ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

28 June 2005 *

In Case T-386/04,

Eridania Sadam SpA, established in Bologne (Italy),

Italia Zuccheri SpA, established in Bologne,

Zuccherificio del Molise SpA, established in Termoli (Italy),

CO.PRO. B — Cooperativa produttori bieticoli Soc. coop. rl, established in Minerbio (Italy),

SFIR — Società fondiaria industriale romagnola SpA, established in Cesena (Italy),

represented by G. Pittalis, I. Vigliotti, G. Roberti, P. Ziotti and A. Franchi, lawyers, with an address for service in Luxembourg,

applicants,

* Language of the case: Italian.

Commission of the European Communities, represented by C. Cattabriga and L. Visaggio, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Council of the European Union, represented by F. Ruggeri Laderchi, acting as Agent,

intervener,

APPLICATION for annulment of Article 1(d) of Commission Regulation (EC) No 1216/2004 of 30 June 2004 fixing the derived intervention prices for white sugar for the 2004/05 marketing year (OJ 2004 L 232, p. 25),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. M. Vilaras, President, M.E. Martins Ribeiro and K. Jürimäe, Judges,

Registrar: H. Jung,

makes the following

Order

Legal background

1 Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector (OJ L 178, p. 1, 'the basic regulation') established, among other things, in Title 1, Chapters 1 and 2, a price system and a quota system for marketing years 2001/02 to 2005/06.

2 Under the quota system each Member State is allocated a basic quota for national sugar production which is shared out, within each Member State, between producer undertakings in the form of A and B quotas. These two quotas give entitlement to guaranteed sales and relate to the annual marketing year, which begins on 1 July of each year and ends on 30 June of the following year.

3 The price system includes an intervention regime intended to guarantee product prices and sales and stabilise the sugar market.

4 The prices of white sugar are not the same throughout the Community. Article 2(1) and (4) of the basic regulation fixes, for the benefit of sugar manufacturers, an 'intervention price' of 63.19 euros per 100 kg for non-deficit areas and provides for the Commission to fix every year a 'derived intervention price' for each of the deficit areas.

5 The consequence of this price difference, which is known as regionalisation, is that, for deficit areas, the basic regulation provides, within the limits of the quota allocated, for higher remuneration for sugar produced in those areas and, at the same time, for a higher price for the purchase of the raw material needed to produce sugar.

6 Minimum prices for non-deficit areas and minimum prices adjusted upwards for deficit areas corresponds, for the purchase of beet, to the intervention price for non-deficit areas and the derived intervention price for each of the deficit areas respectively. The former prices are payable by sugar manufacturers to beet growers.

7 In relation to the minimum prices applicable to non-deficit areas, the adjusted minimum prices are subject, in accordance with Article 4(2) of the basic regulation, to a double upward adjustment. First, they are increased by an amount equal to the difference between the intervention price and the derived intervention price for the area in question. Secondly the resulting amount is adjusted by the coefficient 1.30.

8 It having been established that the areas of production in Italy were likely to be deficit areas in the marketing year 2004/05, Article 1(d) of Commission Regulation (EC) No 1216/2004 of 30 June 2004 fixing the derived intervention prices for white sugar for the 2004/05 marketing year (OJ L 232, p. 25, 'the contested regulation') fixed the derived intervention price for white sugar for that year at 655.30 euros per tonne for all areas in Italy.

Procedure

9 By application lodged at the Court Registry on 27 September 2004, the applicants brought the present action.

10 By order of 8 December 2004 of the President of the Fifth Chamber of the Court of First Instance, the Council was granted leave to intervene in support of the forms of order sought by the defendant. The Council lodged its statement in intervention on 11 February 2005.

11 By separate document lodged at the Court Registry on 17 November 2004, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance. The applicants lodged their observations on that objection on 14 January 2005.

12 By separate documents lodged at the Court Registry on 29 December 2004, the Associazione nazionale bietecoltori, the Consorzio nazionale bieticoltori and the Associzione bieticoltori italiani requested leave to intervene in support of the forms of order sought by the defendant. The parties did not object to these requests.

Forms of order sought

13 The applicants claim that the Court should:

— reject the objection of inadmissibility raised by the Commission or reserve it for the final judgment;

— annul Article 1(d) of the contested regulation;

— alternatively, under Article 241 EC, declare Article 2 of the basic regulation unlawful and inapplicable, in that it does not allow the Commission to take into consideration the existence of zero-rated out-of-quota imports with a view to fixing the derived intervention price;

— order the Commission to pay the costs.

14 In its objection of inadmissibility, the Commission claims that the Court should:

— principally, dismiss the action as inadmissible;

— order the applicants to pay the costs;

— alternatively, prescribe new time-limits for further steps in the proceedings, pursuant to the second subparagraph of Article 114(4) of the Court's Rules of Procedure.

15 In its statement of intervention, the Council claims that the Court should declare inadmissible both the action and the plea of illegality raised by the applicants under Article 241 EC.

Admissibility

16 Pursuant to Article 114(1) of the Rules of Procedure, the Court of First Instance may, if a party so requests, rule on the question of admissibility without considering the merits of the case. Under Article 114(3), unless the Court otherwise decides, the remainder of the proceedings is to be oral. In the present case, the Court considers that the information in the documents before it is sufficient and that there is no need to proceed to the oral stage of the proceedings.

Arguments of the parties

17 The Commission contends that the action should be dismissed as inadmissible. It argues that the contested regulation constitutes a normative measure by which the applicants are not individually concerned (judgment of the Court of First Instance in Case T-168/95 *Eridania and Others* v *Council* [1999] ECR II-2245, as confirmed on appeal by order of the Court of Justice in Case C-352/99 P *Eridania and Others* v *Council* [2001] ECR I-5037).

18 This, in its view, is confirmed by the order of the Court of First Instance of 8 July 2004 in Case T-338/03 *Eridania Sadam and Others* v *Commission*, not published in the European Court Reports (paragraph 31).

19 According to the Commission, in this order the Court of First Instance also made it clear that the alleged injury suffered by the applicants due to the combined effect of the increase in the price of beet in Italy resulting from the application of the derived intervention price and the fall in the price of sugar in that Member State attributable to increased imports of sugar from the Balkans was not in itself sufficient to distinguish the applicants individually, within the meaning of the settled case-law of the Court of Justice and the Court of First Instance (paragraphs 34 to 36 of the order).

20 Lastly, the Court of First Instance concluded that the inadmissibility of the action for annulment of Article 1(c) of Commission Regulation (EC) No 1158/2003 of 30 June 2003 fixing the derived intervention prices of white sugar for the 2003/04 marketing year (OJ L 162, p. 24) did not mean that the applicants were deprived of effective judicial protection. The applicants could have challenged the legality of Regulation No 1158/2003 before the competent national courts and indeed have made use of that right in the judicial proceedings commenced before the Tribunale amministrativo regionale (Regional Administrative Court) of Lazio (Italy) (paragraphs 41 and 42 of the order).

21 The same conclusions should be drawn in this particular case, since the legal situation of the applicants and the nature and scope of the contested regulation, on the one hand, and the legal situation and the nature and scope of Regulation No 1158/2003 analysed by the Court of First Instance in the order of 8 July 2004, *Eridania and Others* v *Commission*, paragraph 18 above, on the other, are perfectly identical. The applicants have not invoked any different attribute or special circumstance capable of substantiating the existence of an individual interest in applying for the annulment of the contested regulation and, moreover, the Commission could not conceive of any such attribute or circumstance.

22 The Council supports the Commission's arguments and also claims that the action is inadmissible. It adds that the applicants' reference to the Opinion of Advocate General Jacobs in connection with the judgment of the Court of Justice in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, I-6681, and to the judgment of the Court of First Instance in Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365, is totally irrelevant, the situations considered in those cases being, in any event, very different from that which underlies the present case.

23 Furthermore, the Council disputes the applicants' argument that the mechanism of reference for a preliminary ruling provided for by the EC Treaty is inconsistent with the principle of effective judicial protection. On no occasion during the last half-century has either the constitutional court of a Member State with a similar mechanism or the European Court of Human Rights found judicial protection based on references for a preliminary ruling to be ineffective.

24 With regard to the applicants' citation of paragraph 4 of Article III-365 of the Treaty establishing a Constitution for Europe (OJ 2004, C 310, p. 1), the Council points out that this is an argument *delege ferenda*. Thus, the future elimination, in some cases, by this provision of the requirement of an individual interest shows that this requirement exists in current law and that, as long as the present treaty remains in force, it would be arbitrary to disregard it.

25 Finally, the Council considers that the alternative plea of illegality raised by the applicants against Article 2 of the basic regulation should be rejected as inadmissible, on the grounds that the application does not satisfy the requirements of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance (order of the Court of Justice of 6 January 2004 in Case C-333/02 *Italy* v *Commission*, not published in the European Court Reports, paragraph 12). In any event, the applicants not being entitled to seek the annulment of the contested regulation, they are not entitled to rely on the illegality of the basic regulation either, which concerns them only in their capacity of sugar producers.

26 The applicants do not dispute that the contested regulation constitutes an act of general application and acknowledge the obstacles to the recognition of their standing to bring proceedings against such acts raised by the settled case-law of the Court of Justice and the Court of First Instance relative to the interpretation of the fourth paragraph of Article 230 of the Treaty.

27 However, they consider that this case-law, which has been confirmed by the judgments of the Court of Justice in *Unión de Pequeños Agricultores* v *Council*, paragraph 22 above, and in Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425, and by the order of 8 July 2004 in *Eridania Sadam and Others* v *Commission*, paragraph 18 above, is particularly restrictive and could even result in a denial of justice where an act of general application directly affecting the legal situation of private individuals does not require the national authorities to take any implementing measure 'downstream' and where the only possibility of challenging its validity is therefore to violate its provisions in order to plead its invalidity in subsequent proceedings (judgment in *Jégo-Quéré* v *Commission*, paragraph 22 above, paragraph 45, and the Opinion of Advocate General Jacobs in connection with the judgment in *Unión de Pequeños Agricultores* v *Council*, paragraph 22 above, paragraph 43).

28 The applicants add that, in the light of the principle of effective judicial protection enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, as amended (ECHR) and reaffirmed by the judgments in *Unión de Pequeños Agricultores* v *Council*, paragraph

22 above, and *Commission* v *Jégo-Quéré*, paragraph 27 above, and by Article 47 of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ C 364, p. 1), the procedure of reference for a preliminary ruling under Article 234 EC cannot be regarded as guaranteeing individuals an effective right of recourse enabling them to challenge the legality of Community provisions of general application that directly affect their legal situation.

29 Reference for a preliminary ruling is not a judicial remedy available to applicants but rather a tool whose use is largely left to the discretion of the national court. Hence the possibility of obtaining a reference to the Court of Justice for a preliminary ruling is a matter of chance, the referral procedure being excessively complicated and attended by difficulties and uncertainties. This assessment is held to be confirmed by the fact that so far the internal proceedings brought by the applicants before Tribunale amministrativo regionale of Lazio, in the course of which they questioned the legality of fixing, by Regulation No 1158/2003, the intervention price for white sugar in Italy for the marketing year 2003/04, has not given rise to any reference to the Court of Justice for a preliminary ruling.

30 Finally, the applicants argue that it is precisely in order to ensure effective judicial protection for individuals against acts of general application which do not require any implementing measure that the future substitution of Article III-365(4) of the Treaty establishing a Constitution for Europe for Article 230(4) EC will allow any natural or legal person to institute proceedings 'against a regulatory act which is of direct concern to him or her and does not entail implementing measures'. In reality, this substitution is purely declaratory, inasmuch as the right of effective recourse to a competent court, as repeatedly reaffirmed (see paragraph 28 above), is already one of the fundamental principles of Community law (judgment of the Court of Justice in Case 222/84 *Johnston* [1986] ECR p. 1651, paragraph 18).

Findings of the Court

31 First of all, the parties all accept that the contested regulation constitutes a normative act. Thus, Article 1(d) of the contested regulation applies to objectively defined situations and is directed, in general terms, at categories of persons regarded generally and in the abstract (see the order of 28 June 2001 in *Eridania and Others* v *Council*, paragraph 17 above, paragraphs 45 and 46; the judgment in *Eridania and Others* v *Council*, paragraph 17 above, paragraph 39, and the order of 8 July 2004 in *Eridania Sadam and Others* v *Commission*, paragraph 18 above, paragraph 31).

32 It is apparent from the actual wording of the fourth paragraph of Article 230 EC and the settled case-law of the Court of Justice that a natural or legal person is entitled to bring an action for annulment of a measure which is not a decision addressed to it only if the person is not only directly concerned by the measure but also individually concerned by it (judgment of the Court of Justice in Case C-167/02 P *Rothley and Others* v *Parliament* [2004] ECR I-3149, paragraph 25; see also judgment of the Court of Justice in Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraph 5).

33 In this connection, it should be noted that, in accordance with settled case-law, natural or legal persons can claim to be individually concerned only if they are affected by the measure in question by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons and thus distinguishes them individually in the same way as the addressee (judgments in *Unión de Pequeños Agricultores* v *Council*, paragraph 22 above, paragraph 36; *Commission* v *Jégo-Quéré*, paragraph 27 above, paragraph 45, and order of 8 July 2004, *Eridania Sadam and Others* v *Commission*, paragraph 18 above, paragraph 33).

34 In the present case, the applicants, in the part of the application devoted to the admissibility of this action, fail to cite any attributes or special circumstances that

might substantiate the existence of an individual interest in seeking the annulment of the contested regulation and admit to being aware of the obstacles to the recognition of their standing to bring proceedings for the annulment of the regulation raised by the settled case-law of the Court of Justice and the Court of First Instance. However, a general reading of the application indicates that, according to the applicants, the contested regulation has a special impact on their legal situation which makes it possible to distinguish them from any other operator in the sector, insofar as, unlike the other Community operators in the sector, the applicants are exposed to the combined effect of an increase in the price of beet in Italy, resulting from the application of the derived intervention price, and a fall in the price of sugar in that country, attributable to increased imports of sugar from the Balkans.

35 In this connection, it should be noted that it is not sufficient for some operators to be economically more affected by a measure than their competitors for them to be regarded as individually concerned by that measure (orders of the Court of First Instance of 15 September 1999 in Case T-11/99 *Van Parys and Others* v *Commission* [1999] ECR II-2653, paragraph 50, and of 8 July 2004 in *Eridania Sadam and Others* v *Commission*, paragraph 18 above, paragraph 35).

36 It follows that the alleged injury, even if proved, would not, in itself, suffice to distinguish the applicants individually, within the meaning of the settled case-law cited in paragraphs 32 and 33 above.

37 However, the applicants argue that this case-law is particularly restrictive and does not ensure effective judicial protection in the case of a regulation that is directly applicable, without the intervention of the national authorities.

38 In this respect, it should be noted that individuals are entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to

such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. This right is also enshrined in Articles 6 and 13 of the ECHR (see judgment in *Commission* v *Jégo-Quéré*, paragraph 27 above, paragraph 29, and the case-law cited).

39 By Articles 230 EC and 241 EC, on the one hand, and by Article 234 EC, on the other, the Treaty has established a complete system of legal remedies and procedures for reviewing the legality of acts of the institutions and has entrusted such review to the Community Courts (see, to that effect, the judgment of the Court of Justice in Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23). Under this system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid (judgment of the Court of Justice in Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20), to make a reference to the Court of Justice for a preliminary ruling on validity (judgment in *Unión de Pequeños Agricultores* v *Council*, paragraph 22 above, paragraph 40).

40 Thus, it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection (judgment in *Unión de Pequeños Agricultores* v *Council*, paragraph 22 above, paragraph 41).

41 Within this context, in accordance with the principle of cooperation in good faith laid down in Article 10 EC, the national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act (judgment in *Unión de Pequeños Agricultores* v *Council*, paragraph 22 above, paragraph 42).

42 However, as the Court of Justice has ruled, it is not appropriate for an action for annulment before the Community Court to be available to an individual who contests the validity of a measure of general application, such as a regulation, which does not distinguish him individually in the same way as an addressee, even if it could be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue. Such a system of remedies would require the Community Court, in each individual case, to examine and interpret national procedural law, and that would go beyond its jurisdiction when reviewing the legality of Community measures (judgments in *Unión de Pequeños Agricultores* v *Council*, paragraph 22 above, paragraphs 37 and 43, and *Commission* v *Jégo-Quéré*, paragraph 27 above, paragraph 33).

43 Accordingly, an action for annulment before the Community Court should not, on any view, be available, even where it is apparent that the national procedural rules do not allow the individual to contest the validity of the Community measure at issue unless he has first contravened it (judgment in *Commission* v *Jégo-Quéré*, paragraph 27 above, paragraph 34).

44 In the present case, it should be pointed out that the fact that the contested regulation applies directly, without intervention by the national authorities, does not, in itself, mean that an operator who is directly concerned by it can contest its validity only if he has first contravened it. It is possible for domestic law to permit an individual directly concerned by a general legislative measure of national law which cannot be directly contested before the courts to seek from the national authorities under that legislation a measure which may itself be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by the contested regulation may seek from the national authorities a measure under that regulation

which may be contested before the national court, enabling the operator to challenge the regulation indirectly (see, to that effect, the judgment in *Commission* v *Jégo-Quéré*, paragraph 27 above, paragraph 35, and the order of 8 July 2004, *Eridania Sadam and Others* v *Commission*, paragraph 18 above, paragraph 41).

45 In the present case, this interpretation is borne out by the fact that when the validity of fixing, by regulations similar to the contested regulation, derived intervention prices for white sugar for all areas in Italy for the marketing years 1996/97 and 1997/98 was challenged by the sugar producers concerned in the competent Italian courts, those courts found it necessary to refer for a preliminary ruling questions that gave rise to judgments of the Court in Cases C-289/97 *Eridania* [2000] ECR I-5409 and C-160/98 *Eridania* [2002] ECR I-2533, respectively.

46 Moreover, as the Commission points out and the applicants themselves acknowledge, the validity of fixing, by Regulation No 1158/2003, the derived intervention price for white sugar in Italy for the marketing year 2003/04 was challenged by the applicants within the context of judicial proceedings they brought before the Tribunale amministrativo regionale of Lazio. The fact that these proceedings have not 'so far' given rise to a reference to the Court of Justice does not demonstrate the alleged lack of judicial protection for the applicants. Thus, there is no reason to believe that, in the present case, the applicants would be deprived of effective judicial protection if not allowed to bring an action for annulment of the contested regulation before the Community Court.

47 In any event, although it is true that the condition according to which a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually (see, to that effect, the judgments of the Court of Justice in Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 14 and 15; and in Cases C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraphs 13 to 17, and C-309/89

Codorniu v *Council* [1994] ECR I-1853, paragraphs 19 to 22), such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts, it being for the Member States, acting in accordance with Article 48 EU, to reform the system currently in force (judgments in *Unión de Pequeños Agricultores* v *Council*, paragraph 22 above, paragraphs 44 and 45, and in *Commission* v *Jégo-Quéré*, paragraph 27 above, paragraph 36). In these circumstances, the applicants cannot validly claim that the envisaged substitution of paragraph 4 of Article III-365 of the Treaty establishing a Constitution for Europe for Article 230(4) EC is 'purely declaratory', as the Treaty cannot lead to an amendment of the current system before it enters into force (order of the Court of First Instance of 16 February 2005, *Fost Plus* v *Commission*, T-142/03 [2005] ECR II-589, paragraph 81).

48 It follows from all the foregoing considerations that the applicants cannot be regarded as individually concerned by the contested regulation, within the meaning of the settled case-law of the Court of Justice and the Court of First Instance.

49 Accordingly, this action must be dismissed as inadmissible, without it being necessary to rule on the applications to intervene, in support of the pleadings of the defendant, by the Associazione nazionale bieticoltori, the Consorzio nazionale bieticoltori and the Associazione bieticoltori italiani.

50 Finally, it should be noted that, alternatively, the applicants ask the Court of First Instance to declare Article 2 of the basic regulation unlawful and inapplicable under Article 241 EC.

51 In this respect, it will suffice to note that the possibility afforded by Article 241 EC of pleading the inapplicability of a regulation or measure of general application forming the legal basis of the contested implementing measure does not constitute an independent right of action and recourse may be had to it only as an incidental plea. Article 241 EC may not be invoked in the absence of an independent right of action (see the orders of the Court of First Instance of 8 July 1999 in Case T-194/95 *Area Cova and Others* v *Council* [1999] ECR II-2271, paragraph 78, and the case-law cited, and of 8 July 2004 in *Eridania Sadam and Others* v *Commission*, paragraph 18 above, paragraph 48).

52 In the present case, the claim for annulment of the contested regulation is inadmissible, so that the abovementioned plea, insofar as it is invoked in support of that claim, is also inadmissible (order of 8 July 2004 *Eridania Sadam and Others* v *Commission*, paragraph 18 above, paragraph 49).

53 It follows from the foregoing that the application must be dismissed as inadmissible in its entirety.

Costs

54 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful and the Commission has applied for costs, the applicants must be ordered to pay their own costs and those of the Commission.

55 In accordance with Article 87(4) of the Rules of Procedure, the Council must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the application as inadmissible.**

2. **Declares that there is no reason to rule on the applications to intervene by the Associazione nazionale bieticoltori, the Consorzio nazionale bieticoltori and the Associazione bieticoltori italiani.**

3. **Orders the applicants to bear their own costs and pay those incurred by the Commission.**

4. **Orders the Council to bear its own costs.**

Luxembourg, 28 June 2005.

H. Jung

Registrar

M. Vilaras

President