ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
8 October 1997 *

In Case T-229/97 R,

Comité Européen des Fabricants de Sucre (CEFS), an association constituted under Belgian law, established in Brussels, represented by Bernard O'Connor, Solicitor, and Bonifacio García Porras, of the Salamanca Bar, with an address for service in Luxembourg at the Chambers of Arsène Kronshagen, 12 Boulevard de la Foire,

applicant,

v

Council of the European Union, represented by Jan-Peter Hix and Ignacio Díez Parra, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by James MacDonald Flett and Xavier Lewis, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

* Language of the case: English.

APPLICATION under Articles 185 and 186 of the EC Treaty for suspension of the operation of Article 1(f) of Council Regulation (EC) No 1188/97 of 25 June 1997 fixing, for the 1997/98 marketing year, the derived intervention prices for white sugar, the intervention price for raw sugar, the minimum prices for A and B beet, and the amount of compensation for storage costs (OJ 1997 L 170, p. 3), in so far as it affects European sugar producers or otherwise *erga omnes*, and for all other such interim measures as the Court may judge necessary,

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

makes the following

Order

The relevant legislation

1 These proceedings for interim measures concern a Council regulation intended, *inter alia*, to fix intervention prices within the framework of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector (OJ 1981 L 177, p. 4, as amended, 'the basic regulation').

2 Article 24 of the basic regulation fixes, for each of the areas of production (which coincide, by and large, with the respective territories of the Member States), an A quantity and a B quantity, each attributable to a specific marketing year. The

Member States divide their A and B quantities between undertakings, under the form respectively of A and B quotas.

3 Sugar produced under the A quotas (A sugar) and under the B quotas (B sugar), when marketed within the Community, benefits from price and marketing guarantees thanks to an intervention system (see Article 9 of the basic regulation). The prices applied by the intervention agencies are fixed each year by the Council in accordance with Article 3 of the basic regulation.

4 As regards white sugar, those prices are not uniform across the whole Community. Article 3(1) provides for 'an intervention price' to be fixed for the non-deficit areas and 'a derived intervention price' for the deficit areas. According to the second subparagraph of Article 9(1) of the basic regulation, those different prices are valid for the area in which the sugar is situated at the time of purchase. Derived intervention prices are systematically fixed at a higher level than intervention prices. Thus, the intention is to help manufacturers in other areas to supply the deficit areas, the difference between the two intervention prices being deemed to cover, in whole or in part, the additional transport costs.

5 The basic regulation also provides for a price scheme for beet processed into A sugar and B sugar respectively (A beet and B beet; see Article 5(4) of the basic regulation). The minimum prices to be paid by sugar manufacturers to beet producers, under Article 6(1) and (2), vary according to the area in which the beet is produced. As provided for by Article 5(3) of the basic regulation, for areas for which a derived intervention price for white sugar is fixed, the minimum prices for A beet and B beet are to be increased by an amount equal to the difference between the derived intervention price for the area in question and the intervention price, such amount being adjusted by the coefficient 1: 30.

6 Until the marketing year 1996/97, every year when the Council fixed the intervention prices it classed Italy among the deficit areas of the Community and, consequently, defined the derived intervention prices for that area. In the light of the effects of that practice on the minimum prices for beet produced in Italy, since 1990 the Italian sugar industry has repeatedly asked for it to be abandoned, Italy, in its view, being in the process of becoming a surplus area.

7 For the marketing year 1997/98, on 25 June 1997 the Council fixed both the intervention and derived intervention prices for white sugar. The intervention price is ECU 63.19 per 100 kilograms, in accordance with Article 1(2) of Regulation (EC) No 1187/97 fixing, for the 1997/98 marketing year, certain sugar prices and the standard quality of beet (OJ 1997 L 170, p. 1). For Italy, Article 1(f) of Regulation (EC) No 1188/97 of 25 June 1997 fixing, for the 1997/98 marketing year, the derived intervention prices for white sugar, the intervention price for raw sugar, the minimum prices for A and B beet, and the amount of compensation for storage costs (OJ 1997 L 170, p. 3, 'Regulation No 1188/97'), fixed the derived intervention price for white sugar at ECU 65.53 per 100 kilograms. The third recital in the preamble to Regulation No 1188/97 states that 'a supply deficit situation is to be foreseen in the areas of production in Italy ...'.

Procedure

8 The applicant, CEFS (European Sugar Manufacturers Committee), is an association constituted under Belgian law and made up of national organizations of sugar manufacturers, and also of individual sugar businesses where their national representative organization is not a member of the CEFS or where there is no national representative organization. It represents the interests of the sugar industry in 14 Member States and Switzerland, together with the 'corresponding members' of five non-European countries.

9 By application lodged at the Registry of the Court of First Instance on 5 August 1997, the applicant brought an action under Article 173 of the EC Treaty for annulment of Article 1(f) of Regulation No 1188/97 in so far as it affects European sugar manufacturers, or otherwise *erga omnes*, and for an order that the Council produce all the documents, data and methods which it used in order to treat Italy as a deficit area in the contested regulation, and also for any other additional measures which the Court might judge necessary.

10 By separate document lodged at the Registry of the Court of First Instance on the same day, the applicant also sought suspension under Articles 185 and 186 of the Treaty of the operation of Article 1(f) of Regulation No 1188/97 in so far as it affects European sugar manufacturers, or otherwise *erga omnes*, and also any other additional measures which the Court might judge necessary.

11 The Council submitted written observations on the application for interim measures on 26 August 1997.

12 By application lodged at the Registry of the Court of First Instance on 1 September 1997, the Commission applied for leave to intervene in support of the forms of order sought by the Council. By documents lodged at the Registry on 9 September 1997, the Council and the applicant informed the Court that they did not object to the application to intervene.

13 The principal parties and the party seeking leave to intervene presented oral argument on 12 September 1997.

Law

The application for leave to intervene

14 Since the Commission's application for leave to intervene was made in accordance with Article 115 of the Rules of Procedure of the Court of First Instance and was submitted pursuant to the first paragraph of Article 37 of the EC Statute of the Court of Justice which, by virtue of the first paragraph of Article 46 thereof, applies to proceedings before the Court of First Instance, the Commission must be granted leave to intervene in these proceedings in support of the form of order sought by the defendant.

The application for interim measures

15 Under the combined provisions of Articles 185 and 186 of the EC Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a the 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), by Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), and by Council Decision 95/1/EC, Euratom, ECSC of 1 January 1995 (OJ 1995 L 1, p. 1), the Court of First Instance may, if it considers the circumstances so require, order that application of the contested act be suspended or prescribe any other necessary measures.

16 Article 104(1) of the Rules of Procedure provides that an application under Article 185 of the Treaty to suspend operation of any act of an institution is to be admissible only if the applicant is challenging the measure in question in proceedings before the Court of First Instance and also that any application for adoption of one of the other interim measures referred to in Article 186 of the Treaty is to be admissible only if it relates to the principal proceedings in a case before the Court of First Instance.

17 As to the substance, Article 104(2) provides that 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 measures applied for. The measures sought must be provisional, in that they must not prejudge the decision on the substance (see, most recently, the order of the President of the Court of First Instance of 21 March 1997 in Case T-79/96 R *Camar* v *Commission* [1997] ECR II-403, paragraph 21).

18 In this application, the Court is asked to order suspension of the operation of the contested regulation and to prescribe any other necessary measures. In order to give a decision on such an application, the Court must first of all consider the applicant's arguments concerning urgency.

Urgency

Arguments of the parties

19 The applicant considers that adoption of the contested regulation entails two consequences which will cause it to suffer serious and irreparable damage: first, a loss of sugar market share; second, continued reduction in its guaranteed A and B quotas.

20 First, the applicant maintains that as a result of the decision to continue to treat Italy as a 'deficit area' and, in consequence, to fix a derived intervention price for white sugar produced in Italy of ECU 65.53 per 100 kilograms, ECU 2.34 higher than the ordinary intervention price of ECU 63.19, Italian manufacturers of sugar-based products are led to use non-Community sugar in preference to Community sugar for their exports to non-member countries. Non-Community sugar is imported at the free world market price (which is much lower than the intervention price charged in the Community) and without payment of customs duties, to

be used as the raw material for products which are then re-exported to non-member countries under the customs rules known as 'Inward Processing Relief Arrangements' ('IPRA'). By contrast, Italian or Community sugar is used on the basis of the intervention price, with the advantage of the export refund provided for by Article 17 of the basic regulation if the final product is exported; since, however, the amount of the refund, equivalent to the difference between the intervention price of sugar in the Community and the price of sugar on the free world market, is the same for the whole Community, it follows that with regard to sugar produced in Italy, a deficit area with a derived intervention price higher than the ordinary intervention price, the refund can never completely make up the difference in price compared with sugar marketed in non-member countries. Consequently, 'Italian manufacturers of processed products will use non-Community sugar under the IPRA, rather than Italian or Community sugar' which, in the applicant's view, risks causing the loss of a substantial market share and, moreover, an increase in imports of non-Community sugar. The applicant claims that during the period from October 1995 to September 1996, 72 000 tonnes of non-Community sugar were bought in Italy under the IPRA, while for the marketing year 1996/97 imports of approximately 150 000 tonnes are expected, in a situation in which 'the consumption of the big Italian manufacturers of processed products made with sugar is about 400 000 tonnes'.

21 Second, the applicant claims that the Council's decision to declare Italy a deficit area and to fix a derived intervention price risks giving rise to 'a substantial increase in the production of sugar' in the Community, leading to an increase in sugar exports to be subsidized through the refund machinery and to an increase in volume of Community sugar stocks. In the applicant's view, an increase in exports or stocks is contrary to the commitments entered into by the Community in the Agreement concluded as a result of the Uruguay Round of GATT (General Agreement on Tariffs and Trade) negotiations (signed in April 1994), which provide for a reduction in the level of Community sugar subsidies and, consequently, in the guaranteed A and B sugar quotas from the year 2001. In order to comply with those commitments, the Community is therefore obliged to reduce those quotas from one marketing year to the next or at the end of the transitional period

expiring in 2001, as provided for in the basic regulation as amended by Council Regulation (EC) No 1101/95 of 24 April 1995 (OJ 1995 L 110, p. 1). According to the applicant, that reduction in quotas would affect the whole European sugar industry, not only sugar manufacturers in the deficit area.

22 The applicant maintains that annulment of the contested regulation would not prevent the alleged damage from becoming irreparable, since the danger is that loss of market share and reduction in quotas would place European manufacturers in an extremely difficult position in which it was likely that they might have to 'cease trading' or lose for good 'a substantial part of their market share'.

23 The Council contends that the applicant's arguments concerning inward processing have no relevance to this case. The implementation of various means of managing the sugar market — inward processing arrangements or export refunds — falls to the political choice of the Community legislature, which can perfectly well adjust them to the circumstances described by the applicant without its being possible to call into question the fixing of the derived intervention price in Italy for the marketing year 1997/98. What is more, the defendant states that the assumption that at some time in the future the market share of some European sugar manufacturers might be reduced as the result of the application of the IPRA is not sufficient to prove that it is, as alleged, unlawful to regionalize sugar prices.

24 Nor does the defendant subscribe to the applicant's conclusions as to the risk of a reduction in the level of A and B quotas as a result of the application of Article 23 of the basic regulation. That article provides that quotas are to remain unchanged until the marketing year 2000/01, and that only on certain conditions — which are not satisfied in the circumstances — may quotas be reduced in order for the Community to fulfil its commitments within the framework of the World Trade Organization (WTO). In the defendant's view, the Community more than fulfilled

its commitments for the marketing year 1995/96 and for 1996/97 the exportable balance is again expected to be less than the maximum provided for under WTO agreements. Since those agreements allow the Community to adjust any shortfall at the end of the transitional period, namely from the year 2001, any reduction of A and B quotas is for the time being purely hypothetical. Contrary to what the applicant maintains, the Council considers that it is not the application of the derived prices system in Italy which might threaten the interests of European sugar manufacturers, but instead the abolition of that system: if that were to happen, since sugar manufacturers in countries with a surplus have an interest in exporting the surplus sugar to non-member countries, taking advantage of the refund scheme, rather than in marketing it in deficit areas such as Italy, the sudden increase in the volume of exports could in actual fact undermine the Community's compliance with its commitments within the WTO, hence the necessity of a reduction in A and B quotas even before the end of the transitional period.

25 With reference to the allegedly irreparable nature of the damage alleged to be suffered by the applicant, the Council considers that the CEFS has adduced no evidence to support the claim that the European sugar industry could be damaged by the fixing of derived intervention prices in Italy for the marketing year 1997/98. The risk of going out of business pleaded by the applicant is therefore hypothetical, and is not supported by any evidence.

26 The Commission, intervening in support of the Council, declared at the hearing on 12 September 1997 that it agreed with the defendant's analysis concerning urgency. In particular, the Commission considers that imports of non-Community sugar into the Community represent 1% of Italian production, and that therefore the risk alleged by the applicant of loss of market share is overstated. With regard to the Community's commitments within the WTO, the intervener notes that for the

marketing years 1995/96, 1996/97 and 1997/98 the aggregate sugar export ceilings approved by the WTO — an aggregation quite within the GATT rules — was about 4 520 000 tonnes, while Community sugar exports to non-member countries for the same period were about 3 400 000 tonnes, which leaves an operating margin of 1 120 000 tonnes for the current marketing year.

Findings of the President of the Court

27 It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for them. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage that would entail serious and irreparable consequences (see the order of the President of the Court of First Instance in Case T-168/95 R *Eridania and Others* v *Council* [1995] ECR II-2817, paragraph 33).

28 In this case, the damage which the applicant claims it will suffer if the contested provision is implemented consists of two parts. First, the loss of a considerable share of the European sugar market to the advantage of importers of non-Community sugar and, second, continuing reduction in the guaranteed A and B quotas.

29 So far as concerns the second aspect, even the applicant's own statements show that there is no real danger of a reduction in A and B quotas until the year 2001, which marks the end of the transitional period under the commitments concluded by the Community in the WTO, by which time it is probable that judgment will have been given in the main proceedings. There is no evidence to suggest such a risk might occur before the end of the transitional period: indeed, the Commission

has pointed out — and has not been contradicted by the applicant — that up to the marketing year 1997/98 the sugar export ceiling in the context of the WTO of about 4 520 000 tonnes has not been reached, and the volume of Community exports of sugar to non-member countries, forecast to be 3 400 000 tonnes, leaves a sufficient operating margin for it to be concluded that no reduction in quotas is foreseeable in the near future. In those circumstances, the actual existence of the damage alleged by the applicant would not appear to have been established.

30 As regards proof of the first aspect of the damage alleged by the applicant, namely the loss of a significant share of the European sugar market to importers of non-Community sugar, the applicant has not shown the damage to be serious and irreparable.

31 While the statistics prepared by the Commission demonstrate that for the marketing year 1995/96 imports of non-Community sugar into Italy under the IPRA amounted to approximately 72 000 tonnes (see Annex 17 to the application for interim measures), the applicant adduces no evidence to show that, for the marketing year 1996/97, the volume of sugar imports will be 'about 150 000 tonnes', as it claims in paragraphs 91 and 94 of the application for interim measures. The one source of information cited in that respect, namely the letter from the President of the 'Groupe Paritaire' of 16 July 1997 to Franz Fischler, a Member of the Commission (Annex 18 to the application for interim measures), mentions this figure as the estimate made by the 'Italian beet-growers' representative' of the 'second-stage processing industry's demand for exports' but gives no explanation of the method used to arrive at that figure. As regards the volume of imports recorded for the marketing year 1995/96 and the estimated imports for the following year, the applicant does not put forward any facts to demonstrate that 'the consumption of the big Italian manufacturers of processed products made with sugar' is about 400 000 tonnes a year (application for interim measures, paragraph 91), whereas total consumption of sugar in Italy is estimated to be 1 483 000 tonnes for the year 1997/98 (ibid., paragraph 72).

32 So far as concerns the economic reasons underlying the — undisputed — fact that 72 000 tonnes of non-Community sugar were imported into Italy in the marketing year 1995/96 under the IPRA, there is nothing in the documents in the case to preclude the possibility that Italian manufacturers of sugar-based products for export have been using an alternative resource which is made indispensable precisely because Italian sugar production is in deficit, as opposed to preferring a cheaper product than Italian sugar at the derived intervention price.

33 In any event, the President of the Court of First Instance considers that the loss of market share claimed by the applicant is not evidently irreversible. No evidence has been adduced to show that, if the contested provision were annulled, and notwithstanding the obligations resulting in this case from Article 176 of the EC Treaty, Italian manufacturers of sugar-based products for export would continue to import non-Community sugar under the IPRA in preference to using Italian sugar to which the derived intervention price would no longer apply. At first sight, therefore, that loss constitutes something which could be reversed following such annulment. As regards the period between the date on which the contested provision was adopted and its possible annulment, there is prima facie nothing to preclude any interested person from being able to obtain compensation for unjustified loss by means of the remedies provided for by the Treaty, especially Articles 178 and 215 (see the order in Case T-6/97 R *Comafrica and Dole Fresh Fruit Europe* v *Commission* [1997] ECR II-291, paragraph 49).

34 Since the applicant has not duly substantiated its application for interim measures so far as urgency is concerned, the application for interim relief must be rejected without there being any need to consider whether it is admissible or whether the pleas in law and arguments put forward in support of the action in the main proceedings seem at first sight to be well founded.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The Commission is granted leave to intervene in support of the form of order sought by the Council.**

2. **The application for interim relief is dismissed.**

3. **Costs are reserved.**

Luxembourg, 9 October 1997.

H. Jung

Registrar

A. Saggio

President