Case 25/85 R

Nuovo Campsider
v
Commission of the European Communities

Summary

Application for the adoption of interim measures — Suspension of operation — Conditions governing the grant of such a measure
(ECSC Treaty, Art. 39)

The interim measures provided for by Article 39 of the ECSC Treaty will only be granted if the factual and legal circumstances relied upon establish a *prima facie* case for the measures sought. Furthermore, there must be an urgent need for the measures, in the sense that it must be necessary for them to be adopted and to take effect before judgment is given on the substance of the case in order to avoid serious and irreparable damage to the party seeking their adoption. Finally, they must be provisional, that is to say, they must not prejudge the decision on the substance of the case.

ORDER OF THE PRESIDENT OF THE COURT
6 March 1985 *

In Case 25/85 R

Nuovo Campsider, an association of undertakings within the meaning of Article 48 of the ECSC Treaty, 8 Piazza Velasca, 20122 Milan, represented by Michel Waelbroeck and Alexandre Vandencasteele, Avocats, 341 Avenue Louise, 1050 Brussels, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 Rue Philippe-II,

applicant,

* Language of the Case: French.

V

Commission of the European Communities, represented by Rolf Wägenbaur and Marie-José Jonczy, Legal Advisers of the Commission, acting as Agents, with an address for service in Luxembourg at the office of Georges Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

THE PRESIDENT OF THE COURT
OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

1 By an application dated 28 January 1985, Nuovo Campsider applied for the adoption of interim measures requiring the Commission to exercise its power of recommendation in order to ensure that, in implementation of the Decision of the Member States of 6 March 1953, exports of ferrous scrap to non-member countries were frozen at a level of 450 000 tonnes per month, and also requiring it immediately to commence the procedure for the adoption of price intervention measures and for the application of Article 59 of the ECSC Treaty.

2 That application, which was lodged at the Court Registry on 29 January 1985, is founded on Article 35 of the ECSC Treaty and Article 83 of the Rules of Procedure.

3 The applicant refers to its action for failure to act under Article 35 of the ECSC Treaty, lodged at the Court Registry on 29 January 1985.

4 The applicant submits that as a result of the increase in the demand for ferrous scrap in the United States and the rise in the value of the dollar, exports to non-

member countries have become very attractive for dealers. Although there has been an increase in the collection of scrap, the rise in the price level has led dealers to reduce their sales in the hope of further rises and also in order to carry over their profits to the next tax year. Customs statistics demonstrate the scale of the shortage affecting electric steel mills which use scrap as a raw material. It has meant that they are at a disadvantage in relation to integrated steel mills; they are no longer profitable and have even been compelled to suspend production because they have run out of scrap.

5 The interim measures which the applicant requests are necessary because the mills are unable to maintain production and fulfil their orders as a result of a shortage of ferrous scrap and because the persistent rise in the price of scrap has led to an intolerable drain on their financial resources.

6 The first measure requested in its application would have the effect of holding down scrap exports at the average level of the last three years and is therefore solely intended to preserve the existing situation, while the second is directed towards the commencement of preparatory procedures which would not in any way prejudge the Court's decision on the main application. As regards the substance of its main application, the applicant maintains that the developments described above jeopardize the essential aims of the ECSC Treaty and that the institutions have failed in their obligation to ensure an orderly supply on the Common Market.

7 The applicant points out that, by a decision of 6 March 1953, the Members of the Council declared their agreement to maintain until further notice the completest possible restriction on exports to non-member countries.

8 That decision was adopted under Article 57 of the ECSC Treaty, which provides that the High Authority is to give preference to indirect means of action, including intervention in regard to commercial policy. Under Article 71, the governments of the Member States retain their powers in matters of commercial policy, but are required to afford each other such mutual assistance as is necessary. Article 73 provides that the High Authority is empowered to make recommendations to Member States to secure the coordination of measures taken under Article 71.

9 Where there is a shortage and the other means of action at its disposal are not sufficient to deal with it, the Commission has the power to commence the procedure provided for by Article 59, which permits the imposition of export quotas.

10 The applicant claims that, although it requested the Commission to take action by telex on 16 November 1984, the Commission failed to do so despite numerous reminders. It alleges that, according to reports in the press, the Commission has stated to the Council that no immediate measures to restrict exports are necessary, although the present level of exports of 6 million tonnes constitutes a maximum which should not be exceeded and the statistical monitoring of exports must be carried out under stricter procedures.

11 The applicant maintains that the Commission's findings are based on a study which is clearly out of date. Exports to non-member countries up to mid-December 1984 were well in excess of 6 million tonnes, and the fall in the quantities available on the Italian market and the rise in the selling-price for scrap, which the Commission mentions as mere possibilities, have already come about.

12 By not taking any action in response to the applicant's request within the period of two months laid down by Article 35 of the ECSC Treaty, the Commission failed to take the measures which it was required to adopt in order to safeguard the objectives of the ECSC Treaty. The Commission displayed a serious lack of foresight and care amounting to a disregard of the purpose for which the ECSC Treaty vested it with its powers and hence to a misuse of powers (Judgment in Case 8/55 *Fédéchar* [1956] ECR 292).

13 With regard to the facts, the Commission denies having been inactive and points out that it submitted, at the Council's request, a report on the ferrous scrap market.

14 While recognizing that undertakings using scrap as a raw material are experiencing difficulties of supply, it expresses strong doubts as to the appropriateness of adopting interventionist measures on the ferrous scrap market, which is a world market.

15 In connection with the first head of the request for interim measures, which relates to a freeze in the level of exports, the Commission argues that that would involve a measure of commercial policy, which is a matter for the governments of the Member States. Intervention in pricing matters, which is also requested, is not appropriate. It would need to be accompanied by restrictions on exports in order to be effective and would have the effect of slowing down exports and the collection of scrap. It would therefore do more harm than good.

16 The Commission states that under Article 59 it is empowered to restrict exports to non-member countries if it finds that the Community is confronted with a serious shortage and that the indirect means of action provided for in Article 57 are not sufficient to deal with it. According to the Commission, there cannot be said to be a shortage, still less a serious shortage. Undertakings are able to obtain supplies provided only that they are willing to pay the market price.

17 The Commission states that the decision adopted on 6 March 1953 (an international agreement in simplified form) is now only enforced in Denmark, Italy and Ireland. The Commission did the most it could within the limits of its powers to ensure that effect was given to that decision in Commission Recommendation No 75/97/ECSC of 23 December 1974 (Official Journal 1975, L 38, p. 19), Article 2 of which provides that 'Member States shall take any general or specific measure necessary to penalize offences against provisions relating to the prohibition of, or restrictions on, the exportation of scrap iron and similar products to third countries from whichever Member State the goods come'.

18 According to the Commission, the application for interim measures does not satisfy any of the requirements defined in a long line of decisions of the Court.

19 In the first place, the main application, founded on failure to act, is clearly inadmissible. The Commission was never formally required to act, since the applicant's telex message requested it 'to give serious consideration to the necessity, which is now urgent, for appropriate measures to restore the ferrous scrap market to its normal state'. That communication does not constitute a sufficiently precise request to mark the commencement of the period for bringing an action for failure to act.

20 The application is also inadmissible because it is not for an association of undertakings to require the Commission to impose rigid constraints on all the Member States simply because that association is having difficulties in obtaining supplies of scrap. At the very most, an application is only admissible if it is demonstrated that the Commission's refusal clearly had the sole and deliberate object of causing it harm.

21 In addition, the application is unfounded because the Commission was not under a duty to adopt the requested measures, since it has a discretion in the matter. In that connection the applicant has not adduced any evidence of misuse of powers.

22 Further, there is no urgent need for the granting of interim measures since there cannot be said to be a shortage, the product being available albeit at high prices. No Member State has put a proposal to the Council along the lines requested by the applicant.

23 Since the Commission is not endowed with a power of decision, but only with a power of initiative, the requested measures could not have any immediate effect which would make it possible for the applicant to avoid suffering serious and irreparable damage.

24 Finally, an order requiring the Commission to use its power of initiative would clearly prejudge the decision on the main application since it would imply that the Commission had wrongly failed to act and involve taking a decision on the organization of the scrap market in its stead.

25 The President would point out that Article 39 of the ECSC Treaty provides that actions brought before the Court do not have suspensory effect. By virtue of the same article the Court may, however, if it considers that circumstances so require, order that application of the contested decision be suspended or prescribe any other interim measure.

26 The Court has consistently held that such measures will only be granted if the factual and legal circumstances relied upon establish a *prima facie* case for the measures sought. Furthermore, there must be an urgent need for the measures, in

the sense that it must be necessary for them to be adopted and to take effect before judgment is given on the substance of the case in order to avoid serious and irreparable damage to the party seeking their adoption. Finally, they must be provisional, that is to say, they must not prejudge the decision on the substance of the case.

27 With regard to the factual and legal circumstances of the case, it should be noted that if the price of ferrous scrap is driven up by demand to a level such that a significant part of Community industry is no longer in a position to pay the price demanded, then there is a *prima facie* case for the finding that there is a shortage even though scrap may be available in sufficient quantities.

28 That the undertakings belonging to the applicant association are in a serious situation sufficient to establish urgency is not in any real doubt since they cannot raise their selling-prices in order to offset the increase in the price of scrap, which is their raw material.

29 Article 59 of the ECSC Treaty requires the Commission to take action whenever Community undertakings are confronted with a serious shortage and the indirect means of action at its disposal are not sufficient to deal with this. Nevertheless it has not been demonstrated that the current market situation has as yet reached a position of serious shortage within the meaning of Article 59; consequently, a *prima facie* case for the finding that the Commission has wrongfully failed to act is not made out. However, it is necessary for the Commission to keep the development of the scrap market under close supervision and to take the requisite measures within the limits of the powers conferred upon it.

30 With regard to the other provisions referred to in the application, the Commission enjoys a wide discretion with which the Court cannot interfere in interim proceedings, at least in the absence of solid evidence of a misuse of powers.

31 It must be added that interim measures of the kind requested in the application can only be granted at the risk of prejudging the decision on the substance of the case.

32 Finally, certain reservations must be expressed as to the admissibility of the main application. The request communicated by telex on 16 November 1984 does not,

at first sight, appear to be in the form of the formal notice requiring the Commission to act envisaged by Article 35 of the ECSC Treaty and does not expressly refer to specific measures which the Commission was to adopt, even if the applicant is able to prove that the question was raised orally, as it stated at the hearing.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

1) The application is dismissed.

2) Costs are reserved.

Luxembourg, 6 March 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President