Case 119/86 R

Kingdom of Spain
v
Council and Commission of the European Communities

(Viticultural products — General rules and detailed rules for the application of the supplementary trade mechanism provided for in the Act of Accession of the Kingdom of Spain)

Summary

Application for the adoption of an interim measure — Suspension of operation of a decision — Conditions for granting — Serious and irreparable damage
(EEC Treaty, Art. 185; Rules of Procedure, Art. 83 (2))

ORDER OF THE PRESIDENT OF THE COURT
9 July 1986 *

In Case 119/86 R

Kingdom of Spain, represented by the Minister for Foreign Affairs, acting through his Agent, L. J. Casanova Fernández, Secretary-General for the European Communities, assisted by F. Mansito Caballero, Director-General for the Coordination of Legal and Institutional Relations with the Communities, J. Folguera Crespo, Assistant Director-General for the Coordination of Legal Affairs concerning the Communities, A. Sainz de Vicuña Barroso, Head of the Legal

* Language of the Case: Spanish.

Service of the Ministry of Foreign Affairs, J. de Miguel Zaragoza, Assistant Director-General for International Legal Cooperation at the Ministry of Justice and M. Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Spanish Embassy, 6, boulevard Emmanuel-Servais,

applicant,

v

Council of the European Communities, represented by its Agents, A. Sacchettini and J. Elizalde, members of its Legal Department, with an address for service in Luxembourg at the office of J. Käser, Director of the Legal Affairs Department of the European Investment Bank, 100, boulevard Konrad-Adenauer

and

Commission of the European Communities, represented by its Agents, J.-C. Seché and C. Palacio, members of its Legal Department, with an address for service in Luxembourg at the office of G. Kremlis, also a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendants,

APPLICATION for an order suspending the operation of Council Regulation (EEC) No 569/86 of 25 February 1986 laying down general rules for the application of the supplementary mechanism applicable to trade (Official Journal 1986, L 55, p. 106), Commission Regulation (EEC) No 574/86 laying down detailed rules for the application of the supplementary trade mechanism (Official Journal 1986, L 57, p. 1) and Commission Regulation (EEC) No 647/86 of 28 February 1986 laying down certain detailed rules for the application of the supplementary trade mechanism to viticultural products (Official Journal 1986, L 60, p. 50), in so far as they relate to products of the wine sector,

THE PRESIDENT OF THE COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

1 By an application lodged at the Court Registry on 23 May 1986, the Kingdom of Spain brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that the following regulations are void:

(i) Council Regulation (EEC) No 569/86 of 25 February 1986 laying down general rules for the application of the supplementary mechanism applicable to trade;

(ii) Commission Regulation (EEC) No 574/86 of 28 February 1986 laying down detailed rules for the application of the supplementary trade mechanism;

(iii) Commission Regulations (EEC) Nos 624/86, 641/86, 643/86 and 647/86 of 28 February 1986 laying down detailed rules for applying the supplementary trade mechanism respectively to

(a) new potatoes (Official Journal 1986, L 60, p. 1);

(b) importation into Portugal of the products processed from fruit and vegetables listed in Annex XXII to the Act of Accession (Official Journal 1986, L 60, p. 34);

(c) the live plants and floriculture products listed in Annex XXII to the Act of Accession and imported into Portugal (Official Journal 1986, L 60, p. 39);

(d) viticultural products (Official Journal 1986, L 60, p. 50).

2 By an application lodged at the Court Registry on 9 June 1986, the applicant applied under Article 185 of the EEC Treaty, Article 36 of the Protocol on the Statute of the Court of Justice of the EEC and Article 83 of the Rules of Procedure for an order suspending the operation of the aforementioned Council Regulation No 569/86 of 25 February 1986 and Commission Regulations Nos 574/86 and 647/86 of 28 February 1986, in so far as they relate to products of the wine sector, until the Court has given judgment in the main proceedings.

3 The defendants submitted their written observations on 24 June 1986. The parties presented oral argument on 26 June 1986.

4 Before examining whether or not this application for interim measures is well-founded and so that the problem may be considered in its entirety, it may be helpful to provide a brief description of the supplementary trade mechanism and the general rules and detailed rules for its application as set out in the regulations of the Council and the Commission which are the subject of this application.

5 The supplementary trade mechanism (hereinafter referred to as 'the STM') is provided for in Articles 81 to 85 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (Official Journal 1985, L 302, p. 23, hereinafter referred to as 'the Act of Accession'). Article 81 provides that a supplementary mechanism applicable to trade between the Community of Ten and Spain is to be set up and is to apply to imports into the Community of Spanish fruit and vegetables, products of the wine sector and new potatoes, on the one hand, and to imports into Spain from the Community of Ten of products of the wine sector and products of the meat, milk, fruit and vegetables and cereals sectors, on the other. The second subparagraph of Article 81 (1) states that, in general, the STM is applicable to all products to which it relates from 1 March 1986 to 31 December 1995 but that it is to operate in the fruit and vegetables sector only as from 1 January 1990.

6 Article 83 (1) of the Act of Accession provides that, in principle at the start of each marketing year, a forward estimate is to be drawn up for each of the products subject to the STM on the basis of production and consumption estimates. On the basis of that estimate, a forward timetable on development in trade and on fixing an indicative import ceiling in the market in question is to be drawn up. Article 83 (2) provides that the successive fixing of indicative ceilings must reflect a certain steady progress so as to ensure a gradual opening up of the market and the full realization of free movement within the Community on the expiry of the period of application of transitional measures. The second subparagraph of Article 83 (2) provides that, to that end, an annual rate of progress for the indicative ceilings is to be determined.

7 Article 84 provides that, when the timetable referred to in Article 83 is drawn up, a 'guide' quantity must be determined for imports into Spain of certain Community products subject to the STM, and fixes that quantity for 1986 and its progress for each of the following three years in relation to the previous year.

8 Article 85 lays down the definitive measures which may be adopted where examination of developments in intra-Community trade shows that a significant increase in imports has taken place in the EEC and there is a risk that that situation will result in or is resulting in the indicative import ceiling for the product being exceeded for the year in question. Article 85 (3) provides that in that event the Commission is to assess the gravity of the situation and to adopt a decision, under the Management Committee procedure, either to raise the indicative ceiling, if the market in question has not suffered significant disturbances following the development of imports, or to limit or suspend imports, but only to the extent and for such time as is strictly necessary to put an end to the disturbance. The limitation or suspension of imports may even be restricted to certain regions of the EEC. Article 85 (4) provides that: 'The application of the STM may in no event lead to products coming from Spain . . . being treated in a less favourable manner than those coming from third countries . . . '.

9 On the basis of Article 89 (1) of the Act of Accession, the Council adopted Regulation No 569/86 laying down general rules for the application of the STM. Referring in the first recital in the preamble thereto to the aim of the STM, namely 'to monitor the development of trade and to apply the requisite measures provided for in the Act' and, in the second recital, to 'the additional guidelines agreed on at the conference', the Council adopted, for the purpose of implementing the STM, a system of certificates and securities the main characteristics of which may be described as follows.

10 Article 1 (1) of Regulation No 569/86 provides that products subject to the STM may be released for consumption only on presentation of an STM certificate or licence which, according to Article 1 (4), may be issued in respect of Spanish products by the Spanish authorities alone. Article 1 (3) provides that 'STM certificates or licences shall be issued subject to the provision of a security, guaranteeing compliance with the undertaking to release for consumption during the period of validity of the STM certificate or licence, which shall be wholly or partly forfeit if the transaction is not completed within that time or is only partly completed'. In addition, Article 3 established an identical system of STM import licences and securities in order to monitor the trend in imports from third countries in the same way as the trend in Community imports. Article 4 provides that 'the issuing of supplementary trade mechanism certificates and supplementary trade mechanism import licences may be limited to certain products in a sector'

and 'spread out over the year' and that time-limits may be set for the issuing of such certificates and licences.

11 On 28 February 1986, pursuant to Article 7 of Regulation No 569/86, the Commission adopted Regulation No 574/86 laying down detailed rules for the application of the STM. Article 2 provides *inter alia* that the STM licence is to authorize and require the sale of the net quantity of the designated product during its period of validity and Article 6 (2) provides that the licence is normally to be issued on the fifth working day following the day the application is submitted. On the same date the Commission also adopted Regulation No 647/86 laying down certain detailed rules for the application of the STM to viticultural products. The indicative import ceilings for Spanish viticultural products imported into the Community in the 1985/86 and 1986/87 seasons are set out in Article 1. Article 4 determines the amount of the security to be lodged in respect of STM licences, whilst Article 3 provides that: 'The supplementary trade mechanism licences referred to in Article 2 of Regulation (EEC) No 574/86 shall be valid for four months from the day on which they were applied for.'

12 Those three regulations adopted by the European institutions for the application and operation of the STM are the subject of an application for the suspension of their operation lodged by the applicant, in so far as they relate to viticultural products. The applicant considers that the system of STM licences requiring the lodging of a security established by the regulations is incompatible with the provisions of the EEC Treaty on the free movement of goods, the principle of legal certainty, the principle of proportionality, the standstill rule laid down in Articles 31 and 32 of the EEC Treaty and the principle of Community preference.

13 According to Article 185 of the EEC Treaty actions brought before the Court of Justice do not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

14 Article 83 (2) of the Rules of Procedure provides that an application for interim measures must state the factual and legal grounds establishing a *prima facie* case for the interim measures applied for and the circumstances giving rise to urgency.

15 The Court has consistently held that the urgency of an application for interim measures referred to in Article 83 (2) of the Rules of Procedure must be assessed in the light of the extent to which an interlocutory order is necessary to avoid serious and irreparable damage to the party seeking the interim measure.

16 In that connection the applicant states, in order to show that the system established by the aforementioned regulations seriously damages Spanish exports, that the system adopted has resulted in an STM which is considerably more restrictive than that provided for in Articles 81 to 85 of the Act of Accession. In its view the system of STM licences requiring the lodging of a security, and the rules for the application of the STM as described in paragraphs 9 to 11 of this order, represent a considerable burden for exporters and are, moreover, perceived as such by them. In support of the latter assertion it refers to some 40 telex messages sent by exporters and importers of Spanish wine, which it produces in Annex III to the application for interim measures and which contain their complaints regarding the system of STM licences and securities.

17 The applicant is of the opinion that in the light of those considerations it is clear that the purpose of the rules for the application of the STM as established by the regulations at issue is in reality not to monitor the development of trade but to create a particularly serious obstacle to imports of viticultural products from Spain, although the aim of the STM, which is to monitor the development of trade and, if necessary, to apply the measures provided for in Article 85 of the Act of Accession, could be amply achieved by the regular provision of statistical information to the Commission by the national customs authorities.

18 In the written observations submitted to the Court in the present interlocutory proceedings the defendants contend primarily that the system of STM licences requiring the lodging of a security is the only system capable of ensuring that the STM fulfils its purpose and operates effectively. Moreover, most of the detailed rules for the application of the system in question correspond to the general rules which have long been applied to non-member countries and which the Court accepted as both necessary and appropriate in its judgment of 17 December 1970 (Case 11/70 *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125).

19 The applicant also alleges that the damage it has suffered as a result of the establishment of a system of STM licences requiring the lodging of a security is irreparable. The system penalizes Spanish exports heavily by burdening them with a considerable number of formalities and additional expenses and has caused a significant fall in the level of exports. Consequently, Spanish exporters are losing their market shares and their outlets in the Community. If that situation were to continue for the duration of the main proceedings before the Court there is a risk that markets would be lost irretrievably.

20 In order to show the reality and scale of the fall in Spanish exports of viticultural products to the Community of Ten, the applicant refers to two tables of statistics contained in Annex IV to its application for interim measures. The first table compares the exports of different types of Spanish wines actually effected during the two months following the entry into force of the STM, namely March and April 1986, with the monthly average of exports effected in 1985. The second table shows the indicative export ceilings per category of wine over six months, the quantity which may be exported each month within those limits and the exports which were actually effected during the months of March and April 1986. In that connection the applicant submits that in relation to each type of wine the level of actual exports was at best no more than three-quarters of the quantity which could be exported within the limits of the indicative ceiling.

21 The applicant is of the opinion that the first table produced by it clearly shows that for all types of wine, with the exception of white quality wines, the level of actual exports in March and April 1986 was considerably lower than the monthly average for 1985. That fall was particularly appreciable in relation to white table wines and rosé and red table wines, for which the level of exports in March and April varied between a mere 15 and 26% of the monthly average for 1985 and was the direct consequence of the establishment of the system of STM licences requiring the lodging of a security.

22 The defendants dispute that exports of Spanish viticultural products fell as a result of the entry into force on 1 March 1986 of the STM and adduce statistics in support of their view. They produce in particular a table of statistics contained in the annex to their observations which compares the average monthly level of

exports actually effected, calculated on the basis of exports in 1982, 1983 and 1984, and the licences granted in March, April and May 1986. Since the figures derived from the licences were higher than the average monthly level of exports the defendants conclude that exports to the Community of Ten have increased slightly since 1 March 1986.

23 The defendants also contend that even if it is shown that Spanish exports of viticultural products have fallen since the entry into force of the STM, that fall should not necessarily be imputed to the mechanism. The fall could easily be explained by the change in the administrative arrangements for such exports, which may have encouraged exporters either to advance their exports so as to effect them before the introduction of those arrangements or to defer their exports until they had a better understanding of how the system functioned.

24 In response to a request made to the applicant at the hearing, it submitted to the Court the figures for January, February and May 1986, which complete the first table of statistics referred to in paragraph 20 of this order.

25 In the light of the foregoing considerations, it must be stated that the figures produced by the parties to the proceedings diverge to a large degree and lead to diametrically opposite conclusions. In order to establish whether or not there is serious and irreparable damage it therefore appears necessary to consider closely the statistics provided by the two parties.

26 In that respect it must be recognized that, as the applicant rightly pointed out at the hearing, in the figures which they have submitted to the Court the European institutions have compared two elements which do not appear to be comparable, namely the number of imports actually effected and the applications for licences. The issue of a licence in one month does not necessarily mean that the importation took place during that month but merely that it may take place during the four months from the date of issue, since Article 3 of Regulation No 647/86 provides that the licence is to be valid for four months from the day on which it was applied for. It would therefore seem that *prima facie* the conclusions drawn from those statistics by the defendants cannot be accepted.

27 With regard to the statistics produced by the applicant, it must be stated that although they appear to contain information which is relevant in assessing whether or not serious and irreparable damage has occurred they are, nevertheless, not sufficient to establish the existence of such damage, principally for the following two reasons.

28 In the first place, the figures show that Spanish exports of table wine have decreased substantially whereas exports of quality wine have barely fallen or have even increased in some cases, for example that of white wine. The figures produced for January and February 1986 show that a quite considerable fall in exports had already occurred in respect of table wines but no satisfactory explanation for that fall has been given. Consequently, in the light of the information now before the Court, the President considers that it is not possible to establish, at the moment, any causal link between the implementation of the STM and the decrease in the level of exports of certain types of wine.

29 In the second place, it must be recalled that Article 3 of Regulation No 647/86 provides that an STM licence is to be valid for a period of four months from the day on which it is applied for. The Commission stated at the hearing that as a result of administrative difficulties it had been impossible to make the system of STM licences requiring the lodging of a security operational in practice until 13 March 1986. It therefore appears that, whatever their relevance, the statistics produced by the applicant do not relate to a sufficiently long period of time to enable the Court to obtain an accurate picture of the situation. At the very least it appears that the minimum reference period should be four months from the actual entry into force of the system, that is to say it should extend at least until 13 July 1986. Since Article 1 (1) of Regulation No 647/86 fixed the indicative import ceilings for Spanish viticultural products imported into the Community in respect of the 1985/86 marketing year for the period between 1 March 1986 and 31 August 1986, it would appear more logical to extend the reference period to the latter date.

30 It follows from the foregoing that the applicant has failed to adduce evidence showing that the application of the STM would cause serious damage to exports in the wine sector. With regard to the irreparable nature of any damage, the

applicant has been unable to show that a fall in exports, in particular where it affects only the table wines sector, necessarily results in a loss of certain markets.

31 Since the applicant has failed to show the urgency of the situation, as required by Article 83 (2) of the Rules of Procedure, it does not appear necessary to examine the factual and legal grounds relied upon by it to establish a *prima facie* case for the grant of the interim measure applied for.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

(1) The application is dismissed.

(2) The costs are reserved.

Luxembourg, 9 July 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President