ORDER OF THE PRESIDENT OF THE COURT
6 JULY 1984 [1]

Union sidérurgique du Nord et de la l'Est de France (Usinor) v Commission of the European Communities

Case 62/84 R

Application for the adoption of interim measures — Suspension of the operation of a decision imposing a fine — Conditions under which such a suspension is granted — Provision of a guarantee

(ECSC Treaty, Art. 39)

In Case 62/84 R

UNION SIDÉRURGIQUE DU NORD ET DE L'EST DE LA FRANCE (USINOR), a public limited company whose registered office is at La Défense, 9-4, Place de la Pyramide, Puteaux (Hauts-de-Seine), represented by L. Funck-Brentano of the Paris Bar, with an address for service in Luxembourg at the Chambers of M. Neuen-Kauffman of the Luxembourg Bar, 21 Rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, 200 Rue de la Loi, B-1040 Brussels, represented by Frank Benyon, a member of its Legal Department, with an address for service in Luxembourg at the office of Manfred Beschel, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the suspension of the operation of Commission Decision No C(84) 104/1 of 26 January 1984 concerning a fine imposed on the applicant under Article 58 of the ECSC Treaty,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

1 — Language of the Case: French.

ORDER

I — Summary of the facts

By Decision No C(84) 104/1 of 26 January 1984, the Commission of the European Communities imposed a fine of 9 415 015 European Currency Units on Usinor, pursuant to Commission Decision No 1831/81/ECSC of 24 June 1981 (Official Journal 1981, L 180, p. 1), for exceeding in the first quarter of 1982, by 24 443 and 7 570 tonnes respectively, its production quotas for products in Categories Ib and Id, and, by 33 159, 34 538, 6 037 and 10 881 tonnes respectively, the parts of its quotas permitted to be delivered in the common market for Categories Ia, Ib, Ic and Id and, in the second quarter of 1982, for exceeding by 10 819 tonnes its production quota for products in Category Id and, by 5 991, 4 765 and four tonnes respectively, the parts of its production quotas for products in Categories Ic, Id and VI permitted to be delivered in the common market.

An action was brought for a declaration that that decision was void (Case 62/84). By letter of 30 January 1984, the Commission informed the applicant that if it brought an action before the Court of Justice of the European Communities — and in the light of the fact that it had already been penalized for an infringement of Decision No 1831/81/ECSC — the Commission would seek to recover 70% of the principal amount payable. The applicant pointed out in reply that the previous decision referred to by the Commission in support of its demand for immediate payment of the fine was still the subject of proceedings before the Court (Case 78/83) and that, consequently, only in respect of the fine for exceeding delivery quotas for Category Ic, the legality of which was not contested in Case 78/83, could the requirement of an immediate payment of 70% arise. None the less, it offered a guarantee in respect of the balance in the form of a promissory note.

II — Written procedure

Since payment of the fine was about to be enforced, the *applicant* lodged an application at the Court Registry on 8 June 1984 under the second paragraph of Article 39 of the ECSC Treaty and Article 83 (1) of the Rules of Procedure to suspend the operation of the Commission Decision of 26 January 1984 and, in the alternative, for the adoption of any other interim measures which might be required, such as the provision of a guarantee of payment covering the amount payable and any surcharges for delay.

In its application, the applicant contends essentially that as long as an infringement is the subject of proceedings pending before the Court, the Commission is not entitled to take account of it as a ground for finding that an infringement has been repeated and for consequently refusing to accept the provision of a guarantee rather than immediate payment of the fine.

Moreover, the Commission regards any new case of a quota being exceeded as the repetition of an infringement regardless of the category of products in respect of which the excess is recorded, whereas an infringement can be regarded as having been repeated only where a quota is exceeded on a subsequent occasion within the same category of products.

The applicant considers that the measures sought will not prejudge the decision to be given on the substance of the case. Furthermore, the interim measures sought are justified in fact and in law. The Commission's letter constitutes a real threat whose purpose can only have been to dissuade the applicant from bringing an action. In his order of 5 July 1983, Case 78/83 R (Usinor), the President of the Court considered that "the damage inflicted on the applicant in requiring it to pay what is a considerable sum, even for an undertaking of its size, before the Court has established the existence of a first infringement would be disproportionate in comparison with the Commission's interest, even though a legitimate one, in reinforcing the deterrent effect of its decision by the immediate recovery of 70% of the fine". Finally, the interim measures sought are urgent because the decision of 26 January 1984 provides for penalties in the event of failure to pay within the period notified (1% per month of delay). The sum demanded is considerable. Short-term loans are out of the question, because of the credit control measures in force in France in 1984 and because of the group's debts. Immediate payment of the amounts in question would represent a greater financial burden than the provision of a guarantee of payment in the form of a promissory note in accordance with the procedure accepted by the Commission for the guarantee system provided for in Decision No 3716/83/ECSC.

The *Commission* points out that in his aforementioned order of 5 July 1983, the President of the Court recognized that "In the context of its general policy regarding fines the Commission is not acting unlawfully in modifying that policy, in particular with regard to the recovery of fines, in the light of the circumstances which lead it to take action". The Commission considers essentially that deferment of payment pending the outcome of the legal proceedings might facilitate the commission of further infringements. The measures sought are not, at first sight, justified either in fact or in law. The applicant has not put forward a *prima facie* case for concluding that its application is well founded and the Commission sufficiently refuted that application in its defence of 9 April. Since the application for the adoption of interim measures has the same purpose as the original action, the measures sought might prejudge the decision to be given on the substance of the case.

Finally, the applicant has in no way proved that the measures are a matter of urgency, that is, that they are necessary to prevent serious and irreparable damage. It certainly does not seem impossible for the applicant to obtain the necessary funds on a "longterm" basis, that is, by recourse to the shareholders. Moreover, the applicant knows that it can ask the Commission to allow payment by instalments on specified dates. If the Court granted the suspension sought in the present case, other undertakings would make similar applications and the measures would thus no longer constitute a penalty and a deterrent for undertakings which repeatedly commit infringements. The Commission draws attention to the fact that, of 165 undertakings subject to the

quota system, only 27 have been penalized and only 11 have committed further infringements. Undertakings which respect the system must not be put at a disadvantage.

The Commission points out that the order of the President of 5 July 1983 on which the applicant relies was made only because the dispute before the Court, which gave rise to the demand for payment of 70% of the fine for a further quota infringement (Case 78/83), involved the resolution of "sensitive and complicated problems", which is not the case in these proceedings.

Finally, the Commission, for several reasons, rejects Usinor's proposal to provide only a promissory note as a guarantee of payment of the fine.

Decision

1 According to Article 39 of the ECSC Treaty actions brought before the Court do not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested decision be suspended and prescribe any other necessary interim measure.

2 The applicant claims that the Court should make an order suspending the operation of the Commission's decision of 26 January 1984 which imposed on it a fine of 9 415 015 (nine million four hundred and fifteen thousand and fifteen) European Currency Units for exceeding the production or delivery quotas allocated to it for the first and second quarters of 1982 in respect of various iron and steel products.

3 Although proceedings were instituted for a declaration that that decision was void, the Commission decided, in accordance with what is now an established practice, to enforce payment of 70% of the principal amount payable, in view of the fact that the applicant had already been penalized for an infringement of general Decision No 1831/81/ECSC of 24 June 1981. The Commission considers that it is appropriate to adopt a more severe approach with regard to suspending enforcement of the penalty until the Court has given judgment on actions brought against decisions imposing fines in cases where a penalty has already been imposed for a first infringement.

4 The applicant denies that the excesses of which it is accused in respect of the first and second quarters of 1982, even if proved, constitute a second infringement. It points out in that connection that even though it has already been sanctioned by a previous decision imposing a fine upon it for excesses recorded during the fourth quarter of 1981, it has brought an action against that decision on which the Court has not yet delivered judgment. According to the applicant, as long as the Court has not upheld that fine, in whole or in part, it cannot be said that the applicant has committed a further infringement.

5 Oral argument in this case was presented on 21 June 1984 in relation to the dispute before the Court concerning quotas alleged to have been exceeded during the fourth quarter of 1981 (Case 78/83) and the Advocate General's opinion is listed to be delivered on 11 October 1984; judgment will be delivered within a foreseeable period after that date.

6 In those circumstances, and in the light of the stage of the procedure reached in Case 78/83, it is appropriate to suspend the operation of the contested decision, in any event until the Court has delivered judgment in that case, since that judgment might have an appreciable influence on the decision to be given in the present dispute.

7 It will be for the parties, after the Court has delivered judgment in Case 78/83, concerning an application for a declaration of the nullity of Commission Decision No C(83) 376/5 of 24 March 1983, to draw the necessary conclusions from that judgment with regard to the recovery of the fine to which this order relates and, if appropriate, to make a further application to the Court for the adoption of interim measures.

8 The applicant also proposes to furnish only a promissory note as security for payment of the fine, a proposal that the Commission has already accepted in relation to the system provided for in Commission Decision No 3716/83/ ECSC of 23 December 1983 (Official Journal 1983, L 373, p. 5).

9 Decision No 3716/83/ECSC deals with a different situation, in which it is necessary to guarantee that any penalty which might be imposed can be enforced rapidly in the event of non-compliance with the minimum prices or quantities which may be delivered in the common market. On the other hand, where a fine has been imposed, the requirement of a bank guarantee is in accordance with the general policy of the Commission, which has been

found to be reasonable and was recognized as justified in the order of the President of the Court of 11 November 1982 (Case 263/82 R *Klöckner-Werke* v *Commission* [1982] ECR 3995).

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

1. **The operation of Article 2 of Commission Decision No C(84) 104/1 of 26 January 1984 shall be suspended until the thirtieth day following the date of notification to the parties of the judgment to be delivered by the Court in Case 78/83, *Usinor* v *Commission,* on condition that the applicant provides a bank guarantee in advance guaranteeing payment of the fine imposed by that decision and for any default interest;**

2. **Formal note is taken of the applicant's offer to settle 70% of the part of the fine relating to excesses in delivery as regards Category Ic in the first half of 1982;**

3. **For the rest the application is dismissed;**

4. **The costs are reserved.**

Luxembourg, 6 July 1984

J. A. Pompe
Deputy Registrar

A. J. Mackenzie Stuart
President