ORDER OF THE PRESIDENT OF THE COURT
OF 25 OCTOBER 1974 [1]

Nederlandse Vereniging voor de Fruit- en Groentenimporthandel, Nederlandse Bond van Grossiers in Zuidvruchten en ander Geimporteerd Fruit v Commission of the European Communities

Case 71/74 R and RR

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NEDERLANDSE VERENIGING VOOR DE FRUIT- EN GROENTENIMPORTHANDEL, NEDERLANDSE BOND VAN GROSSIERS IN ZUIDVRUCHTEN EN ANDER GEIMPORTEERD FRUIT, represented by J. J. A. Ellis and B. H. ter Kuile, both advocates and avoués at The Hague, with an address for service in Luxembourg at the chambers of J. Loesch, advocate, 2, rue Goethe,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, B. van der Esch, with an address for service in Luxembourg at the office of P. Lamoureux, Legal Adviser, 4, boulevard Royal,

defendant,

and

THE FRUITUNIE ASSOCIATION, represented by R. A. de Jonge, advocate at Utrecht, with an address for service in Luxembourg at the chambers of E. Arendt, avocat-avoué, 34 B IV, rue Philippe II,

intervener,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

1 — Language of the Case: Dutch.

ORDER

Facts

On the basis of a proceeding instituted under Article 85 of the Treaty establishing the EEC, the Commission took a Decision, on 25 July 1974 (IV/26.602 — Frubo, OJ L 237, of 29. 8. 1974, p. 16 et seq.), by which it declared that the provisions of Article 9 of an agreement concluded between the applicants relating to the sale by auction of citrus and other fruit imported into the Netherlands constitute an infringement of Article 85 (1) of the Treaty.

The Decision rejected the applicants' request for exemption under Article 85 (3) and ordered them and the associated undertakings to bring the said infringements to an end forthwith.

On 23 September 1974, the applicants brought an action for the annulment of the said Decision.

By a separate document they made a twofold application for suspension of operation to cover, on the one hand, the period prior to the Court's interim decision, and, on the other hand, the period between the interim decision and the Court's judgment in the main action.

By statement of 30 September 1974, Fruitunie made an application to intervene in the main action and in this interim procedure.

The applicants made a first special application to suspend the operation of the Decision until the Court had reached a decision in the interim procedure.

The Commission replied that it is not its practice to force the parties concerned formally to annul their agreements or to make them conform to the Treaty when an interim application is pending against a decision declaring an agreement incompatible with Article 85.

It undertook not to act otherwise in this case.

The applicants request further that the Court should suspend the operation of the contested Decision until it has given judgment in the main action.

In support of this application they invoke the need for their Association, the fact that it has been in existance for many years and the fact that even if they were to succeed in the main action the temporary suspension of the Association's effectiveness would permanently jeopardize its existence.

There is also serious doubt concerning the validity of the contested Decision.

Moreover, the matter is pressing, since the marketing season for Spanish oranges is approaching and must be conducted in accordance with the traditional marketing system which, otherwise, will 'collapse', resulting in a rise in prices which until now have been lower than those in force generally in the EEC.

No Community interest opposes the grant of the suspension, given the fact that the marketing system in issue has existed since 1952 and the fact that it took the Commission several years to reach its Decision.

In conclusion, the applicants ask the Court, in its decision on the interim application, to order the suspension of operation of the Decision of the Commission of the European Communities of 25 July 1974 (No IV/26.602 — Frubo) 'until judgment has been delivered in the action brought by the applicants against this Decision, or at least until such time as the Court shall judge to be just and appropriate, subject to any decision in the matter which the

Court may consider necessary, and to order the Commission to bear the costs of the interim procedure'.

The Commission, defendant in the main action in the interim procedure, claims that it is not certain that an amendment of the basic document of association during the case is likely to cause immediate and irreparable damage.

Moreover, in the defendant's opinion, the Court is being asked to substitute itself for the Commission and the suspension of operation of a decision of rejection cannot be equated with the grant of an authorization which has been refused by the executive.

Even if the Court considers the Commission's argument incorrect, it is not advisable in this case for the Court to adopt the measure requested, since this would cause the wholesalers once more to be liable to penalties under the agreement.

The Commission submits in conclusion that the application should be dismissed and the applicants ordered to bear the costs of the interim procedure.

The intervener asserts that it has an interest in the action by reason of the fact that its interest might be compromised by an annulment of the Decision or by suspension of its operation.

The continuance of the agreement, even on a temporary basis, would prevent the intervener from operating independently as an importer and would restrict its freedom of supply.

This situation affects trade between Member States, as is shown by the contested Decision.

The intervener is likely to suffer serious damage.

Accordingly, it concludes that the Court should dismiss the application for suspension of operation.

The applicants in the main action oppose the request to intervene made by Fruitunie on the grounds that the submissions set out in the application to intervene do not seek to support the submissions of one of the parties, but seek to support the Decision in issue, and that the said request does not satisfy the procedural requirements laid down by the Protocol on the Statute of the Court.

Law

1 The intervener's interest in the case results from the advantages which it can gain from the operation of a Decision freeing it from the agreement in issue.

2 This being so, it supports the submissions of the Commission.

3 Its intervention in this interim procedure is therefore admissible.

4 The aim of the interim application is to persuade the Court to decide in favour of the suspension of operation of the Commission's Decision, with the

result that the prohibited agreement should be regarded as temporarily valid until judgment is given in the main action.

5 However, it is outside the jurisdiction of the Court, within the context of an interim procedure, to substitute its own appraisal for that of the Commission and render provisionally valid an agreement which has been annulled on the basis of Article 85 (1) with the consequences prescribed by Article 85 (2).

6 In compliance with Article 185 of the EEC Treaty, the Court can, at most, grant a suspension of the operation of the contested Decision insofar as that suspension is established to be absolutely necessary, having regard to the urgency of the situation and to the irreversible nature of the damage which might ensue from immediate operation of the Decision before the Court's judgment in the main action, with regard to which such suspension is in any case without prejudice.

7 The Commission, moreover, has declared that 'it is not its practice to force the parties concerned formally to annul their agreements or to make them conform to the Treaty when an interim application is pending against a decision declaring an agreement incompatible with Article 85'.

8 It is therefore sufficient to suspend the operation of the Commission's Decision until the date of the Court's judgment, subject however to the non-application, during that period, of the clauses under which penalties may be imposed on the parties to the agreement.

9 At this stage, it is appropriate to reserve costs.

On those grounds,

THE PRESIDENT

as an interim ruling,

orders:

1. The intervention of the Fruitunie Association in this interim procedure is allowed;

2. The operation of Decision IV/26.602 — Frubo is suspended until the Court has given its judgment on the substance of the case;

3. However, the clauses under which penalties may be imposed on the parties to the agreement shall not apply during this period;

4. The costs are reserved.

Done and ordered in Luxembourg on 15 October 1974.

A. Van Houtte
Registrar

R. Lecourt
President