ORDER OF THE PRESIDENT OF THE COURT
15 MARCH 1983 [1]

Ferriere di Roè Volciano SpA v Commission of the European Communities

Case 234/82 R

Proceedings on application for the adoption of interim measures — Suspension of operation — Suspension of operation of a decision imposing a fine — Conditions governing grant — Provision of a security — Requirement to provide a bank guarantee not making it possible to escape the damage which would result from the operation of the decision — Grant of suspension justified

(ECSC Treaty, Art. 39, Rules of Procedure, Art. 86 (2))

The conditions required for the suspension of the operation of a Commission decision imposing a fine on a steel undertaking are present and it is unnecessary to make such suspension conditional on the prior provision of a security where there are serious reasons for taking the view that the requirement to provide a bank guarantee in order to obtain a suspension of the operation of the decision would not permit the applicant to escape the damage which would result from the operation of the contested decision pending judgment in the main proceedings, and in particular where the applicant undertaking, because of its small size, may find difficulties in obtaining the necessary credit and where, have regard to the fact that it operates exclusively as a subcontractor, the amount of the fine, calculated at a flat rate per tonne, may represent a heavier burden for it than for an undertaking which realizes on its own behalf all the added value of the production concerned.

In Case 234/82 R

FERRIERE DI ROÈ VOLCIANO SPA, whose registered office is at 24 Via Garibaldi, Roè Volciano, represented by Fabrizzio Massoni, Advocate of 273 Avenue du Fré, B-1180 Brussels, with an address for service in Luxembourg at the Chambers of A. Elvinger, Advocate, 15 Côte d'Eich,

applicant,

v

1 — Language of the Case: French.

COMMISSION OF THE EUROPEAN COMMUNITIES, 200 Rue de la Loi, B-1049 Brussels, represented by Sergio Fabro, a member of its Legal Department, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION to suspend the operation of the Commission Decision of 13 August 1982 concerning a fine imposed on the applicant under Article 58 of the ECSC Treaty,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

I — Summary of the facts

In the light of market trends and the situation in the steel industry, the Commission, by general Decision 2794/80/ECSC of 31 October 1980 (Official Journal, L 291, p. 1), instituted a monitoring system and a system of production quotas for the period between 1 November 1980 and 30 June 1981. However, that system has been extended to the present time subject to certain amendments, in particular by Commission Decision 1831/81/ECSC of 24 June 1981 (Official Journal, L 180, p. 1), which was in turn amended by Commission Decision 2804/81/ECSC of 23 September 1981 (Official Journal, L 278, p. 1).

According to Article 4 of Commission Decision 1831/81/ECSC the Commission is to fix production quotas on a quarterly basis for several groups of products. According to Articles 6 to 10 those quotas are to be fixed for each undertaking on the basis of the reference production of that undertaking and the application of abatement rates to the reference production. Article 5 provides that the Commission is to inform each undertaking of its reference production and the production quotas resulting from an application of the abatement rates.

By a letter dated 6 August 1981 the Commission informed the applicant of its reference production and production quotas for different types of steel products in respect of the third quarter of 1981.

By Decision 1191(5)/82/ECSC of 13 August 1982 the Commission established that the applicant had exceeded the production quota allocated to it for the third quarter of 1981 by 1 012 tonnes in respect of product Categories V

(reinforcing bars) and VI (merchant bars) and therefore imposed a fine of 75 900 (seventy-five thousand nine hundred) European currency units, or 100 284 393 (one hundred million two hundred and eighty-four thousand three hundred and ninety-three lire). That sum was to be paid within two months of the date of the notification of the decision and was subject to a surcharge of 1% per month or part thereof in the event of any delay in paying. The applicant was notified of that decision on or about 25 August 1982.

It should be added that by a letter dated 17 August 1982 the Commission informed the applicant that, in the event of proceedings' being brought before the Court in respect of the decision imposing the fine, it would be prepared to delay execution thereof on condition that a bank guarantee was provided for payment of the fine if it remained payable, together with default interest if appropriate.

On 17 September 1982 the applicant brought an action under Article 33 of the ECSC Treaty claiming that the decision of 13 August 1982 imposing the fine should be declared void. That action is pending before the Court.

II — Written procedure

By application lodged at the Court Registry on 22 February 1983 the *applicant* applied under the second paragraph of Article 39 of the ECSC Treaty and Article 83 (1) of the Rules of Procedure to suspend the operation of Commission Decision 1191(5)/82/ECSC.

In its application the applicant states that it has brought an action for a declaration that that decision is void, but that it is not in a position to provide the bank guarantee required by the Commission for suspension of the contested decision. In support of its statement the applicant produces a copy of correspondence between itself and two banking institutions.

In its observations lodged at the Court Registry on 2 March 1983 the *defendant*, the Commission, contends that the Court should dismiss the application to suspend the operation of its decision of 13 August 1982 submitted by the applicant and that it should reserve the costs.

In support of its conclusions the defendant states in essence that it has not been shown to be necessary on either factual or legal grounds to order suspension.

The applicant has not indicated that there is a sufficient likelihood that the main action is admissible or well founded. Although it takes the view that it cannot be required, at the stage of the interlocutory proceedings, to prove that the disputed decision is well founded, it adds that the documents which it has submitted in the main proceedings demonstrate that it is justified.

Furthermore the defendant contends that the applicant has not shown that the measure which it seeks is necessary in order to avoid serious and irreparable harm. Even if the documents submitted by the applicant show that it is not able to obtain a bank guarantee, that does not lead to the conclusion that the payment of the fine would amount, at this stage in

the main proceedings, to serious and irreparable harm. That is especially so in view of the fact that the applicant has not yet requested the Commission to be allowed to pay the fine by instalments, as it is entitled to do.

Decision

1 According to Article 39 of the ECSC Treaty, actions brought before the Court do not have suspensory effect. The Court may, however, if it considers that the circumstances so require, order that application of the contested decision or recommendation be suspended and may prescribe any other necessary interim measures.

2 The applicant has claimed that the Court should order that the operation of the decision of 13 August 1982 imposing on it a fine of 75 900 (seventy-five thousand nine hundred) European currency units or 100 284 393 (one hundred million, two hundred and eighty-four thousand, three hundred and minety-three) lire be suspended. Although the Commission claims that the application should be dismissed, it may be seen from its written and oral observations that the Commission does not raise any objection to the grant of the suspension requested, on condition that the applicant provides a bank guarantee ensuring the payment of the fine, if it remained payable, together with default interest if appropriate. In adopting this view, the Commission is abiding by a course of action which it adopted in 1981 which may be regarded as justified, provided that consideration is given in appropriate cases to the question whether there are special reasons why it should not be followed.

3 The applicant seeks to obtain the suspension sought without being obliged to provide a guarantee. It claims that it is not in a position to furnish such a guarantee. In support of that claim, it has produced declarations which establish that that is indeed the case.

4 It may be seen from the written and oral observations of the parties that the admissibility of this application for the adoption of interim measures is not disputed and that the main action raises questions of law and of fact which

lead to the conclusion that the legal circumstances of the action and the application for the adoption of interim measures satisfy the conditions prescribed under Article 83 (2) of the Rules of Procedure.

5 It is moreover established that the applicant is a small processing undertaking with heavy financial burdens and that during the period concerned it was working solely as a subcontractor for other iron and steel undertakings. The defendant has conceded that for those reasons this case presents certain exceptional features.

6 It may be concluded that the provision of a bank guarantee creates special difficulties for the applicant in view of the fact that it is often much more difficult for a small undertaking to obtain the necessary credit. Furthermore, it would seem appropriate to take into consideration in the interlocutory proceedings, as an argument in favour of the suspension of the disputed decision, the fact that it is not possible to exclude the possibility that the fine, calculated at a flat rate per tonne in accordance with Article 12 of Decision 1831/81/ECSC, may represent a heavier burden for a processing undertaking, which plays a part in only a limited portion of the production process than for an undertaking which realizes on its own behalf all the added value of the production concerned.

7 There are therefore serious reasons for taking the view that the requirement to provide a bank guarantee in order to obtain a suspension of the operation of the decision imposing the fine would not permit the applicant to escape the damage which would result from the operation of that decision pending judgment in the main proceedings.

8 In those circumstances, the conditions required for the suspension of the operation of the disputed decision are present and it is unnecessary, in this case, to make such a suspension conditional on the prior provision of a security.

9 In the circumstances, costs should be reserved.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

1. **The operation of Article 2 of the Commission Decision of 13 August 1982 concerning a fine imposed on the applicant shall be suspended until the delivery of judgment in the main proceedings.**

2. **The costs are reserved.**

Luxembourg, 15 March 1983

P. Heim
Registrar

J. Mertens de Wilmars
President