ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
7 November 1995 *

In Case T-168/95 R,

Eridania Zuccherifici Nazionali SpA, a company governed by Italian law, with its registered office in Genoa (Italy),

Industria Saccarifera Italiana Agroindustriale SpA (ISI), a company governed by Italian law, with its registered office in Padua (Italy),

Sadam Zuccherifici, a division of Società Esercizi Commerciali Industriali SpA (SECI), a company governed by Italian law, with its registered office in Bologna (Italy),

Sadam Castiglionese SpA, a company governed by Italian law, with its registered office in Bologna,

Sadam Abruzzo SpA, a company governed by Italian law, with its registered office in Bologna,

Zuccherificio del Molise SpA, a company governed by Italian law, with its registered office in Termoli (Italy),

* Language of the case: Italian.

Società Fondiaria Industriale Romagnola SpA (SFIR), a company governed by Italian law, with its registered office in Cesena (Italy),

Ponteco Zuccheri SpA, a company governed by Italian law, with its registered office in Pontelagoscuro (Italy),

represented by Bernard O'Connor, Solicitor, and by Ivano Vigliotti and Paolo Crocetta, of the Genoa Bar, with an address for service in Luxembourg at the Chambers of Arsène Kronshagen, 12 Boulevard de la Foire,

applicants,

v

Council of the European Union, represented by Jan-Peter Hix and Marco-Umberto Moricca, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank,

defendant,

APPLICATION for suspension of the operation of Article 1(f) of Council Regulation (EC) No 1534/95 of 29 June 1995 fixing, for the 1995/96 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 1995 L 148, p. 11),

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

makes the following

Order

Community legislation and facts

1 The present proceedings for interim relief concern a Council regulation fixing *inter alia* intervention prices pursuant to 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; hereinafter 'the basic Regulation'). The applicants are sugar manufacturers which seek suspension of the operation of one of the provisions of that act, by reason of the effects it has, in accordance with the basic Regulation, on the prices of beet processed by them.

2 Article 24 of the basic Regulation fixes, for each of the sugar-producing regions (which essentially correspond to the territory of the various Member States), a basic quantity A and a basic quantity B, by reference each time to a marketing year. The Member States allocate their basic quantity A and basic quantity B between the undertakings as A quotas and B quotas.

3 When the sugar produced in accordance with A quotas (A sugar) or B quotas (B sugar) is placed on the market within the Community, it is covered by a pricing

and marketing guarantee through the operation of an intervention system (see Article 9 of the basic Regulation). The prices applied by the intervention agencies are fixed annually by the Council in accordance with Article 3 of the basic Regulation.

4 In the case of white sugar, those prices are not the same throughout the Community. Article 3(1) of the basic Regulation provides for an 'intervention price' to be fixed for the non-deficit areas and for a 'derived intervention price' to be fixed for each of the deficit areas. Pursuant to the second subparagraph of Article 9(1) of the basic Regulation, the price to be applied depends on the area in which the sugar is situated at the time of purchase. The derived intervention prices are systematically fixed at a higher level than the intervention price. That is designed to assist manufacturers from the other areas in supplying 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 establishes a price system for beet processed into A or B sugar (A or B beet; see Article 5(4)). In accordance with Article 6(1) and (2), the minimum prices which sugar manufacturers must pay to the beet growers vary according to the area where the beet is grown. Article 5(3) provides that, for areas for which a derived intervention price for white sugar is fixed, the minimum prices for A beet and B beet are 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. Under Article 10(1) of Regulation (EEC) No 206/68 of the Council of 20 February 1968 laying down outline provisions for contracts and inter-trade agreements on the purchase of beet (OJ English Special Edition 1968 (I), p. 19), the delivery contracts agreed between the beet sellers and the sugar manufacturers fix the time-limits for any advance payments and for the settlement of the beet purchase price. Article 10(2) of that regulation states that the time-limits are those valid during the 1967/68 marketing year, but that inter-trade agreements may derogate from that provision.

6 Until the 1994/95 marketing year, when fixing the intervention prices each year, the Council classed Italy as one of the Community's deficit areas and accordingly established derived intervention prices for it. In view of the effect that has on the minimum prices for beet grown in Italy, since 1990 the Italian authorities and the Italian sugar industry have requested, on several occasions, that that policy be abandoned, since in their view Italy is about to become a surplus area.

7 As regards the 1995/96 marketing year, the Council established both the intervention prices and the derived intervention prices for white sugar on 29 June 1995. The intervention price was set at ECU 63.19 per 100 kilograms by Article 1(2) of Council Regulation (EC) No 1533/95 fixing, for the 1995/96 marketing year, certain sugar prices and the standard quality of beet (OJ 1995 L 148, p. 9). A derived intervention price for Italy was fixed at ECU 65.53 per 100 kilograms by Article 1(f) of Council Regulation (EC) No 1534/95 fixing, for the 1995/96 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 1995 L 148, p. 11).

8 The third recital in the preamble to Regulation No 1534/95 states that 'a deficit supply situation is to be foreseen in the areas of production in Italy'.

Procedure

9 By application registered at the Court of First Instance on 5 September 1995, the applicants, whose registered offices are in Italy and who have been allocated a large part of the A and B quotas corresponding to Italy's basic quantities, brought an action under Article 173 of the EC Treaty for annulment of Regulation No 1534/95

or, at least, of Article 1 thereof, and of any prior, subsequent or in any way related act, including the basic Regulation or, at least, Articles 3, 5 and 6 thereof, together with all implementing measures.

10 By a separate document, registered at the Court of First Instance on the same date, the applicants sought, pursuant to Article 185 of the EC Treaty, suspension of the operation of Regulation No 1534/95 or, at least, of Article 1(f) thereof, and of any other prior, subsequent or in any way related act.

11 The Council submitted its written observations on the present application for interim measures on 25 September 1995. The parties presented oral argument on 10 October 1995.

Law

Subject-matter of the dispute

12 In response to a question addressed to them at the hearing, the applicants stated that the present application sought suspension of the operation of only Article 1(f) of Regulation No 1534/95.

Admissibility and substance of the application for interim measures

13 Pursuant to Articles 185 and 186 of the EC Treaty in conjunction with 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) and by Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), the Court of First Instance may, if it considers that the circumstances warrant such a ruling, make an order suspending the operation of the contested act or prescribe the necessary interim measures.

14 Article 104(1) of the Rules of Procedure of the Court of First Instance provides that an application to suspend the operation of a measure is admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. Article 104(2) provides that an application for the adoption of any interim measure referred to in 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. The measures sought must be provisional in that they must not prejudge the decision on the substance (see the order of the President of the Court of First Instance of 10 March 1995 in Case T-395/94 R *Atlantic Container and Others* v *Commission* [1995] ECR II-595, paragraph 27).

Arguments of the parties

— Admissibility

15 On the basis of Article 104(1), mentioned above, and of settled case-law (see the orders of the President of the Court of Justice of 8 May 1987 in Case 82/87 R *Autexpo* v *Commission* [1987] ECR 2131, paragraph 15; of 27 January 1988 in Case 376/87 R *Distrivet* v *Council* [1988] ECR 209; of 13 July 1988 in Case 160/88 R *Fédération Européenne de la Santé Animale and Others* v *Council* [1988] ECR 4121, paragraph 22; and of the President of the Court of First Instance of 15 March 1995 in Case T-6/95 R *Cantine dei Colli Berici* v *Commission* [1995] ECR II-647, paragraph 26), the Council submits that the present application should be declared inadmissible, since the main application is itself manifestly inadmissible, on the ground that the applicants are not individually concerned by the contested act.

According to the Council, in order for economic operators to be regarded as being individually concerned by a particular act, their legal position must be affected by reason of circumstances which differentiate them from all other persons and distinguish them individually in the same way as an addressee (see the order of the Court of First Instance of 29 June 1995 in Case T-183/94 *Cantina Cooperativa fra Produttori Vitivinicoli di Torre di Mosto and Others* v *Commission* [1995] ECR II-1941, paragraph 49; also the judgments of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, p. 107, and Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 18). Article 1(f) of Regulation No 1534/95 concerned all beet growers and sugar manufacturers in Italy. The applicants are only concerned by virtue of their objective status as sugar manufacturers, in the same way as any other Italian sugar manufacturer. In particular, the provision at issue was not adopted with their situation specifically in mind. On the contrary, it was based on the finding that a supply deficit was foreseeable in the area in question.

17 That assessment is not affected in the Council's opinion by the fact that the applicants have been allocated production quotas. Moreover, in view of the possibility that quotas may be assigned to new producers in accordance with Article 25(2) and (3) of the basic Regulation, those quota-holders do not constitute a closed class.

18 In their main application, the applicants submit that their action is admissible. The Community judicature recognizes that applicants have a right of action where they are individually concerned by virtue of the fact that they are members of a limited class of traders who are identifiable and particularly affected by the act at issue, even if it is a regulation (see the judgments of the Court of Justice in Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207 and in Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477). The applicants in the present case, as Italian sugar manufacturers holding production quotas for the 1995/96 marketing year, are individually concerned by the contested act. Those quota-holders alone are entitled to deliver sugar to the intervention agency at the intervention price, the fixing of which is precisely the subject-matter of the dispute.

— Prima facie case

19 In order to establish a prima facie case, the applicants refer to their pleas in support of their main application. One group of pleas alleges infringement of the basic Regulation, misuse of powers and finally erroneous assessment of the situation in fact and in law, breach of the principle that the decision adopted must be consistent with the conditions required, and failure to conduct a proper investigation. Those pleas in law relate to the applicants' complaint that the Council wrongly considered that a deficit supply situation was to be foreseen in Italy (see paragraph 8, above). However, according to figures provided by various Community departments and by the Italian authorities, there was a surplus in Italy during the 1992/93 and 1993/94 marketing years. The provisional figures for the 1994/95 marketing year also indicate a surplus in Italy. At the hearing, the applicants further stated that the latter assessment had recently been confirmed by the definitive figures. In that light it is probable that a similar situation will arise during the 1995/96 marketing year. By not providing adequate reasons to support its conclusion to the contrary, the Council has also infringed Article 190 of the EC Treaty.

20 The remaining pleas put forward by the applicants allege infringement of Article 40 and of Articles 30 and 34 of the EC Treaty. As regards infringement of Article 40, the applicants claim that, since they are compelled to pay a higher minimum price for the raw material than similar operators established in Member States considered to be surplus areas, they suffer from unlawful discrimination in relation to their sales in Italy (despite the additional transport costs being borne by those competitors, since those costs entailed are not as great as the difference between the two levels of minimum price) and their exports to other Member States (which, in practice, are precluded for that reason), and also in relation to their exports to non-member countries (since export refunds are linked to the intervention price, not the derived intervention prices). According to the applicants' submissions at the hearing, that discrimination affects intra-Community trade notwithstanding the fact that a higher intervention price is established for Italy than for neighbouring countries, since those prices do not correspond to market prices. All those effects are contrary to the principle of the free movement of goods as laid down by Articles 30 and 34 of the Treaty.

21 In response to the applicants' first set of pleas, the Council contends that it was justified in predicting that during the 1995/96 marketing year a structural deficit would again become evident, given Italy's record of structural deficit throughout the decade preceding the two marketing years (1992/93 and 1993/94) singled out by the applicants, which — assuming that their allegations are substantiated — recorded a modest production surplus. In any event, the Council enjoys a wide discretion in evaluating the range of data which must be taken into account in fixing the annual intervention prices. In reviewing the exercise of such a power the Community judicature must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority in question clearly exceeded the bounds of its discretion (see Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, paragraph 25). The data referred to above regarding the past does not substantiate such defects. So far as concerns the alleged infringement of Article 190 of the Treaty, the Council contends that, since the regulations fixing the intervention prices are adopted on the basis of complex economic factors, the statement of reasons must be regarded as sufficient if it describes the overall situation which gave rise to their adoption and the general objectives which they seek to attain (see the judgments of the Court of Justice in Case 5/67 *Beus* v *Hauptzollamt München* [1968] ECR 83 and of the Court of First Instance in Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93 *O'Dwyer and Others* v *Council* [1995] ECR II-2071, paragraph 67). Regulation No 1534/95 refers to the basic Regulation and, accordingly, to all the objectives defined therein with regard to the sector at issue; the third recital in the preamble thereto, by specifying that a deficit supply situation was foreseeable, set out the reasons justifying the fixing of derived intervention prices.

22 The Council further maintains that the contested provision does not give rise to any discrimination incompatible with Article 40 of the Treaty, since the difference in the rules applied is based on objective criteria, relating to satisfying, more or less in full, sugar supply requirements in the various areas of the Community. In any event, since the derived intervention price applicable to the Italian manufacturers is higher than the intervention price for similar operators in the areas considered to be non-deficit, the processing margins for the two groups of manufacturers, expressed in ecus, are identical, notwithstanding the difference between the minimum prices for the raw material. Furthermore, the lira's depreciation against the ecu has caused a 22.7% increase in the 'official price' of white sugar, expressed in lire, since 1 July 1994, without there being a parallel increase in the cost of other

production factors also borne by manufacturers in lire. As regards the treatment of Italian manufacturers exporting to non-member countries, the Council contends that the disadvantage they claim to suffer in this context is offset by the fact that the burden placed on those manufacturers in terms of contributions is less than that borne by their counterparts to whom the intervention price applies. The Council concludes that the discrimination — assuming that it were shown to exist — would be entirely negligible. Lastly, in response to the plea alleging infringement of Articles 30 and 34 of the Treaty, the Council denies that application of the derived intervention price for sugar manufactured in Italy constitutes a hindrance to intra-Community exports of that product. All A sugar and B sugar manufactured in Italy benefits from the derived intervention price in question, whether it is sold on the Italian market or exported to other Member States or non-member countries.

— Urgency

23 The applicants submit that, if operation of the contested provision is not suspended, they risk serious and irreparable damage. For the marketing year at issue, the increase in the beet price pursuant to the contested provision amounts to LIT 82 000 million for Italian manufacturers holding quotas, taken as a whole, of which LIT 76 000 million must be paid by the applicants. The national aid paid to the sugar industry under Article 46 of the basic Regulation which, in the past, enabled that increased cost of the raw material to be recovered, has been reduced to a negligible level with effect from the marketing year at issue (see Council Regulation (EC) No 1101/95 of 24 April 1995 amending Regulation (EEC) No 1785/81 on the common organization of the market in the sugar sector and Regulation (EEC) No 1010/86 laying down general rules for the production refund on certain sugar products used in the chemical industry, OJ 1995 L 110, p. 1). The amount of the increase borne by the applicants represents approximately 8.8% of their processing margin. At the hearing, the applicants claimed that the disparity between the two minimum beet prices was equivalent to one-third of their operating profits, a much higher amount than in the case of the beet growers. They added that the increase in the 'official price' of sugar since 1 July 1994, expressed as a weighted average, was only 9%, and that fuel consumption costs, which they pay in US dollars and which

account for a high proportion of their total costs, have risen by a significantly greater amount (20%) than the general rate of inflation in Italy (6%) because of exchange-rate trends. According to the applicants, the inter-trade agreements entered into each year for the last 20 years, to which the beet purchase contracts refer, provide that the settlement of the sums due to the beet growers (that is, the balance outstanding after the advance payments) must be effected, at the latest, by 31 December following the commencement of the marketing year. Since that practice is well established, the time-limit constitutes a constant factor, even though the agreement for the 1995/96 marketing year has not yet been concluded. At the hearing, the applicants challenged the Council's reasoning based on the fact that the conversion rate would be fixed after that date. A change in the conversion rate, which is inherently unpredictable, would not necessarily create a positive balance for the sugar industry. If the Court of First Instance were to uphold the main application after 31 December 1995, the applicants would have to request reimbursement of sums unduly paid from over 100 000 beet growers, many of whom deliver only limited quantities and would certainly not effect the reimbursement promptly and willingly. According to the case-law, an applicant risks serious and irreparable damage where, if an interim measure is not adopted, the recovery of significant amounts appears uncertain (see the order of the President of the Court of Justice of 20 October 1977 in Case 119/77 R *Nippon Seiko and Others* v *Council and Commission* [1977] ECR 1867). That assessment applies by analogy to the damage caused by the discriminatory effects, described above, produced by the contested provision (see above, paragraph 20).

24 The Council takes the view that the burden of proof of urgency is on the applicants (see the orders of the President of the Court of First Instance of 26 October 1994 in Cases T-231/94 R, T-232/94 R and T-234/94 R *Transacciones Marítimas and Others* v *Commission* [1994] ECR II-885, paragraph 41, and of 1 December 1994 in Case T-353/94 R *Postbank* v *Commission* [1994] ECR II-1141, paragraph 30), and argues that they have failed to establish urgency. In its view, since the inter-trade agreement for the 1995/96 marketing year is still under negotiation, the applicants can ensure that it fixes a settlement date taking account of the present dispute, or provides for the balance to be paid into frozen accounts or requires the beet producers to arrange bank guarantees for the reimbursement of any amount

unduly paid. The facts in the present case may therefore be distinguished from those underlying the order in *Nippon Seiko and Others* v *Council and Commission*. The Council adds that, in any event, 31 December 1995 cannot be regarded as the time-limit for payment of the balance of the beet price. In the first place, the conversion rate applicable to the minimum beet price will not be known until July 1996 (see Article 1(1) of Commission Regulation (EEC) No 1713/93 of 30 June 1993 establishing special detailed rules for applying the agricultural conversion rate in the sugar sector, OJ 1993 L 159, p. 94). Secondly, the amounts of the production levies for the 1995/96 marketing year, which determine the final balance payable for that year's beet, will not be known until October 1996 (see Article 28a(3) and Article 29(2) of the basic Regulation). As regards the assessment of the alleged damage, the Council states that the increased beet price is borne by the consumer, since the intervention price applicable to Italy is also higher than that applicable to the non-deficit areas. Furthermore, prices on the Italian sugar market are even higher than that intervention price. The figure of LIT 76 000 million is a relatively modest figure, bearing in mind the applicants' high turnovers, their processing margin, referred to above, expressed in ecus, and the increase in the 'official price' of white sugar, expressed in lire, since July 1994 (see paragraph 22 above). Lastly, the alleged damage is of a purely financial nature and therefore cannot be regarded as irreparable or even as being reparable only with difficulty, since it may ultimately be the subject of financial compensation (see the order of the President of the Court of Justice of 19 December 1990 in Case C-358/90 R *Compagnia Italiana Alcool* v *Commission* [1990] ECR I-4887, paragraph 26, and the order of the President of the Court of First Instance of 7 July 1994 in Case T-185/94 R *Geotronics* v *Commission* [1994] ECR II-519, paragraph 22). The applicants have not shown that the damage could not be made good in its entirety if the Court of First Instance were to annul the contested act.

— Balancing of all the interests

25 The applicants claim that, if the operation of the measure is suspended as sought, no party would thereby be caused serious and irreparable damage.

26 According to the Council, suspension of the operation of the contested measure would seriously harm the interests of both the Community and the beet growers. As regards the interests of the Community, the Council submits that, if the Court of First Instance rejected the main application, the temporary abolition of the derived intervention price applicable to Italy would undermine the stability of the intervention price system provided for by the basic Regulation. As regards the interests of the beet growers, there would be a risk of their being seriously damaged by the sudden drop in the price of their products. Where the interim measures sought may have a serious effect upon the rights and interests of third parties who, not being parties to the case, cannot have had their views heard, as is the case here with those producers, such measures can be justified only if it would appear that without them the applicants would be exposed to a situation likely to endanger their very existence (see the order of the President of the Court of First Instance of 10 May 1994 in Case T-88/94 R *Société Commerciale des Potasses et de l'Azote et Entreprise Minière et Chimique* v *Commission* [1994] ECR II-263, paragraph 44). In the present case, the applicants have not adduced evidence showing that they run such a risk if their application is dismissed.

Findings of the President

— Alleged manifest inadmissibility of the main action

27 It is established case-law that the issue of the admissibility of the main application should not, in principle, be examined in proceedings relating to an application for interim measures but should be reserved for the examination of the main application, unless it is apparent at first sight that the latter is manifestly inadmissible. To decide on admissibility at the stage of the application for interim measures, in cases where it is not prima facie totally excluded, would be in effect to prejudge the substance of the case (see the orders of the President of the Court of Justice of 16 October 1986 in Case 221/86 R *Group of the European Right* v *Parliament* [1986] ECR 2969 and of 27 June 1991 in Case C-117/91 R *Bosman* v *Commission* [1991] ECR I-3353, and the orders of the President of the Court of First Instance of 23 March 1992 in Joined Cases T-10/92 R, T-11/92 R, T-12/92 R, T-14/92 R and T-15/92 R *Cimenteries CBR and Others* v *Commission* [1992] ECR II-1571, paragraphs 44 and 54, of 15 December 1992 in Case T-96/92 R *Société Générale des Grandes Sources and Others* v *Commission* [1992] ECR II-2579, paragraphs 31 to 35, and of 24 February 1995 in Case T-2/95 R *Industrie des Poudres Sphériques* v *Council* [1995] ECR II-485, paragraph 24).

28 In the present case, it must therefore be ascertained whether, as the Council contends, the main application for annulment of Article 1(f) of Regulation No 1534/95 should at first sight be regarded as manifestly inadmissible.

29 Under the fourth paragraph of Article 173 of the Treaty, a natural or legal person may institute proceedings against an act in the form of a regulation only if it is of direct and individual concern to that person. According to settled case-law, although an act may be of a legislative nature in that it applies to all the traders concerned, taken as a whole, that does not prevent it from being of individual concern to some of them. In order for traders to be regarded as being individually concerned by an act of general application which has been adopted by a Community institution, their legal situation must have been adversely affected by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons (see, in particular, the judgments of the Court of Justice in *Plaumann* v *Commission*, cited above, p. 107, Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 13, and *Codorniu* v *Council*, cited above, paragraphs 19 to 22). In particular, it has been held *inter alia* that where, in accordance with the applicable rules, the institution concerned was bound, when adopting the act at issue, to take into account the situation of certain traders, that fact may create individual concern (see the judgments of the Court of Justice in *Piraiki-Patraiki and Others* v *Commission*, cited above, paragraphs 19 to 21, and *Sofrimport* v *Commission*, cited above, paragraphs 10 to 13, and the judgment of the Court of First Instance in Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraphs 64 to 78).

30 In the present case, a detailed analysis would be necessary in order to determine whether, when fixing the derived intervention price in dispute, the Council could base its conclusions solely on an examination of the objective situation of the Italian sugar market — as it argues in support of its objection of inadmissibility — without taking into account the specific situation of Italian sugar manufacturers. In particular, in the context of that analysis of the structure of the market, the question whether it was necessary, under the applicable rules, to take into account *inter*

alia the situation of the applicants, who together hold 92% of the sugar production quotas allocated to Italy, cannot be determined by the judge hearing an application for interim relief.

31 In fixing for Italy a derived intervention price for white sugar for the 1995/96 marketing year, which began on 1 July 1995, Article 1(f) of the contested Regulation, adopted on 29 June 1995, caused an increase in the minimum prices applicable in Italy to the beet supplies stipulated in the cultivation contracts agreed as early as February 1995 (in accordance with the cycle of the sugar year) between the beet growers and the sugar manufacturers, as is apparent from the application for interim measures (paragraph 3). Pursuant to Article 5(3) of the basic Regulation, the amount of that increase is 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. In those circumstances, the question whether, under the applicable rules, the Council had a duty to take those contracts into account when adopting Article 1(f) of Regulation No 1534/95 also requires a detailed analysis which cannot be carried out by the judge hearing an application for interim relief.

32 For all those reasons, and without prejudice to any finding which the Court of First Instance may make when considering the main application, the judge hearing the application for interim relief cannot at this point conclude that the main application for annulment of Article 1(f) of Regulation No 1534/95 is manifestly inadmissible. Consequently, the application for interim relief cannot be dismissed on that ground.

— Urgency

33 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 the party seeking

suspension of operation 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 in *Atlantic Container* v *Commission*, paragraph 50).

34 In the present case, the damage which the applicants claim they will suffer if operation of the contested provision is not suspended comprises two elements: first, the sums paid to the beet growers which, if that provision is subsequently annulled, are unlikely to be recovered, in view of the number of beet producers concerned and the fact that many of them will only have delivered limited quantities and, secondly, the serious damage caused to the applicants by the discrimination to which the contested rules give rise.

35 As regards the alleged uncertainty regarding recovery of the sums unduly paid, it should be held that that risk does not appear to be sufficiently immediate to justify the measures sought.

36 According to the explanations provided by the applicants in their application for interim measures and confirmed at the hearing, the inter-trade agreement concerning *inter alia* the sugar industry's payment of those sums is still at the negotiation stage. The negotiations relate in part precisely to the problems ensuing from the fact that the applicants contest the fixing of a derived intervention price for Italy and hence the application of the corresponding minimum price for beet.

37 In those circumstances, the time-limit and other detailed rules governing payment of the balance in question cannot be regarded as established or even as sufficiently foreseeable.

38 Admittedly, the applicants stated at the hearing that representatives of the two groups of traders concerned were engaged in difficult discussions on that point. They also asserted that, after 31 December 1995 and in the absence of an inter-trade agreement, they risk being ordered to pay the sums in dispute, since the national courts will probably consider 31 December 1995 to be the time-limit, having regard to the relevant provisions of numerous agreements relating to previous marketing years.

39 However, the judge hearing the application for interim measures is not at present apprised of any factor enabling him to exclude, at first sight, serious likelihood of the current negotiations resulting before the date in question in an agreed solution which, with regard to the time-limit or other detailed rules governing payment, will remove the alleged risk of the applicants not being able to recover sums unduly paid. Conversely, those negotiations will also allow the beet growers to ensure that their interests are safeguarded in the event that the main application is rejected, those interests being, moreover, matters of which the judge hearing an application for interim measures must take account in any event (see the order of the President of the Court of Justice of 22 May 1978 in Case 92/78 R *Simmenthal* v *Commission* [1978] ECR 1129, paragraphs 8, 9, 18 and 19).

40 Furthermore, the applicants have not in any event shown that, if they pay the sums in dispute on 31 December 1995, that will cause them serious and irreparable damage by reason of the difficulty of recovering them later.

41 The applicants have not explained why the beet growers or, at least, a substantial number of them would not promptly comply with the sugar industry's requests for reimbursement, notwithstanding the clear legal situation that would result if the contested provision were to be annulled. The fact that the applicants would have to recover the sums in question from a large number of traders does not appear, at first sight, to be an impossible task, particularly bearing in mind their ongoing business relationship with the beet growers. The applicants have not adduced specific evidence to show that they would probably suffer damage owing to the difficulties

involved in recovering the sums unduly paid. Consequently, such damage appears unpredictable and uncertain. At the hearing, moreover, the applicants admitted, at least implicitly, that the fixing of a definitive exchange rate at the end of the marketing year, applicable to the minimum beet price, might leave them better off in their dealings with the beet growers. In such an eventuality, which is inherent in the operation of the market organization, as provided for by the applicable legislation, the applicants would be faced with a similar task.

42 Lastly, even assuming that recovery of the sum in question, in whole or in part, from the beet growers may prove impossible or especially difficult and that, consequently, the unrecovered sum might then constitute damage suffered by the applicants, it has not been established that such damage would be so serious as to justify suspension of the operation of Article 1(f) of Regulation No 1534/95. It is settled case-law that 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 (see the order of the President of the Court of Justice of 18 October 1991 in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 24, and *Industrie des Poudres Sphériques* v *Council*, paragraph 28). In accordance with those principles, the interim measures sought in the present case would be justified only if it appeared that, without such a measure, the applicants would be exposed to a situation liable to endanger their very existence or to restrict their market share irreversibly.

43 The information provided by the applicants regarding the effect of the alleged damage on their business operations also fails to demonstrate that the contested legislation may cause them such serious damage. It is common ground that, if all the beet growers, who are paid in ecus, failed to reimburse the sums unduly paid in the event that the main application for annulment were successful, the maximum damage to the applicants would amount to 8.8% of their processing margin — equal to

the difference between the costs of sugar production and the revenue from it — expressed in ecus. In that connection, the applicants have provided no convincing evidence that such damage would impair their viability or irreversibly restrict their market share.

44 Consequently, as regards the consequences of the alleged difficulty of the applicants' obtaining from the beet growers reimbursement of sums unduly paid, the criterion of urgency has not been satisfied.

45 That is also true of the damage ensuing, according to the applicants, from the discrimination described in the main application. Suffice it to observe that such damage is inherently in the nature of a loss of earnings which may be made good in its entirety following annulment of the contested measure and that, therefore, in the absence of evidence to the contrary, that damage is purely financial and not irreparable.

46 Consequently, since the condition of urgency has not been satisfied with respect to any of the forms of damage alleged by the applicants, the present application must be dismissed, without there being any need to consider the other conditions which must be satisfied before the application may be upheld.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for the adoption of interim measures is dismissed.

2. The costs are reserved.

Luxembourg, 7 November 1995.

H. Jung

Registrar

A. Saggio

President