Case 310/85 R

Deufil GmbH & Co. KG
v
Commission of the European Communities

(State aid for the production of polyamide and polypropylene yarn)

Summary

Interim measures — Suspension of execution — Conditions for the grant thereof — Irreparable nature of the damage
(EEC Treaty, Art. 185; Rules of procedure, Art. 83 (2))

ORDER OF THE PRESIDENT OF THE COURT
6 February 1986 *

In Case 310/85 R

Deufil GmbH & Co. KG, a limited partnership governed by German law, whose registered office is at 10 Industriestraße, D-4619 Bergkamen-Rünthe, represented by its general partner, Deufil GmbH, whose registered office is at the same address, represented in its turn by Klaus G. Beisken, Rechtsanwalt, Düsseldorf, with an address for service in Luxembourg at the office of Émile Vogt, director of Compagnie financière de crédit et de gestion, 40 boulevard Joseph-II,

applicant,

* Language of the Case: German.

v

Commission of the European Communities, represented by its Legal Adviser, Norbert Koch, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the suspension of the operation of Commission Decision No 85/471 of 10 July 1985 (File No C (85) 1925), on an aid granted by the Federal German Government to a producer of polyamide and polypropylene yarn situated in Bergkamen (Official Journal 1985, L 278, p. 26),

THE PRESIDENT OF THE COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

1 By an application lodged at the Court Registry on 14 October 1985, Deufil GmbH & Co. KG, a limited partnership, represented by its general partner, Deufil GmbH, established at Bergkamen, brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision No 85/471 of 10 July 1985 (Official Journal, L 278, p. 26) was void. In that decision, the Commission declared illegal and incompatible with the common market within the meaning of Article 92 of the EEC Treaty aid amounting to DM 2 945 000 granted in 1983 to the applicant, a producer of polyamide and polypropylene yarn. It required the Federal Republic of Germany to recover the said aid from the applicant and to inform the Commission within two months of the date of notification of the aforementioned decision of the measures taken by it to comply with that requirement.

2 By an application lodged at the Court Registry on 13 January 1986, the applicant brought an action under Article 185 of the EEC Treaty and Article 83 (1) of the

Rules of Procedure for suspension of the operation of Commission Decision No 85/471 until the Court has delivered its judgment in the main proceedings.

3 The defendant submitted written observations on 21 January 1986. The parties presented oral argument on 3 February 1986.

4 Before considering the merits of the present application for the adoption of interim measures, it is appropriate to summarize briefly the steps which preceded the adoption of Decision No 85/471 by the Commission.

5 Having applied on 29 June 1982 for a subsidy in order to enlarge its plant at Bergkamen, the applicant company was granted aid in 1983 of DM 1 722 000 by the Federal Government under Article 1 of the law relating to Investment Subsidies (Institutionszulagengesetz) and DM 1 223 000 by the *Land* North Rhine-Westphalia [hereinafter referred to as 'North Rhine-Westphalia'] under a regional aid programme (Gemeinschaftsaufgabe).

6 That aid partly financed the installation of modern equipment suitable for the production of both polyamide and polypropylene yarn and enabled the applicant company to increase its annual production capacity from 3 000 to 5 000 tonnes. It should also be pointed out that that aid, which represented 14.97% of the total cost of the investment, was granted by the Government of the Federal Republic of Germany without being previously notified to the Commission under Article 93 (3) of the EEC Treaty.

7 Following repeated requests, the Commission was informed by the Federal German Government on 15 February 1984 that the aid in question, the details of which are given above, had been granted to the applicant.

8 Following an initial scrutiny, the Commission considered that the aid in question was illegal in so far as it constituted an infringement of Article 93 (3) of the EEC Treaty and it did not meet the conditions which must be fulfilled for one of the exceptions provided for in Article 92 of the EEC Treaty to apply. The Commission therefore initiated the procedure provided for in the first subparagraph of Article

93 (2) of the EEC Treaty. The Commission concluded that procedure by adopting Decision No 85/471.

9 In the interests of completeness, it is appropriate to describe briefly the legal rules applicable to polyamide and polypropylene yarn when the aid at issue was granted.

10 Polyamide yarn is covered by the code governing aid for synthetic fibres and yarn production introduced by the Commission which, by virtue of various decisions, will apply until 1987. The two guiding principles laid down in that code are, on the one hand, that any aid involving an increase in capacity, even in the case of modernization or conversion, is contrary to Article 92 of the EEC Treaty and, on the other hand, that aid facilitating a restructuring operation which leads to a reduction in production capacity is, in principle, compatible with Article 92 of the EEC Treaty.

11 Polypropylene yarn was not included in the category of products covered by the code in 1985. However, it is apparent from the documents before the Court that before that date polypropylene yarn, like polyamide yarn, was covered by the basic guidelines laid down by the Commission in 1971 and 1977 for aid to the textile industry, which provide that, in order to be compatible with the common market, any investment aid granted must be linked to the attainment of an objective connected with restructuring and not merely with modernization of production facilities.

12 As can be clearly seen from the rules laid down in Article 93 (3) of the Treaty, any aid concerning either of those two types of yarn must, in all cases and regardless of the objective pursued, be notified to the Commission before being granted.

13 Under Article 185 of the EEC Treaty, actions brought before the Court of Justice do not have suspensory effect. The Court may, however, if it considers that the circumstances so require, order that application of the contested act be suspended.

14 Article 83 (2) of the Rules of Procedure requires that applications for the adoption of interim measures must state the factual and legal grounds establishing a *prima*

facie case for the interim measures applied for and the circumstances giving rise to urgency.

15 According to well-established case-law of the Court, the urgency of an application for the adoption of interim measures referred to in Article 83 (2) of the Rules of Procedure must be assessed in the light of the extent to which an interlocutory order is necessary to avoid serious and irreparable damage to the party seeking the adoption of the interim measure.

16 In that regard, the applicant claims that the Federal Minister for Economic Affairs and the Government of North Rhine-Westphalia now propose, in compliance with Commission Decision No 85/471, to cancel their decision to grant the aid at issue and to take steps to recover the amounts paid. Since action has thus been taken to implement Commission Decision No 85/471 and since its application for the annulment of that decision does not have suspensory effect, the applicant considers that suspension of the operation of the decision is urgently required if the disastrous economic consequences which would result from it are to be avoided.

17 In the applicant's view, there is a danger that recovery of the aid granted and the failure to pay further aid of DM 3 million applied for to cover part of a further investment of the same kind totalling DM 20 million would reduce and even exhaust the lines of credit available to the applicant from banks and from its parent company, Radici. Such a blow to its credit would cause it to go into liquidation and would bring about the loss of 180 jobs in an area in which the economic situation is already particularly difficult.

18 For its part, the Commission expresses the view in its written observations regarding the application for interim measures that the applicant has not shown that the implementation of Commission Decision No 85/471 would be likely to cause it serious and irreparable damage.

19 Neither the Federal German Government nor that of North Rhine-Westphalia has yet taken any concrete measure to implement the decision and recover the aid at issue. Moreover, even if the contested decision were implemented the applicant would not be likely to suffer damage since the only part of that decision which is directly applicable for the purposes of Article 185 of the EEC Treaty is the obli-

gation imposed on the person to whom the decision is addressed to recover the amount paid. Decision No 85/471 does not directly create any obligation to pay on the part of the applicant. Recovery of the aid at issue cannot therefore be sought immediately. The applicant can only be made liable to re-pay the aid by a decision ordering the withdrawal and recovery thereof adopted by the German authorities on the basis of the national provisions concerning cancellation of unlawful administrative acts. Moreover, the applicant is entitled to institute administrative proceedings under its national law for suspension of the operation of such a decision of the German authorities.

20 The Commission also contends that enforcement of the obligation to repay is not likely to cause the applicant to go into liquidation, as the latter alleges, since it is a wholly-owned subsidiary of the Radici group, which has substantial financial resources.

21 It is apparent from the documents before the Court and from the replies to certain questions put at the hearing that the Federal German Government and the Government of North Rhine-Westphalia have not yet adopted concrete measures designed to cancel their decision approving the aid and to recover the aid already granted. The letter sent by the Minister for Economic Affairs to the applicant on 11 November 1985 which the latter produced at the hearing in reply to a question cannot in any circumstances be regarded as a formal request by the German authorities for repayment of the aid. The contents of that letter clearly indicate that the German authorities' sole purpose was to find out whether the applicant was going to bring an action before the Court of Justice for interim relief in the form of suspension of the operation of Commission Decision No 85/471, so that it could discharge the obligation to pass that information on to the Commission imposed on it by Article 2 of that decision.

22 Even though the contents of the letter of 11 November 1985 might appear to show that the German authorities intend to send a formal request to the applicant for repayment of the subsidies granted to it in the event of the President of the Court of Justice not granting the application for interim measures and ordering suspension of the operation of Commission Decision No 85/471, the applicant stated at the hearing that it intends to avail itself of all the remedies available before the German courts. Notwithstanding the differences which emerged between the parties at the hearing with regard to the conditions under which the German courts could order suspension of the operation of a demand for repayment of aid, the President of the Court of Justice considers that the possi-

bility of bringing such an action before the national courts would enable the applicant to avoid serious and irreparable damage, provided that it can show that such damage is likely.

23 Moreover, the applicant has put forward no convincing evidence as to the seriousness of the economic and financial difficulties in which it would find itself if it were obliged to repay the aid in question. The only conclusion which may be drawn from the auditor's report for the years 1983 and 1984 produced in connection with this application is that if the subsidy were recovered the banks would not increase their lines of credit. On the other hand, there is no reason to believe that the Radici group, the parent company of the applicant, whose financial circumstances, according to the Commission — and the applicant does not contradict it — would appear to be extremely sound, as is demonstrated by its recent purchase of the Swiss company Noyfil, would not support its subsidiary financially if the aid were recovered. It must also be pointed out that the applicant was unable to provide information on its financial position for 1985.

24 Because of the fragmentary financial information supplied and the close links between the applicant and the Radici group, it appears at first sight that implementation of the decision to recover the subsidies granted would not imperil the applicant's economic survival.

25 Consequently, the applicant has put forward no conclusive argument showing that implementation of Commission Decision No 85/471 would cause it to suffer serious and irreparable damage.

26 Since the applicant has not proved the existence of the urgency required by Article 83 (2) of the Rules of Procedure, it is not necessary to consider whether the factual and legal grounds upon which it relies establish a *prima facie* case for the interim measures applied for.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders:

(1) The application is dismissed;

(2) The costs are reserved.

Luxembourg, 6 February 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President