ORDER OF THE PRESIDENT OF THE COURT
11 OCTOBER 1973 [1]

Miles Druce and Co Ltd
v Commission of the European Communities

Joined Cases 160 and 161/73 R

In Cases 160 and 161/73 R

MILES DRUCE AND COMPANY LIMITED, High Wycombe, Buckinghamshire, represented by B. H. ter Kuile, lawyer, of The Hague, and by A. J. C. Paines, solicitor, of London; address for service in Luxembourg at the chambers of M[e] Jacques Loesch, 2 rue Goethe,

applicant,

against

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its legal advisers, C. L. Close and E. Zimmermann; address for service in Luxembourg at the chambers of P. Lamoureux, its legal adviser, 4 boulevard Royal,

defendant,

supported by

GUEST, KEEN AND NETTLEFOLDS LIMITED, Smethwick, Warley, Worcestershire, represented by E. Gutt, lawyer, of Brussels, and by Michael M. Wheeler, Queen's Counsel, of Lincoln's Inn, London, address for service in Luxembourg at the chambers of M[e] André Elvinger, 84 Grand Rue,

intervener,

1 — Language of the Case: English.

THE PRESIDENT

makes the following

ORDER

Issues of fact

Miles Druce and Co., Limited, a company incorporated under English law with its registered office at High Wycombe, Buckinghamshire, (referred to as M.D.), has made two applications to the Court based on Articles 33 and 35 respectively of the ECSC Treaty.

The applications were filed in the Court Registry on 17 August 1973.

The applications seek to have annulled, first, Decision IV/ce 73-01713 JV/cv dated 18 July 1973 of the Commission and, second, the refusal contained in that decision.

By this Decision, addressed to M.D. on 23 July 1973 in the form of a letter signed by Mr Verges of the Directorate-General of Competition, the Commission refused to take the measures, either temporary or final, which M.D. had requested the Commission to take in two consecutive applications of 27 June and 17 July 1973, with regard in particular to Guest, Keen and Nettlefolds Ltd., (referred to as 'G.K.N.').

As grounds for the applications, M.D. alleged that G.K.N. had acquired, during the years 1972 and 1973, control of approximately 39·9 % of the ordinary shares in M.D. and had declared its intention of making a public offer of purchase to obtain further shares.

On 18 June 1973 G.K.N. sought prior authorization from the Commission under Article 66 (1) of the ECSC Treaty for the public offer of purchase relating to M.D.

No decision has yet been given on this.

On 27 June 1973 M.D. requested the Commission to take interim measures, under Article 66 (5).

The Commission was of the opinion that it should refrain from adopting any such measures, however the facts might be interpreted in law, and that after deciding in accordance with Article 66 (2) whether to find that there was a concentration, it had merely to give or withold its authorization for it and then adopt any necessary conservatory measures.

In view of G.K.N.'s voluntary undertaking not to summon a general meeting of M.D. for six months, on 18 July the Commission gave its express refusal, approved by the signature of Mr Verges of the Directorate-General of Competition, to take the provisional decisions requested by M.D. in repeated applications.

On 17 August 1973, M.D. submitted to the Court the two applications mentioned above to have the Commission's decision annulled, the first on the basis of Article 33 and the second on the basis of Article 35 of the ECSC.

In subsidiary applications ('ex parte applications') lodged on 31 August 1973, M.D. sought from the President of the Court an interim order, by way of what is described by M.D. as 'ex parte preliminary proceedings', to be obtained immediately, without further formality, and providing for certain conservatory measures.

On receiving notification of this, the Commission lodged a written reply on 19 September 1973.

Meanwhile G.K.N., having been granted permission by a Court Order of 24 September 1973 to intervene in the main action, filed its own observations on the present proceedings on 27 September 1973.

M.D., the applicant, after stating the facts and the object of its request to the judge in the interim proceedings asks that, in accordance with Article 39 (3) of the Treaty, Article 33 of the Statute of the Court and Article 83 of the Rules of Procedure, all measures necessary be taken pending judgment in the main action.

On the understanding that its request is directed against both G.K.N. and any third party acting on its behalf, M.D. claims that the Court should order, *inter alia:*

'1. that G.K.N. shall acquire no further shares in M.D.;

2. that G.K.N. shall not exercise the voting rights attached to the 39·9 % (or to any portion of that percentage) of paid-up share capital of M.D. which it has already acquired;

3. that G.K.N. shall not exercise the right it has under Section 132 of the Companies Act 1948 to call a General Meeting of M.D.;

4. that G.K.N. shall not propose any resolution in the event of a General Meeting of M.D. being held.'

M.D. claims that the reason for the urgency of these measures lies in the absence of any guarantee or safeguard, especially with regard to the ineffectual and inappropriate undertaking given by G.K.N. to the Commission, and in the refusal made by the Commission, which alone is competent to take the desired action.

According to M.D., the chief danger, apart from the situation already explained in the main action, lies in the degree of control held by G.K.N. over M.D., which has been deprived of the opportunity to extend operation of its services or to postpone its extension of them, and the confidence of other businesses in M.D.

As further grounds for its application for interim measures, M.D. points to the breach of law of which it will be the victim; the need to remedy, at the expense of the company which is at fault, a manifest infringement of the Treaty; the slowness of the Commission's administrative procedure; and, lastly, the fact that no situation which is unlawful can possibly be allowed to persist in producing its effects.

M.D. offers to produce any necessary evidence for the facts on which it has based its application.

A table showing the distribution of its capital has been submitted by M.D.

Lastly, it claims that the Commission should be ordered to pay the costs of the interim proceedings.

The *defendant Commission* points out that the requests made in the application for interim measures are identical with those in the main action.

The alleged injury suffered by M.D. could be remedied only by sale of M.D. shares currently held by G.K.N., which could not be accomplished by way of interim measures.

The undertakings given by G.K.N. are sufficient to preclude, for the time being, its participating in any of M.D.'s decisions.

The effectiveness of these undertakings could be ensured if need be by exercising the powers conferred on the Commission by Article 66 (5) and (6), and by the possibility of imposing financial sanctions.

There is no imminent threat of grave or irreparable damage.

Finally, the applications for 'ex parte preliminary proceedings' are inadmissible since there is no provision for these in the Rules of Procedure of the Court.

The Commission therefore contends that the Court should

'— reject the applications for an order for interim measures;

— declare that the 'ex parte' applications are not admissible;

— order the applicant to pay the costs of these proceedings.'

The *intervener G.K.N.*, besides putting forward certain arguments on the main proceedings, claims that the application for interim measures is inadmissible, since by seeking measures to be taken against a third party to the action, M.D. is contravening Article 39 of the Treaty and the general principles of the law of procedure common to all Member States.

G.K.N.'s intervention in the main action could not alter this legal situation.

According to G.K.N., any order for interim measures would be directly prejudicial to the decision in the main action, since the two proceedings seek practically the same end and it has not been found that the alleged concentration exists.

An order for interim measures would be more to M.D.'s advantage than success in the main action, since the measures requested are not within the competence of the Court when deciding on an application for annulment, as may be seen from Article 34 ECSC.

G.K.N. alleges that the Court has no jurisdiction to decide on the application made by M.D., since the Rules of Procedure make no provision for such applications.

G.K.N. supports the argument of the Commission as to the similarity between the main action and the applications for interim measures, and to the lack of urgency.

The alleged damage suffered by M.D. is a disadvantage normally present whenever a takeover bid is made.

G.K.N.'s undertaking concerning the neutrality it would maintain for the present is sufficient evidence of the fact that such damage is purely hypothetical, since under both national law in Britain and Community law, no takeover of M.D. by G.K.N. can occur until further action is taken by the latter.

It is pointless to attempt to secure by means of interim measures the non-exercise of the voting rights of shareholders of M.D.

G.K.N. contends that the Court should:

'reject the requests for interim measures;
dismiss the application for an order that interim measures be taken;
order M.D. to pay the costs of these proceedings, including the costs of the intervener.'

Issues of law

Admissibility

1 The aplications for interim measures have been described by M.D. by reference to the British procedure of 'ex parte preliminary proceedings' which allows conservatory measures to be taken merely on demand, without hearing all parties concerned.

2 In view of the circumstances and the documents in the file, however, the applications must be considered as applications for interim measures within the meaning of Article 39 of the ECSC Treaty and Article 33 of the Statute on the ECSC Court of Justice.

3 The applications thus comply with the requirements of Article 83 of the Rules of Procedure and are accordingly admissible.

4 Article 84 (1) has been followed in the normal manner and both parties have been heard in the written and oral procedure.

Urgency

5 According to Article 83 (2) of the Rules of Procedure the jurisdiction of the Court to order interim measures is subject to the establishment of 'circumstances giving rise to urgency'.

6 The applications for interim measures made under the summary procedure do not differ in substance from the object of the written applications in the main action submitted on 17 August 1973.

7 No event has occurred since that date which could present M.D. with an imminent threat.

8 It cannot be doubted that the British regulations which make the transactions feared by M.D. subject to authorization will be applied.

9 Moreover, G.K.N. has given an undertaking that it will not make use of the shares it holds in M.D. to summon a general meeting of that company's shareholders within the next six months.

10 No new circumstance has arisen to raise doubts concerning the maintenance of the status quo.

11 After the declaration made by the Commission in court, it cannot be supposed that the Commission itself will not ensure the same.

12 If despite G.K.N.'s undertaking and the declaration made by the Commission the status quo should appear to be threatened for any reason whatsoever, it will be for the Commission, with due notice, to make an immediate decision on the matter under Article 66 of the Treaty, or, at the very least, on the interim measures provided for by Article 66 (5), third paragraph, without prejudice to any possible application of Articles 83 and 84 of the Rules of Procedure.

There is accordingly no urgency.

The application for interim measures made by M.D. must be refused, and costs reserved.

On those grounds

Having regard to Articles 39 and 66 of the Treaty establishing the ECSC;
Having regard to Article 33 of the Statute of the ECSC Court of Justice;
Having regard to Articles 83 and 84 of the Rules of Procedure;
After hearing the parties to the main action and the intervening party;

the President

1. **Dismisses the applications for urgent interim measures 160/73 R and 161/73 R;**

2. **Reserves the costs.**

Luxembourg, 11 October 1973.

A. Van Houtte
Registrar

R. Lecourt
President