

Case T-31/07 R

Du Pont de Nemours (France) SAS and Others

v

Commission of the European Communities

(Applications for interim measures — Application for suspension of operation of a measure — Directive 91/414/EEC — Admissibility — Prima facie case — Urgency — Balance of interests)

Order of the President of the Court of First Instance, 19 July 2007 II - 2773

Summary of the Order

1. *Applications for interim measures — Conditions governing admissibility — Prima facie admissibility of the main action*
(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(1); Council Directive 91/414; Commission Directive 2006/133)
2. *Actions for annulment — Subject-matter — Partial annulment*
(Art. 230 EC)

3. *Applications for interim measures — Suspension of operation — Interim measures — Application for suspension of the operation of certain provisions in a directive*
(Arts 242 EC and 243 EC)
4. *Agriculture — Common agricultural policy — Discretion of the Community institutions — Scope — Judicial review — Limits*
5. *Applications for interim measures — Suspension of operation — Interim measures — Conditions for granting — Prima facie case*
(Arts 242 EC and 243 EC)
6. *Applications for interim measures — Suspension of operation — Interim measures — Conditions for granting — Urgency — Serious and irreparable damage*
(Arts 242 EC and 243 EC)
7. *Applications for interim measures — Suspension of operation — Conditions for granting — Serious and irreparable damage*
(Art. 242 EC)
8. *Applications for interim measures — Interim measures — Conditions for granting — Balancing of all the interests involved*
(Art. 243 EC)

1. On an application for interim measures, examination of the admissibility of the main action is necessarily summary because the proceedings for interim relief are by nature urgent. The admissibility of the main action can only be assessed on a prima facie basis, the aim being to examine whether the applicant has adduced sufficient elements which justify the a priori conclusion that the admissibility of the main action cannot be excluded. The court hearing the interim measures action should declare that action inadmissible only where the admissibility of the main action can be wholly excluded. Otherwise, to rule on admissibility at the stage of the proceedings for interim relief, when admissibility is not, prima facie, wholly excluded, would in effect prejudge the Court of

First Instance's decision in the main action.

On an application for interim measures attached to an action for partial annulment under the fourth paragraph of Article 230 EC, directed against Directive 2006/133 amending Council Directive 91/414 to include flusilazole as an active substance, it cannot be excluded, at first sight, that that directive indi-

vidually affects an applicant which is mentioned in Regulation No 933/94 laying down the list of active substances of plant protection products and designating the rapporteur Member States for the implementation of Regulation No 3600/92, in its capacity as the notifier of an interest, as provided for under Article 4(1) of that regulation, and which has, moreover, participated in the assessment procedure for the substance in question and on that basis benefited from procedural guarantees.

3. Where, on an application for interim measures, the applicants seek suspension of the operation of certain provisions in a directive, and they base their application not only on Article 242 EC, but also on Article 243 EC, the Court may, on the basis of Article 243 EC, prescribe any necessary interim measures. In particular, it may, on a provisional basis, issue appropriate directions to the Commission.

(see paras 124-126)

(see paras 107-109, 112)

2. Partial annulment of a Community measure is possible only if the elements whose annulment is sought may be severed from the remainder of the measure. That requirement of severability is not satisfied where the partial annulment of a measure would have the effect of altering its substance. The question whether partial annulment would alter the substance of a contested measure is an objective criterion, and not a subjective criterion linked to the policy pursued by the authority which adopted the measure at issue.

4. In a sector falling within the common agricultural policy, 'risk' constitutes a function of the probability that use of a product or a procedure will adversely affect the interests safeguarded by the legal order. 'Hazard' ('danger') is commonly used in a broader sense and describes any product or procedure capable of having an adverse effect on human health. The purpose of a risk assessment is to assess the degree of probability of a certain product or procedure having adverse effects on human health and the seriousness of those potential effects.

(see paras 114, 119)

Where a Community authority is called upon, in the performance of its duties, to

make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion.

meets a standard of risk that is legally acceptable when the appropriate instructions on use are followed.

If, on an application for interim measures, an applicant pleads infringement both of Directive 91/414, in that Directive 2006/133, amending it in order to include flusilazole as an active substance, was not based on a risk assessment, and of the precautionary principle, assessment of those two pleas, because of their complexity, requires an in-depth examination which cannot be conducted by the court hearing the application for interim measures

(see paras 130, 131, 137)

5. Under Article 5 of Directive 91/414 concerning the placing of plant protection products on the market, inclusion of an active substance in Annex I to that directive is excluded unless, in the light of current scientific and technical knowledge, it may be expected that a plant protection product containing the active substance will be safe. In other words, even if a substance is hazardous, it may still, at first sight, be included in Annex I to Directive 91/414, provided it

However, those two pleas cannot be regarded, *prima facie*, as devoid of foundation where the Commission's reasoning in adopting Directive 2006/133 appears, at first sight, to cast doubt on the risk assessment previously conducted, without the reasons for doubting evidence which it had gathered over a number of years of assessment being clearly stated, and where, in order to reply to the two pleas in question, the Court might have to rule on whether the Commission exceeded its discretion in adopting the contested directive. If the

Commission did in fact err in basing Directive 2006/133 on an assessment of hazards and not a risk assessment, thereby infringing both Directive 91/414 and the precautionary principle, the possibility that such error could affect the lawfulness of Directive 2006/133 cannot be excluded.

(see paras 133, 138, 140-143)

the applicant would be placed in a situation which would endanger its very existence or irremediably affect its market share. If the implementation of a measure whose annulment is sought in the main action may cause irreversible market developments on a market on which the applicant is already present, the losses which would thereby ensue for the applicant, though financial in nature, may nevertheless exceptionally be regarded as irreparable for the purposes of granting interim relief.

(see paras 144, 145, 174, 175, 193)

6. The urgency of an application for interim measures must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the relief. Where damage depends on the occurrence of a number of factors, it is enough for that damage to be foreseeable with a sufficient degree of probability. However, the applicant is still required to prove the facts which are deemed to show the probability of serious and irreparable damage.

Damage of a purely pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation. Under that principle, the suspension sought can be justified only if it appears that, if the measure were not granted,

7. On an application for interim measures, where the applicant is an undertaking, the gravity of material damage should be assessed in the light of, in particular, the size of that undertaking. In addition, for the purposes of assessing the economic circumstances of an applicant, consideration may be given, in particular, to the characteristics of the group to which it belongs by virtue of its shareholding structure. When considering the characteristics of the group, it is necessary to assess all the factual circumstances of the case.

Furthermore, the court hearing an application for interim measures must

determine, in the light of the circumstances of the individual case, whether immediate implementation of the measure which is the subject of the application for suspension of operation may cause the applicant serious and immediate damage which no subsequent decision could repair.

(see paras 196, 203, 204)

8. When, in the context of an application for interim measures in which it is submitted that the applicant is at risk of suffering serious and irreparable damage, the court hearing the application weighs up the various interests at

issue, it must determine whether the possible annulment of the contested decision by the court giving judgment in the main action would make it possible to reverse the situation that would be brought about by its immediate implementation and, conversely, the extent to which the suspension of its operation would be such as to prevent the objectives pursued by the contested decision if the main application were to be dismissed. In that regard, as a rule, there can be no question but that the requirements of the protection of public health must take precedence over economic considerations.

(see paras 206, 207)