ORDER OF THE PRESIDENT OF THE COURT
OF 29 NOVEMBER 1978 [1]

Simmenthal S.p.A.
v Commission of the European Communities

Case 243/78 R

In Case 243/78 R

SIMMENTHAL S.P.A., having its registered office in Aprilia (Italy), represented and assisted by Emilio Cappelli and Paolo de Caterini, Advocates of the Rome Bar, with an address for service in Luxembourg at the Chambers of Charles Turk, 4 Rue Nicholas Welter,

applicant,

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Kalbe, acting as Agent, assisted by Guido Berardis, a member of the Legal Service, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser to the Commission, Jean Monnet Building, Kirchberg,

defendant,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

has made the following

ORDER

Facts and Issues

The facts, the procedure and the observations of the parties may be summarized as follows:

1. Pursuant to Article 13 (1) of Regulation No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187) "A levy shall be charged on imports into the Community of frozen meat".

1 — Language of the Case: Italian.

However, in order to take account of the needs of the processing industry, according to Article 14 of the said regulation as originally worded a special import system consisting in the total or partial suspension of the levy was applied in favour of certain meat intended for processing. Meat intended for the manufacture of preserves of the corned beef type not containing characteristic components other than beef and jelly could be imported with total suspension of the levy, whereas in the case of meat intended for processing into other products, the total or partial suspension of the levy could, in certain circumstances, be made conditional upon the purchase of intervention meat (the so-called "linking" system).

2. (a) On 14 February 1977 the Council adopted Regulation No 45/77 (Official Journal L 61, p. 1), amending, *inter alia*, Article 14 of Regulation No 805/68. The alterations, in so far as they are relevant to the present case, were prompted, basically, by a slump in prices within the Community, made worse by massive imports from third countries, which made it necessary to adjust import arrangements and, in particular, "certain special systems", to avoid a recurrence of similar situations (of the second to the fifth recitals of the preamble to Regulation No 425/77). Accordingly, that regulation provided in particular as follows:

— Meat intended for the manufacture of preserved food of the corned beef type shall qualify, "under the conditions laid down in this article", for the total suspension of the levy, and meat intended for the manufacture of other products shall qualify, under those conditions, for the total or partial suspension of the levy (Article 14 (1) (a) and (b) of the new version of the regulation).

— Each year the Council shall draw up an estimate of meat which may be imported under the arrangements laid down in that article (Article 14 (2)).

— Importation under suspension of the levy shall be made conditional on production of an import licence issued for a quantity falling within the limits laid down each quarter (Article 14 (3) (a)).

— Importation under total suspension of the levy may be made conditional, as far as necessary, upon production of a purchase contract for frozen meat held by an intervention agency, that is to say upon the "linking" system, in the case of meat intended for the manufacture of preserved food of the corned beef type and the manufacture of other products (Article 14 (3) (b)).

— Each quarter, the Commission shall determine the quantities which may be imported, the rate of suspension of the levy, where applicable, the relationship between the quantities which may be imported and the quantities to which, where necessary, the "linking" system is applied, as well as detailed rules for the application of that article (Article 14 (4)).

(b) The Commission laid down detailed rules for the application of the new version of Article 14 of Regulation No 805/68 in Regulations Nos 585/77 of 18 March 1977 (Official Journal L 75, p. 5) and 597/77 of 18 March 1977 (Official Journal L 77, p. 1), both of which were subsequently amended and supplemented by Regulations Nos 1384/77 of 27 June 1977 (Official Journal L 157, p. 16) and 2901/77 of 22 December 1977 (Official Journal L 338, p. 9), and subsequently replaced by Regulations Nos 571/78 of 21 March 1978 (Official Journal L 78, p. 10) and 572/78 of 21 March 1978 (Official Journal L 78, p. 17). In particular, those regulations contain provisions concerning the import licence for which provision is made in the new version of Article 14 (3) (a) of Regulation No 805/68, production of which is the precondition for suspension of the levy.

(c) In Regulation No 2900/77 of 22 December 1977 (Official Journal L 338, p. 6), the Commission exercised with effect from 1 January 1978 the power, provided at Article 14 (3) (b) of Regulation No 805/68 in its new form, to have recourse to the "linking" system, making importation with total suspension of the levy conditional upon "the submission of a purchase contract for frozen meat held by an intervention agency, concluded in accordance with this regulation" (Article 1 of Regulation No 2900/77). The various aspects of the rules in force as from 1 January 1978 may be summarized as follows:

— For importation of the meat in question, an import licence is required. A licence may be issued to any "natural or legal person who for at least 12 months has been carrying on business in the meat and livestock sector ... in a Member State" (Article 11a 2 (a) of Regulation No 585/77, in the version contained in Regulation No 2901/77, and Article 12 (2) (a) of Regulation No 571/78).

— The application for a licence must be accompanied by the original of a purchase contract for frozen meat held by an intervention agency, drawn up in accordance with Regulation No 2900/77 during the quarter in which the application is made (Article 11a (1) (a) of Regulation No 585/77, in the version contained in Regulation No 2901/77, and Article 12 (1) (a) of Regulation No 571/78).

— The sale of frozen meat held by an intervention agency shall take place by way of invitation to tender, pursuant to Regulation No 216/69 of the Commission of 4 February 1969 (Official Journal, English Special Edition 1969 (I), p. 31), subject to the special provisions laid down in Regulation No 2900/77 (Article 1 (2) of Regulation No 2900/77).

  According to that procedure, in the light of the tenders received and transmitted to it by the intervention agencies, the Commission fixes minimum selling prices. If the price offered is less than the minimum price, it is refused. Successful tenderers are those offering the highest price.

— Offers must be made for a total quantity of not less than five tonnes and not more than an hundred tonnes (Article 3 (4) of Regulation No 2900/77).

— The intervention agencies issue partial invitations to tender every quarter, for which tenders may be submitted only during the first ten days of each quarter (Articles 2 (2) and 3 (1) of Regulation No 2900/77).

— Following the decision of the Commission fixing minimum selling prices, the intervention agencies inform tenderers of the decision on their tenders and conclude purchase contracts with successful tenderers.

(d) On the basis of the above-mentioned rules, the Commission published in the Official Journal C 11 of 13 January 1978, p. 16, a "general notice of periodic invitations to tender for the sale of frozen beef held by the intervention agencies to enable the import with total suspension of the levy of frozen beef and veal intended for processing".

3. (a) On page 34 of the Official Journal C 11 of 13 January 1978 there was published the "notice of invitation to tender No It P 1 — Regulation (EEC) No 2900/77 — for the sale of certain frozen unboned (bone-in) beef held in stock by the Italian intervention agency" for the first quarter of 1978, pursuant to which the said intervention agency was to sell some 4 000 tonnes of beef and veal.

The applicant, a large producer of preserved food specializing in the

preparation of preserves containing only beef and veal and jelly, submitted an offer in response to that invitation to tender in order to obtain at least some supplies on the external market with the benefit of the import system involving suspension of the levy.

(b) On 15 February 1978 the Commission adopted Decision 78/258 (Official Journal L 69, p. 36), which was addressed to the Member States. In that decision it fixed the minimum selling prices for the frozen beef put up for sale by the intervention agencies in connexion with that invitation to tender and fixed the maximum quantities of meat intended for the manufacture of preserved food of the corned beef type and which might be imported with total suspension of the levy at 5 027 tonnes.

Pursuant to that decision the Italian intervention agency informed the applicant that its tender had been rejected because it was lower than the minimum price fixed by the Commission.

4. (a) On 13 April 1978 the applicant brought an action (Case 92/78) against Decision 78/258 of the Commission. In that action it is demanding that the Court should declare null, void or inapplicable, within the meaning of Article 184 of the EEC Treaty, Regulation No 585/77, and in particular Articles 11 and 11a, Regulation No 2900/77 and Regulation No 2901/77, especially as regards the total suspension of the levy in the framework of the special import system for frozen beef and veal, as well as the general notice of invitations to tender published in the Official Journal, C 11 of 13 January, and the notice of invitation to tender No It P 1.

The applicant is of the opinion that the Commission fixed at too low a level the quantities which might be imported with suspension of the levy and that by way of the detailed rules it in fact excluded the applicant from the advantage of the special system, thereby causing it difficulties in relation to supplies. In support of its application it claimed, *inter alia*, as follows:

— Regulation No 2900/77 and the general notice of invitations to tender, which gave concrete expression to the "linking" system, were in breach of essential procedural requirements in that they contained no statement of reasons;

— As regards Regulation No 585/77 and Regulation No 2900/77, there was a breach of the principles which prompted the adoption of the special import system for frozen meat intended for processing and discrimination between traders;

— As regards Regulations Nos 2900/77 and 2901/77, there was a breach of the principles behind the special import system for frozen meat intended for processing, misuse of powers and a breach of the principle of proportionality;

— As regards Regulation No 2900/77, and in particular Articles 3 and 5, there was a breach of the prohibition of discrimination between traders;

— As regards Regulation No 2900/77, and in particular Article 4, and the general notice of invitations to tender, and in particular point 4, there was a breach of the principle of the impartiality of the public administration.

The Commission has denied that the submissions upon which the applicant relies have any foundation and has challenged the admissibility of the application. With regard to admissibility the Commission has claimed that the applicant does not have a legitimate interest in bringing the action: even if the contested decision were annulled the applicant could not derive any advantage therefrom since the contracts have already been concluded and the import licences issued. To annul the decision would not necessarily mean that the

applicant would be granted what it desires and even less that third parties should be deprived of what they have obtained pursuant to the invitation to tender.

In connexion with that case the Government of the Italian Republic has intervened in support of the applicant's conclusions.

The Court has not yet ruled on that application.

(b) On the same date, that is 13 April 1978, the applicant submitted to the Court pursuant to Articles 185 and 186 of the EEC Treaty and Article 83 (1) of the Rules of Procedure, an application, designated 92/78 R, requesting that:

— The effectiveness of Decision No 78/258 be suspended and that the Commission be ordered to instruct the national authorities to suspend the issue of import licences corresponding to the contracts of purchase entered into by successful tenderers with the intervention agencies; and that

— The application of the special arrangements for the importation of frozen meat intended for the processing industry be suspended until publication of the final judgment.

In support of its application the applicant claimed that the system created by the Commission would lead to the exclusion of the applicant from the benefits of the special import system and the assignment of those benefits to traders who have nothing to do with the processing industry. Whereas it normally processes 20 000 tonnes of meat per year, more than half of which is of extra-Community origin, it has been obliged to acquire all its meat from an incalculable number of traders at unfavourable prices. It has thus been subjected to severe supply difficulties.

By order of 22 May 1978 of the President of the Court that application was dismissed.

As regards the first head of claim, the President held as follows: "Even assuming for the sake of argument that that statement is correct, it should be emphasized that the decision in dispute is addressed to all the Member States and it may be presumed that within the Community as a whole the majority of the said licences have already been issued, so that from this point of view the effectiveness of the decision in dispute has been exhausted and it can therefore no longer be the subject-matter of a suspensory measure.

Moreover, to restrict the application of the measure sought to licences which have not yet been issued would amount to depriving those concerned of a right conferred upon them by the Community rules in force.

Even if it is accepted that the Court is empowered to adopt an interim measure having so serious an effect on the rights and interests of third parties, who are not parties to the dispute and have not therefore been able to express their views, such a measure could, however, only be justified if, in its absence, the applicant would be exposed to a situation which threatened its very existence."

As regards the second head of claim, the President held as follows: "It follows that the measure sought might have serious consequences on the market in beef and veal and adversely affect the interests of an incalculable number of agricultural producers and traders.

The scope and possible consequences of such a measure would render it out of all proportion to the individual interest which the applicant wishes to safeguard."

5. (a) On the basis of the rules outlined above the Commission published in the Official Journal C 225 of 22 September 1978, at p. 43, "notice of invitation to

tender No It P 4 — Regulation (EEC) No 2900/77 — for the sale of frozen boned beef held in stock by the Italian intervention agency" for the fourth quarter of 1978, according to which that intervention agency was to sell some 4 019 tonnes of beef and veal.

The applicant submitted a tender in response to that invitation.

(b) On 27 October 1978 the Commission adopted a decision addressed to the Member States in which it fixed the minimum selling prices for the frozen beef and veal held by the intervention agencies in connexion with that invitation to tender and fixed at 3502 tonnes the maximum quantities of meat intended for the manufacture of preserved food of the corned beef type accepted for importation with total suspension of the levy.

Pursuant to that decision the Italian intervention agency informed the applicant that its tender had been rejected because it was lower than the minimum price fixed by the Commission.

6. (a) On 3 November 1978 the applicant brought an action against the Commission's decision of 27 October 1978. In that action it claims that the Court should declare that decision to be null and void and declare inapplicable, within the meaning of Article 184 of the EEC Treaty, notice of invitation to tender No It P 4, the general notice of invitations to tender published in the Official Journal C 11 of 13 January, Regulation No 571/78, in particular Articles 9, 11 and 12, and Regulation No 2900/27.

This action is based on arguments almost identical to those relied on in Case 92/78.

(b) On the same day and pursuant to Articles 185 and 186 of the EEC Treaty and Article 83 (1) of the Rules of Procedure the applicant made an application requesting that:

(a) The effectiveness of the Commission's decision of 27 October 1978, limited, as appropriate, to the results of the notice of invitation to tender No It P 4, be suspended, and that the Commission be ordered to give the necessary instructions to the Italian authorities to suspend the conclusion of contracts of purchase with successful tenderers and the issue of the corresponding import licences;

(b) The application of the special arrangements for the importation of frozen meat intended for the processing industry for 1979 be suspended until publication of the final judgment in Case 92/78.

In support of its application, the applicant maintains *inter alia* as follows:

In practical terms, by this second action and its application for suspensory measures the applicant is seeking to show that the arguments which the Commission has raised against the admissibility of the first action, Case 92/78, maintaining that it is devoid of any useful effect in relation to the applicant, are false. It is not open to doubt that at the present time, only a few days after its adoption, the contested decision of 27 October 1978 has not yet been implemented. Will the Commission maintain, once again, that the applicant has no interest in the outcome of the action? Even if, once again, assuming that the application is dismissed, the contested decision were rapidly and irreversibly to exhaust its effectiveness to the detriment of the applicant, the admissibility of the application cannot be made to depend upon the outcome, whether favourable or unfavourable, of an application for suspensory measures. The action remains admissible irrespective of the outcome of the proceedings.

But the purpose of the application is not merely to provide a practical

demonstration regarding the existence of an interest in taking legal action. Even in relation to the principles set out in the order of 22 May 1978, on this occasion the conditions justifying the request for the adoption of urgent measures do exist:

— The decision of 27 October 1978 has not yet been implemented, so that, in the event of a suspension of its effectiveness, there would be no fear of serious consequences in relation to the rights and interests of tenderers;

— The effects of the measure requested are limited and there would be no risk of serious disturbance on the market in meat;

— The injury suffered by the applicant has in the meanwhile become more severe, to the point where it seriously threatens its existence, because it has been entirely excluded from the special arrangements for facilitated importation whereas, at the time of the last invitation to tender, the prices which it offered were equal to those fixed by the Commission for the clearance of stocks intended for industrial uses.

The Court could limit the suspension to the result of the notice of invitation to tender No It P 4. At all events, the Commission should be ordered to suspend implementing measures for 1979.

7. In its observations submitted on 16 November 1978 the Commission contended that the application should be dismissed. It stated, *inter alia:*

(a) As regards point (a) of the application.

Although the application for suspensory measures was submitted rapidly, a good many import licences in the various Member States have already been issued. Any limitation of the measures to licences which have not yet been issued would amount to depriving those concerned of a right conferred upon them by the Community rules in force. Furthermore, if the measures were limited to Italy this would amount to discrimination. There is no justification for measures having so serious an effect on the rights and interests of third parties.

A decision granting the application would, moreover, be devoid of any useful effect as far as the applicant is concerned. It would not entitle it to acceptance of its offer on the terms which it proposed. A fresh invitation to tender, which would be the automatic consequence thereof, would lead to the same outcome with regard to the applicant, whose offer was derisory. That offer (950 units of account per tonne) was the lowest, the minimum price having been fixed at 1737 units of account per tonne. It was far lower than the normal selling price for intervention meat, which is 1291 units of account per tonne. It was submitted in full knowledge of the minimum prices fixed for the three preceding quarters, which were 1 601, 1 593 and 1 518 units of account per tonne respectively, and it was even lower than the offer made by the applicant on the occasion of the first invitation to tender, which was 1 091 units of account per tonne.

The applicant's only interest in this connexion is the financial interest represented by the importation of 100 tonnes of meat free of levy, since importation otherwise than free of levy is always possible. The measures requested are out of all proportion to that interest. Moreover, the latter would not be irreversibly affected if the Court did not grant the suspensory measures requested, since the financial advantage could be made good by way of damages.

In order to safeguard the financial advantage in question it would have been

sufficient to ask the competent authorities to authorize importation with provisional suspension of the levy in anticipation of the judgment of the Court in the main proceedings. Such a measure cannot now be ordered, however, sinces the Court would thereby act *ultra petita*, granting the applicant more than it could obtain in the main proceedings.

(b) As regards point (b) of the application

This measure has not the slightest connexion with the subject-matter of the main proceedings, being concerned with the application of the special arrangements during 1979 for the whole of the Community. It does not appear to be necessary for the protection of the financial interests of the applicant. Its scope and the consequences which it might have for commercial activity within the sector are out of all proportion to the personal interest which it is the applicant's alleged desire to safeguard. It would be of no practical value because it would deprive Community traders of the advantage of the special import arangements without allowing the applicant to enjoy the advantage which it claims, still less giving it the right to import meat free of the levy.

8. The parties presented oral submissions at the hearing on 22 November 1978.

Decision

The first head of claim

1 The first head of claim of the application seeks the suspension, limited, where appropriate, to the results of the notice of invitation to tender No It P 4 (published in the Official Journal C 225 of 22 September 1978), of the effectiveness of the Commission's decision of 27 October 1978, and an order that the Commission should give the necessary instructions to the Italian authorities to suspend the conclusion of contracts of purchase with successful tenderers and the issue of the corresponding import licences.

2 Pursuant to Article 1 that decision, the annulment of which is sought by the applicant in its principal action, fixes the minimum prices for frozen beef stored by the intervention agencies which were to be adopted for adjudicating the invitation to tender held in accordance with Regulation (EEC) No 2900/77 for the final quarter of 1978.

3 Article 2 fixes, for the period 1 October to 31 December 1978, the maximum quantities of meat intended for the processing industry to be accepted for importation with total suspension of the levy.

4 The decision in question not only concerns the interests of the applicant but also impinges upon the interests of all third parties who submitted offers in connexion with the invitation to tender in question.

5 The suspension of the effectiveness of the decision, even if it were limited to the results of invitation to tender No It P 4, would amount, at least temporarily, to depriving other tenderers, who are not parties to the dispute and have not been heard, of the benefit of concluding a contract for the purchase of frozen meat stored by the Italian intervention agency and of being issued with an import licence which they are entitled to demand pursuant to the rules in force.

6 Even if it is accepted that the Court is empowered to adopt, in the context of an urgent procedure and on an interim basis, a measure having so serious an effect on the rights and interests of third parties, that course of action could be justified only if it appeared that, in the absence of such measure, the applicant would be exposed to a situation which threatened its very existence.

7 The applicant has not put forward evidence of circumstances which might, *prima facie,* justify such a submission.

8 On the contrary, it is clear from the applicant's observations that up to now it has succeeded in obtaining supplies, albeit under difficult conditions.

9 Moreover, the applicant did not challenge the corresponding Commission decisions concerning the second and third quarters of 1978.

10 Accordingly, it does not appear that the implementation of the decision concerning the fourth quarter of 1978 is likely to pose a serious threat to the existence of the applicant.

11 In those circumstances, the application must be dismissed as to its first head.

The second head of claim

12 The second head of claim of the application seeks the suspension, until publication of the final judgment in Case 92/78, of the application of the special arrangements for the importation of frozen meat intended for the processing industry for 1979.

13 That request must be understood as referring to the complex of regulations adopted by the Commission in implementation of the "linking" system provided for in Article 14 (3) (b) of Regulation No 805/68 in the version amended by Council Regulation No 425/77.

14 The applicant requests that the effectiveness of those rules be suspended provisionally and that the Commission should refrain from adopting implementing measures based on those rules, with effect for the whole Community.

15 In adopting the rules in question the Commission exercised powers given to it by the Council under the terms of the said Article 14 in order to avoid the occurrence of disturbances on the market in beef and veal.

16 Suspension of application of the rules in question would have serious effects on the market in question and would adversely affect the interests of an incalculable number of agricultural producers and traders throughout the Community.

17 The applicant has not demonstrated the existence of circumstances in evidence of an individual interest, the safeguarding of which could justify, *prima facie*, the interim measure requested.

18 Such measure, by reason of its scope and possible consequences, would be out of all proportion to the applicant's interest.

19 The second head of claim should therefore also be dismissed.

20 The decision on costs should be reserved until the final judgment in Case 243/78.

On those grounds,

THE PRESIDENT,

by way of interlocutory decision,

hereby orders as follows:

1. **The application for interim measures is dismissed;**

2. **Costs are reserved.**

Luxembourg, 29 November 1978.

A. Van Houtte
Registrar

H. Kutscher
President