ORDER OF THE PRESIDENT OF THE COURT
19 December 1990 *

In Case C-358/90 R,

Compagnia italiana alcool Sas di Mario Mariano & Co., a company incorporated under Italian law, having its registered office at Naples, represented by E. H. Pijnacker Hordijk, of the Amsterdam Bar, and H. J. Bronkhorst, a member of the Bar of the Hoge Raad der Nederlanden, with an address for service in Luxembourg at the Chambers of L. Frieden, 62 avenue Guillaume,

applicant,

v

Commission of the European Communities, represented by R. Fischer, Legal Adviser, and C. Docksey, a member of its Legal Department, with an address for service in Luxembourg at the office of G. Berardis, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for interim measures suspending the application of Commission Regulations (EEC) Nos 3389/90 and 3390/90 of 26 November 1990 each opening a special sale by tender of vinous alcohol held by intervention agencies, for use as motor fuel within the Community,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

* Language of the case: English.

Order

1 By application lodged at the Court Registry on 7 December 1990, Compagnia italiana alcool Sas di Mario Mariano & Co. brought an action under the second paragraph of Article 173, Article 178 and the second paragraph of Article 215 of the EEC Treaty seeking primarily a declaration that the decision or decisions of the Commission, notified to the applicant by letters of 21 November 1990, not to take action on tenders received under special tender procedures Nos 5/90 and 6/90, opened by Commission Regulations (EEC) Nos 2575/90 and 2576/90 of 5 September 1990, each opening a special sale by tender of vinous alcohol held by intervention agencies, for use as motor fuel within the Community (Official Journal 1990 L 243, pp. 22 and 24), are void. The applicant also seeks compensation for the damage it allegedly suffered as a result of the contested decision or decisions and as a result of the subsequent sale of the same quantities of alcohol under two new special tender procedures, Nos 7/90 and 8/90, opened by Commission Regulations (EEC) Nos 3389/90 and 3390/90 of 26 November 1990, each opening a special sale by tender of vinous alcohol held by intervention agencies, for use as motor fuel within the Community (Official Journal 1990 L 327, pp. 19 and 21).

2 By a separate document lodged at the Court Registry on the same day, the applicant also applied, under Article 186 of the EEC Treaty, for interim measures suspending the application of those two regulations opening special tender procedures Nos 7/90 and 8/90 until the Court has given judgment in the main action.

3 The Commission submitted its written observations on the application for interim measures on 14 December 1990.

4 Before the merits of the application for interim measures are examined, the background to the dispute and the relevant regulations should be summarized.

5 Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organization of the market in wine (Official Journal 1987 L 84, p. 1) provides in Article 35 for distillation operations for by-products of winemaking, in Article 36 for distillation operations for certain wines and, in Article 39, for compulsory distillation of table wine where the market in table wine is in a state of serious imbalance.

6 In accordance with that regulation, products obtained from the distillation operations envisaged by the provisions mentioned above are taken over by the intervention agencies.

7 According to Articles 37 and 40 of that regulation, the products of those distillation operations held by intervention agencies are to be disposed of so as not to cause any disturbance of the market in alcohol and spirituous beverages. According to Article 37(1), which relates to the products of the distillation operations referred to in Articles 35 and 36 of the regulation, such disposal is to take place in other sectors, in particular in the fuel sector, each time disposal is likely to bring about such a disturbance. According to Article 40(2), which relates to the products obtained from the compulsory distillation of table wine as referred to in Article 39 of the regulation, those products may be disposed of only in the form of neutral alcohol or denatured alcohol. Article 40 also provides that the products in question are to be disposed of, in particular, by a tendering procedure in a manner ensuring equality of access to the merchandise and equality of treatment of purchasers.

8 On 12 December 1988, the Council, considering that the procedure for disposal of alcohol from the various distillation operations should be the same, adopted its Regulation (EEC) No 3877/88 laying down general rules on the disposal of alcohol obtained from the distillation operations referred to in Articles 35, 36 and 39 of Regulation (EEC) No 822/87 and held by intervention agencies (Official Journal 1988 L 346, p. 7).

9 According to Article 1 of that regulation, the alcohol in question is to be disposed of by tendering procedures under conditions which must ensure equality of treatment for all interested parties wherever they are established in the Community.

10 According to the preamble to the regulation, since experience had shown that there was no point in trying to sell such alcohol on the markets for the various normal uses because those markets were saturated, a preferential outlet should be sought in the fuel sector and, in order not to disturb competition with the products which might be replaced by alcohol, the Commission should be granted the possibility of taking no action on tenders received.

11 Article 2 of the regulation provides that for each tendering procedure, which may be subject to special conditions, particularly to avoid market disruptions, the Commission may either take action on the tenders received or take no action.

12 In accordance with Article 3 of the regulation, the conditions under which the invitations to tender were to be organized were adopted in Commission Regulation (EEC) No 1780/89 of 21 June 1989 laying down detailed rules for the disposal of alcohol obtained from the distillation operations referred to in Articles 35, 36 and 39 of Regulation (EEC) No 822/87 and held by intervention agencies (Official Journal 1989 L 178, p. 1).

13 That Commission regulation provides for three types of invitation to tender: standing invitations to tender, individual invitations to tender and special invitations to tender.

14 In the case of the latter type, to be used for the sale of large quantities of alcohol, the initial version of the regulation provided that each invitation to tender was to relate to two lots each consisting of at least 600 000 hectolitres but not more than 1 200 000 hectolitres expressed in hectolitres of alcohol at 100% vol. A tenderer whose tender was accepted had, in particular, to provide proof, within 20 days, that a performance guarantee had been lodged, the level of which was to be fixed in the notice of invitation to tender and which was to ensure that the alcohol constituting the first lot was in fact used for the purposes specified in the notice of invitation to tender, the removal of the second lot being subject to the lodging of a similar performance guarantee.

15 Considering that it was necessary to take account of the cost of the investments that needed to be made in processing plants for the use of vinous alcohol in the fuel sector within the Community, the Commission, by its Regulation (EEC) No 2568/90 of 5 September 1990 amending Regulation No 1780/89, cited above (Official Journal 1990 L 243, p. 11), made amendments to the conditions relating to sales by special invitation to tender. Under the amended conditions, each invitation to tender no longer relates to two lots but to several lots each consisting of at least 300 000 hectolitres but no more than 1 200 000 hectolitres. According to that regulation, the Commission may also decide to replace the performance guarantee by the obligation for the successful tenderer to submit to inspection by an international surveillance firm. However, the regulation introduces an obligation for the tenderer whose tender is accepted to lodge within 20 days a removal guarantee the level of which is fixed in the notice of invitation to tender and which is to ensure that the alcohol constituting the first lot is removed within the time-limit laid down, the removal of subsequent lots being subject to the lodging of similar removal guarantees.

16 On 5 September 1990, the Commission, by its aforesaid Regulations Nos 2575/90 and 2576/90 relating to special invitations to tender Nos 5/90 and 6/90, put on sale a quantity of 3 200 000 hectolitres in five lots of 640 000 hectolitres and a quantity of 1 600 000 hectolitres in five lots of 320 000 hectolitres respectively, held by the French, Italian and Spanish intervention agencies and intended to be used within the Community in the fuel sector. Under those regulations, the performance guarantee is replaced, for those invitations to tender, by the obligation for the successful tenderer to submit to inspection by an international surveillance firm. According to the notices of invitation to tender relating to those two special procedures (Official Journal 1990 C 224, pp. 10 and 15), the removal guarantee for the first lots is fixed at ECU 40 per hectolitre of alcohol at 100% vol.

17 Before the expiry of the time-limit of 25 September 1990 laid down in the notices of invitation to tender, the applicant sent to the Commission two tenders relating to those two tender procedures.

18 After being asked to provide certain additional information about its activities, the applicant, by letters of 21 November 1990, was informed that the Commission had decided not to accept its tenders regarding those two tendering procedures in view of the offers received and taking into account the situation on the world market

for fuel. In those letters, the Commission stated that it would decide on a reopening of the special sales of the vinous alcohol concerned within the shortest possible time.

19 Considering that, with a view to simplifying the system of guarantees required, a single performance guarantee should be required for the purpose of ensuring that the alcohol awarded was removed and put to the intended use, the Commission, by its Regulation (EEC) No 3391/90 of 26 November 1990, amending Regulation No 1780/89, cited above (Official Journal 1990 L 327, p. 23), made fresh amendments to the conditions relating to sales by special tender procedure. Under the new conditions, the performance guarantee may no longer be replaced by an obligation for the successful tenderer to submit to inspection by an international surveillance firm and must ensure that the total quantity of alcohol for which a contract is awarded is in fact used for the purposes specified in the notice of invitation to tender. The removal guarantee, however, is abolished.

20 On the same date, 26 November 1990, the Commission, by its aforesaid Regulations Nos 3389/90 and 3390/90 relating to special procedures Nos 7/90 and 8/90, put on sale again the same quantities of alcohol held by the French, Italian and Spanish intervention agencies as those concerned in special procedures Nos 5/90 and 6/90 intended to be used within the Community in the fuel sector. According to the two notices of invitation to tender (Official Journal 1990 C 296, pp. 9 and 14), the performance guarantee is fixed at ECU 90 per hectolitre at 100% vol. for the total quantity put up for sale.

21 The applicant states that it is unable to provide such a guarantee for the whole quantity put up for sale and that the obligation to provide a guarantee of that order constitutes such a financial burden that it is prohibitive for undertakings, even medium-sized undertakings, and thus constitutes a breach of the principle of equal access to those products laid down in Article 40 of Council Regulation No 822/87, cited above.

22 The applicant believes that the tenders which it submitted under special procedures Nos 5/90 and 6/90 were the highest and contends in particular that the Commission decision or decisions refusing to take action on the tenders received is, or are, unlawful because of insufficient reasoning and that the resale of the same quantities of alcohol under prohibitive conditions constitutes a misuse of power.

23 Since the contract concerning the quantities of alcohol put up for sale may be awarded immediately after 20 December 1990, the date which notices of special procedures Nos 7/90 and 8/90 set for the time-limit for the submission of tenders, the applicant requests that the interim measures ordering the suspension of application of the regulations relating to those tender procedures should be adopted before that date.

24 It should be borne in mind that, according to Article 83(2) of the Rules of Procedure, a decision ordering interim measures is subject to the existence of circumstances giving rise to urgency and factual and legal grounds establishing a prima-facie case for the interim measures applied for.

25 The Court has consistently held that the urgency of an application for interim measures must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party requesting the interim measures.

26 As regards the serious and irreparable damage facing the party seeking the interim measures, the Court has held (see, most recently, the Order of the President of the Court in Case C-257/90 R *Italsolar SpA* v *Commission* [1990] ECR I-3841) that damage of a financial nature is not in principle considered to be serious and irreparable unless it could not be wholly recouped if the applicant were to be successful in the main action.

27 In this regard, the applicant points out that if it is successful in the main action, the annulment of the contested decision or decisions should put it in the position in which it would have been if the decision or decisions had not been adopted. This would be impossible without the interim measures requested, since the applicant is no longer able to obtain the large quantities of alcohol put up for sale at the price at which it has tendered and on the conditions laid down for special procedures Nos 5/90 and 6/90. Since the applicant cannot participate in tender procedures Nos 7/90 and 8/90 owing to the prohibitive conditions laid down for them, the applicant will, if the interim measures sought are not granted, be excluded for a long time from the market in alcohol for use in the fuel sector owing to the size and duration of the contracts in question.

28 It should be noted that the damage which will allegedly arise is of a financial nature. The applicant does not mention any evidence showing that the alleged damage cannot be made good in its entirety. In its main application, the applicant seeks in particular compensation for all damage suffered by it as a result of the contested decision or decisions and of the subsequent sale of the same quantities of alcohol, the applicant reserving the right to quantify that damage.

29 Even assuming that the alleged damage could not be made good entirely by an award of damages, the commercial interests which the applicant seeks to protect should be weighed against the interests of the Community in disposing, on conditions considered appropriate by the Commission, of the very large quantities of alcohol held in intervention resulting from the distillation operations provided for under the common organization of the market in wine whose storage, according to the Commission, causes significant logistical problems.

30 In those circumstances, it must be held that the application for interim measures does not satisfy the condition relating to urgency. The application should therefore be dismissed.

On those grounds,

THE PRESIDENT

hereby orders as follows:

(1) The application for interim measures is dismissed.

(2) Costs are reserved.

Luxembourg, 19 December 1990.

J.-G. Giraud
Registrar

O. Due
President