence is lodged" (Article 9 (1) (a) of Regulation No 585/77).

— In order to be eligible for consideration applications must, *inter alia*, be submitted by "a natural or legal person who for at least 12 months has been carrying on business in the meat and livestock sector and is officially registered in a Member State" (Article 11a (2) (a)).

(c) On 22 December 1977 the Commission adopted Regulation No 2900/77 "laying down detailed rules for the sale of beef held by the intervention agencies to enable the import with total suspension of the levy of frozen beef and veal intended for processing", which entered into force on 1 January 1978. That regulation contains, *inter alia*, the following provisions:

— Pursuant to Article 1 (1) importation with total suspension of the levy "shall be conditional upon the submission of a purchase contract for frozen meat held by an intervention agency, concluded in accordance with this regulation".

— Under Article 1 (2) the sale shall take place by way of tender, pursuant to Regulation No 216/69 of the Commission of 4 February 1969 (Official Journal, English Special Edition 1969 (I), p. 31), subject to the derogating provisions laid down in Regulation No 2900/77.

Regulation No 216/69 concerning "the disposal of frozen beef and veal bought in by intervention agencies" provides for invitations to tender as one of the methods of determining selling prices and lays down detailed rules therefor; minimum selling prices are fixed by the Commission; if the tender is for less than the minimum price it shall be refused; successful tenderers are those who offer the highest prices, it being understood that when several tenders at the same price are received for the same quantity, the intervention agency shall divide the quantity available or award it by balloting.

— The intervention agencies shall issue partial invitations to tender every quarter "under the tendering system"; a general notice of invitation to tender shall be published at the latest on the date of publication of the first partial invitation to tender (Article 2 (1) and the first subparagraph of Article 2 (2)).

— "Tenders may be submitted only during the first 10 days of each quarter. However, on the first occasion, they may be submitted only between 20 and 30 January 1978" (Article 3 (1)).

— "Only tenders for a total quantity of not less than five tonnes and not more than 10 tonnes ... can be accepted" (Article 3 (4)).

(d) Pursuant in particular to its own Regulations Nos 216/69, 2900/77 and 2901/77 the Commission published, in the Official Journal C 11 of 13 January 1978, at page 16, a "general notice of periodic invitations to tender for the sale of frozen beef held by the intervention agencies to enable the import with total suspension of the levy of frozen beef and veal intended for processing".

The same edition of the Official Journal contains, at page 34, the "notice of invitation to tender No It P 1 — Regulation (EEC) No 2900/77 — for the sale of certain frozen unboned (bone-in) beef held in stock by the Italian intervention agency". Pursuant to that notice the said intervention agency "shall sell approximately 4 000 tonnes of frozen unboned beef", and more particularly "in accordance with the rules laid down [in the above-mentioned general notice]"; "only tenders which reach [the Italian intervention agency] on 30 January 1978 at the latest shall be considered".

(e) On 15 February 1978 the Commission adopted Decision 78/258/EEC (Official Journal L 69, p. 36), addressed to all the Member States and founded, in particular, on the new Article 14 of Regulation No 805/68, as well as on Regulations Nos 216/69, 585/77, 2900/77 and 2901/77:

— Pursuant to Article 1 (1) and the annex, that decision fixed "the minimum selling prices for frozen beef stored by the intervention agencies which are to be adopted for the invitation to tender held in accordance with Regulation (EEC) No 2900/77, for which the time-limit for submitting tenders was 30 January 1978", that is to say for the first quarterly invitation to tender held in 1978 (see Articles 2 and 3 (1) of Regulation No 2900/77).

— Article 2 of the decision fixed, "for the period 1 January to 31 March 1978", at 5 027 tonnes the maximum

quantities of meat intended for the manufacture of beef and jelly preserves accepted for importation with total suspension of the levy.

2. By an application against the Commission, lodged at the Registry of the Court on 13 April 1978, to which successive amendments have been made by way of a "corrigendum", the applicant claims, in substance, that the Court should "declare null, void or inapplicable, within the meaning of Articles 173 and 184 of the EEC Treaty", the following measures:

— Decision 78/258;

— The general notice of invitations to tender referred to above at 1 (d);

— Notice of invitation to tender No It P 1;

— Regulation No 585/77, and in particular Articles 11 and 11a;

— Regulation No 2900/77;

— Regulation No 2901/77, "especially as regards the total suspension of the levy in the framework of the special import system for frozen beef and veal".

In support of that action, the applicant submits *inter alia* the following:

1. The system instituted by the Council is based on the desire to ensure sufficient supplies for Community producers of preserves. That industry, precisely because of the establishment of the common organization of the market in beef and veal, in fact came to find itself, objectively, in a position of inferiority in relation to its extra-Community competitors, for whom the world market offers very extensive possibilities for obtaining supplies.

   The modification of the said system pursuant to the amendments made by Regulation No 425/77 to Article 14 of Regulation No 805/68 subjected the industrial sector to which the applicant belongs to a less liberal system in that it enables the Community authorities wholly to control imports of frozen meat, permitting them, in particular, to fix the maximum quantities which may be imported with suspension of the levy and to render that suspension conditional upon the submission of a contract for the purchase of meat held by an intervention agency (the so-called "linking" system).

2. However, the new system could have functioned satisfactorily if the Commission had exercised the powers attributed to it by the Council in a reasonable and correct manner. The contested measures and the effects produced thereby show, however, that such has not been the case:

   — The Commission has fixed at too low a level the quantities which could be imported with suspension of the levy.

   — It has decided to operate the "linking" system, laying down detailed rules which are open to criticism:

      — In the first place, it allows an excessive number of interested parties to participate in the procedure for sale by tender. Genuine processors are therefore placed in competition with a practically infinite number of traders who are thus enabled subsequently to sell to processors, on particularly favourable terms to themselves, the meat imported free of the levy.

      — Moreover, the Commission has limited all individual offers made in response to the invitations to tender to a maximum quantity of 100 tonnes and, moreover, has

rendered the admissibility of tenders to all sorts of further restrictive conditions.

— The effects of the general rules governing invitations to tender are also applicable.

— For the applicant, in particular, the system in question has provoked unacceptable consequences:

— The applicant is an undertaking which processes some 20 000 tonnes of beef and veal per year. In view of the qualitative characteristics of its products it is obliged to obtain its meat largely by way of imports from third countries.

— For the second, third and fourth quarters of 1977 it was granted import licences for completely insignificant quantities (12, 12 and 5.8 tonnes, respectively). In the first invitation to tender of 1978 its tender was quite simply refused because the price offered was lower than the minimum price fixed by the Commission.

— In consequence, in order to obtain at least part of its supplies on the external market, the applicant "has been obliged to undertake humiliating and onerous negotiations in order to acquire those quantities which had been obtained by the multitude of importers who are not processors, for whom the irrational management of the special import arrangements by the Community authorities has provided the opportunity for parasitic profit-margins which are as unhoped for as they are unjustified".

3. (a) On the same date, namely 13 April 1978, the applicant submitted to the Court, pursuant to Articles 185 and 186 of the EEC Treaty and Article 83 (1) of the Rules of Procedure, a request that:

1. "In so far as possible, the effectiveness of Decision ... 78/258 ... be suspended, and that the Commission be ordered to instruct the national authorities to suspend the issue of import licences corresponding to the contracts of purchase entered into by successful tenderers with the intervention agencies;"
2. "The application of the special arrangements for the importation of frozen meat intended for the processing industry be suspended until publication of the final judgment."

In support of the application for the adoption of interim measures the applicant maintains *inter alia* as follows, while also referring to the principal application:

For the reasons set out in the application the applicant has suffered very serious damage, which is likely to recur in a more serious form in the future; even if a favourable judgment is given on the principal application that damage could not be made good. Indeed, if the interim measures requested are not taken, and even if the Court settles the dispute with dispatch, then in all probability it will be impossible to avoid the Commission's inviting tenders for the quantities of meat to be imported during the second and third quarters of 1978, with the result that the said quantities will, as in the past, be diverted to traders other than industrial processors.

(b) In the observations which it lodged at the Registry on 24 April 1978 the Commission contends that the request for the adoption of interim measures

should be dismissed and that the costs should be reserved. In support of its submissions the Commission adduces the following arguments:

1. The first head of claim

It is impossible to deprive Decision 78/258 of all legal effect two months after its adoption. Requests for the issue of licences had to be submitted in the course of the quarter in which the corresponding contract of purchase was entered into, that is, in the case in point, before 31 March 1978. Requests corresponding to the contracts concluded in that quarter were therefore submitted some while ago and the relevant licences were issued immediately pursuant to the provisions of Article 11a (6) of Regulation No 585/77. Those concerned have therefore acquired rights of which they cannot be deprived retroactively.

The retroactive suspension of the effectiveness of the decision in question is not necessary for the purpose of protecting a legitimate interest on the part of the applicant. The latter can acquire as much meat as it needs both on the Community market and on the world market; furthermore, it can participate in invitations to tender on the conditions laid down by the Community rules. On the occasion of the last invitation to tender its tender was not accepted for the simple reason that it was not high enough. Thus the interest which the applicant is claiming in the case in question merely consists in not paying purchase prices which are higher than those which are convenient for it. By implication, therefore, the application contains a claim to preferential treatment in comparison with competitors. Moreover, this financial interest of the applicant would not be irreversibly damaged if its application were dismissed; indeed if, in the main action, the Court were to decide that the Commission has infringed the rights of the applicant the latter could seek reparation for any damage suffered.

The measures sought, both in the main action and in the present procedure, are out of all proportion to the benefit in view. In order to obtain exemption for the importation of a necessarily limited quantity, the applicant is demanding the annulment of sales of intervention meat throughout the Community and the withdrawal of import licences from their holders relating to the equivalent of nearly 13 000 tonnes.

On the other hand, even on the assumption that the disputed decision is annulled, it would not follow that the applicant is therefore entitled to obtain as much meat as it wishes, at a price convenient to it. Nor would the Community be under an obligation to suspend the application of the levy for the exclusive benefit of the applicant. The only consequence would be that it would be necessary to publish a new notice of invitation to tender, for which the applicant would be eligible under the same conditions as any other trader.

2. The second head of claim

The applicant is attempting to obtain by way of an interim measure the result which it seeks in its principal application. According to the Commission, therefore, that application is inadmissible for the reasons which it sets out in detail.

The measure sought is devoid of all practical purpose. The suspension of the whole system would deprive all the Community traders concerned of the possibility of taking advantage of the implementation of that system, while the applicant would not derive directly therefrom the benefit which it seeks

and, more especially, would not obtain the right to import meat in future exempt from the levy.

(c) The parties submitted oral observations before the President of the Court on 8 May 1978.

Decision

The first head of claim

1 The first head of claim of the application requests the suspension, "in so far as possible", of the effectiveness of Commission Decision 78/258, in the sense that that suspension should be ordered on an interim basis and that "the Commission be ordered to instruct the national authorities to suspend the issue of import licences corresponding to the contracts of purchase entered into by successful tenderers with the intervention agencies".

2 Pursuant to Article 1, that decision fixes the minimum prices to be applied in relation to meat "for the invitation to tender held in accordance with Regulation (EEC) 2900/77, for which the time-limit for submitting tenders was 30 January 1978".

3 Article 2 of the decision fixes, "for the period 1 January to 31 March 1978", the maximum quantities of meat intended for the processing industry to be accepted for importation with total suspension of the levy.

4 It is common ground that in accordance with the provisions in force applications for import licences relating to the quantities available for importation under the above-mentioned conditions during the period in question had to be submitted by 31 March 1978.

5 On the other hand, according to Article 11a (6) of Regulation No 585/77, "the licence shall be issued without delay to the applicant".

6 However, during the hearing the applicant stated that in its opinion, in so far as Italy is concerned, not all the licences in question have yet been issued to those concerned by the national authorities.

7 Even assuming for the sake of argument that that statement is correct, it should be emphasized that the decision in dispute is addressed to all the Member States and it may be presumed that within the Community as a whole the majority of the said licences have already been issued, so that from this point of view the effectiveness of the decision in dispute has been exhausted and it can therefore no longer be the subject-matter of a suspensory measure.

8 Moreover, to restrict the application of the measure sought to licences which have not yet been issued would amount to depriving those concerned of a right conferred upon them by the Community rules in force.

9 Even if it is accepted that the Court is empowered to adopt an interim measure having so serious an effect on the rights and interests of third parties, who are not parties to the dispute and have not therefore been able to express their views, such a measure could however only be justified if, in its absence, the applicant would be exposed to a situation which threatened its very existence.

10 No such situation exists in the case in point and the first head of claim must therefore be dismissed.

The second head of claim

11 Under its second head the application requests the suspension, "until publication of the final judgment", of "the application of the special arrangements for the importation of frozen meat intended for the processing industry".

12 That request must be understood as referring in essence to the complex of regulations adopted by the Commission in implementation of Article 14 of Regulation No 805/68 in its amended version as referred to in Council Regulation No 425/77, in so far as the applicant has disputed those regulations in its principal application.

13 In adopting the rules in question the Commission performed the task entrusted to it by the Council under the terms of the said Article 4 (4), that is to say, the task of determining the detailed rules for the application of that article.

14 Should the occasion arise, jurisdiction to rule as to the lawfulness of the provisions whereby the Commission laid down those detailed rules does not belong to the Court in the context of interlocutory proceedings but only on the occasion of a judgment on the principal application.

15 It may suffice to note that if the application for the adoption of interim measures were granted, all the provisions for the implementation of Article 14 of Regulation No 805/68 would thereby be jeopardized.

16 The application under consideration is therefore aimed, in substance, at depriving the said Article 14 of all effect until the Court has given judgment on the principal application.

17 Moreover, as is clear from the second to the fifth recitals of the preamble to Regulation No 425/77, the amendments made by that regulation to Article 14 of Regulation No 805/68 were prompted by the desire to avoid a recurrence of the situation which had already occurred previously, consisting in a market price slump following massive imports.

18 It follows that the measure sought might have serious consequences on the market in beef and veal and adversely affect the interests of an incalculable number of agricultural producers and traders.

19 The scope and possible consequences of such a measure would render it out of all proportion to the individual interest which the applicant wishes to safeguard.

20 During the hearing the applicant intimated that it might be satisfied with interim measures of a less incisive character than those requested by it in its application.

21 However, it put forward no precise submissions on this matter.

22 In view of all these facts the second head of claim in the application must also be dismissed.

23 The decision on costs should be reserved until the final judgment in Case 92/78.

On those grounds,

THE PRESIDENT,

by way of interlocutory decision,

hereby orders as follows:

1. **The application is dismissed;**

2. **Costs are reserved.**

Luxembourg, 22 May 1978.

A. Van Houtte
Registrar

H. Kutscher
President