ORDER OF THE PRESIDENT OF THE COURT
1 FEBRUARY 1984 [1]

# Ilford SpA
# v Commission of the European Communities

Case 1/84 R

1. *Proceedings on application for adoption of interim measures — Suspension of operation — Interim measures — Admissibility of application — Conditions — Measure of individual concern to applicant*
   *(EEC Treaty, Arts. 185 and 186)*

2. *Measures adopted by the institutions — Temporal application — Retroactivity — Conditions — Particular reasons*

In Case 1/84 R

ILFORD SPA, whose registered office is in Orrigio (Italy), represented by Angelo Pesce, of the Milan Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, 200 Rue de la Loi, B-1049 Brussels, represented by Eugenio de March, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Manfred Beschel, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION pursuant to Article 185 of the EEC Treaty for the adoption of interim measures or for suspension of the operation of the Commission

1 — Language of the Case: Italian.

Decision of 20 October 1983 authorizing the Italian Republic not to apply Community treatment to films for colour photographs originating in Japan,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

## ORDER

### I — Summary of the facts

By decision of 19 July 1983 (Official Journal, L 218, p. 14), the Commission authorized the Italian Republic to introduce intra-Community surveillance of imports of film in rolls, sensitized, unexposed, perforated or not, for colour photographs, originating in non-member countries but put into free circulation in the Community. The decision was taken at the request of the Italian Republic which in support of its request provided the Commission with information on the economic difficulties which might result for the sole Italian producer from the loss of its market share for the product in question; in such circumstances the producer would no longer be able to continue its own production and thus to provide employment in Italy.

Using information obtained on the basis of that decision, on 10 October 1983 the Italian Republic made a request pursuant to Article 115 of the EEC Treaty that it be authorized not to apply Community treatment to those films, originating in Japan and put into free circulation in the other Member States, until 30 September 1984. It requested that this measure also cover applications for import permits already pending.

By decision of 20 October 1982 addressed to the Italian Republic the Commission authorized Member States, as from 5 October 1982 and until 5 March 1984, not to apply Community treatment to films in rolls, sensitized, unexposed, perforated or not, for colour photographs (Common Customs Tariff subheadings 37.02 ex A II and ex B IV; Nimexe codes 37.02/31, 35, 41, 43, 92), originating in Japan and put into free circulation in the other Member States, for which applications for import permits

had been lodged after 4 October 1983. It is however specified that this authorization does not cover a quantity of 100 000 units, to be shared among the applicants for import permits whose applications were duly pending on the date of the decision. A notification of the decision was published in the Official Journal of 22 October 1983 (Official Journal, C 285, p. 6).

By application registered at the Court on 3 January 1984 Ilford SpA, a company registered under Italian law, brought proceedings for a declaration that the Commission Decision of 20 October 1983 is void. In a separate document registered at the Court on the same day, the applicant applied, pursuant to Article 185 of the EEC Treaty and Article 83 of the Rules of Procedure, for the operation of the decision at issue to be suspended.

Ilford is a member of the Ilford group, of which the parent company is Ilford Limited (United Kingdom), which in turn is a member of the Ciba-Geigy group. The Ilford group produces black and white films and completes the range of products offered to its customers with colour films imported from Japan, under an agreement concluded with Konishiroku Photo Ind. Co. Ltd, in 1982.

## II — Written procedure

In its application for the adoption of interim measures the applicant claims that the Court should suspend the operation of the decision of 20 October 1983. In support of its application the applicant argues, in substance, that the decision contested in the main proceedings is justified neither in law nor in fact. The importation of Japanese colour films cannot cause the difficulties to which Article 115 refers, because that flow of trade is balanced by the export to Japan of black and white films and accessory products of Italian origin. Nor is there any deflection of trade with the meaning of Article 115 because the films in question were in free circulation in the United Kingdom, and when the Commission adopted the contested decision Italy had not implemented protective measures or measures regulating the direct import into Italy from Japan of films of the type concerned.

The applicant further argues that the contested measure in the main proceedings causes it severe harm and may lead it to reduce the activity of Ilford staff assigned to colour films; the measures requested are therefore necessary and urgent. The measures are urgent in particular because the damaging effects of the contested decision will make themselves felt as soon as stocks of products affected by the prohibition of imports are exhausted. The applicant says that it maintains stocks sufficient to cover its needs for a period of 60 to 70 days.

In its observations on the application for the adoption of interim measures the Commission, the defendant in the case, contends that the Court should dismiss the application and order the applicant to pay the costs.

In support of its observations it refers first to serious doubt concerning the admissibility of the application in the main proceedings which contests a decision addressed to the Italian Republic. The applicant does not

establish that the contested decision is of individual concern to it within the meaning of Article 173 of the EEC Treaty. The inadmissibility of the application in the main proceedings is itself sufficient ground for the dismissal of the application to suspend the operation of the decision.

The defendant further argues that in the main proceedings the applicant may at most request the Court to declare void the authorization granted to the Italian Republic in respect of applications for import permits which it submitted between 5 and 20 October 1983, the date an article of the contested decision entered into force. In those circumstances suspension of the operation of the decision would have the same result as a definitive declaration of nullity and would therefore have effects which go beyond the powers of a judge hearing an application for the adoption of interim measures. The measure requested by the applicant is neither sufficiently distinct from the object of the main proceedings nor of an interim nature.

The defendant disputes the argument raised by the applicant to the effect that at the time at which the contested decision was adopted no protective measures were in force in Italy against direct imports of colour films of the type in question. In its view the fact that the previous quota provision for direct imports from Japan ceased to have effect on 30 September 1983 means that from that date onwards imports were completely prohibited.

For those reasons the defendant considers that the applicant's request does not appear *prima facie* to be sufficiently well-founded in law or in fact. It argues, moreover, that the applicant has not shown that the measure requested is urgently required in order to avoid certain damage, since the arguments raised by the applicant merely indicate a risk of possible loss.

III — Oral procedure

Having been duly summoned, the parties presented oral argument at the hearing of the application for the adoption of interim measures on 26 January 1984.

## Decision

1 The applicant is an Italian producer of black and white photographic films. According to its submissions the Ilford group, of which it is a member, concluded an agreement with a Japanese producer in the middle of 1982, with a view to marketing colour films, which that group does not produce, in the Community and in particular in Italy. As a result the applicant imported the products referred to in the contested decision into Italy from other Member States where they were in free circulation. That possibility was

ended by the contested decision as from 5 October 1983, while the Italian Government has since 30 September 1983 prevented direct importation of those products.

2 In its main application contesting that decision the applicant's argument is essentially to the effect, on the one hand, that the decision is contrary to Article 115 of the EEC Treaty because the conditions of fact and of law to which the implementation of the protective measures provided for by that article are subject are not present in this case, and, on the other hand, that it is made retroactive to 5 October, whereas no justification is provided or exists regarding the need for that retroactive effect.

3 In support of its application for suspension or for interim measures the applicant argues that, taking into account the illegalities with which the contested decision is tainted, its suspension or such other measures as the Court may consider appropriate are urgently required, pending the Court's judgment in the main proceedings, in order to avoid endangering the applicant's activity. The applicant notes in this respect that the contested decision means a complete halt in its supply of colour photo products (which it markets under its name) and that its stock of the products in question is sufficient to cover its needs only for 60 to 70 days.

4 The Commission submits that the application for suspension or for other interim measures, which it considers to be both inadmissible and unfounded, should be dismissed.

## Admissibility

5 According to the Commission the application for the adoption of interim measures is, like the main application, inadmissible on the ground that the contested measure, addressed exclusively to the Italian Republic, is not of direct or individual concern to the applicant. It emphasizes that according to the case-law of the Court the fact that the applicant is an importer of the product in question is not sufficient to distinguish it individually as required by Article 173 of the Treaty.

6 In the course of the oral procedure it was revealed that the applicant had duly submitted applications for import permits on 13 October 1983, that is, before the date on which the contested decision was adopted (20 October 1983) but after the date on which it took effect (9 October 1983). As the Court pointed out in its judgment of 23 November 1981 (Case 62/70, *Bock* v *Commission,* [1971] ECR 897), that fact is sufficient to differentiate importers in such a situation from others and to distinguish them individually just as in the case of the person addressed.

7 Without prejudice to the Court's decision concerning the admissibility of the main application, these findings are sufficient for a conclusion that the application for suspension or for interim measures is admissible.

Substance

8 It is not disputed that in any event until 30 September 1983 (and according to the Commission after that date also) the direct import into Italy from Japan of the products concerned was subject to restrictions. Most recently a Ministerial Decree of 7 January 1983, (Official Journal of the Italian Republic No 13 of 14. 1. 1983, p. 334) opened a quota for those products in the amount of USD 265 000 for the period from 1 October 1982 to 30 September 1983. That Ministerial Decree, whose effect came to an end on 30 September 1983, was not renewed or replaced for the period subsequent to that date.

9 Until 5 October 1983, however, the same products could be imported freely into Italy if they had first been put into free circulation in another Member State. The contested decision put an end to that possibility at the request of the Italian Republic, which had previously, by Commission Decision No 83/374 of 19 July 1983 (Official Journal, L 218 of 9. 8. 1983, p. 14), obtained authorization to submit those products to the system known as "intra-Community surveillance".

10 Under Article 115 of the Treaty the Commission may authorize Member States to take necessary protective measures, the conditions and details of which are to be determined by it, in order to ensure that the execution of commercial measures taken by a Member State in accordance with the

Treaty are not obstructed by deflection of trade, or where differences between such measures lead to economic difficulties in one or more of the Member States.

11 At this stage in the proceedings the Commission has not, either in the statement of the reasons on which the decision is based or in the course of these interlocutory proceedings, succeeded in showing satisfactorily that the conditions for the execution of the protective measures referred to in Article 115 are met in this case, and in particular has not shown the existence of any Italian domestic measure of commercial policy taken in accordance with the Treaty.

12 According to the applicant, the limitation of direct imports into Italy of the products in question, of Japanese origin, which until 30 September 1983 resulted from the Ministerial Decree of 7 January 1983 referred to above, came to an end on that date since the decree was not renewed. The applicant concludes that from then on there was no longer any national measure limiting direct imports. This point of view finds some support in the fact that the Council from year to year authorized the independent extension of provisions of certain trade agreements and protocols concluded by Member States with non-member countries. In particular Council Decision No 82/591 of 12 August 1982 (Official Journal, L 244 of 19. 8. 1982, p. 24) authorized the renewal from 19 August 1982 until 30 September 1983 of "agreed minutes" which had been the subject of bilateral negotiations between Italy and Japan in 1969. It should be noted in particular that the expiry date of the Ministerial Decree of 7 January 1983 coincided exactly with the expiry date of the extension authorization and that in spite of the new extension of the "agreed minutes" permitted by the Council in its Decision No 83/401 of 9 August 1983 (Official Journal, L 233 of 24. 8. 1983) no new ministerial decree has been adopted since then.

13 The Commission, for its part, maintains that the basis for the prohibition of direct imports is a more general national measure, namely the Ministerial Decree of 6 May 1976 (Official Journal of the Italian Republic, ordinary supplement of 16. 6. 1976, No 157), which imposed a complete prohibition of direct imports without ministerial authorization, so that from 30 September 1983, in the absence of a ministerial decree opening a quota, the direct importation of the products in question was completely prohibited.

14 That view gives rise to serious doubts in several respects. The assertion that the Ministerial Decree of 7 January 1983 was adopted in the context of the system established by the Decree of 6 May 1976 finds no support in the recitals in the preamble to the former decree which refer to several legal provisions without making any mention of the latter decree. Moreover the Commission itself, in the recitals in the preamble to the decision contested in the main proceedings, starts from the hypothesis that a quota has been established by the Italian authorities, and does not refer to any other national measure.

15 As a result it is impossible at this stage of the proceedings to find with sufficient certainty that there is a national measure in the sense required by Article 115 of the Treaty.

16 It should be added that even if it had to be accepted, as the Commission suggests, that the Decree of 6 May 1976 constitutes a national measure for the purposes of Article 115 of the Treaty, it is doubtful whether it can be a measure executed in accordance with the Treaty.

17 The Commission itself admits that the prohibition of imports which it says is laid down by the Decree of 6 May 1976 can be in accordance with the Treaty only to the extent to which the system which it establishes is, in its turn, in accordance with Regulation No 288/82 of 5 February 1982 on common rules for imports (Official Journal, L 35 of 9. 2. 1982).

18 Article 20 of that regulation expressly requires that any Member State which intends to change a quantitative restriction must inform all the other Member States and the Commission. The Commission has provided no evidence which would establish that the transformation of the quota granted in particular for the period 1 October 1982 to 30 September 1983 into a total prohibition of direct imports into Italy as from the latter date was the subject of such consultation. It follows that, also in the context of Regulation No 288/82, it is not possible to find that after 30 September 1983 there was a national measure taken in accordance with the Treaty, whereas the application of Article 115 is conditional upon the existence of such a measure.

19 Finally, it must be pointed out that the decision contested in the main proceedings gives no particulars concerning the fact that it is made retroactive to 5 October 1983. Although, according to the case-law of the Court, it is not impossible for Community decisions to have retroactive effect, decisions having such effect must include in the statement of the reasons on which they are based particulars which justify the desired retroactive effect. The decision in question is silent in this regard.

20 It follows from the above considerations that the question of the conformity with Article 115 of the Treaty of the decision contested in the main proceedings raises serious problems, so that in any event the first condition to which the suspension of its operation or the granting of interim measures is subject has been met.

21 With regard to the necessity and urgency of a suspension of the decision, in order to avoid serious and irreparable harm to the applicant, it must be accepted, taking into account the explanations provided by the applicant and not contradicted by the Commission, that a complete halt in supplying to an undertaking whose stock is sufficient for a period of about 60 to 70 days may place that undertaking in an extremely difficult situation. That is particularly so if, as the applicant asserts, without being contradicted by the Commission, the agreement concluded with its Japanese supplier of colour films in return gave the undertakings of the Ilford group, including the applicant, the possibility of marketing in Japan black and white films which the applicant produces.

22 It is however necessary to take into account the fact that the supply agreement with the Japanese supplier was concluded relatively recently, in full knowledge of the quantitative restrictions which applied to direct imports into Italy of the products in question. In those circumstances the possibility of recourse by the Commission to Article 115 in order to prevent deflection of trade should have been considered among the risks of the undertaking. That was particularly so since the Commission, in its decision of 19 July 1983, had authorized the placing under surveillance of the products in question.

23 In the light of all the circumstances referred to above, the operation of the contested decision should be suspended to the extent set out below.

On those grounds,

THE PRESIDENT

by way of interim decision

hereby orders as follows:

1. **The operation of the Commission's decision of 20 October 1983 authorizing the Italian Republic not to apply Community treatment to films in rolls, sensitized, unexposed, perforated or not, for colour photographs (subheadings 37.02 ex A II and EX B IV of the Common Customs Tariff) originating in Japan and in free circulation in the other Member States (Official Journal, C 285 of 22 October 1983, p. 6) shall be suspended in respect of the applications for import permits submitted by Ilford between 5 and 20 October 1983, to the extent necessary in order to ensure normal supplies to the applicant during the period from 5 October 1983 to 31 March 1984. Those needs shall be assessed in consideration of the stocks of the products in question held by Ilford on 5 October 1983 and of its sales figures for those products over the previous 12 months. The Commission and Ilford will come to an agreement before 29 February 1984 on the number of units which it must thus be possible to import for release into free circulation. Should they be unable to agree they will inform the President of the Court, by 1 March 1984, of their respective proposals, giving the reasons for their failure to agree.**

2. **The costs are reserved.**

Luxembourg, 1 February 1984

P. Heim
Registrar

J. Mertens de Wilmars
President