ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

26 March 2003(1)

(Proceedings for interim relief - Overseas countries and territories - Request for establishment of a partnership working party - Alleged decision to refuse - Partial inadmissibility of heads of relief sought - Admissibility of main action - Urgency - Absence)

In Case T-85/03 R,

Government of the Cayman Islands, represented by E. Sharpston, QC,

applicant,

v

Commission of the European Communities, represented by R. Lyal and B. Eggers of its Legal Service, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for interim measures in respect of the ongoing legislative consideration of the Commission's 'Proposal for a Council directive to ensure effective taxation of savings income in the form of interest payments within the Community' (COM/2001/0400 final, OJ 2001 C 270 E, p. 259), submitted on 18 July 2001 and based on Article 94 EC,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES

makes the following

Order

Background

1. By letter of 21 October 2002 from the Leader of Government Business of the Cayman Islands Government ('the Leader of Government Business'), the applicant requested the urgent establishment by the Commission of a Partnership Working Party ('PWP') pursuant to Article 7 of the Council Decision of 27 November 2001 on the association of the overseas countries and territories with the European Community ('Overseas Association Decision') (OJ 2001 L 314, p. 1). The purpose of the request is essentially to discuss the implications for the Cayman Islands of the eventual adoption by the Council of the Commission's 'Proposal for a Council directive to ensure effective taxation of savings income in the form of interest payments within the Community', submitted on 18 July 2001 and based on Article 94 EC (COM/2001/0400 final, OJ 2001 C 270 E, p. 259, hereinafter 'the proposed directive').

2.

The Commission replied initially by letter of 28 November 2002, wherein further details of the grounds relied upon for the request were sought.

3.

In a second letter of 3 December 2002, the Leader of Government Business provided additional details regarding the concerns underlying the applicant's request and insisted on the need and justification for the urgent convening of a PWP.

4.

On 24 January 2003, the applicant's representative in London ('applicant's representative') attended a meeting in Brussels of the Overseas Countries and Territories ('OCTs') Association.

5.

On 31 January 2003, the applicant's representative asked by e-mail the official responsible in Directorate-General ('DG') Development for handling the applicant's request to amend item 5.1 of the draft minutes of the meeting of 24 January 2003 which she had received so as to reflect what, in her view, constituted the response to her enquiry, made of the same official at that meeting, as to the state of progress made by the Commission in processing the applicant's request.

6.

Revised minutes were sent to the applicant's representative by e-mail on 20 February 2003. Item 5.1 thereof reads in relevant part:

'The representative of the Cayman Islands recalled her Government's request for a partnership meeting.

The Commission's representative indicated that, ECOFIN having recently reached an agreement on a draft directive on taxation of savings, it is anticipated that a reply will be sent to the Cayman Islands shortly.'

7.

The Leader of Government Business wrote, also on 20 February 2003, by fax to the Commission noting that the applicant had been 'advised verbally' that the Commission had 'made a decision not to respond to [its] request' and that it therefore appeared that an internal Commission decision had already been taken in respect of that request. He called on the Commission, within seven days, to give the applicant written notification, with reasons, of its decision in respect of that request.

8.

On 3 March 2003, the Commission official responsible for handling the applicant's request, referring to the letter of 20 February 2003 of the Leader of Government Business, wrote by e-mail to the applicant's representative to clarify what he described as an apparent 'misunderstanding' regarding what occurred during their respective conversation at the OCTs Association meeting on 24 January 2003. He states that, on that occasion, he indicated at merely that a reply would be sent by the Commission to the applicant in respect of its request 'as soon as possible'.

9.

In an affidavit of 5 March 2003 annexed to the present application, the applicant's representative avers that the Commission official responsible for handling the applicant's request informed her, upon her enquiry as to the state of progress in processing the request, that a decision had been taken by the Commission not to respond thereto until after the Council had adopted a decision in respect of the

proposed directive. As regards the e-mail of 5 March 2003, the same representative avers to being 'not entirely clear as to its intended meaning'.

Legal and factual context

10. The Cayman Islands are listed in Annex II to the EC Treaty for the purposes of Part Four (Articles 182 EC to 188 EC) thereof on the 'Association of the OverseasCountries and Territories'. There is no dispute that the islands are a British overseas territory for whose foreign affairs the United Kingdom is responsible.

11. Article 187 EC requires the Council, 'on the basis of the experience acquired under the association of countries and territories with the Community and of the principles set out in the Treaty, [to] lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the Community'.

12. The second recital in the preamble to the Overseas Association Decision, which is based on Article 187 EC, recalls the objectives of the association arrangements between the OCTs and the Community, set out in Declaration No 36 to the final act adopted by the Amsterdam Intergovernmental Conference, as being, *inter alia*:

'- promoting the economic and social development of the OCTs more effectively;

- developing economic relations between the OCTs and the European Union;

- taking greater account of the diversity and specific characteristics of the individual OCTs, including aspects relating to freedom of establishment

[...]'

13. Under Article 1(1), first subparagraph, of the Overseas Association Decision, the purpose of the association is stated to be the establishment of 'close economic relations between [the OCTs] and the Community as a whole'. Article 1(2) provides that '[t]he association relates to the OCTs listed in Annex 1 A', among whom are enumerated the 'Cayman Islands'.

14. Article 7, entitled 'Dialogue and Partnership', of the Decision provides:

'1. With the aim of enabling the OCT to take a full part in the implementation of the OCT-EC association, with due regard for the way that the institutions of the Member States concerned are organised, the association shall use a consultation procedure based on the provisions referred to below. It shall deal with any issue arising in relations between the OCTs and the Community.

2. A broad-based dialogue should enable the Community, all the OCTs and the Member States to which they are linked to consult each other on the principles, detailed procedures and results of the association. An OCT-EU forum for dialogue, hereinafter referred to as the 'OCT Forum', shall meet annually to bring together OCT authorities, representatives of the Member States and the Commission.

3. There shall be separate partnerships between the Commission, the Member State to which the OCT is linked and each OCT, represented by its authorities, to enable the objectives and principles of this Decision, in particular those referred to in Articles 4 and 19 to be put into practice. This trilateral consultation shall hereinafter be referred to as the 'partnership'.

Partnership working parties, acting in an advisory capacity, shall be set up for each OCT. Their membership shall comprise the abovementioned three partners. These working parties may be convened at the request of the Commission, of a Member State or of an OCT. At the request of one of the partners, several partnership working parties may hold joint meetings to consider subjects of common interest or the regional aspects of the association.

4. This consultation shall be conducted in full compliance with the respective institutional, legal and financial powers of each of the three partners. The Commission shall chair the working parties [...] and provide their secretariat [...]

5. The opinions of the working parties [...] shall, where appropriate, be the subject of Commission decisions, within the limits of its powers, or of proposals from the Commission to the Council with a view to implementation of new elements of the OCT-EC association or its amendment on the basis of Article 187 of the Treaty.'

15.

According to the terms of so-called 'Tax carve-out clause' contained in Article 55:

'1. [...] the most-favoured-nation treatment granted in accordance with the provisions of this Decision shall not apply to tax advantages which the Member States or OCT authorities are providing or may provide in the future on the basis of agreements to avoid double taxation or other tax arrangements, or domestic fiscal legislation in force.

2. Nothing in this Decision may be construed to prevent the adoption or enforcement of any measure aimed at preventing the avoidance or fraud of taxes pursuant to the tax provisions of agreements to avoid double taxation or other tax arrangements, or domestic fiscal legislation in force.

3. Nothing in this Decision shall be construed to prevent the respective competent authorities from distinguishing, in the application of the relevant provisions of their fiscal legislation, between taxpayers who are not in the same situation, in particular with regard to their place of residence, or with regard to the place where their capital is invested.'

16.

The Commission submitted its second proposal (its earlier proposal, submitted in 1989, having been withdrawn) for a directive regarding a common system ofwithholding tax on interest income on 20 May 1998, (OJ 1998 C 212, p. 13, the '1998 proposal'). This proposal envisaged what was called a 'co-existence' model, whereby Member States could choose between the transmission of information to the recipient's Member State of residence or the imposition of a withholding tax. It also contained a draft decision of the representatives of the Governments of the Member States meeting within the Council according to Article 2 of which:

'Member States which have dependent or associated territories or which have special responsibilities or taxation prerogatives in respect of other territories are committed to taking appropriate measures, where appropriate within the framework of their constitutional arrangements, to ensure that provisions

concerning interest payments to Community residents, equivalent to those contained in the Directive once adopted, may be applied in those territories'.

17.

At the European Council in Santa Maria da Feira (Portugal) on 19-20 June 2000, political agreement was reached on a system based solely on an exchange of information, coupled with a transitional period during which certain Member States would continue to be allowed to apply a withholding tax. It was also agreed that, once agreement could be reached on the substantial content of the directive, but before its adoption, negotiations would be undertaken with certain non-member countries, notably Switzerland, to promote the adoption of equivalent measures by those countries regarding the savings income of Community residents. At the same time the Member States committed themselves to promoting the adoption of the same measures in all relevant dependent or associated territories.

18.

Substantial agreement on the content of the 1998 proposal was reached at the Economic and Financial Affairs Council (hereinafter 'ECOFIN') meeting of 26-27 November 2000.

19.

Pursuant to the sole article of Decision 2001/823/EC of the representatives of the Governments of the Member States meeting within the Council of 27 November 2001 concerning the taxation of savings in Caribbean dependent or associated territories (OJ 201 L 314, p. 78):

'The Member States concerned commit themselves to promote the adoption in all the Caribbean dependent or associated territories referred to in Annex I A of the [Overseas Association Decision] of the same measures that the Member States adopt and implement under any Community rules to be adopted on the taxation of savings'.

20.

The Commission, considering that the consensus at which the Council had arrived no longer reflected its 1998 proposal, withdrew that proposal and submitted the proposed directive on 18 July 2001.

21.

Article 7 of the proposed directive provides that:

'This Directive shall apply to interest paid by a paying agent established within the territory to which the Treaty applies by virtue of Article 299 thereof'

22.

In its legislative resolution of 14 March 2002 in respect of the proposal the European Parliament called for the amendment of the proposed directive, including the insertion of the following additional paragraph into Article 7:

'Member States shall ensure that this Directive also applies to interest paid by paying agents established in their associated territories or depend[e]nt territories'.

The justification for this proposed amendment was stated as being 'to ensure that the Member States concerned continuously ensure that their dependent territories respect the provisions of the Directive'.

23.

The Commission has declined to submit a modified proposal containing the above or other of the amendments proposed by the European Parliament to the Council.

24.

At the ECOFIN meeting of 3 December 2002, the British Chancellor of the Exchequer gave an assurance that the Caribbean dependent and associated territories of the United Kingdom would apply the same measures as those set out in the proposed directive.

25.

Political agreement was reached, *inter alia*, on the proposed directive at the ECOFIN meeting of 21 January 2003. It called for the formal adoption of the directive before the meeting of the European Council scheduled for 20-21 March 2003.

26.

Although the adoption of the proposed directive was (along with two other fiscal proposals forming part of what is now for convenience described as 'the Tax Package') on the agenda for the ECOFIN meeting of 7 March 2003, it was agreed at that meeting to defer further discussion of the Tax Package to the next ECOFIN meeting scheduled for 19 March 2003.

27.

On 19 March 2003 no final agreement was reached by the ECOFIN. However, according to the conclusions of the presidency regarding the said 2497th Council meeting, 'all delegations but one [...] reaffirmed their commitment' formally to adopt the proposed directive 'as soon as possible' (Council Document 7431/03 of 20 March 2003 (Press 79)).

Procedure

28.

By application lodged on 5 March 2003 at the registry of the Court of First Instance, the applicant brought an action for annulment in respect of the alleged decision of the Commission not to respond to its earlier urgent request of 21 October 2002 to establish a PWP pursuant to Article 7 of the Overseas Association Decision.

29.

By separate application, lodged the same day at the registry, the applicant brought an application before the President of the Court of First Instance, pursuant to Articles 242 EC and 243 EC, seeking, by way of interlocutory relief until judgment in the main action, the following interim measures:

'(a) an order prohibiting the Commission from presenting the proposed directive to the ECOFIN meeting on Friday 7 March 2003 and/or the meeting of the Council on 21 March 2003;

(b) an order further prohibiting the Commission from presenting the proposed directive to a subsequent ECOFIN meeting and/or a subsequent Council meeting, until such time as the Court of First Instance shall have heard and determined the Cayman Islands Government's application for the annulment of the Commission's decision not to respond to the Cayman Islands Government's request for a PWP, or until such other time as the Court of First Instance shall deem just.'

30.

On 12 March 2003 the Commission lodged its written observations in respect of the application for

interim measures.

31. In the light of those observations, the applicant lodged, on 15 March 2003, an application to amend, by substitution, the orders sought in the prayer for relief of its application for interim measures. The amended prayer seeks:

'(a) an order requiring the Commission to exercise its powers formally to withdraw its proposal for the proposed directive, alternatively not to present that proposal, so that there is no longer a Commission proposal before the ECOFIN meeting on 19 March 2003 and/or before the Council on 21 March 2003 which can be adopted and pass into law;

(b) further or alternatively an order requiring the Commission to withdraw its proposal for the proposed directive, so that there is no longer a Commission proposal before the ECOFIN meeting on 19 March 2003 and/or before the Council on 21 March 2003 which can be adopted and pass into law;

(c) further or alternatively (should the Court consider that it has the necessary power to do so) an order requiring ECOFIN and/or the Council not to consider the proposed directive further until after the [a]pplicant's concerns have been addressed in a PWP;

(d) an order requiring the Commission forthwith to establish a PWP, as requested by the applicant in its letter of 21 October 2002, in conformity with Article 7(3), second paragraph of the Overseas Association Decision;

(e) an order requiring the Commission thereafter to convene a meeting of that PWP, at a date convenient to the three partners, to discuss the concerns raised by the [A]pplicant in its letter of 21 October 2002;

(f) such other or supplementary order as may appear to the Court just and expedient in all the circumstances;

(g) an order granting the [A]pplicant its costs of these proceedings for interim relief, alternatively, if the application for interim relief is dismissed, an order that each party bear its own costs.'

32. The parties submitted oral observations at the hearing before the President of the Court of First Instance on 17 March 2003.

Law

33. Under the combined provisions of Articles 242 EC and 243 EC, on the one hand, and Article 225(1) EC on the other, the Court of First Instance may, if it considers that the circumstances so require, order suspension of the operation of the contested measure or prescribe the necessary interim measures.

34. Under the first subparagraph of Article 104(1) of the Rules of Procedure of the Court of First Instance ('the Rules'), an application to suspend the operation of any measure is admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. That rule is no mere formality; rather, it means that the main action, on which the application for interim relief

depends, must be admissible. To rule, at the stage of the proceedings for interim relief, on the admissibility of the main action, when its admissibility is not, prima facie, wholly excluded, would be tantamount to prejudging the Court of First Instance's decision in respect of that action (orders in Case T-342/00 R *Petrolessence and SG2R* v *Commission* [2001] ECR II-67, paragraph 17, and in Joined Cases T-195/01 R and T-207/01 R *Government of Gibraltar* v *Commission* [2001] ECR II-3915, paragraph 47).

35.

Article 104(2) of the Rules 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 (*fumus boni juris*) for the interim measures applied for. These conditions are cumulative, so that an application to suspend the operation of any measure must be dismissed if one of them is lacking (orders in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, at paragraph 30, and in *Government of Gibraltar* v *Commission*, cited above, paragraph 48). Where appropriate, the judge hearing the application must also balance the interests involved (orders in Case C-445/00 R *Austria* v *Commission* [2001] ECR I-1461, paragraph 73, and in *Government of Gibraltar* v *Commission*, at paragraph 48).

36.

Furthermore, the measure sought must, in accordance with Article 107(3) and (4) of the Rules, be provisional inasmuch as it 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 (orders in Case C-149/95 P(R) *Commission* v *Atlantic Container Line* [1995] ECR I-2165, paragraph 22, and in Case C-7/00 P(R) *Goldstein* v *Commission*, not published in the ECR, paragraph 24).

Admissibility

Arguments of the parties

37.

The applicant submits that the main action is, at least arguably, admissible. It contends that the Commission has adopted a decision not to respond to its request for a PWP until after the Council has adopted a directive based on the proposed directive. Regardless of whether this alleged decision is addressed to the Cayman Islands Government, it is clearly, the applicant submits, of direct and individual concern to it as the democratically-elected representative of the islands. It produces legal effects vis-à-vis the applicant essentially because it denies the latter's right under the Overseas Association Decision to express its views regarding the proposed directive within the context of a PWP. The alleged decision thus constitutes a reviewable act (Case 294/83 *Les Verts* v *European Parliament* [1986] ECR 1339).

38.

The applicant also submits that the grant of interim measures sought would be provisional since it would merely preserve the status quo until judgment in the main action. If no interlocutory relief were granted, that action would be rendered ineffective as a means of obtaining a proper forum within which the applicant's legitimate concerns as to the lawfulness and likely effects of the proposed directive could be discussed and, if possible, addressed prior to its adoption.

39.

As regards its application to amend by substitution the orders sought in the prayer of its application

for interim relief, the applicant contends that its request is exceptionally justified in the special circumstances of the present case. Until the Commission's written observations were received by the applicant, it had no knowledge of the reasons underlying that institution's decision not to grant the request for a PWP and, in particular, of its view as to the finished nature of its role in the legislative process. During the hearing, the applicant, in response to a question put to it by the President, decided to withdraw its requested amendment in so far as it purported to seek relief in respect of the Council.

40.

The Commission submits, firstly, that the present application is devoid of object. Since the proposed directive is based upon Article 94 EC, the Commission, uponsubmitting that proposal on 18 July 2001, completed, at least formally, its direct role in the legislative process. The proposed directive now being before the Council, it is solely the latter which can decide whether, how and when to proceed.

41.

The Commission also contends that the main action is manifestly inadmissible for want of an attackable act. The evidence submitted by the applicant shows that no Commission decision on the request for a PWP has been taken. At most it shows that the request is still being examined. In this respect, the Commission, although denying that Article 7 of the Overseas Association Decision creates a right for an OCT to demand that a PWP be convened at a specific time, submits that the more appropriate remedy for the applicant to invoke would be Article 232 EC. In this respect, it refers to the relevant case-law according to which a letter from an institution called upon to act under that provision and 'stating that the questions raised are being examined does not in fact amount to the defining of a position such as to release it from its duty to act' (Case T-95/96 *Gestevisión Teleinco* v *Commission* [1998] ECR II-3407, paragraph 88).

42.

Even if a decision existed, it would not, according to the Commission, constitute an act adversely affecting the applicant. It would merely constitute an interim step in a process that might conceivably in the future affect the applicant's interests. This is essentially because the present application and, indeed, the main case, as the Commission emphasised at the hearing, are based on the misconception that the proposed directive would, if adopted, apply to the Cayman Islands. In reality, it is only the subsequent adoption of an autonomous decision by the United Kingdom to apply the same measures as those contained in such a directive to those islands that would adversely affect the applicant's legal position. No such effects can flow from the political agreement by the Member States, whose existence the Commission does not seek to deny, that the United Kingdom, among others, should seek to apply such measures to its overseas dependencies.

Findings of the President of the Court of First Instance

43.

The Commission's objections concern the admissibility of the present interim-measures application and of the main action to which it relates.

44.

As regards the former, it is clear, in so far as the applicant seeks interim measures regarding the Commission's participation in the ECOFIN meetings of 7 and 21 March 2003 (see head (a) cited in paragraph 29 above), that the present application, which it is appropriate to recall was lodged on 5 March 2003, has become devoid of purpose by reason of the passage of time.

45.

To the extent that the orders sought in the prayer for relief submitted with that application also seek to restrain the Commission from 'presenting the proposed directive' to the Council at subsequent ECOFIN meetings (see head (b) also cited in paragraph 29 above), that part of the application is equally without object to the extent that by 'presenting' the applicant envisages the submission of a draft to theCouncil. As the Commission rightly points out, the Commission completed its formal role in the legislative process prescribed under Article 94 EC upon submitting the proposed directive to the Council on 18 July 2001. Under that provision, the Council acts by unanimity on a proposal from the Commission after consulting the European Parliament and the Economic and Social Committee, i.e. pursuant to a procedure that is commonly referred to as the consultation procedure. Consequently, having submitted its proposal, short of withdrawing that proposal, either definitively or with a view to submitting a new modified proposal pursuant to Article 250(2) EC, the only role for the Commission in the legislative process under Article 94 EC is to take part in the discussions of the Council's working parties and in the relevant Council meetings with a view to defending and explaining its proposal. Such a purely political input from the Commission cannot be equated with the formal legal step of submitting a legislative proposal to the Council under Article 94 EC. It is manifestly beyond the scope of the competence of the Community judicature to interfere with the exercise by the Commission of such political prerogatives within that legislative procedure. The interim relief sought cannot therefore constitute the proper object of an interlocutory order.

46.

In any event, assuming, first, the application may be read only as seeking merely to restrain any further political input from the Commission until judgment in the main action and, second, that the judge hearing the present application had, at least in principle, jurisdiction to issue an order of the type sought, the present application would be inadmissible for want of any direct or obvious link between the restraint of any further such input and the object of the main action, namely the annulment of the alleged decision to refuse the applicant's urgent request to convene a PWP.

47.

It follows that the interim measures initially sought by the applicant are inadmissible, regardless of whether the main action to which they purportedly relate is itself admissible.

48.

As regards the amended prayer for relief submitted on 15 March 2003, the applicant justifies its application on the basis that it was only the Commission's written observations lodged on 13 March 2003 which enabled it obtain a detailed knowledge of the background to the progress so far of the proposed directive, to the way in which the Commission has approached its request for a PWP, to the current status of the proposed directive, to the extent to which the Commission considers that it has completed its role in the legislative process and to the current relationship between ECOFIN and other Council meetings. In its view, the knowledge gleaned from the Commission's observations in respect of these matters justifies the application, by analogy, of Article 48(2) of the Rules to its application to amend its prayer for relief.

49.

The Commission's agent objected at the hearing on 17 March 2003 to the admissibility of the application. None of the points raised in the Commission's observations in respect of the applicant's application for interim measures relatedto matters of which the applicant could not, at most by making reasonable efforts, have been unaware prior to lodging of its application for interim measures.

50. The Commission's objection is well founded in so far as it relates to the lack of novelty of the background to the progress so far of the proposed directive, of the account of the current status of the proposed directive and of the explanation of the relationship between ECOFIN and Council meetings provided in its written observations. These are matters of public record and the Commission's written observations cannot be regarded as containing any significant revelations in respect of these matters.

51. Conversely, the applicant's request to amend its prayer for relief appears more justified inasmuch as it is based on the way in which the Commission had approached the request for a PWP prior to lodging the aforesaid observations, and in particular on the adoption for the first time in those observations of the position that the Commission considers itself to have completed its role in the legislative process. Although the Commission correctly insists on the finished state of its formal role in the legislative procedure applicable under Article 94 EC since the submission of its proposal, it still retains the legal power to withdraw the proposed directive even though its written observations would appear to indicate that the exercise of this prerogative has been excluded.

52. It follows that, as not all of the arguments advanced by the applicant to justify the proposed amendments of its prayer for relief are unconvincing, the application to amend the interim measures sought should be viewed as partially justified, with the result that the application, as amended, may not be regarded as wholly inadmissible. It is therefore necessary to examine which of the orders sought fall to be treated as potentially admissible.

53. Heads (a) and (b) of the new prayer for relief (cited in paragraph 31 above) are, for the reason indicated in paragraph 44 above, inadmissible. In so far as the new prayer purports at head (c) to seek orders in respect of the Council, which is not a party to these proceedings, it was, quite appropriately, withdrawn by the applicant at the hearing (see paragraph 39 above). As regards heads (d) and (e), it is clear that the measures sought would not be provisional, inasmuch as they would, in effect, prejudge the central legal issue in the main action, namely the question whether the Commission is obliged to accede to the applicant's request for a PWP.

54. On the other hand, independently of whether the recalcitrance of the Commission to answer, at least in writing, the applicant's urgent request over a period of nearly five months caused the latter to fail to appreciate the possibility retained by the Commission of withdrawing the proposed directive, no convincing objection may be made in respect of the admissibility of head (f).

55. In order to consider the admissibility of this head, regard must be had to the admissibility of the main action.

56. In this respect, the applicant's claim, as clarified in its oral observations, is that it is prima facie reasonable to interpret Article 7 of the Overseas Association Decision, especially having regard to the Article 1 thereof and recitals 1 and 7 in the preamble thereto, as imposing an obligation to establish a PWP once a matter potentially affecting the common interest of the association or of an OCT arises. Referring to Article 7(3), second subparagraph, third sentence, of that Decision, the Commission

claims, however, that no right to have a PWP is granted because a certain discretion is envisaged for it through the use of the terms 'may be established'. In response, the applicant asserted at the hearing that the word 'may' refers to the power actually to convene a PWP and should be read as a mere enabling word; that is to say as permitting the Commission, a Member State or an OCT to convene such a partnership forum, but that once such a request is made by one of those actors the convening of a PWP is obligatory.

57.

This latter interpretation of the Overseas Association Decision would not appear to be wholly implausible. Article 1 of the Decision sets out unequivocally the objective of the 'OCT-EC Association' as being 'to promote the economic and social development of the OCTs and to establish close economic relations between them and the Community as a whole'. Article 7(1) refers in mandatory terms, so as to enable the OCTs fully to participate in the implementation of the association, to the use of certain consultation procedures, including the tripartite PWP forum. As regards the latter, both the first and second subparagraphs of Article 7(3) employ the word 'shall' in respect of the PWPs whose establishment 'for each OCT' is envisaged. Consequently, it cannot be excluded that the Court of First Instance may conclude in the main action that the proper overall interpretation of Article 7(3) is that, once an OCT, in requesting the establishment of a PWP, identifies a relevant and appropriate subject-matter for discussion within the framework of such a forum, the convening of such a forum by the Commission, which is charged under Article 7(4) with chairing, *inter alia*, PWPs and providing their secretariat, is mandatory.

58.

Furthermore, the mere fact that the purpose of the request at issue in the main action in this case is to establish a PWP to discuss the implications for the Cayman Islands of the eventual adoption by the Council of a fiscal measure, namely the proposed directive, would not in itself, as result of the so-called 'tax carve-out clause' in Article 55 of the Overseas Association Decision, appear wholly to preclude the applicability of Article 7 thereof. In this respect, the applicant advanced a plausible argument at the hearing that, adopting a harmonious interpretation of both provisions, the non-hindrance of the enforcement of tax measures, which would appear to be the principal objective of Article 55, could not be called into question by the establishment of a PWP pursuant to Article 7 to discuss such tax measures prior to their adoption, where their adoption and subsequent implementation could affect the economy of an OCT.

59.

It cannot therefore be excluded for the purposes of the present application that a Commission decision to refuse to establish a PWP may constitute an act affecting the legal rights of the applicant as the requesting party.

60.

It follows that the essential issue as regards the admissibility of the main action is whether the Commission has actually adopted a decision to refuse to establish a PWP. On this matter, there exists a clear conflict of evidence between the applicant's understanding of the nature of the oral communication made to its representative at the meeting in Brussels on 24 January 2003 and that of the Commission official concerned. Although the case-law does not exclude the possibility of oral decisions (see the judgments in Joined Cases 316/82 and 40/83 *Kohler* v *Court of Auditors* [1984] ECR 641, paragraph 9, Case 58/88 *Olbrechts* v *Commission*, paragraph 10, Case T-113/95 *Mancini* v *Commission*, [1996] ECR-SC p. I-A-185 and p. II-543, paragraph 23; and the order in Case T-52/01 R

Schaefer v *Commission*, paragraph 39), suffice it to say that the judge hearing the present application entertains very serious doubts as to whether any decision legally affecting the rights of the applicant has so far been made.

61. Assuming that the applicant's understanding of the relevant communication is correct and that an oral communication by a Commission official stating that the Commission would not reply to a request such as that at issue in the present case (which had been addressed to the Commission itself via the member responsible for DG Development) until after the proposed directive was adopted by the Council may be regarded as constituting a decision of the Commission to that effect (even though the applicant has been unable to adduce evidence that the official concerned had any authority to make such a communication), such a decision would merely be preparatory in nature. In effect, it would constitute a decision to postpone taking a decision. In the absence of any binding legal obligation for the Commission to take a final decision regarding the request, either by or around 24 January 2003, when the disputed oral communication occurred, or within the seven-day deadline subsequently given to the Commission in the letter of 20 February 2003 from the applicant's Leader of Government Business, the decision at issue clearly could not be viewed as one that would affect the applicant's legal interests.

62. The main action would therefore appear to be manifestly inadmissible. In effect, that action was brought pursuant to the fourth subparagraph of Article 230 EC when the appropriate remedy, in so far as the applicant alleges that the Commission is obliged under Article 7(3) of the Overseas Association Decision to respond (and in the particular circumstances of this case to so expeditiously) to its request, would have been, as the Commission aptly points out, to invoke the procedure applicable to actions for failure to act under the third subparagraph of Article 232 EC.

63. That part of the present application which is not inadmissible for the reasons set out in paragraphs 44 to 53 above) falls, consequently, to be considered as inadmissible because of the manifest inadmissibility of the main action.

Urgency and balance of interests

64. It is, however, appropriate in the special circumstances of the present case, particularly the obvious, significant political consequences for the applicant of the adoption of the proposed directive prior to judgment being given in the main action, or indeed in any future action for failure to act that might be brought against the Commission, briefly to consider the merits of the present application for interim measures in so far as it seeks to obtain an order requiring the Commission provisionally to withdraw the proposed directive.

65. Even if the disputed oral communication made at the meeting of 24 January 2003 could conceivably be construed as constituting a reviewable act of direct and individual concern to applicant for the purposes of the fourth subparagraph of Article 230 EC, the present application would have to be dismissed for lack of urgency without its being necessary to consider whether a prima facie case as to its illegality has been made out.

66. As the Commission aptly observes the proposed directive will not apply to the Cayman Islands. It is beyond dispute that it has not submitted a modified text to the Council containing the amendment proposed by the European Parliament to which the applicant refers (see paragraph 22 above). Indeed, as the applicant rightly points out (the Commission being in agreement with it on this point), the Community legislature has no competence to adopt an act on the basis of Article 94 EC whose geographical scope extends beyond the territory of the Community as defined in Article 299(1) and (2) EC. Moreover, there would appear, at least provisionally, to be no other basis in Community law upon which, even if the legal basis of the proposed directive were amended in Council by unanimity in accordance with Article 250(1) EC, the territorial scope of any directive adopted could be extended directly to OCTs such as the Cayman Islands.

67. Consequently, although there is no doubt in this case as to the existence of a political agreement at intergovernmental level pursuant to which, in the case of the Cayman Islands, the United Kingdom has undertaken, if the proposed directive is adopted, to take the necessary domestic (municipal) measures to ensure that, once the directive is implemented in the United Kingdom, the same measures will be applied to the territory of the Cayman Islands, this consequence, if it comes to pass, will not flow legally from the directive itself. The applicant accepted at the hearing, in this respect, that the British Government would, in all likelihood, seek to adopt an Order in Council extending the national implementing measures in question to the islands. Whether any such measures would be valid would appear to depend entirely on the constitutional arrangements applicable in fiscal matters between the United Kingdom and the Cayman Islands. This is matter which falls entirely outside the competence not only of the Commission but also of the Community judicature. If and when any such measures are adopted, it will be for the appropriate British courts to consider whether they are intra or ultra vires the powers reserved to the British Crown under the aforesaid constitutional arrangements.

68. It follows, as a matter of Community law, that the intergovernmental agreement reflected in the sole article of Decision 2001/823/EC (cited in paragraph 19 above), the unequivocal content of which has been confirmed in numerous other documents to which reference has been made by the applicant in support of its application for interim relief, is unenforceable. Consequently, no infringement proceedings under Articles 226 EC or 227 EC could, the Commission rightly accepted at the hearing, be brought before the Court of Justice against the United Kingdom if it decided, following the adoption of the proposed directive, not to respect that agreement but merely to implement that directive into domestic United Kingdom law.

69. Consequently, any damage which the economy of the Cayman Islands may suffer as a result of the adoption of the proposed directive, such as that referred in annexes 4 and 5 to the present application (estimated as likely to be anything between USD 30 million and USD 70 million per annum), would flow not from the adoption as such of the said directive, which cannot as a matter of Community law apply to the Cayman Islands, but from any domestic (municipal) measures, or the threat of the adoption of such measures, enacted subsequently by the United Kingdom to extend to the Cayman Islands the national measures it adopts to transpose the directive into United Kingdom law.

70. Even if the damage to the economy of the Cayman Islands which might result from financial

institutions present on the islands deciding to move their operations to other locations as a result of the adoption of the directive were, in itself, capable of being regarded as serious and potentially irreparable, no convincing evidence has been adduced to show that any such eventual decisions could be attributed exclusively to the adoption of the directive rather than to the commercial choices, based on risk-limitation assessments, made by such institutions (see, by analogy, the order in *Government of Gibraltar* v *Commission*, cited above, at paragraphs 101 and 105).

71. The condition relating to urgency clearly therefore not being satisfied, it is unnecessary to consider the balancing of interests involved in this case. Suffice it to say that it would seem to favour the Commission since, assuming that the judge hearing an interim-measures application has jurisdiction to require the Commission provisionally to withdraw a legislative proposal, such jurisdiction would fall to be exercised only in the most extreme and pressing of circumstances. This is not the case where, as in this application, no direct legal consequences for the applicant or for the third parties whose interests it seeks to protect will flow from the adoption of the proposal at issue.

72. For all of the above reasons, the present application for interim measures must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application is dismissed;

2. Cost are reserved.

Luxembourg, 26 March 2003.

H. Jung

B. Vesterdorf

Registrar

President

1: Language of the case: English.