ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
21 December 1994 *

In Case T-301/94 R,

Laakmann Karton GmbH, a company established under German law, having its registered office in Velbert (Germany), represented by Dietrich Fudickar, Rechtsanwalt, Wuppertal, with an address for service in Luxembourg at the Chambers of Alex Bonn, 62 Avenue Guillaume,

applicant,

v

Commission of the European Communities, represented by Bernd Langeheine and Richard Lyal, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, also of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for suspension of operation of Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty

* Language of the case: German.

(IV/C/33.833 — Cartonboard, OJ 1994 L 243, p. 1), in so far as Article 3 thereof imposes a fine of ECU 2 200 000 on the applicant,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts and procedure

1 On 13 July 1994 the Commission adopted Decision 94/601/EC relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard, OJ 1994 L 243, p. 1) ('the Decision'). According to Article 1 of the Decision, the 19 cartonboard suppliers there listed have infringed Article 85(1) of the Treaty by participating in an agreement and concerted practice whereby they engaged in a range of anti-competitive activities within the common market, as summarized in Article 1.

2 The Decision states that the practices were implemented within the framework of the 'Product Group Paperboard' ('PG Paperboard'), which brought together a

significant number of European cartonboard manufacturers. The Decision also states that the PG Paperboard had, during the reference period, that is to say, from 1986 to 1991, a number of committees, including, in particular, the 'Presidents' Working Group' ('PWG'), the 'President Conference' and the 'Joint Marketing Committee' ('JMC'). The Decision further states that the PWG brought together representatives of the eight principal manufacturers and took decisions of a general nature regarding the timing and level of price rises to be implemented by cartonboard manufacturers. The PWG also introduced a number of arrangements among the participants regarding their respective market shares which had the purpose of preventing concerted price initiatives being jeopardized by over supply. The results of discussions within the PWG were submitted on a regular basis to the 'President Conference', at which, according to point (42) of the Decision, all the undertakings to which the Decision was addressed were represented. According to the Decision, the main purpose of the JMC, within which all European manufacturers of cartonboard were represented, was to give effect to the price increases agreed on by the PWG.

3 The list of addressees of the Decision contained in Article 5 includes Laakmann Karton GmbH&Co. KG ('Laakmann Karton'), which ceased to exist in June 1993. It is common ground that the applicant was a general partner in that partnership enterprise and that it took over the enterprise and continued its activity.

4 Article 3 of the Decision imposes on Laakmann Karton a fine of ECU 2 200 000 for the infringements described in Article 1. Article 4 provides that the fines imposed under Article 3 are payable in ECU within three months of the date of notification of the Decision.

5 The Commission notified the applicant of the Decision by letter of 1 August 1994. The Commission pointed out in that letter that if the applicant brought an action

before the Court of First Instance the Commission would not take any steps to recover the fine while the case was pending before the Court, provided that interest accrued on the amount due as from the date on which the period for payment expired and that a bank guarantee, acceptable to the Commission, covering both the principal sum of the amount due and interest thereon, was provided by no later than that date.

6 By application lodged at the Registry of the Court of First Instance on 3 October 1994 the applicant brought an action under Article 173 of the EC Treaty for annulment of the Decision or, in the alternative, for reduction of the fine imposed on it.

7 By a separate document lodged at the Registry of the Court of First Instance on 3 November 1994, the applicant made this application under Article 185 of the EC Treaty for suspension of operation of the Decision in so far as it imposes a fine of ECU 2 200 000 on the applicant.

8 The Commission submitted its observations on the application for interim measures on 18 November 1994. The parties presented oral argument on 25 November 1994.

Law

9 Under the combined provisions of Articles 185 and 186 of the EC Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 estab-

lishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that the circumstances so require, order that operation of the contested measure be suspended or prescribe any necessary interim measures.

10 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures referred to in Articles 185 and 186 of the Treaty must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Such measures must be provisional in the sense that they do not prejudge the decision on the substance of the case (see the order of the President of the Court of First Instance of 26 October 1994 in Cases T-231/94 R, T-232/94 R and T-234/94 R *Transacciones Maritimas and Others* v *Commission* [1994] ECR II-885, paragraph 20).

Arguments of the parties

11 In order to establish a prima facie case for its claim, the applicant relies on three grounds of challenge. They are (i) that it is not one of the addressees of the Decision; (ii) that the Commission carried out an incorrect appraisal of the facts in relation to its involvement in the practices objected to in the Decision; and (iii) that the amount of the fine imposed is excessive.

12 In support of its first ground of challenge, the applicant submits that the Decision is addressed to Laakmann Karton GmbH&Co. KG and is not

expressly addressed to itself, so that the Decision is void for that reason alone.

13 The applicant's second ground of challenge is directed against the Commission's findings of fact regarding the applicant's involvement in the practices objected to in the Decision, in particular its participation on the committees of the PG Paperboard. Its involvement, the applicant claims, was very limited, particularly with regard to the 'President Conferences', in which connection the applicant never took part in any agreement or concerted practice. Nor, moreover, did it ever take part in a meeting of the PWG. The applicant, which claims that its market position did not allow it to influence the prices charged, maintains that it did no more than align its prices, negotiated directly with its customers, with those decided on by the major manufacturers. Furthermore, the investments necessary for survival on the market forced it to increase its prices. Finally, even though it practised a 'price before tonnage' policy, it never took part in a discussion on maintaining the market shares of the principal manufacturers at a constant level.

14 By its third ground of challenge, the applicant criticizes the Commission for not specifying the criteria which determined the amount of the fine and, in particular, for not assessing the duration and degree of its involvement in the operation of the PG Paperboard, contrary to Article 15 of Council Regulation No 17 of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). Moreover, contrary to its assertions in the Decision, the Commission failed to take account of the applicant's cooperation as a mitigating factor. Finally, the Commission based the fine, in the applicant's case and in its case alone, on the total turnover figure rather than on that for the product concerned, notwithstanding the explanations given by the applicant during the administrative procedure.

15 With regard to the issue of urgency, the applicant refers to German insolvency law, under which over-indebtedness and insolvency of a limited-liability company must

result in winding-up by the court. In view of the losses which it has incurred and the provision made for payment of the fine, in the amount of part of that fine, entering the rest of the fine on the liabilities side would render it insolvent for accounting purposes. During the hearing, the applicant added that winding-up, on account of excessive indebtedness, of a company limited by shares could only be avoided if the assessment of its chances of survival was positive. A positive prognosis would be impossible if the applicant were required to pay the fine immediately. The applicant also states that it would become insolvent if the interim measure applied for were not to be granted. Given its assets, it is not in a position to satisfy an obligation in the amount of the fine payable on 5 November 1994, which would oblige its directors to apply for winding-up by the court. The applicant submits in that context that, despite approaches to its banks, it has been unable to obtain the guarantee demanded from it in view of its bad financial position. As for the parent company, it has refused to provide the applicant with the necessary funds and has declared that it is not prepared to make any fresh payments.

16 The Commission notes first that the present application seeks suspension of operation of the Decision in so far as it requires the applicant to provide a bank guarantee in an amount equal to that of the fine imposed on it. Such an application can be granted only in quite exceptional circumstances, which are not present in this case. The applicant has failed to demonstrate urgency or to specify the pleas of fact or law establishing a case for adoption of the interim measures applied for.

17 In reply to the applicant's first ground of challenge, to the effect that it is not one of the addressees of the Decision, the Commission states that the applicant and Laakmann Karton are one and the same in both factual and economic terms. The applicant's partners merely decided to change its name, extend its objects and increase its share capital. As general partner of the former GmbH & Co. KG, the applicant continues to be liable for infringements committed by the latter.

18 With regard to the second ground of challenge, the Commission observes that the applicant does not deny its involvement in the PG Paperboard but merely states that it was not present at a number of meetings. Having regard to the view taken of the infringement found, as apparent from the preamble to the Decision, it was unnecessary in this case to explain in exhaustive detail how each undertaking was involved in each action. In any event, the applicant acknowledges that it learned of the price increases planned by the major manufacturers and that it increased its prices as a result. This is quite typical behaviour for a member of a cartel, and there is no need to ascertain whether its market position would have allowed it to impose such increases unilaterally. When the applicant states that its prices were negotiated individually with each customer or that they were increased as a result of investments made, its argument is at variance with its own explanations regarding its own alleged adaptation to the pricing policy of the major manufacturers.

19 So far as concerns the applicant's third ground of challenge, concerning the amount of the fine, the Commission first points out that the duration of the infringement is specified in Article 1 of the Decision (mid-1986 until April 1991) and that the applicant's involvement in the practices complained of is described in detail in the preamble and the annexes to the Decision. Moreover, the applicant was not treated as one of the 'ringleaders' responsible for these practices, on which were imposed relatively higher fines than that imposed on the applicant, and did not demonstrate any particular cooperation with the Commission during the investigation. With regard to the turnover figure used for calculating the fine, the Commission states that the Decision relates to the whole of the cartonboard market, with the exception of a few products, and that the applicant amended its indicated turnover figures only at the final stage of the administrative procedure without further substantiating those changes.

20 So far as the urgency of the requested measure is concerned, the Commission considers that the applicant has not provided sufficient evidence of the losses which it alleges, because the calculations provided have not been verified by an independent expert. It goes on to submit that, for the duration of the proceedings before the Court of First Instance, the applicant will not be required to include the full amount of the fine among its liabilities, since the Commission has specifically waived its claim to payment on condition that a bank guarantee is provided, which

cannot seriously be said to threaten the applicant's survival, given the relatively low costs involved. With regard to the applicant's approaches to its banks with a view to securing the guarantee demanded, the Commission points out that no letter from any of the banks concerned has been produced and it states that the applicant has not explained why the banks refused to accede to its request. The Commission also points out that in order to assess the applicant's capacity to provide a bank guarantee (but not to pay the amount of the fine), it is necessary to take account of the applicant's relationship with its 100% parent company and of the financial and economic situation of the group to which the applicant belongs, which is extremely favourable.

Appraisal of the President of the Court of First Instance

21 Before a ruling is given on the present application for interim measures, it is necessary to define precisely the subject-matter of the proceedings. In its application, the applicant is seeking suspension of the operation of the Decision in so far as Article 3 of the Decision imposes on it a fine of ECU 2 200 000. It is not disputed that the Commission, in its letter of 1 October 1994 notifying the Decision, pointed out to the applicant that, if it brought an action before the Court of First Instance, no steps would be taken to recover the fine while the case was pending before the Court, subject to the condition that the applicant would provide a bank guarantee, acceptable to the Commission, covering the principal debt and any interest payable. In those circumstances, the only useful purpose of the application is dispensation from the obligation to provide a bank guarantee as a condition for obtaining suspension of immediate operation of the Decision.

22 According to a consistent line of case-law, such an application can be upheld only in exceptional circumstances (see, in particular, the orders of the President of the Court of Justice in Case 107/82 R *AEG* v *Commission* [1982] ECR 1549, paragraph 6, and in Case 234/82 R *Ferriere di Roè Volciano* v *Commission* [1983] ECR 725,

paragraphs 2 and 8). The applicant has failed to provide any evidence justifying a prima facie finding that that condition has been satisfied in the present case. This is so both with regard to its arguments seeking to establish the urgency of the suspension requested, to the effect that it cannot possibly provide a bank guarantee and that it runs the risk of being wound-up by court order, and with regard to the prima facie merits of its main application.

23 First, as far as the question of urgency is concerned, it is necessary to begin by considering whether the applicant has established prima facie that it cannot possibly provide the guarantee demanded.

24 In that regard, it must be held at the outset that the affidavits of the applicant's directors annexed to the application for interim measures cannot be regarded as probative in view of the fact that they are entirely general in nature. They state: 'Laakmann endeavoured to secure from its banks a guarantee in order to avoid enforcement of the Commission Decision. A guarantee could not be obtained.' No explanation is given as to the reasons or circumstances which led the banks to refuse the applicant's request.

25 Moreover, the situation described in those affidavits is at odds with three letters from different banks which the applicant produced during the hearing. Whilst each of those banks makes the grant of a guarantee conditional on provision of adequate security in view of 'Laakmann GmbH's position with regard to its balance sheet

and earnings' or of its 'economic situation', none of the letters expresses any view as to whether the applicant is in a position to provide such security.

26 In order to assess the applicant's ability to provide the guarantee in question, account should also be taken of the group of undertakings to which it belongs directly or indirectly (see the order of the President of the Court of Justice in Case 86/82 R *Hasselblad* v *Commission* [1982] ECR 1555, paragraph 4, as well as the order of the President of the Court of First Instance of 25 August 1994 in Case T-156/94 R *Siderúrgica Aristrain Madrid* v *Commission* [1994] ECR II-715, paragraph 33), particularly with regard to the possibility of providing the security which the banks might require. At first sight there is no evidence to suggest that those companies would be prevented economically or legally from providing the applicant with the support it needs in order to secure the guarantee demanded. Such a conclusion is not undermined in this case by the fact that the companies which at present directly or indirectly control the applicant assumed control only after the reference period taken into consideration in the Decision had gone by. As the applicant admitted at the hearing, the company which indirectly controls it was aware, when control was assumed in 1992, that the applicant might be fined. It is also common ground that when the transaction price was settled the likelihood of a fine was taken into account. Finally, it cannot be discounted that the value of the shares transferred may have been influenced by the practices objected to in the Decision.

27 Next, with regard to the risk that the applicant might be wound-up by court order, it must be held that, even assuming that its statements concerning losses incurred since the beginning of 1994 have been sufficiently corroborated, that risk has not been demonstrated in respect of the possibility of over-indebtedness or insolvency.

28 Regarding the possibility of its being wound-up by court order for reasons of over-indebtedness, the applicant accepted at the hearing that the over-indebtedness which might arise if the full amount of the fine were to be included among its liabilities would not necessarily result in the institution of winding-up proceedings, provided that the applicant received a positive prognosis of survival. In that regard the applicant indicated that the prognosis would depend on whether or not it was required to pay the fine immediately. In view of the subject-matter of the application for interim measures, as defined in paragraph 21 of the present order, dismissal of this application would not oblige the applicant to pay the fine immediately, provided that the guarantee demanded by the Commission is supplied. On this latter point, the applicant has failed to give any explanation as to how it could affect the survival prognosis.

29 In so far as the applicant's argument is based on the possibility of its being wound-up on grounds of insolvency, this is not relevant either since, as with the reasoning rejected in the previous paragraph, the argument is based on the mistaken assumption that it would be required to pay the fine immediately if its application were to be dismissed.

30 Finally, and in any event, it must be held, as regards the possible existence of exceptional circumstances justifying adoption of the measure sought, that none of the grounds of challenge put forward by the applicant to show that its main application is well founded has disclosed any factor such as to raise immediately particularly serious doubts as to the legality of the Decision.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed;

2. The costs are reserved.

Luxembourg, 21 December 1994.

H. Jung — J. L. Cruz Vilaça

Registrar — President