ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
26 October 1994 *

In Cases T-231/94 R, T-232/94 R and T-234/94 R,

Transacciones Marítimas, SA,

Recursos Marinos, SA,

and

Makuspesca, SA,

companies incorporated under Spanish law, with their registered offices at Vigo (Spain), represented by Santiago Martinez Lage, Allendesalazar Corcho and Javier Vías Alonso, all of the Madrid Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicants,

* Language of the case: Spanish.

Commission of the European Communities, represented by Francisco Santaolalla, Legal Adviser, and Amparo Alcover, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for

in Case T-231/94 R, suspension of the operation of Article 2 of Commission Decision C(94) 670/3 of 24 March 1994 withdrawing Community financial aid granted to the applicant for a project to construct a fishing vessel;

in Case T-232/94 R, suspension of the operation of Article 2 of Commission Decision C(94) 670/2 of 24 March 1994 withdrawing Community financial aid granted to the applicant for a project to construct a fishing vessel;

and in Case T-234/94 R, suspension of the operation of Article 2 of Commission Decision C(94) 670/1 of 24 March 1994 withdrawing Community financial aid granted to the applicant for a project to construct a fishing vessel,

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

makes the following

Order

Facts and procedure

1 By applications lodged at the Court Registry on 15 June 1994, the applicants brought actions under Article 173 of the EC Treaty for the annulment of, respectively, Commission Decisions C(94) 670/3, C(94) 670/2 and C(94) 670/1 of 24 March 1994, whereby the Commission withdrew Community financial aid which it had granted, pursuant, respectively, to its Decision C(87) 2200/137 of 21 December 1987 and its Decisions C(89) 632/73 and C(89) 632/47 of 26 April 1989, for three fishing vessel construction projects.

2 By documents lodged at the Court Registry on 6 July 1994, the applicants submitted three applications under Article 185 of the EC Treaty for suspension of the

operation of Article 2 of the decisions of 24 March 1994, cited above, which ordered repayment of that aid.

3 The Commission submitted its observations on those applications on 22 July 1994. The parties presented oral argument on 9 August 1994.

4 At that hearing, the President of the Court of First Instance requested the parties to examine the possibility of reaching an amicable settlement and set a time-limit of 31 August 1994 for submitting to him, should such agreement not be reached, certain information concerning the instruments constituting them, their legal and economic status and their indebtedness to banks. The applicants were also requested to state, within the same time-limit, whether they would be able to constitute a bank guarantee covering the whole amount of the aid granted. Since the parties failed to reach an agreement, the applicants submitted the information requested to the Court Registry on 31 August 1994. The Commission submitted its observations on the documents produced by the applicants by letter of 14 September 1994.

5 Before examining whether the applications for interim measures are well founded, it will be helpful to set out the facts which gave rise to the dispute, as they emerge from the pleadings and other documents lodged by the parties and from the oral argument presented at the hearing on 9 August 1994.

6 The applicants are companies whose object, under the instruments constituting them, is fishing, and who have a common majority shareholder and manager.

Transacciones Maritimas SA ('Tramasa') was established in April 1984, and Makuspesca SA and Recursos Marinos SA were established in November 1986.

7 By Decision C(87) 2200/137 of 21 December 1987, adopted pursuant to Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1987 L 376, p. 7), the Commission granted financial aid of PTA 39 283 091 to Tramasa for the construction of a fishing vessel named 'Tiburón III'. That aid covered 35% of the amount of PTA 112 237 000 which the Commission stated was capable of being paid by way of subsidy. That amount was less than the total cost of the project, which amounted to PTA 126 500 000. As required by Regulation No 4028/86, the construction of the vessel 'Tiburón III' was also financed by aid from the Spanish authorities.

8 On 6 April 1988 Tramasa requested the Commission to make a part payment of the Community aid on the strength of an invoice from the constructing shipyard, dated 15 March 1988, which certified that 51% of the total investment had been paid. The Commission made the part payment on 12 July 1988. On 25 October 1988 Tramasa requested the Commission, on the strength of a shipyard invoice certifying payment of the full price of the vessel, to pay the balance of the aid. The Commission did so on 4 April 1989.

9 On 9 October 1989 Tramasa sold the vessel 'Tiburón III' for PTA 112 857 453.

10 By Decision C(89) 632/73 of 26 April 1989, adopted pursuant to Regulation No 4028/86, the Commission granted aid of PTA 107 570 097 to Recursos

Marinos for the construction of a fishing vessel named 'Acechador'. That aid covered 35% of the amount which the Commission stated was capable of being paid by way of subsidy, namely PTA 307 344 850. That amount was less than the total cost of the project, which amounted to PTA 322 300 000. As required by Regulation No 4028/86, the construction of the vessel in question was also financed by aid from the Spanish authorities.

11 On 10 May 1989 Recursos Marinos requested the Commission to make a part payment of the Community aid on the strength of a shipyard invoice of 2 May 1989, which certified payment of 94% of the total investment. The Commission made the part payment on 28 July 1989. On 21 November 1989 Recursos Marinos requested the Commission, on the strength of a shipyard invoice of 4 October certifying that the full vessel price had been paid, to pay the balance of the aid. The Commission did so on 28 November 1989.

12 In May 1990 Recursos Marinos sold the vessel 'Acechador' for PTA 175 000 000.

13 By Decision C(89) 632/47 of 26 April 1989, adopted pursuant to Regulation No 4028/86, the Commission granted aid of PTA 79 934 630 to Makuspesca for the construction of a fishing vessel named 'Makus'. That aid covered 35% of the amount which the Commission stated was capable of being paid by way of subsidy, namely PTA 214 070 374. That amount was less than the total cost of the project, which amounted to PTA 217 250 000. As required by Regulation No 4028/86, the construction of the vessel was also financed by aid from the Spanish authorities.

14 On 5 June 1989 Makuspesca presented the Commission with a shipyard invoice of 8 February 1989, which certified payment of the full vessel price, and requested payment of the Community aid. The Commission paid it on 8 June 1989.

15 In July 1992 Makuspesca sold the vessel 'Makus'.

16 Between 25 and 31 March 1990, under powers conferred on them by Article 46 of Regulation No 4028/86, the Commission's officers carried out inspection visits of the applicant companies to check the use of the aid granted. The inspections were particularly concerned with the companies' accounts. Following those visits, and at the request of the Commission, the departments of the Intervención General de la Administración del Estado (State Public Accounts Department) carried out inspections on the premises of the three companies in May 1990. The reports drawn up as a result of those inspections show, in particular, that authentication of the accounts of the companies in question had been refused for the financial year 1987, that the accounts for 1988 had been authenticated within the time-limit laid down by Spanish law, and that the 1989 accounts had been authenticated out of time. As a result of those inspections, the Spanish authorities adopted decisions reducing the aid they had granted and ordering repayment of the overpaid amounts.

17 The documents before the Court and the statements of the applicants' lawyers at the hearing on 9 August 1994 reveal that Recursos Marinos has been liquidated and that the two other applicants have not pursued any activity during the most recent financial years.

18 Since the three applications for suspension of the contested decisions are connected, the cases must be joined for the purposes of these interlocutory proceedings.

Law

19 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 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), the Court of First Instance may, if it considers that circumstances so require, order that application of contested acts be suspended or prescribe any necessary interim measures.

20 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures as envisaged under Articles 185 and 186 of the Treaty 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. Such measures must be provisional in the sense that they do 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-239/94 R *EISA* v *Commission* [1994] ECR II-703, paragraph 9).

The arguments of the parties

21 In order to make out a prima facie case for their claims, the applicants put forward, by reference to their pleadings in the main proceedings, four pleas in law based, respectively, on breach of the principles of legal certainty and of the protection of legitimate expectations, breach of essential procedural requirements, breach of the principle of proportionality and misuse of powers.

22 With respect to their first plea, the applicants begin by stating that nearly six years elapsed between their request for payment of the aid from the Commission and the Commission's request for repayment and that, furthermore, nearly three years

elapsed between the Commission's receipt of the inspection reports from the Spanish authorities and its adoption of the contested decisions. In the applicants' submission, it follows from the case-law of the Court of Justice that such conduct constitutes a breach of the principle of legal certainty.

23 The applicants then maintain that the Commission's conduct also constitutes a breach of their legitimate expectations, inasmuch as, between the time when the aid was granted to them and the time when the decisions ordering repayment were adopted, they were given no indication that the Commission considered that they had acted unlawfully. The Commission's silence, even after the request by the Spanish authorities in 1991 that part of the aid granted by them be reimbursed, reinforced the applicants' expectations, and, in the applicants' submission, constitutes a ground for annulling the contested decisions according to the case-law of the Court of Justice (judgment in Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749). Moreover, the unlawful actions of which the applicants stand accused relate essentially, in their submission, to differences of interpretation as to the method of calculating the cost of the vessels and do not in any way constitute manifest infringements of the rules in question.

24 The applicants argue, furthermore, that their legitimate expectations were not adversely affected by the inspection visits carried out by the Commission's agents on 30 March 1990. In the applicants' submission, a measure of that kind was a mere facility allowed by the rules in force which did not in any way imply suspicion of the undertakings inspected. In the present case, moreover, those inspection visits had not given rise to the sending of an official report or of any other document containing an accusation against the applicants.

25 With respect to their second plea, which is put forward in the alternative and alleges a breach of essential procedural requirements, the applicants claim that the

Commission did not inform the Spanish authorities of the initiation of the procedure for suspending, reducing or terminating aid, as required by Article 7 of Commission Regulation (EEC) No 1116/88 of 20 April 1988 laying down detailed rules for the application of decisions granting aid for projects concerning Community measures to improve and adapt structures in the fisheries and aquaculture sector and in structural works in coastal waters (OJ 1988 L 112, p. 1). Neither the Commission's communication to the Secretaria General de Pesca Maritima, the organization with responsibility in Spain for administering aid granted under Regulation No 4028/86, of its intention to initiate the procedure nor consultation with the permanent committee on the structure of the fishing industry could be regarded as complying with that requirement.

26 The applicants also maintain that the contested decisions were adopted in breach of Article 190 of the EC Treaty, inasmuch as the reasons given for them are insufficient and are identical for all the decisions, despite the existence of factual differences between the three situations. The reasons given were, moreover, vague and imprecise in so far as, first, the discrepancies alleged against the applicants between the cost they declared and the price they actually paid for the vessels were not stated in figures and, secondly, the reasons given did not state whether shipbuilding subsidies paid to the shipyards directly by the national authorities should or should not be included in the amounts of the investments capable of being subsidized. Finally, the reasons given for the decisions were based on factual inaccuracies or misrepresentations.

27 With respect to their third plea, which is also put forward in the alternative, the applicants invoke a breach of the principle of proportionality, inasmuch as, from amongst all the sanctions provided for by Regulation No 4028/86, the Commission chose the withdrawal of aid, which was the sanction reserved for the most serious breaches. In the present case, however, the main obligation, namely the construction of vessels, had been fulfilled and the irregularities alleged against the applicants concerned only ancillary obligations.

28 With respect to their fourth plea, which is also put forward in the alternative and accuses the Commission of misusing its powers, the applicants argue that, by its decisions, the Commission was attempting to implement a recommendation of the Court of Auditors contained in a special report on the application of Regulation No 4028/86 and designed to prevent the rapid resale of vessels constructed with the aid of Community funds.

29 As for the serious and irreparable damage which they would suffer if the contested decisions were put into operation, the applicants' first argument, invoking the order of the Court of Justice in Cases 31/77 R and 53/77 R *Commission* v *United Kingdom* [1977] ECR 921, is that the defects in those decisions are so serious as to make proof of damage no longer necessary in order to substantiate the urgency of suspension.

30 In the alternative, the applicants argue that operation of the contested decisions would, in any event, cause them serious and irreparable damage. As their balance sheets demonstrate, repayment of the aid granted would precipitate the insolvency of the two companies not already dissolved (Makuspesca and Tramasa). Moreover, it carried the risk of very serious consequences for Recursos Marinos which, although already liquidated, could be subject to judicial proceedings and, possibly, a declaration of 'retrospective insolvency'.

31 Finally, the applicants argue that the damage which would be caused to them by the application of the contested decisions would be far greater than that which would be caused to the Community interest through a measure suspending their operation. The fact that the Commission waited five years after the grant of the aid before attempting to recover it constitutes proof of this.

32 The Commission begins by questioning the legal existence of Recursos Marinos, the applicant in Case T-232/94. It appears from a certificate from the commercial

register produced by the applicant itself that Recursos Marinos was dissolved and liquidated in December 1991. The Commission requests the Court to set a time-limit, pursuant to Article 44(6) of the Rules of Procedure, for the applicant to clarify the situation.

33 As for the first plea relied on by the applicants in order to make out a prima facie case for their claims, the Commission considers that the interval which elapsed before the adoption of the contested decisions was at least partly due to the applicants, whose obstructive attitude at the time of the inspection visits by the Commission's officers in March 1990 necessitated further inspections by the Spanish authorities. Moreover, the Commission wished to await the outcome of the administrative proceedings brought by the applicants against the decisions of the Dirección General de Estructuras Pesqueras ordering partial repayment of the national aid which had been granted to them, which decisions, the Commission stresses, indicated to the applicants that the reduction of national aid was independent of any possible sanction that the Commission might adopt. In any event, the Commission maintains that the applicants cannot invoke the legitimate expectation they claim to have entertained with respect to the benefit of a subsidy, the grant of which was based on false information supplied by them in manifest breach of the applicable legislation. In that respect, the Commission points out that the invoices drawn up by the shipyards not only do not correspond with payments actually made by the applicants, but do not even reflect the true cost of the investments, which, the Commission maintains, was significantly less than the amounts shown in the invoices. The Commission maintains, moreover, that the total amounts of the investments shown on the application forms for Community aid, and also shown, by way of sums paid, on the certificates drawn up with a view to the full payment of the aid granted, do not in any case coincide with the base values of the vessels declared by the shipyards to the national authorities.

34 As regards the second plea, based on breach of essential procedural requirements, the Commission points out, first, that the Spanish authorities were informed of the

proceedings for withdrawing the aid and of the Commission's intention to order its repayment, and that, following the contacts established, those same authorities submitted their own observations in December 1992 and March 1993. Secondly, the Commission considers that, having regard to the case-law of the Court of Justice, sufficient reasons were given for the decisions in question. In particular, those decisions referred to the inspection reports by the Spanish authorities, which gave information as to figures and as to the inclusion of subsidies received directly by the shipyards in the amounts of the investments that formed the subject-matter of the aid.

35 As regards the plea based on breach of the principle of proportionality, the Commission states that the applicants deliberately falsified the amounts of the investments for which the aid was requested and that, in the face of such conduct, mere reduction of the aid in proportion to the inaccuracies established would constitute an invitation to fraud, since, having regard to the impossibility of checking all the applications submitted, the accuracy of declarations was an essential element of the subsidies system.

36 Finally, the Commission considers that the applicants do not advance any argument capable of supporting their assertions of a misuse of powers.

37 The Commission also disputes the existence of any urgency justifying the suspension of the contested decisions. It points out that the applicants are all inactive, with the sole exception of Makuspesca, which underwent a major reduction in its assets after the inspection visit by the Commission's officers. The Commission argues that the applicants cannot rely, in order to obtain the suspension of the operation of the contested decisions, on a situation which they themselves created, apparently with the sole aim of making repayment of the aid they had received impossible.

38 As for the balancing of the interests involved, the Commission considers that the damage which the Community interest would suffer if the operation of the

contested measures were suspended would be far more serious than the alleged damage which the applicants might suffer as a result of their immediate application. Such suspension would undermine the credibility of the system of structural aids in the fisheries sector and would render the recovery of the amounts already paid impossible.

Findings of the President of the Court of First Instance

39 In these applications for interim measures, it must first be decided whether Recursos Marinos, the applicant in Case T-232/94 R, has the capacity to be a party to judicial proceedings. The company joined to its application a certificate from the commercial register of the province of Pontevedra, dated 23 May 1994, from which it appears that the company was dissolved and liquidated in 1991. However, the authority drawn up by a Vigo notary, which is also attached to the application, confers upon the company's liquidator 'sufficient legal capacity' to instruct lawyers appointed for the purposes, *inter alia*, of representing the company in judicial proceedings, especially before the Court of First Instance. In the course of the hearing, the applicant's representative argued that the applicant has an interest in contesting the legality of the Commission's decision in judicial proceedings, in order to avoid the consequences in national law of that decision being put into operation.

40 The question whether a company that has been dissolved and liquidated, and which, even though it could have relied on that liquidation, has chosen to bring an action, still has the capacity to be a party to judicial proceedings cannot be decided by the judge hearing the application for interim measures. At this stage, and having regard to all the information available, the statements by the notary who drew up the authority to represent the company filed by the applicant should be accepted. Therefore, and without prejudice to the conclusion which the Court of First Instance might reach in its examination of the main action, the capacity of the applicant to bring the present application for interim measures must be accepted at this stage.

41 As regards the urgency of an application for interim measures, it is settled case-law that such an application must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for those measures (see the order of the President of the Court of First Instance in Case T-593/93 R *Gestevisión Telecinco* v *Commission* [1993] ECR II-1409, paragraph 27). It is for the party seeking suspension of the operation of a contested decision to prove that it cannot wait for the outcome of the main proceedings without suffering damage that would entail serious and irreparable consequences.

42 On that point, the applicants maintain that the operation of the Commission's decisions would entail their being placed in judicial liquidation. Having regard to the information which the applicants have provided concerning their financial situation, there does indeed appear to be a real risk of their being placed in judicial liquidation, inasmuch as the amounts of aid repayable, namely PTA 75 000 000, 107 000 000 and 39 000 000, far exceed the amount of their assets. Even though, as the Commission rightly points out, the applicants have no real economic activity and the tangible consequences of such liquidation would be less serious than those which would occur if such an activity were being pursued, it cannot be denied that it would very probably entail the forced dissolution of the companies and have serious personal consequences for their managers and shareholders. There is therefore a risk that the damage which the applicants would suffer as a result of the immediate operation of the Commission's decisions would be serious and irreparable.

43 As regards the pleas put forward by the applicants in order to make out a prima facie case, it should be noted that a number of those pleas, concerning in particular the breach of general principles of law or of essential procedural requirements, cannot at this stage be regarded as manifestly lacking all foundation. In particular, the plea that, in demanding repayment of all the sums paid by way of aid granted, the Commission did not, in the circumstances of the case, take the requirements of the principle of proportionality into account requires a detailed examination of the

facts and the legal context of the case, which lies outside the scope of the present interlocutory proceedings.

44 In those circumstances, and without there being any need to examine the other pleas and arguments put forward by the applicants, it must be held, so far as the present applications for interim measures are concerned, that the conditions concerning the existence of a prima facie case and of a risk of serious and irreparable damage, in the event of those applications not being granted, are satisfied.

45 Nevertheless, a balance must be struck between, on the one hand, the applicants' interest in not being placed in judicial liquidation and, on the other hand, the Community interest in thze recovery of aid improperly paid and in the penalization of frauds in the system of Community subsidies. In that respect it should be noted, first, that the reason given for the contested decisions, in so far as they order repayment of the aid granted, is the Commission's finding of the existence of a number of serious irregularities committed by the applicants, of which the information before the Court provides sufficiently tangible evidence for the judge hearing the application for interim measures. Secondly, it is apparent from the information before the Court, taken as a whole, that, if the Commission were obliged to wait for the conclusion of the main proceedings, there would be a real risk of its not being able to find sufficient assets to obtain repayment of the aid in question in the event of the applications in those proceedings being dismissed. It should be borne in mind that one of the applicants has already been liquidated, the other applicants' assets and shave capital and reserves are practically non-existent, and none of them has engaged in any activity during the past few years.

46 The balancing of the interests in question therefore requires, in order that the Community interest may be preserved, that enforcement of the present order be made conditional, pursuant to Article 107(2) of the Rules of Procedure of the Court of First Instance, on the constitution by the applicants of a bank guarantee sufficient to ensure the repayment, if necessary, of all the aid they received.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. Cases T-231/94 R, T-232/94 R and T-234/94 R are joined for the purposes of the proceedings for interim measures.

2. Operation of Article 2 of Commission Decisions C(94) 670/3, C(94) 670/2 and C(94) 670/1 of 24 March 1994, withdrawing the Community financial aid granted to each of the applicants for a project to construct a fishing vessel, is suspended until the Court of First Instance delivers judgment in the main proceedings.

3. The suspension of operation ordered in the preceding paragraph is subject to the constitution by the applicants of a bank guarantee in favour of the Commission, covering, until the Court of First Instance delivers judgment in the main action, the full amount of the aid granted.

4. Costs are reserved.

Luxembourg, 26 October 1994.

H. Jung — Registrar

J. L. Cruz Vilaça — President