ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

10 November 2004 *

In Case T-316/04 R,

Wam SpA, established in Cavezzo di Modena (Italy), represented by E. Giliani, lawyer,

applicant,

v

Commission of the European Communities, represented by V. Di Bucci and E. Righini, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for an order suspending the operation of the Commission Decision of 19 May 2004 (C (2004) 1812 final) on State aid C 4/2003 (former NN 102/2002),

* Language of the case: Italian.

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

makes the following

Order

Facts and procédure

1 On 19 May 2004 the Commission adopted Decision C (2004) 1812 final on State aid C 4/2003 (former NN 102/2002) granted by the Italian Republic to the applicant ('the contested decision').

2 In the contested decision the Commission states that in 1995 and 2000 the applicant received two loans at a reduced rate of interest, under Italian law No 394/81 of 29 June 1981, intended to help Italian firms to enter the markets of States that were not members of the European Union ('the aid at issue').

3 Article 1 of the contested decision provides that the aid at issue falls within the scope of Article 87(1) EC, that it was not notified to the Commission under Article 88(3) EC and that it constitutes unlawful aid.

4 Article 2 of the contested decision therefore provides that the sum of EUR 48 054.41, with interest from 24 April 1996, and the sum of EUR 104 930.65, with interest from the date of the decision, must be recovered.

5 By application lodged at the Court Registry on 2 August 2004, the applicant brought an action under Article 230 EC seeking annulment of the contested decision.

6 By a separate document lodged at the Court Registry on 30 September 2004, the applicant brought the present application for interim relief under Article 242 EC and Article 104 et seq. of the Rules of Procedure of the Court of First Instance, seeking an order suspending the operation of the contested decision. The applicant is also claiming that the Commission should be ordered to pay the costs.

7 The Commission submitted its written observations on the present application for interim relief on 14 October 2004, within the period prescribed under Article 105(1) of the Rules of Procedure. It contends that the application for a suspension order should be dismissed and that the applicant should be ordered to pay the costs.

Law

8 Under the provisions of Articles 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 application of a contested act be suspended or prescribe any necessary interim measures.

9 Article 104(2) of the Rules of Procedure provides that an application for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (order of the President of the Court of 14 October 1996 in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30). The judge hearing the application, where appropriate also balances all the interests at stake (order of the President of the Court of 29 June 1999 in Case C-107/99 R *Italy* v *Commission* [1999] ECR I-4011, paragraph 59).

10 The measures sought must also be provisional inasmuch as they must not prejudge the points of law or fact in issue or neutralise in advance the effects of the decision subsequently to be given in the main action (order of the President of the Court of 19 July 1995 in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22).

11 Also, in the context of that overall examination, the judge hearing the application enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed (order of the President of the Court in *Commission* v *Atlantic Container Line and Others*, paragraph 23).

12 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.

Arguments of the parties

13 The applicant claims that all the conditions for granting interim measures are satisfied in the present case.

14 In order to show that the condition concerning a prima facie case is satisfied, the applicant refers to the 11 pleas contained in its main application, which are also set out in its application for interim relief. Those pleas allege infringement of several general principles of Community law and of Articles 87 EC, 88 EC, 253 EC and of Article 2(b) of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid (OJ 2001 L 10, p. 30). The applicant attaches to its application several documents and offers of witness evidence relating to the prima facie case, and in particular as to whether the State aid identified by the Commission was likely to affect competition.

15 So far as the condition of urgency is concerned, the applicant claims that the operation of the contested decision would lead to an irreversible situation entailing irreparable damage. The applicant puts forward four grounds of urgency in that regard.

16 First, the operation of the contested decision would lead to Law No 394/81 not being applied and, hence, funds intended to enable Italian firms to establish themselves in third countries would be suspended, so that Italian investment in those markets would be reduced and there would be a decline in the relative position of Italian firms, including the applicant's firm.

17 Second, the applicant asserts that the operation of the contested decision would force the Italian Republic to bring proceedings in order to recover subsidies granted since the entry into force of Law No 394/81, that is to say, since 1981, which would cause damage to all the recipient firms, irreversibly affect the economic equilibrium and create a climate of insecurity and mistrust for firms in Italy.

18 Third, the applicant contends that the operation of the contested decision would mean that the funding agreements for the applicant would be void and it would be obliged to repay immediately the sum of EUR 1 480 000, which would jeopardise its existence. The same would apply with regard to agreements entered into by other firms, which would cause irreparable damage both to them and to the national economy.

19 Fourth, the applicant adds that the Italian legislature could, by means of new regulations, revoke the funding facilities provided for under the scheme currently in force, so that the applicant could no longer obtain a refund of the aid at issue if the Court of First Instance were to annul the contested decision.

20 As regards balancing all the interests at stake, the applicant considers that suspension of the operation of the contested decision represents the most balanced option, since immediate operation of the decision would cause serious and irreparable damage not only to the applicant but also to the Italian economy and the European economy, whereas suspension of the operation of the contested decision would not prevent it from being fully effective in the event of the main application being dismissed.

21 The Commission submits no observations on the applicant's arguments with regard to the condition concerning a prima facie case, considering that the application is, at any event, manifestly unfounded as regards urgency and balancing all the interests.

22 In that regard, the Commission contends that the applicant has not adduced any evidence to establish the urgency of the measures sought. In the Commission's view, all the arguments concerning the alleged damage that would be suffered by the Italian economy and Italian firms are irrelevant as regards demonstrating urgency in respect of the applicant's own interests, which is required under settled case-law. The applicant has failed to demonstrate that the alleged damage would jeopardise its existence on the market. At any event, the damage pleaded is purely hypothetical and not supported by any evidence whatsoever.

23 As regards the balancing of interests, the Commission considers that to be clearly in its favour, since the alleged damage is purely hypothetical whereas the Community interest in implementing the decision, according to settled case-law, outweighs the interest of the recipient of the aid.

24 Lastly, the Commission contends that the applicant's offers of witness evidence are irrelevant since they do not concern the condition of urgency or the balancing of interests.

Assessment by the President of the Court

25 The President of the Court considers that in the present case it is necessary to consider first of all the condition of urgency.

26 In that regard, it is established case-law that the urgency of an application for interim measures must be assessed in relation to the necessity for an order granting

interim relief in order to prevent serious and irreparable damage to the party requesting the interim measure. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of this kind (see order of the President of the Court of First Instance of 3 December 2002 in Case T-181/02 R *Neue Erba Lautex* v *Commission* [2002] ECR II-5081, paragraph 82, and case-law cited therein).

27 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. However, the applicant is required to prove the facts forming the basis of its claim that serious and irreparable damage is likely (see order of the President of the Court of 12 October 2000 in Case C-278/00 R *Greece* v *Commission* [2000] ECR I-8787, paragraph 15; order in *Neue Erba Lautex* v *Commission*, paragraph 83, and case-law cited therein).

28 Moreover, it is settled case-law that in order to prove that the condition of urgency is met an applicant is required to show that suspension of the operation of a measure or other interim measures sought are necessary in order to protect his own interests (see to that effect order of the President of the Court of 4 May 1964 in Case 12/64 R *Ley* v *Commission* [1965] ECR 132). However, in order to establish urgency, an applicant cannot plead damage to an interest which is not personal to him, such as for example to an aspect of public interest or to the rights of third parties, be they individuals or a State (see to that effect, order of the President of the Court of 6 May 1988 in Case 112/88 R *Crete Citron Producers Association* v *Commission* [1988] ECR 2597, paragraph 20, and order of the President of the Court of First Instance of 30 June 1999 in Case T-13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II-1961, paragraph 136). Such interests may be taken into consideration only when the Court comes to balance the interests at stake (order in *Pfizer Animal Health* v *Council*, paragraph 136).

29 Lastly, it should be pointed out that, although it is firmly established that 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, it is also settled case-law that an interim measure is justified if it appears that, without that measure, the applicant would find itself in a position which could jeopardise its existence before final judgment in the main action or irremediably alter its position in the market (order in *Neue Erba Lautex* v *Commission*, paragraph 84; orders of the President of the Court of First Instance of 20 July 2000 in Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 45, and of 27 July 2004 in Case T-148/04 R *TQ3 Travel Solutions Belgium* v *Commission* [2004] ECR II-3027, paragraph 46).

30 It is therefore necessary to consider whether the applicant has established to the requisite legal standard whether the operation of the contested decision is likely to damage the applicant's own interests to such an extent as to jeopardise its existence or irreversibly alter its position in the market before final judgment in the main action.

31 In that regard, the fact remains that the applicant has not adduced any evidence that would lead the President of the Court of First Instance to draw such a conclusion. On the contrary, it must be stated that the arguments with regard to urgency which the applicant put forward in the application for interim relief are general and hypothetical and are not supported by the necessary evidence.

32 As regards the applicant's arguments concerning the consequences, for firms in Italy and for the Italian economy and the European economy, of not applying Law No 394/81 — namely, suspension of funding, termination of all the funding agreements concluded under that law and proceedings being brought to recover subsidies granted in the past — it must be said that, besides the fact that they do not directly concern the applicant and are therefore not relevant to consideration of the

condition of urgency, those arguments are purely hypothetical and by no means supported by the slightest evidence. On the contrary, as the Commission rightly states, the contested decision expressly mentions in paragraph 125 that it 'is without prejudice to the compatibility of the national framework established by Law No 394/81'.

33 It should be pointed out once again that, contrary to what the applicant appears to assert, an adverse effect on the rights of the persons considered to be the recipients of State aid which is incompatible with the common market forms an integral part of any Commission decision requiring the recovery of such aid and cannot be regarded as constituting in itself serious and irreparable damage, whether or not a specific assessment is made of the seriousness and irreparability of the precise prejudice alleged in each case considered (order in *Greece* v *Commission*, paragraph 21).

34 As regards the specific effects of the operation of the contested decision on the applicant's situation, it must be said that the applicant merely claims that there will be an irreversible change in the economic equilibrium and irreparable damage to the position of Italian firms, including its own, on the market generally, without making any attempt to adduce any evidence of its claims.

35 Moreover, as regards the applicant's argument that the operation of the contested decision would mean that funding agreements would be declared void and that it would be required to pay the sum of EUR 1 480 000 — a figure that is disputed by the Commission, which states that the amount of the repayment does not

correspond to that required by the decision, which stipulates that only the sums of EUR 48 054.41 and EUR 104 930.65, plus interest, are to be recovered — it should be pointed out that the applicant makes general assertions without attempting to demonstrate either the truth of the assertion or that payment of such a sum would be likely to jeopardise its existence.

36 Lastly, as regards the applicant's fourth argument concerning the possibility that the Italian Republic might in future reform the system of aid which the applicant benefited under, so that the latter could no longer obtain repayment of the aid in question in the event of annulment of the decision, that argument too is hypothetical and not supported by any evidence whatsoever. Moreover, as the Commission states, even in that case the applicant would have the opportunity to bring proceedings at a later date against the Italian Republic or against the Commission, and the applicant does not put forward any arguments showing that it is being prevented from bringing such proceedings to protect its interests.

37 In the light of the above, since the applicant has brought no evidence to support its assertions regarding the serious and irreparable damage that would stem from the operation of the contested decision, it must be held that the applicant has not managed to establish that without an order suspending the operation of the contested decision is ordered it will suffer serious and irreparable damage.

38 The condition concerning the urgency of the application for suspension of the operation of the measure is therefore not established to the requisite legal standard. Consequently the application for interim relief must be dismissed without it being necessary to consider whether the other conditions for granting suspension of the operation of the contested decision are satisfied.

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, 10 November 2004.

H. Jung — Registrar

B. Vesterdorf — President