ORDER OF THE PRESIDENT OF THE COURT
8 May 1991 *

In Case C-356/90 R,

Kingdom of Belgium, represented by J. Devadder, Adviser in the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent, assisted by E. Marissens, of the Brussels Bar, and P. Devers, of the Ghent Bar, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

applicant,

v

Commission of the European Communities, represented by T. F. Cusack, Legal Adviser, and B. S. Drijber, a member of its Legal Department, with an address for service in Luxembourg at the office of G. Berardis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the suspension of the operation of Commission Decision 90/627/EEC of 4 July 1990 on loans granted by the Belgian authorities to a shipowner for the purchase of a 34 000 m³ LPG ship and two refrigerator ships (Official Journal L 338, p. 21),

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

* Language of the case: Dutch.

Order

1 By application lodged at the Court Registry on 6 December 1990, the Kingdom of Belgium sought a declaration under the first paragraph of Article 173 of the EEC Treaty that Commission Decision 90/627/EEC of 4 July 1990 on loans granted by the Belgian authorities to a shipowner for the purchase of a 34 000 m³ LPG ship and two refrigerator ships (Official Journal L 338, p. 21) was void; that decision had been notified to the office of the Belgian Permanent Representation on 4 October 1990.

2 Article 1 of that decision states that the loans having a grant equivalent of 35% granted by the Belgian Government to the shipping companies Fertex and Europese Transport Maatschappij Crystal Prince for the building, respectively, of a 34 000 m³ LPG ship and two refrigerator ships in the Boelwerf shipyard are incompatible with the common market.

3 Article 2 of the decision requires the Belgian Government, pursuant to Article 93(2) of the Treaty, to revise the terms of the loans so as to reduce them to a maximum level of 26% in grant equivalent terms, in line with the ceiling fixed by the Commission for 1989 in accordance with Article 4(2) of Council Directive 87/167/EEC of 26 January 1987 on aid to shipbuilding (Official Journal L 69, p. 55).

4 By a separate document, also lodged at the Court Registry on 6 December 1990, the Kingdom of Belgium submitted an application for interim relief under Articles 185 and 186 of the EEC Treaty, seeking the suspension of the operation of the abovementioned decision and an order that the Commission reopen the administrative procedure provided for in Article 93(2) of the Treaty.

5 The Commission submitted its written observations on the application for interim relief on 21 December 1990.

6 By letter lodged at the Court Registry on 31 January 1991, the applicant confirmed that discussions had taken place between the parties and that it was not impossible that it might withdraw its application for interim relief.

7 By telex registered at the Court on 26 March 1991, the applicant informed the Court that it maintained its application.

8 It is necessary, before considering whether the application for interim relief is well founded, to outline briefly the legal context surrounding the contested decision and the background to the dispute.

9 Under Article 92(3)(d) of the EEC Treaty, the Council may specify categories of aid, other than those listed in Article 92(3)(a) to (c), which may be considered to be compatible with the common market.

10 On 26 January 1987, in accordance with that provision, the Council adopted Directive 87/167 on aid to shipbuilding, Article 13 of which provided that it was to apply from 1 January 1987 to 31 December 1990.

11 Article 4(1) of that directive provides that production aid in favour of ship building and ship conversion may be considered compatible with the common market provided that the total amount of aid granted in support of any individual contract does not exceed, in grant equivalent, a common maximum ceiling expressed as a percentage of the contract value before aid.

12 According to Article 4(2) and (3), that ceiling is fixed by the Commission and reviewed by it every 12 months. With effect from 1 January 1989, that ceiling was fixed at 26% (Commission Communication 89/C 32/06 concerning aid to shipbuilding, Official Journal 1989 C 32, p. 3).

13 Under Articles 3(2) and 4(4) of the directive, the ceiling is to apply not only to all forms of production aid granted directly to shipyards but also to all forms of aid to shipowners which are available as aid for the building or conversion of ships, where that aid is actually used for the building or conversion of ships in Community shipyards.

14 In accordance with Article 3(1) of the directive, the system of aid for shipowners provided for in the Belgian Law of 23 August 1948, which is intended to ensure the maintenance and development of the merchant fleet, sea fishing and shipbuilding and which sets up for that purpose a fund for shipping and shipbuilding, was notified to the Commission.

15 It appears from the documents before the Court that that system provides for aid in the form of repayable advances of funds at a reduced rate of interest which may not, without special derogation, exceed 70% of the value of a new ship, in the form of guarantees in respect of supplementary loans granted by finance organizations and in the form of interest subsidies amounting to half of the interest rate on such loans, but not exceeding 3%; the total amount of the guaranteed loans and advances may not exceed 85% of the price of the ship. The contested decision states that according to the information given to the Commission by the Belgian Government, advances are granted at an interest rate of 4 to 5%, repayable over 15 years with a grace period of two years from the delivery of the ship.

16 The aid at issue, relating to the building of three ships at the Boelwerf shipyard, was granted by the Belgian authorities during 1989 and consists of an advance of funds amounting to 85% of the contract prices, repayable over 15 years at an interest rate of 2% with a grace period of three years.

17 In the contested decision, the Commission points out that, in view of the market interest rate of 8.25% prevailing at the material time, the aid thus granted represents a grant equivalent of 35%, exceeding by 9% the ceiling laid down for 1989, whereas if it had been granted in accordance with the conditions laid down in the Belgian system previously notified to the Commission it would have amounted to a grant equivalent of only 20.5%.

18 The applicant does not dispute the calculation of the grant equivalent as carried out by the Commission, but claims that the Commission has failed to acknowledge the dual purpose of the aid system at issue. According to the actual terms of the Belgian legislation, that purpose is not merely to aid fleet development, preferably through shipbuilding in Belgian yards, but also to assist the operation of Belgian maritime undertakings. Before carrying out the calculation, the Commission should have identified the portion of the aid representing aid to the operation of vessels flying the Belgian flag. The applicant also claims that Directive 87/167, on which the Commission bases its decision, does no more than establish a presumption that aid exceeding the ceiling laid down is incompatible with the common market. The Commission should have demonstrated that the aid granted ran contrary to the true aim of that directive, which is to prevent an increase in the capacity of the shipyards within the Community. It should at least, during the administrative procedure, have allowed the applicant an opportunity to submit proof that the aid at issue did not run contrary to that aim.

19 Under Article 83(2) of the Rules of Procedure, an order suspending the operation of a decision or adopting other interim measures may be made only where there are circumstances giving rise to urgency and pleas of fact and law have been stated establishing a prima facie case for the suspension or other interim measures.

20 As the Court has consistently held, the urgency of an application for suspension or other interim measures must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party requesting the suspension or other interim measures.

21 In that regard, the applicant claims that if suspension is not ordered it will not be possible to make the outstanding advance payments to the shipping companies concerned in good time. That would not only be detrimental to the activities of those companies but would above all entail a risk that they might not be able to meet their financial commitments towards the Boelwerf shipyard. Stoppage of

work on the three ships concerned, which would result from such a situation, would seriously jeopardize the restructuring of that yard.

22 The applicant stresses that it attaches the greatest importance to the restructuring of the Boelwerf shipyard, which was begun in 1986 and is aimed at reducing the yard's capacity. It is crucial to the success of that restructuring that it should be possible to take ancillary measures such as granting aid to shipowners. The applicant's national interest would be damaged if such necessary restructuring could not be backed up by ancillary measures.

23 With regard to that alleged damage, it must be borne in mind that the Court has consistently held (see, in particular, the order of the President of the Court in Case 142/87 R *Belgium* v *Commission* [1987] ECR 2589) that a party seeking the suspension of the operation of a measure must furnish proof that he cannot await the conclusion of the main action without personally suffering damage which would have serious and irreparable effects for him.

24 Neither the damage which may be suffered by the shipping companies nor that which may be suffered by the Boelwerf shipyard, the restructuring of which would be endangered, constitutes damage which may be suffered by the applicant itself. The applicant stresses the national interest in the restructuring of the yard, but no factor has been put forward from which it may be concluded that the obstacle likely to be put in the way of that restructuring by the contested decision would amount to serious and irreparable damage for the applicant.

25 Furthermore, even if the shipyard concerned had itself alleged that if operation were not suspended the contested decision might cause the yard serious and irreparable damage, it would still have had to show that a revision of the terms of the loans, the only measure which the Belgian Government is required to carry out, would lead to the shipping companies in receipt of the loans being no longer able to meet their commitments towards it and that such an event would cause the shipyard grave and irreparable damage even before the Court could give its

judgment on the main application. As the Commission stated in its written observations, the contested decision does not in any way prohibit payment of the outstanding amounts of the advances, provided that the terms of all the loans granted are revised so as to bring them to a maximum level of 26% in grant equivalent terms.

26 It follows from the foregoing that the application for suspension of the operation of the decision does not meet the requirement of urgency.

27 Since the application for suspension of the operation of the decision must therefore be dismissed, the application for an order that the Commission reopen the administrative procedure provided for in Article 93(2) of the EEC Treaty, which presupposes the non-implementation of the said decision, cannot be granted.

28 The application for interim relief must therefore be dismissed in its entirety.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

(1) The application for interim relief is dismissed;

(2) Costs are reserved.

Luxembourg, 8 May 1991.

J.-G. Giraud
Registrar

O. Due
President