ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

26 February 1997 *

In Case T-191/96 R,

CAS Succhi di Frutta SpA, a company incorporated under Italian law, established in Verona (Italy), represented by Alberto Miele, of the Padua Bar, Antonio Tizzano and Gian Michele Roberti, of the Naples Bar, and Carlo Scarpa, of the Venice Bar, Cabinet Tizzano, 36 Place du Grand Sablon, Brussels,

applicant,

v

Commission of the European Communities, represented by Paolo Ziotti, of its Legal Service, acting as Agent, assisted by Alberto Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Italian.

APPLICATION for suspension of the operation of the Commission decision of 6 September 1996 amending its decision of 14 June 1996 on the supply of fruit juice and fruit jams for the people of Armenia and Azerbaijan provided for in Regulation (EC) No 228/96 of 7 February 1996 (OJ 1996 L 30, p. 18),

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

makes the following

Order

Legal framework, facts and procedure

1 By Regulation (EC) No 228/96 of 7 February 1996 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan (OJ 1996 L 30, p. 18, hereinafter 'Regulation No 228/96'), the Commission opened a tendering procedure for the supply of 1 000 tonnes of fruit juice, 1 000 tonnes of concentrated fruit juice and 1 000 tonnes of fruit jams. Article 1 of the regulation provided that the tendering procedure was initiated in accordance with the provisions of Commission Regulation (EC) No 2009/95 of 18 August 1995 laying down detailed rules for the free supply of agricultural products held in intervention stocks to Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan pursuant to Council Regulation (EC) No 1975/95 (OJ 1995 L 196, p. 4), and in particular Article 2(2) thereof, which provides that 'the invitation to tender may relate to the quantity of

products to be removed physically from intervention stocks as payment for the supply of processed products from the same group of products to a delivery stage to be determined in the notice of invitation to tender'.

2 In Annex I, to which Article 1 refers, Regulation No 228/96 indicated, for each of the six lots in respect of which tenders are invited, the characteristics of the products to be supplied and the products which tenderers are to take from the intervention agencies in payment for the supply. In particular, Annex I provided that the products to be taken in payment by the tenderer were, depending on the lot, to be either apples or oranges.

3 Article 3(2) of Regulation No 228/96 provided that the offer of the tenderer was to indicate, for each lot, the total quantity of fruit withdrawn from the market which he undertook to take over from the producer organizations concerned, in payment of all supply costs to the delivery stage, and that the take-over was to be effected in instalments of 1 000 tonnes, each successive instalment not being released until proof of having processed the previous instalment had been supplied. Pursuant to Article 4(a) of Regulation No 228/96, the intervention agencies were to ensure the successful tenderers priority access to the products withdrawn from the markets with a view to providing the conditions for a proper execution of the supply operation.

4 Following the submission of various tenders within the time prescribed by the Regulation, lots 1, 3, 4, 5 and 6 were awarded to Trento Frutta SpA (hereinafter 'Trento Frutta') and lot 2 to Loma GmbH.

5 CAS Succhi di Frutta SpA (hereinafter 'CAS') had participated in the tenders for lots 1 and 2. Its offers were not accepted, since it proposed to withdraw, in payment for the supply of its products, a quantity of apples much higher than the quantities proposed by the two successful tenderers in their offers in respect of each of those two lots.

6 In its offers, Trento Frutta had stated that it was prepared to take peaches instead of apples should there be a shortage of apples (annex 6 to the Commission's observations). On 6 March 1996 the Commission wrote to AIMA, the Italian intervention agency, informing it that lots 1, 3, 4, 5 and 6 had been awarded to Trento Frutta. The Commission stated that, depending on the lot in question, Trento Frutta would receive in payment a given quantity of either (a) apples or, in the alternative, peaches; or (b) oranges or, in the alternative, apples or peaches (annex 8 to the Commission's observations).

7 By decision of 14 June 1996 on the supply of fruit juice and fruit jams for the people of Armenia and Azerbaijan provided for in Regulation No 228/96 (annex 1 to the Commission's observations), the Commission allowed those successful tenderers wishing to do so to take delivery of, instead of apples or oranges, 'other products withdrawn from the markets, in predetermined quantities reflecting the processing equivalence of the products in question'. According to the second recital, that decision was adopted because since publication of the invitation to tender the quantities of apples and oranges withdrawn from the market had been negligible in comparison with the quantities required, although the withdrawal season was virtually over. The substitute products referred to in the decision were peaches and apricots and the coefficient of equivalence between peaches and apples was fixed at 1 to 1. Furthermore, by decision of 22 July 1996 (annex 2 to the Commission's observations), the Commission provided that nectarines might also be substituted for the apples to be withdrawn by the successful tenderers in payment for the supply of their products.

8 Following a complaint lodged by CAS, the Commission reconsidered the rules for the substitution of other fruit for apples and oranges. In its decision of 6 September 1996 amending the decision of 14 June 1996 on the supply of fruit juice and jams for the people of Armenia and Azerbaijan, pursuant to Regulation No 228/96 (annex 1 to the application for interim measures), it fixed a new coefficient of equivalence between peaches and apples or oranges which was less favourable to the successful tenderers. According to that decision, which, like the previous decision, was addressed to Italy, France, Greece and Spain, 0.914 tonnes of peaches might be substituted for one tonne of apples and 0.372 tonnes of peaches for one

tonne of oranges. Those new coefficients applied only to products which, on 6 September 1996, had not yet been withdrawn by the successful tenderers in payment for supplies.

9 According to the Commission's observations, owing to the small quantities of fruit available from the intervention agencies, on 29 January 1997, or almost one year after having discharged its supply obligation, Trento Frutta had received only 25% of the quantity of fruit indicated in its offers for the five lots awarded to it. It is apparent from the documents before the Court that of the 22 000 tonnes of fruit already withdrawn by Trento Frutta, approximately 16 500 tonnes were peaches (see annex 10 to the Commission's observations, indicating the quantities of fruit already handed over to Trento Frutta by 30 January 1997).

10 By application lodged at the Registry of the Court of First Instance on 25 November 1996, CAS sought the annulment of the decision of 6 September 1996.

11 By separate document lodged at the Registry of the Court of First Instance on 16 January 1997, the applicant also applied, pursuant to Article 185 of the EC Treaty, for suspension of the operation of the decision. The Commission submitted its written observations by document lodged at the Registry of the Court of First Instance on 29 January 1997. Oral argument relating to the application for interim measures was heard on 6 February 1997.

Law

12 Under Articles 185 and 186 of the Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144,

p. 21) and by Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), the Court of First Instance may, if it considers that circumstances so require, order that the operation of the contested act be suspended or prescribe any further interim measures which it may deem necessary.

13 Article 104(1) of the Rules of Procedure of the Court of First Instance specifies that an application for suspension is admissible only if the applicant is challenging the measure in question in proceedings before the Court of First Instance. Under Article 104(2), applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. The measures sought must be provisional in that they must not prejudge the decision on the substance of the case (see, most recently, the order of the President of the Court of First Instance in Case T-164/96 R *Moccia Irme* v *Commission* [1996] ECR II-2261, paragraph 17).

The admissibility of the application for interim measures

Arguments of the parties

14 The Commission maintains that the application for interim measures is inadmissible since, first, the action for annulment in the main proceedings is manifestly inadmissible and, secondly, the applicant has no interest in having the operation of the contested decision suspended. In the first place, the main action is manifestly inadmissible because the applicant is not directly and individually concerned by that decision, within the meaning of the fourth paragraph of Article 173 of the Treaty. The decision is independent of the notice of invitation to tender and was adopted after the contract had been awarded. It is therefore of concern only to the successful tenderers and has nothing to do with the actual tendering procedure. The applicant's position is therefore the same as that of any operator in the sector concerned, other than the successful tenderers, irrespective of whether or not it submitted a tender. Furthermore, the main action is also manifestly inadmissible because the applicant has no interest whatsoever in bringing an action against the contested decision.

15 In the second place, the applicant has no interest in having the operation of the contested decision suspended for the same reasons as those indicating that it has no interest in having it annulled. The decision did not authorize peaches to be substituted for apples or oranges, as the applicant complains. It merely amended, in the sense desired by the person concerned, the coefficient of equivalence between those types of fruit defined in the previous decision of 14 June 1996, which specifically provided for such substitution and which the applicant did not seek to have annulled within the prescribed time. Should the amending decision of 6 September 1996 be suspended, the Commission would therefore be obliged to make payment to the successful tenderers on the basis of that previous decision, which establishes a coefficient of equivalence which, according to the applicant's complaints, is essentially favourable to the successful tenderers.

16 The applicant contends that the main action is admissible. In its capacity as a tenderer it is individually concerned by the contested decision. The decision altered the conditions of the tendering procedure by amending *ex post facto* one of the essential elements of the notice, namely the type of product to be obtained in payment. That product was a deciding factor in the decision taken by the undertakings concerned, including the applicant, whether or not to submit an offer, and where they did so defined the terms thereof. Furthermore, the applicant is directly concerned by the contested decision in so far as the national intervention agency implements that decision in its capacity as agent and has no discretion in the matter.

17 At the hearing the applicant also refuted the Commission's allegations concerning its lack of interest in having the contested decision annulled or suspended. The applicant takes the view that the decision replaced the decision of 14 June 1996. The annulment of the contested decision would not, therefore, have the effect of reviving the earlier decision which it had repealed (see Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 2). Nor would suspension of the operation of the decision temporarily revive the decision of 14 June 1996: it would lead to the

application during the main proceedings of the rules of payment specified in the tender notice, so that the Commission would only be able to make apples or oranges available to Trento Frutta, depending on the lots considered, pending the decision of the Court on the main application.

Findings of the President

18 As regards the admissibility of the main action, it should be observed that, according to settled case-law, that question must not as a matter of principle be examined in a procedure for interim measures. It must be reserved for the examination of the main application, unless it is apparent at first sight that the latter is manifestly inadmissible, so as not to prejudge the Court's decision on the substance of the case (see, most recently, the order of the President of the Court of First Instance in Case T-155/96 R *City of Mainz* v *Commission* [1996] ECR II-1655, paragraph 8).

19 In the present case the main action does not appear *prima facie* to be inadmissible. In particular, the arguments put forward by the applicant to demonstrate that the contested decision replaced the previous decision of 14 June 1996, following reconsideration by the Commission of the situation as a whole, so that the person concerned has an interest in seeking its annulment, are not *prima facie* entirely without merit. The same may be said of the applicant's arguments regarding its capacity to challenge a decision which, although addressed to Member States, actually concerns the methods of payment for the supplies to which the tender specifically relates (see paragraphs 1 and 3 above).

20 Moreover, with regard more specifically to the applicant's interest in seeking the suspension of the operation of the contested decision, the President of the Court of First Instance observes that in its application for interim measures the applicant

seeks essentially to have payment to Trento Frutta in the form of peaches stopped during the main proceedings. In the context of that application, and without there being any need at this stage of examining it to state what consequences the mere suspension of the contested decision would have for the rules defining the products which Trento Frutta may obtain in payment for its supplies, it is sufficient to point out that the President of the Court of First Instance hearing an application for interim measures is in any event empowered to adopt any appropriate interim measure in order to grant the application in substance and, where appropriate, to remove the risk of serious and irreparable harm alleged by the applicant, after considering the arguments put forward by each of the parties regarding the various conditions to which the adoption of that measure is subject. That power is limited only by the need to ensure that in the particular circumstances of the case any interim measure granted does not produce irreversible effects and thereby prejudge the decision on the main application.

21 It follows that the Commission's argument that the applicant has no interest in seeking suspension of the operation of the contested decision on the ground that its suspension would necessarily lead to the provisional application of the decision of 14 June 1996, which was more favourable to the successful tenderers than the contested decision, cannot be upheld.

22 For all those reasons, the application for interim measures must be declared admissible.

23 It is therefore necessary to determine whether the substantive conditions for obtaining the interim measure sought are met in this case. In that regard, the President of the Court of First Instance considers it appropriate to examine the condition relating to urgency first.

Periculum in mora

Arguments of the parties

24 The applicant relies on a number of circumstances in order to establish that the damage which it could sustain should the contested decision be applied immediately would be serious and difficult to make good.

25 The decision would severely distort competition in the industrial fruit-processing market and cause the applicant to suffer enormous economic loss. The applicant would be forced to sell its products, whether peach puree or concentrated peach juice, at a price well below its production costs in order to remain competitive with the very low prices which Trento Frutta would be able to charge by virtue of the effects of the contested decision. The applicant evaluates the damage thus sustained at approximately LIT 2.3 billion per annum. Furthermore, it would also sustain a loss of profits in the order of LIT 2 to 2.5 billion as a result of that decision. The ratio of, for example, the selling price of peach puree to the cost price of peaches fell from 2.14: 1 in 1994 to 2.09: 1 in 1995 and 1.67: 1 in 1996. Consequently, the profitability of the applicant's business is no longer guaranteed by market prices for sales in the 1996 marketing year owing to the abnormal pressure brought to bear on those prices by Trento Frutta as a result of being awarded, in payment for the supply of the products referred to in the notice of tender, approximately 65 000 tonnes of peaches, which is between 65% and 70% of the average quantity of peaches processed by the Italian industry (whereas 65 000 tonnes of apples is only 30% of the average quantity of apples processed by that industry).

26 Furthermore, the applicant could lose its share in markets other than the markets in the products in question, namely peach juices. There is a strong incentive for its traditional customers, which it supplies with a number of products, to purchase from competitors not only less expensive peach juices but also other products, eventually putting the applicant's very survival in jeopardy. Such damage would clearly be irreparable. At the very most, it might lead to financial compensation,

which in any event would be difficult to quantify and incapable of affording the applicant *restitutio in integrum* in terms of its presence on the market and the development of its commercial activity.

27 In the present case the urgency of the measure sought lies precisely in the fact that performance of the contract has not yet been completed as regards the greatest part of the fruit to be withdrawn in payment by Trento Frutta, which might take over approximately 65 000 tonnes of fruit in all available to it under the tender. Since it is already aware that it may have available a very large quantity of peaches withdrawn during the 1996/97 withdrawal season, at a price established in advance in the contested decision, Trento Frutta is already in a position to offer peach-based products at prices bearing no relation to the price which will be established during the new harvest and processing season. It is therefore unaffected by normal conditions in the market, where negotiations normally commence shortly before the peach harvest, which begins in June, when figures for fruit production and the volume available for the processing industry are known.

28 Lastly, at the hearing the applicant stated that the balance of interests argued in favour of adopting the measure sought. Suspending the operation of the contested decision would not harm either the Community, since all the supplies have already been made by Trento Frutta, or Trento Frutta, which would obtain in payment the products referred to in the notice of tender, namely apples or oranges, in accordance with the offers which it submitted on the basis of that notice.

29 The Commission disputes the applicant's allegations regarding the risk of damage. The applicant has failed to adduce any evidence that the low prices charged by Trento Frutta are a consequence of the contested decision and cause the applicant serious damage by forcing it to sell at below cost price and causing it to lose market share. Furthermore, and in any event, the alleged damage is purely financial. In that regard, the applicant, which on its own evidence is capable of selling

20 500 tonnes of peach puree per annum, has failed to adduce any evidence whatsoever that the damage referred to could not be made good in full should the contested decision be annulled.

30 Furthermore, the Commission stated at the hearing that intervention stocks of peaches, as well as of apples and oranges or nectarines and apricots, were currently exhausted and that the production and withdrawal of fruit during the next withdrawal season could scarcely be foreseen. Consequently, neither the applicant nor the Commission is in a position to foresee the quantities of peaches, apples or oranges which Trento Frutta will obtain in payment. The damage alleged by the applicant is therefore purely hypothetical and cannot be quantified at present.

Findings of the President

31 According to well-established case-law, the urgency of the adoption of interim measures must be considered by examining whether the implementation of the contested measures, prior to the adoption of the decision of the Court on the main issue, is such as to give rise, for the party requesting the measures, to serious and irreparable damage which could not be made good if the contested decision were annulled or which, despite its interim nature, would be disproportionate to the defendant's interest in having the measures implemented, even when they are the subject of legal proceedings. It is for the applicant to prove that those conditions are satisfied (see, most recently, the order in *City of Mainz* v *Commission*. cited above, paragraph 19).

32 In the present case, according to the applicant, the alleged risk of damage results from a serious distortion of competition in the market in the industrial processing

of peaches following the adoption of the contested decision. However, the applicant has failed to adduce any evidence to support its claims. In particular, neither the information provided by the applicant nor the evidence before the Court establishes a direct link between the low prices charged by Trento Frutta, on which the applicant relies and which allegedly bring abnormal pressure to bear on market prices, and the possibility that pursuant to the contested decision Trento Frutta may obtain payment in peaches rather than apples or oranges. The applicant merely states that Trento Frutta's prices are lower than the applicant's production costs. In that regard, it observes, without providing further particulars, that in the case of peach puree 'Trento Frutta's selling price — as revealed by market surveys — is approximately LIT 517 (and probably less) per kilo'. In the case of concentrated peach juice the selling price does not exceed LIT 4 000 per kilo. The applicant fails to provide any information regarding, in particular, the places where, the dates on which or, where appropriate, the intervals at which the surveys were carried out, in order to establish their reliability. Furthermore, and in any event, the mere fact that, according to the market surveys referred to by the applicant, Trento Frutta was in a position to sell certain products at a price lower than the applicant's production costs does not necessarily result, in the absence of any supporting information, from the fact that Trento Frutta obtained a certain quantity of peaches in payment, according to the coefficient of equivalence determined in the decision of 16 June 1996 and then amended by the contested decision. There might be an alternative explanation, such as, for example, a difference between the production costs of the two undertakings.

33 Furthermore, having regard to the fact that at present all stocks of peaches, and also of apples or oranges, held by the intervention agencies concerned are exhausted, and to the fact that the quantities of fruit which will be produced and withdrawn from the market during the next withdrawal season cannot be foreseen, as revealed by the Commission's answers to the questions put at the hearing, the possibility that Trento Frutta may in future obtain a very large quantity of peaches in payment, at a price determined in advance in the contested decision, is purely hypothetical. The question whether the quantities of apples or oranges withdrawn from the market while the main proceedings are pending before the Court will be sufficient in view of the quantities necessary to pay for the supplies made by

Trento Frutta pursuant to the notice of tender can only be resolved during the next withdrawal season, which, according to the documents in the file (annex 3 to the Commission's observations), runs from August to May for apples and from December to May for oranges. In that context, there is no ground for the assertion that Trento Frutta will not obtain apples or oranges in payment for its supplies, in accordance with Annex 1 to the notice of invitation to tender. It follows that, contrary to what the applicant claims, Trento Frutta does not already have at its disposal a large quantity of peaches withdrawn during the next withdrawal season at a price determined in advance in the contested decision. From that aspect, Trento Frutta remains subject to normal market conditions, like any other trader.

34 In that context, since it has not been established that Trento Frutta's allegedly low prices, on which the applicant relies for the purpose of evaluating the alleged damage, are linked to the contested decision and since, in any event, there is no guarantee that, pursuant to the contested decision, Trento Frutta will obtain by way of payment a large quantity of peaches withdrawn during the 1996/97 withdrawal season, the annual losses of approximately LIT 2.3 billion and the loss of profits of approximately LIT 2 to 2.5 billion which the applicant claims to have sustained as a result of being forced to reduce its own prices in order to remain competitive with Trento Frutta following the operation of that decision are also purely hypothetical and unsupported by any solid or definite basis.

35 Furthermore, and in any event, in so far as the damage alleged by the applicant consists in losses and loss of profits, it is financial loss. It can therefore be

adequately remedied by damages should the contested decision be annulled and, accordingly, cannot be regarded as irreversible.

36 The risk of damage which, according to the applicant, consists in the loss of market share in the peach juice and puree sector — and indeed in the market in other products, in so far as the applicant provides its traditional customers with a number of products — rests on mere contentions of a purely theoretical or general type on the part of the applicant, which has failed to provide any concrete information or evidence to substantiate its argument. That is also the case where the applicant merely states, without providing further particulars, that the implementation of the contested decision will eventually jeopardize its very survival.

37 It follows from all the foregoing that the applicant has failed to put forward any cogent arguments to demonstrate that the immediate operation of the contested decision is likely to cause it serious damage that would be difficult to make good.

38 It follows that the condition relating to *periculum in mora* is not met. The application for suspension of the operation of the decision must therefore be dismissed, without its being necessary to consider the pleas in law and arguments put forward by the applicant as to the substance of the application or, in that regard, to determine whether, as the applicant maintains, there is a *prima facie* case that the contested decision infringes the principle of equality of treatment in that it amends some of the essential conditions laid down in the notice of invitation to tender.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. The costs are reserved.

Luxembourg, 26 February 1997.

H. Jung — A. Saggio

Registrar — President