

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

21 September 2004^{*}

In Case T-310/03 R,

Kreuzer Medien GmbH, established in Leipzig (Germany), represented by M. Lenz,
lawyer,

applicant,

supported by

Falstaff Verlags GmbH, established in Klosterneuburg (Austria), represented by
W.-G. Schärf, lawyer,

intervener,

v

European Parliament, represented by E. Waldherr and U. Rösslein, acting as
Agents, with an address for service in Luxembourg,

^{*} Language of the case: German.

and

Council of the European Union, represented by E. Karlsson, acting as Agent,

defendants,

supported by

Commission of the European Communities, represented by M.-J. Jonczy, L. Pignataro-Nolin and F. Hoffmeister, acting as Agents, with an address for service in Luxembourg,

by

Kingdom of Spain, represented by L. Fraguas Gadea, acting as Agent, with an address for service in Luxembourg,

and by

Republic of Finland, represented by A. Guimaraes-Purokoski and T. Pynnä, acting as Agents, with an address for service in Luxembourg,

interveners,

APPLICATION, submitted by Falstaff Verlags GmbH under Article 243 EC, for an order suspending the operation of Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 2003 L 152, p. 16),

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

makes the following

Order

Facts and procedure

1 By application lodged at the Registry of the Court of First Instance on 11 September 2003, the applicant brought an action seeking annulment of Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 2003 L 152, p. 16, 'the contested directive').

- 2 By order of 12 March 2004, the President of the First Chamber granted the Commission, the Kingdom of Spain and the Republic of Finland leave to intervene in support of the forms of order sought by the defendants. It also granted the company Falstaff Verlags leave to intervene in support of the forms of order sought by the applicant.
- 3 By a separate document lodged at the Court Registry on 10 June 2004, Falstaff Verlags GmbH ('the intervening company') made an application under Article 243 EC seeking an order 'suspending the effects' of the contested directive.
- 4 The Council and the European Parliament lodged their observations on the application for interim relief on 29 and 30 June 2004, respectively. The Commission lodged its observations on that application on 1 July 2004. The applicant and the Kingdom of Spain lodged their observations on 2 July 2004.

Law

- 5 Under the provisions of Article 242 and 243 EC in conjunction with Article 225(1) EC the Court of First Instance may, if it considers the circumstances so require, order that operation of a contested act be suspended or prescribe any necessary interim measures.
- 6 In the light of the documents submitted, the President considers that he has sufficient information to be able to rule on the present application for interim measures and that it is not necessary to hear oral argument from the parties before doing so.

7 The President of the Court considers that in the present case it is necessary to consider first of all the admissibility of the application.

Arguments of the parties

8 The intervening company contends that its application to suspend the effects of the contested directive, lodged under Article 243 EC, is admissible.

9 It points out that all parties to the proceedings before the Court have the right to make such an application in order to protect their interests. Referring to the judgment in Case C-244/91 P *Pincherle v Commission* [1993] ECR I-6965, paragraph 14 et seq., it claims that an intervener must be considered to be a 'party to the proceedings' and must therefore be entitled to make an application under Article 243 EC. The intervening company, having been granted leave to intervene in the main proceedings is therefore permitted to make the present application.

10 The Council, the European Parliament, the Commission and the Kingdom of Spain consider that this application for interim relief is inadmissible.

11 In the views of the Council and the European Parliament, an intervener cannot apply for either suspension of operation, as referred to in Article 242 EC, or the prescribing of other interim measures, as referred to in Article 243 EC. To grant that right to an intervener would be contrary to the provisions of the fourth paragraph of Article 40 of the Statute of the Court of Justice and Article 116(3) of the Rules of Procedure of the Court of First Instance, which provide that interveners may only support the form of order sought by the party in whose support they are intervening.

It is also difficult to reconcile allowing an intervener to make an application for interim relief with other provisions of the Rules of Procedure, which apply expressly to interveners where they are involved (see, in particular, the third subparagraph of Article 87(4), Article 115, Article 116 and Article 134(2) of the Rules of Procedure).

- 12 The Commission claims that, under Article 104(1) of the Rules of Procedure, a distinction must be drawn between, on the one hand, an application for suspension of operation under Article 242 EC, which can only be made by the applicant in the main proceedings, and, on the other hand, an application for an order prescribing other interim measures under Article 243 EC, which may be lodged by any party to the main proceedings. In the present case, the application for suspension under Article 243 EC is in reality an application for suspension of operation within the meaning of Article 242 EC. As the intervening company did not bring the main action against the contested directive its application should be dismissed as inadmissible, under the first subparagraph of Article 104(1) of the Rules of Procedure.
- 13 The Kingdom of Spain contends, in particular, that in the same way as it is not entitled to raise an objection to admissibility (see Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraphs 77 to 79), an intervener may not bring an application for suspension of the operation of an act.
- 14 The applicant has not raised any objections to the admissibility of the present application for interim relief.

Assessment by the President of the Court

- 15 The first subparagraph of Article 104(1) of the Rules of Procedure of the Court of First Instance states that '[a]n application to suspend the operation of any measure adopted by an institution, made pursuant to [Article 242 EC] shall be admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance'.
- 16 Under the second subparagraph of Article 104(1) of the Rules of Procedure, '[a]n application for the adoption of any other interim measure referred to in [Article 243 EC] shall be admissible only if it is made by a party to a case before the Court of First Instance and refers to that case'.
- 17 In the present case, the intervening company has brought an 'application to suspend the operation of a measure made pursuant to Article 243 EC'. By that application it is seeking to obtain from the President of the Court suspension 'of the effects of the [contested] directive both so far as it is concerned and so far as the applicant is concerned until [the Court of First Instance] has ruled on the merits of the case'.
- 18 Although brought under Article 243 EC, that application does not seek to obtain a measure other than that provided for in Article 242 EC. The appropriate legal basis for the present application is therefore Article 242 EC. In that regard, it should be stated that a party should not be permitted to circumvent the rules contained in a provision of the Rules of Procedure by artificially making it subject to other rules contained in the Rules of Procedure.
- 19 The admissibility of the present application must therefore be assessed in the light of the first subparagraph of Article 104(1) of the Rules of Procedure.

- 20 According to that provision an application to suspend the operation of any measure of an institution is to be admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance.
- 21 In the present case, it is not disputed that the intervening company has not challenged the contested directive in an action before the Court of First Instance. In those circumstances, it is not entitled to make its application.
- 22 The present application must therefore be dismissed as inadmissible.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

- 1. The application for interim measures is dismissed.**
- 2. The costs are reserved.**

Done at Luxembourg, 21 September 2004.

H. Jung

Registrar

B. Vesterdorf

President