

ORDER OF THE PRESIDENT OF THE SECOND CHAMBER OF THE
COURT OF FIRST INSTANCE
16 July 1999 *

In Case T-143/99 R,

Hortiplant SAT, a company incorporated under Spanish law, established in Amposta, Spain, represented by Concepción Fernández Vicien, of the Barcelona Bar, and Eva Contreras Ynzenga, of the Madrid Bar, Cuatrecasas Chambers, 78 Avenue d'Auderghem, Brussels,

applicant,

v

Commission of the European Communities, represented by Juan Guerra Fernández, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Spanish.

APPLICATION for suspension of the operation of Commission Decision C (1999) 537 of 4 March 1999 cancelling Community financial assistance,

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

makes the following

Order

Facts and procedure

- 1 By Decision C (92) 3125 of 3 December 1992, adopted under Article 8 of Council Regulation (EEC) No 4256/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the EAGGF Guidance Section (OJ 1988 L 374, p. 25), the Commission granted the applicant financial assistance relating to Project No 92.ES.06.022 entitled 'Initiative in the form of a pilot project to demonstrate a new high-efficiency production system for nurseries: application to ornamental and woodland species'.
- 2 The total cost of the initiative was ECU 1 184 624 and the Community assistance was set at a maximum amount of ECU 731 992.

- 3 In accordance with Annex 2 to the decision of 3 December 1992, two advance payments totalling ECU 512 393 were made to the applicant.
- 4 On 12 June 1997 the Commission sent a letter to the applicant, informing it that Commission staff had started a technical and accounting audit of financial projects already adopted by the Commission under Article 8 of Regulation No 4256/88.
- 5 Following on-site verification and various exchanges of correspondence with the applicant, the Commission notified the applicant of its findings by letter of 3 April 1998. It noted the existence of matters which could amount to irregularities and stated that it had decided to initiate the procedure provided for in paragraph 10 of Annex 2 to the decision of 3 December 1992 and Article 24 of Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1). The applicant was also informed that recovery of the sums already granted could be justified. Finally, the applicant was asked to provide, within six weeks, proof that the obligations arising from the decision of 3 December 1992 had been fulfilled.
- 6 The applicant replied by letter of 26 May 1998.
- 7 On 26 October 1998 the Spanish prosecuting authorities, to which the Commission had passed the file, commenced proceedings against, amongst others, the applicant's members, on the basis of evidence of forgery of business documents and fraud.

- 8 On 4 March 1999 the Commission adopted the contested decision, which was notified to the applicant on 12 April 1999 and also addressed to the Kingdom of Spain. By that decision, the Commission cancelled the financial assistance at issue and ordered the applicant and, as the case may be, persons legally liable for its debts, to refund, within a period of 60 days following notification of the decision, the advance payments already made.
- 9 By application lodged at the Registry of the Court of First Instance on 12 June 1999, the applicant brought an action under Article 230 EC for the annulment of that decision.
- 10 By separate document lodged at the Court Registry on the same day, it also brought, pursuant to Articles 242 EC and 243 EC, the present application for interim relief, by which it seeks suspension of the operation of the contested decision without being required to provide a bond or bank guarantee.
- 11 On 25 June 1999 the Commission submitted its observations on that application.
- 12 In accordance with the second paragraph of Article 106 of the Rules of Procedure, the President of the Court of First Instance was replaced by the President of the Second Chamber.
- 13 The parties presented oral argument at the hearing on 5 July 1999.

Law

- 14 Under the combined provisions of Articles 242 EC and 243 EC and 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), the Court may, if it considers that circumstances so require, order the operation of the contested act to be suspended or prescribe any necessary interim measures.
- 15 Article 104(2) of the Rules of Procedure provides that applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the measures applied for. Those requirements are cumulative, so that an application for suspension of operation must be dismissed if either of them is not met (see, in particular, the order of the President of the Court of First Instance of 21 June 1999 in Case T-56/99 R *Marlines v Commission*, not published in the ECR, paragraph 8).
- 16 It is appropriate to consider the condition relating to urgency first.
- 17 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 harm to the party applying for those measures.
- 18 It is for the party seeking the measures to prove that he cannot wait for the outcome of the main proceedings without suffering harm of that nature (see, in particular, the order of the President of the Court of First Instance in Case T-73/98 R *Prayon-Rupel v Commission* [1998] ECR II-2769, paragraph 36). To be able to determine whether the harm which the applicant fears is serious and irreparable and therefore provides grounds for, exceptionally, suspending the operation of a decision, the judge hearing the application must have hard evidence allowing him to determine the precise consequences which the absence

of the measures applied for would in all probability entail (order of the President of the Fourth Chamber, Extended Composition, of the Court of First Instance in Case T-86/96 R *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd v Commission* [1998] ECR II-641, paragraph 64).

- 19 However, it does not have to be established with absolute certainty that the harm invoked is imminent. It is sufficient that the harm, particularly when it depends on the occurrence of a number of factors, should be foreseeable with a sufficient degree of probability (order of the President of the Court of Justice in Case C-149/95 P(R) *Commission v Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 38).
- 20 In its application for interim relief, the applicant asserts several times that it would run the risk of compulsory liquidation if the operation of the decision were not suspended.
- 21 The Court notes first of all that the applicant did not, when applying for interim relief, adduce any evidence to substantiate those assertions. While the applicant lodged some voluminous annexes, none in fact relates, directly or indirectly, to the undertaking's accounting and financial position, although this appears, by definition, to be an essential element which must underlie the present application.
- 22 It was only at the hearing that the applicant produced a document concerning the company's accounts, headed 'balance sheet' ('balance de situación').
- 23 Apart from the question of the admissibility of such a document given its late disclosure, the Court, after examining it carefully and taking note of the observations made by the parties at the hearing, finds that its evidential value is not sufficient having regard to the principles set out above.

- 24 That document consists simply of a computer-generated list of accounting entries which has not been authenticated in any way by an independent auditor. There is thus no way of establishing its source or guaranteeing its correctness.
- 25 That lack of credibility is further reinforced by the reference '01.01.1999/31.12.1999' which appears at the head of each page, casting doubt on the precise period to which the information produced relates.
- 26 The Court does not question the statement made by the applicant at the hearing that companies of the applicant's type are not obliged under Spanish law to have accounts certified by an independent auditor. The fact remains however that, since the applicant bears the burden of proof in *inter partes* proceedings brought by it for the purpose of obtaining, by way of exception to the first sentence of Article 242 EC, suspension of the operation of a Commission decision, it had to adduce genuinely reliable evidence.
- 27 That applied all the more in the present case since the applicant, as is clear from its application for interim relief and its observations at the hearing, seeks suspension of the operation of the decision without being required to provide a bond or bank guarantee.
- 28 It is settled case-law that an application of that kind may be granted only in exceptional circumstances (see, in particular, *Marlines v Commission*, cited above, paragraph 11).
- 29 In the present case, the applicant has merely produced a certificate from the Caixa Catalana refusing to grant it the guarantee which it had sought. That document, which contains only one sentence which is relevant for the purpose of

these proceedings for interim relief, is formulated in general terms and cannot be regarded as having sufficient evidential value.

- 30 Thus, given the paramount interest of the Community in pursuing and penalising serious irregularities in the use of Community aid, sound *prima facie* evidence of which is disclosed by the file, the Court could not in any event suspend the operation of the decision without a bank guarantee being provided.
- 31 It must accordingly be concluded that the conditions for granting the application for interim relief are not met.

Costs

- 32 The applicant claims that the Court should order the Commission to pay the costs of the present application for interim relief.
- 33 Under Article 87(1) of the Rules of Procedure, decisions as to costs are to be given in the final judgment or in the order which closes the proceedings. Accordingly, an order reserving costs should be made.

On those grounds,

THE PRESIDENT OF THE SECOND CHAMBER
OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim relief is dismissed.
2. The costs are reserved.

Luxembourg, 16 July 1999.

H. Jung

Registrar

A. Potocki

President