JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
7 November 1996 *

In Case T-298/94,

Roquette Frères SA, a company incorporated under the laws of France, established at Lestrem (France), represented by Jacques Dutat, of the Lille Bar,

applicant,

v

Council of the European Union, represented by Arthur Brautigam and Jan-Peter Hix, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

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

intervener,

* Language of the case: French.

APPLICATION for annulment of Council Regulation (EC) No 1868/94 of 27 July 1994 establishing a quota system in relation to the production of potato starch (OJ 1994 L 197, p. 4),

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

composed of: K. Lenaerts, President, P. Lindh and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 11 July 1996,

gives the following

Judgment

1 The basic regulation laying down the regime for the production of potato starch is Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organization of the market in cereals (OJ 1992 L 181, p. 21; hereinafter the 'basic regulation'), which also covers potatoes which may be used instead of cereals for the production of starch. Taking the view that specific constraints, especially of a structural nature, on the starch sector warranted a corrective measure in favour of that sector, the Council adopted, pursuant to Article 8(4) of the basic regulation, Council Regulation (EEC) No 1543/93 of 14 June 1993 fixing the amount of the premium paid to producers of potato starch during the 1993/94, 1994/95 and 1995/96 marketing years (OJ 1993 L 154, p. 4). That regulation provided that, for

the 1993/94 marketing year, Member States were to pay potato-starch producers the premium per tonne of starch produced. The same premium was to apply for the 1994/95 and 1995/96 marketing years provided that total potato-starch production had not exceeded the quantity of 1.5 million tonnes during one or two of the preceding marketing years.

2 Since production exceeded 1.5 million tonnes in the 1993/94 marketing year, the Council adopted, pursuant to Article 1 of Regulation No 1543/93, an amending regulation, Council Regulation (EC) No 1868/94 of 27 July 1994 establishing a quota system in relation to the production of potato starch (OJ 1994 L 197, p. 4; hereinafter 'Regulation No 1868/94' or the 'contested regulation').

3 Under that quota system, each Member State where potato starch has been produced is allocated a quota calculated on the basis of the average quantity of potato starch produced in that Member State in the 1990/91, 1991/92 and 1992/93 marketing years for which a premium was received. In view of the change from the planned economy existing in the new German *Länder* before reunification to a market economy with the consequent change in agricultural production structures and necessary investments, Germany, for its part, was allocated a quota calculated on the average quantity produced in the 1992/93 marketing year, plus an additional quantity of 90 000 tonnes. In addition, a reserve of a maximum of 110 000 tonnes was created in order to cover production in Germany in the 1996/97 marketing year, provided that such production resulted from investments irrevocably undertaken before 31 January 1994.

4 The Member States are required to allocate the quotas for the 1995/96, 1996/97 and 1997/98 marketing years among undertakings producing potato starch. The quotas are to be allocated to undertakings which have received a premium, and are to be calculated on the basis either of the average quantity of starch produced in

the 1990/91, 1991/92 and 1992/93 marketing years or the amount of starch produced in 1992/93. When calculating those quotas, Member States must also take into account investments made by undertakings before 31 January 1994 with a view to the production of potato starch.

Facts and procedure

5 The applicant, Roquette Frères SA, operates two potato-starch plants in France. In the 1993/94 marketing year it received a premium per tonne of starch produced in accordance with Regulation No 1543/93. As a result, it was also entitled to a quota under the quota system established by Regulation No 1868/94.

6 Taking the view that the system is discriminatory, the applicant brought this action for the annulment of Regulation No 1868/94 by application received at the Court Registry on 30 September 1994.

7 By document received at the Court Registry on 8 November 1994, the Council raised an objection of inadmissibility on the ground that the contested measure is not of direct or individual concern to the applicant.

8 In its observations lodged on 12 December 1994 on the objection of inadmissibility, the applicant claimed that the objection should be rejected.

9 On 13 February 1995 the Commission lodged an application to intervene in support of the form of order sought by the Council. Leave to intervene was granted by order of the President of the Court of 3 April 1995.

10 The Commission's statement in intervention on admissibility was lodged on 26 April 1995.

11 By order of 25 October 1995, the Fourth Chamber of the Court decided that the objection of inadmissibility should be considered concurrently with the substance.

12 On 24 January 1996 the Commission lodged a statement in intervention on the substance.

13 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry.

14 Oral argument was heard from the parties at the public hearing on 11 July 1996, when they answered oral questions from the Court. On this occasion, the applicant mentioned that it had also brought proceedings in the Tribunal Administratif (Administrative Court), Amiens, for the annulment of the French orders containing provisions implementing the contested regulation, during which the Tribunal Administratif had been asked to make a reference to the Court of Justice pursuant to Article 177 of the EC Treaty for a preliminary ruling on the validity of the contested regulation.

Forms of order sought

15 The applicant claims that the Court should:

— annul Regulation No 1868/94;

— order the Council to pay the costs.

16 The Council, defendant, claims that the Court should:

— declare the application inadmissible and, in the alternative, dismiss it as unfounded;

— order the applicant to pay the costs.

17 The Commission, intervening, claims that the Court should:

— declare the application inadmissible and, in the alternative, dismiss it as unfounded.

Pleas and arguments of the parties

18 The applicant puts forward in support of its claims two pleas for annulment alleging, first, infringement of the principle of non-discrimination in that the special treatment given to Germany is not objectively justified and, secondly, infringement of the principle of proportionality in that the special treatment given to Germany is, at the very least, excessive.

19 The Council and the Commission argue, principally, that the application is inadmissible and, in the alternative, that it is unfounded.

Admissibility

Brief account of the parties' arguments

20 The Council claims that the contested regulation is not of direct or individual concern to the applicant.

21 It points out that in order for an individual to be regarded as directly concerned, the effects of a contested regulation must follow, necessarily and automatically, from the measure without the need for any subsequent, independent decision of a Community institution or of a State in the exercise of a discretionary power (see Case 69/69 *Alcan Aluminium Raeren and Others* v *Commission* [1970] ECR 385 and Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777).

22 In this connection, the Council observes that the individual quotas are not laid down directly by Regulation No 1868/94 but fixed by the Member States when they make their discretionary choice of the applicable reference period, and that the choice of one reference period over the other may have considerable consequences for the levels of individual quotas, especially where there have been major changes in the quantities produced during the period taken into consideration, which is the case in Germany.

23 In this context, the Council also points out that the Member States are obliged to take account of 'investments made by undertakings producing potato starch before 31 January 1994 which did not give rise to production in the reference period chosen by that State' (see Article 2(2) of the contested regulation).

24 It goes on to state that the contested regulation constitutes a measure of general application with effects on all traders. It is not therefore a decision taken in the form of a regulation within the meaning of the fourth paragraph of Article 173 of the Treaty. It observes that the Court of Justice has held that an act does not lose its character as a regulation simply because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to whom it applies at any given time as long as there is no doubt that it is applicable as the result of an objective situation of law or fact which it specifies and which is in harmony with its ultimate objective (see Case 6/68 *Zuckerfabrik Watenstedt* v *Council* [1968] ECR 409 and Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, paragraph 25). It claims that the applicant is in the same situation as any other trader, that is to say in the same situation as all starch undertakings which produced starch in one or other of the reference periods. It follows that the contested regulation does not affect the applicant by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons (see Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 20).

25 The applicant considers that the contested measure, adopted in the form of a regulation, must nevertheless be regarded as a decision of direct and individual concern to it; it therefore has a personal interest in bringing proceedings.

26 As for the need for the measure to be of direct concern to it, it points out that in France the difference between applying one as opposed to the other of the two calculation methods laid down in the contested regulation is only 0.2%. Consequently, the French Government's discretion is practically non-existent and national implementation should be regarded as being purely automatic (see, in particular, Case 113/77 *NTN Toyo Bearing and Others* v *Council* [1979] ECR 1185).

27 It states that the provision of the contested regulation according to which investments made before 31 January 1994 must be taken into account has no bearing on the determination of individual quotas in France, since French starch producers have not carried out any investment.

28 The applicant goes on to argue that the regulation is of individual concern to it. It claims that the contested regulation applies to a limited number of ascertained traders whose individual situation influenced its content, since the quota which they receive is calculated on the basis of the quantities produced in the last few years. The applicant therefore has an 'attribute peculiar to it' since it shares it with only a very limited number of traders and the 'factual circumstances differentiating it' consist in the fact that it produced the quantity of starch benefiting by a premium in those last few marketing years (see Case 25/62 *Plaumann* v *Commission* [1963] ECR 95 and Case 100/74 *CAM* v *Commission* [1975] ECR 1393 and the orders in Case 138/88 *Flourez and Others* v *Council* [1988] ECR 6393, Case C-225/91 R *Matra* v *Commission* [1991] ECR I-5823 and Case C-131/92 *Arnaud and Others* v *Council* [1993] ECR I-2573).

29 The Commission observes in the first place that the Council adopted the contested measure in order to control the growth of the production of potato starch, which had, in the 1993/94 marketing year, exceeded the predetermined threshold of 1.5 million tonnes. It maintains that the measure is of a legislative nature and does not constitute a decision taken in the guise of a regulation, since it introduced, in the face of an objectively established, uncontested market situation, the control measure which seemed to the Community legislature to be the most appropriate. It emphasizes that the control measure in question is addressed in general, abstract terms to categories of persons determined on the basis of their objective characteristic of starch undertakings, manufacturing starch from potatoes.

30 The Commission goes on to reject the applicant's argument to the effect that it is individually concerned because it belongs to a closed group of traders whose individual situation influenced the content of the contested measure.

31 It asserts that, as the Court of Justice has held, it is not the finding that there is a group of persons concerned which is relevant in order to decide whether or not the applicant is individually concerned, but rather the objective nature and the duration of the regulation at issue. It refers in this regard to the case-law of the Court of Justice according to which an act does not lose its character as a regulation simply because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to whom it applies at any given time as long as there is no doubt that it is applicable as the result of an objective situation of law or fact which it specifies and which is in harmony with its ultimate objective (see *Zuckerfabrik Watenstedt* v *Council*).

32 It adds that there must also be a causal link between the institution's knowledge of the applicant's situation and the measure adopted (see the Opinions of Advocate General Van Gerven in Case C-213/91 *Abertal* v *Commission* [1993] ECR I-3177 and Case C-264/91 *Abertal* v *Council* [1993] ECR I-3265).

33 In this context, it also refers to the fact that in *Abertal* v *Commission* and *Abertal* v *Council and Commission*, the order in *Arnaud and Others* v *Council* and the orders of 21 June 1993 in the cases concerning bananas (see the order in Case C-257/93 *Van Parijs and Others* v *Council and Commission* [1993] ECR I-3335), the Court of Justice declared the applications inadmissible after finding that the contested provisions applied to situations which had been determined objectively and had legal effects as regards categories of persons viewed in a general and abstract manner, even though the applicants argued that they constituted a closed group of traders. The Commission stresses that the applicant has not adduced the slightest evidence capable of proving that its situation was bound to have been taken into consideration at the time when the contested measure was adopted or that there is a causal link between the applicant's individual situation and the said measure.

34 Lastly, the Commission submits that, in any event, the applicant has not adduced the slightest evidence, even less proved, that it is in a specific situation subject to particular protection which the contested measure impaired or that its economic activity is seriously disturbed by the said measure.

Findings of the Court

35 As the Court of Justice and the Court of First Instance have consistently held, the fourth paragraph of Article 173 of the Treaty gives individuals the right to challenge any decision which, albeit in the form of a regulation, is of direct and individual concern to them. The particular objective of that provision is to prevent the Community institutions from being able, merely by choosing the form of a regulation, to preclude an individual from bringing an action against a decision which concerns him directly and individually and thus to make it clear that the nature of a measure cannot be changed by the form chosen (see Joined Cases 789/79 and 790/79 *Calpak and Società Emiliana Lavorazione Frutta* v *Commission* [1980] ECR 1949 and the order in Case T-476/93 *FRSEA and FNSEA* v *Council* [1993] ECR II-1187).

36 The test for distinguishing between a regulation and a decision is whether or not the measure in question has general application, and it is applied by assessing the nature of the contested decision and in particular the legal effects which it is intended to produce or actually produces (see Case 26/86 *Deutz and Geldermann* v *Council* [1987] ECR 941, paragraph 7, and the orders in Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 28, and Case C-87/95 P *CNPAAP* v *Council* [1996] ECR I-2003, paragraph 33).

37 Nevertheless, it is possible that a provision which, as a result of its nature and scope, is general in character may be of individual concern to a natural or legal person where that person is affected by reason of attributes peculiar to him or by reason of factual circumstances differentiating him from all other persons and, as a result, distinguishing him individually in like manner to the addressee of a decision (see, for example, *Plaumann* v *Commission*, at p. 107, and *Codorniu* v *Council*, paragraphs 19 and 20, and the order in *Asocarne* v *Council*, paragraph 43).

38 In this case the contested regulation has no feature enabling it to be classed as a decision taken in the form of a regulation. It is drafted in general, abstract terms and applicable in all the Member States, without any account being taken of the

situation of individual producers. Its aim is to administer the whole Community potato-starch producing industry, as illustrated by the fact that the measures adopted were provided for by Regulation No 1543/93, which provides that in the event that the production of the starch industry as a whole should exceed 1.5 million tonnes, the Council is to decide on what measures to take (see paragraphs 1 to 4 of this judgment).

39 It follows that the contested regulation applies to situations which have been determined objectively and has legal effects as regards a category of persons viewed in a general and abstract manner.

40 The Court holds that this conclusion is unaffected by the fact that the system introduced by the contested regulation involves special treatment for Germany, since that special treatment forms in fact part of the general objective of the regulation and is therefore not connected with the inherent particularities of the persons affected by the difference in treatment.

41 As to the argument that the applicant is 'individually concerned' by the contested regulation because it applies to a limited number of ascertained traders whose individual situation influenced the content of the regulation, the Court holds that the mere fact that a trader forms part of a closed group of traders, to which no individual could be added at the time when the regulation was adopted, is not in itself sufficient for the trader in question to have to be regarded as individually concerned (see Case T-489/93 *Unifruit Hellas* v *Commission* [1994] ECR II-1201, paragraph 25, and Case T-482/93 *Weber* v *Commission* [1996] ECR II-609, paragraphs 63, 64 and 65).

42 Indeed, the Court of Justice and the Court of First Instance have consistently held that an act does not lose its general scope and hence its legislative nature simply because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to whom it applies at any given time as long as there is no doubt that it is applicable as the result of an objective situation of law or fact which it specifies and which is in harmony with its ultimate

objective (see, for example, *Zuckerfabrik Watenstedt* v *Council*, at p. 415; the order in Case T-183/94 *Cantina Cooperativa fra Produttori Vitivinicoli di Torre di Mosto and Others* v *Commission* [1995] ECR II-1941, paragraph 48, and the judgment in *Weber* v *Commission*, paragraph 64).

43 In this case, the applicant is indeed affected by the provisions in question by virtue of a situation objectively determined by the contested regulation which is in harmony with its ultimate objective. The fact that the number of traders concerned is limited is due to the very nature of the system established by the regulation, that is to say the grant of Community aid, through the Member States, to starch manufacturers which had benefited from previous Community measures. In this connection, it should also be noted, as the Council observed at the hearing, that such a situation is not exceptional in the context of the common agricultural policy.

44 It follows from the foregoing that the applicant is in an identical situation to any other starch undertaking which produced a quantity of starch in the 1990 to 1993 marketing years for which a premium was received. Accordingly, no particular attribute or factual circumstances differentiate the applicant from other traders in the same situation. It follows that the applicant is not individually concerned by the contested regulation.

45 Moreover, the Court notes that, since the applicant has challenged the French orders allocating it its individual quota pursuant to Regulation No 1868/94 in the competent national court (see paragraph 14 of this judgment), that court may, if appropriate, refer a question to the Court of Justice for a preliminary ruling pursuant to indent (b) of the first paragraph of Article 177 of the Treaty, under which the Court of Justice has jurisdiction to rule on the validity and interpretation of acts of the institutions of the Community.

46 Consequently, the application must be dismissed as inadmissible and there is no need to consider whether the applicant is directly concerned by the regulation in question.

Costs

47 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 applicant has been unsuccessful and the Council applied for costs, the applicant must be ordered to pay, in addition to its own costs, the costs incurred by the Council. Pursuant to Article 87(4) of the Rules of Procedure, the Commission, as intervener, shall bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicant to pay its own costs and those of the Council;

3. Orders the Commission to bear its own costs.

Lenaerts Lindh Cooke

Delivered in open court in Luxembourg on 7 November 1996.

H. Jung K. Lenaerts

Registrar President