

Case T-346/06 R

Industria Masetto Schio Srl (IMS)

v

Commission of the European Communities

(Applications for interim measures — Application for suspension of operation of a measure — Directive 98/37/EC — Admissibility — Prima facie case — Urgency — Balancing of interests)

Order of the President of the Court of First Instance, 7 June 2007 II - 1786

Summary of the Order

1. *Applications for interim measures — Conditions for 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(2))
2. *Applications for interim measures — Conditions for 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(2); European Parliament and Council Directive 98/37, Arts 2(1) and 7(1) and (2))

3. *Applications for interim measures — Conditions for admissibility — Prima facie admissibility of the main action*
(Arts 230, fourth para., EC, 242 EC and 243 EC; European Parliament and Council Directive 98/37, Arts 2(1) and 7(2))
4. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Urgency — Serious and irreparable damage*
(Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

1. In order for an application for suspension of the operation of an measure to be declared admissible, the applicant must prove the existence of certain matters permitting the prima facie conclusion that the main action to which his application for interim relief relates is admissible, so as to prevent him from obtaining, by way of proceedings for interim relief, the suspension of the operation of a measure which the Community judicature may subsequently refuse to annul, his main action having been ruled inadmissible. Such an examination of the admissibility of the main action is necessarily summary because the proceedings for interim relief are by nature urgent. In the context of proceedings for interim relief, 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 prima facie conclusion that the admissibility of the main action cannot be excluded. The judge hearing the application for interim relief should only declare that application inadmissible where admissibility of the main action can be wholly excluded. To rule, at the stage of the proceedings for interim relief, on the admissibility of the main action, when its admissibility is not, prima facie, wholly excluded, would be tantamount to prejudging the Court of First Instance's decision in respect of that action.

(see paras 31-33)
2. Having regard to the scheme and purpose of Directive 98/37 on the approximation of the laws of the Member States relating to machinery, the Commission seems, prima facie, to have an obligation and not merely a discretionary power, under the provisions of Article 7 of the directive, to rule on the national measure which has been notified to it. It also seems, at first sight, that the Commission is required to rule, not on a draft measure, but on a national

measure which, having been adopted by a Member State, has the effect of restricting the free movement of the machinery concerned.

Commission's measure may give rise to binding legal effects for the producer of the machinery covered by that measure.

(see paras 39, 40, 42)

Moreover, pursuant to the provisions of Article 2(1) of the same directive, Member States are to take all appropriate measures to ensure that machinery or safety components covered by that directive may not be placed on the market and put into service if they endanger the health or safety of persons and, where appropriate, domestic animals or property.

3. Where a Community measure is addressed to a Member State by an institution, if the action to be taken by the Member State to implement that measure is automatic or is a foregone conclusion, it is of direct concern to any person affected by that action. If, on the other hand, the measure leaves the Member State free to act or not to act, or does not require it to act in a certain way, it is the Member State's action or inaction which is of direct concern to the person affected, and not the measure itself.

The Courts hearing an application for interim relief cannot therefore exclude the possibility that the Commission's finding that a national measure adopted by a Member State under Article 7(1) of the directive is justified and the sending of that information to the other Member States, in accordance with Article 7(2) of that directive, may bring about a distinct change in the legal position of the producer of the machinery concerned by the Commission's measure by prohibiting that machinery from being put into circulation or into service on the market of the Member States to which that measure is addressed. Consequently, the possibility remains, *prima facie*, that the

When the Member States are addressees of a measure by which the Commission informs them, pursuant to Article 7(2) of Directive 98/37 on the approximation of the laws of the Member States relating to machinery, that a national measure prohibiting the placing on the market or putting into circulation of certain machines is justified or partially justified, the Member States seem, *prima facie*, able only to prevent the placing on the market or putting into service of the machines covered by the Commission's

measure declaring the national measure justified. Indeed, it seems, at first sight, that it is the Commission which assesses the need to adopt such measures, the Member States being then, it seems, obliged to take the appropriate measures dictated by such an assessment, namely, to withdraw the machines from the market and not to permit the placing on the market or putting into service of those machines if they endanger the health and safety of persons, in accordance with Article 2(1) of the directive. It is therefore possible that the Member States do not have, *prima facie*, any freedom of action when they are the addressees of such a measure.

expressly and exclusively the machines it produces.

(see paras 50-52, 56, 57)

Moreover, although persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of a factual situation which differentiates them from all other persons and thereby distinguishes them individually in the same way as the addressee of the decision would be, it is possible, *prima facie*, that that Commission measure concerns an applicant individually when it concerns

4. In proceedings for interim measures, urgency must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party seeking the interim measure. Although damage of a 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, an interim measure is justified if it appears that, without that measure, the applicant would be in a position that could imperil its existence before final judgment in the main action. It is not necessary for the imminence of the damage to be demonstrated with absolute certainty, it being sufficient, especially when the occurrence of the damage depends on the concurrence of a series of factors, to show that damage is foreseeable with a sufficient degree of probability.

A Commission decision having, *prima facie*, the necessary authority to require

all the Member States to adopt measures restricting trade, such as measures prohibiting the placing on the market and entry into free circulation of certain machines, on account of the risks to the health and safety of persons which those machines would pose, are liable to harm the reputation of the undertaking which produces those machines. The detrimental nature of such harm must therefore be acknowledged. Such harm to the commercial reputation of an undertaking and to the safety reputation of its products is such as to cause it damage which, because it is difficult to assess, is reparable with difficulty. Such damage can also be characterised as serious since that harm is liable, as a result of that decision, to have effects in all the Member States and, consequently, on all the markets in which the applicant is active and not only on one of them. Such harm to its reputation is liable to entail irreparable consequences for its production, both in the sector in question and

in its other sectors of activity and, consequently, for its overall financial situation. Accordingly, the risk that it could rapidly be driven to the brink of insolvency does not appear to be purely hypothetical but is, on the contrary, foreseeable with a sufficient degree of probability.

In the light of those circumstances, the operation of the Commission's decision could cause serious and irreparable damage to the applicant, threatening its existence, with the result that the urgency of the relief applied for appears indisputable.

(see paras 121-123, 136, 137,
142-144, 146)