Case 46/87 R

Hoechst AG
v
Commission of the European Communities

(Competition — Commission investigation — Periodic penalty payments)

Order of the President of the Court, 26 March 1987 1549

Summary of the Order

Interim measures — Suspension of operation — Conditions for granting — Measures not prejudging the decision on the substance of the case — No manifest illegality which per se *requires the suspension of the operation of the decision — Serious and irreparable damage (EEC Treaty, Art. 185; Rules of Procedure, Art. 83 (2))*

ORDER OF THE PRESIDENT OF THE COURT
26 March 1987 *

In Case 46/87 R

Hoechst AG, a company incorporated under German law, whose registered office is at 6230 Frankfurt am Main 80, represented by its Directors and by H. Hellmann, Rechtsanwalt, Cologne, assisted at the hearing by Mr Spitzer, with an address for service in Luxembourg at the Chambers of Messrs Loesch & Wolter, 8 rue Zithe,

applicant,

* Language of the Case: German.

V

Commission of the European Communities, represented by its Agent, N. Koch, its Legal Adviser, 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, primarily, for an order suspending the operation of the Commission decisions of 15 January 1987 ordering an investigation under Article 14 (3) of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-62, p. 87) and of 3 February 1987 imposing periodic penalty payments under Article 16 of Regulation No 17 (Case IV/31.865 — PVC and IV/31.866 — Polyethylene),

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 16 February 1987, Hoechst AG, hereinafter referred to as 'Hoechst', brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of:

(i) the Commission decision of 15 January 1987 ordering an investigation under Article 14 (3) of Regulation No 17/62 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the EEC Treaty, and

(ii) the Commission decision of 3 February 1987 imposing periodic penalty payments under Article 16 of Regulation No 17/62.

2 By an application lodged at the Court Registry on 18 February 1987 the applicant requested the Court, under Article 185 of the EEC Treaty and Article 83 of the Rules of Procedure, to make an interim order primarily for the suspension of the

operation of the said Commission decisions of 15 January and 3 February 1987 until the Court has given judgment on the main application.

3 The defendant submitted its written observations on 9 March 1987. The parties presented oral argument on 18 March 1987.

4 Before considering the merits of this application for interim measures, a brief account should be given of the background to the case and in particular the facts which led the Commission to adopt the two decisions in question.

5 The Commission had, according to its own account, come into the possession of information revealing the existence of agreements or concerted practices between certain producers and suppliers of PVC and polyethylene, including LDPE. Those agreements or concerted practices, which had not been notified to the Commission, fixed the selling prices and quotas or the sales objectives for those products in the EEC.

6 On the basis of the information in its possession, the Commission considered that there was reason to believe that the applicant was still or had been party to those agreements and concerted practices which, should their existence be proved, might constitute a serious infringement of Article 85 (1) of the EEC Treaty. It therefore decided to undertake an investigation pursuant to Article 14 (3) of Regulation No 17 of the Council and for that purpose adopted the decision of 15 January 1987.

7 On 20 January 1987 two officials authorized by the Commission, accompanied by an official of the Bundeskartellamt (Federal Cartel Office), handed to the director of Hoechst's legal department the Commission decision of 15 January 1987 ordering an investigation under Article 14 (3) of Regulation No 17. The official of the Bundeskartellamt at the same time handed him an authorization in writing and an enforcement order dated 16 January 1987 issued by the President of the Bundeskartellamt. Hoechst refused to submit to the investigation on the ground that the decision by which it was ordered did not satisfy the minimum legal

conditions laid down in Article 14 (3) as regards the content of such a decision and, furthermore, claimed a power not provided for in that article, namely the power to conduct a search without first obtaining a warrant from a judge.

8 On 22 January 1987 the Commission officials, accompanied by representatives of the Bundeskartellamt and police officers, again presented themselves at Hoechst's legal department with a view to undertaking the investigation on the basis of the decision of 15 January 1987. It was intended that if Hoechst refused to submit to the investigation the officials of the Bundeskartellamt should enforce the investigation *ex officio* under Article 3 of the German Law of 17 August 1967 implementing Regulation No 17 of the Council, and in particular Article 14 (6) thereof, subject only, it would appear, to the restriction that they were not authorized to obtain documents by means of a search.

9 Hoechst reiterated its view that any action taken by Commission officials based on a decision to undertake an investigation such as that of 15 January 1987 was, for the reasons set out in paragraph 7 of this order, to be regarded as unlawful. Its representatives also stated that they would not actively oppose such an investigation but would refuse to cooperate because it was unlawful. The Commission officials still insisted on conducting an unrestricted investigation, and the police officers, interpreting this as a claim to make a search, withdrew.

10 On 29 January 1987 the Commission sent a telex message to Hoechst in which it required the company to make a declaration before 2 February 1987 agreeing to submit to the investigation; if it failed to do so, the Commission would impose upon it a periodic penalty payment of 1 000 ECU per day from the date of notification of the decision.

11 In reply, Hoechst repeated its previous point of view in a letter dated 2 February 1987. In order to compel Hoechst to submit to the investigation the Commission therefore adopted, on 3 February 1987, a decision imposing upon it a periodic penalty payment pursuant to Article 16 (1) (d) of Regulation No 17 of the Council.

12 At national level, Hoechst applied to the Verwaltungsgericht (Administrative Court) Frankfurt on 23 January 1987 for an interim injunction restraining the Bundeskartellamt from making any search in implementation of the Commission decision of 15 January 1987. On the same day the Verwaltungsgericht Frankfurt granted an interim injunction provisionally suspending the operation of the enforcement order issued by the Bundeskartellamt. The Bundeskartellamt then applied to the Amtsgericht (Local Court) Frankfurt for a search warrant to enable it to compel Hoechst to submit to the investigation required by the Commission. The Amtsgericht Frankfurt rejected that application on 12 February 1987 on the ground that it had not been apprised of the facts on the basis of which the Commission had decided to undertake the investigation in sufficient detail to enable it to verify whether there were in fact substantial grounds for believing that there had been an infringement of the provisions of the EEC Treaty on competition law.

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 the circumstances so require, order that the application of the contested measures be suspended.

14 In order for interim measures such as those requested to be granted, Article 83 (2) of the Rules of Procedure requires that applications for such measures should state the circumstances giving rise to urgency and the factual and legal grounds establishing a *prima facie* case for the interim measures applied for.

15 The Court has consistently held that the urgency of an application for interim measures, as referred to in Article 83 (2) of the Rules of Procedure, must be assessed on the basis of whether it is necessary to grant such measures in order to avoid serious and irreparable damage to the party seeking them.

16 In order to establish a *prima facie* case justifying the suspension of the operation of the Commission decision of 15 January 1987 ordering an investigation, the applicant makes two submissions which, in its view, clearly show that that decision is manifestly illegal.

17 The first submission is that the decision does not satisfy the minimum legal conditions imposed, as regards its content, by Article 14 (3) of Regulation No 17.

18 In its second submission, the applicant claims that the contested decision ordering an investigation claims a power which is not mentioned in Article 14 (3), namely the power to search without first obtaining a search warrant from a judge and thus without any judicial control. According to the applicant, the Commission's argument to the effect that the term 'investigation' in Article 14 must include a search, if Article 14 is not to be deprived of practical effect, has no foundation whatever and is contradicted by the actual wording of the provision. The applicant considers that the fact that a mere reading of the article shows that it does not provide any legal foundation for a right of search is in itself sufficient to establish the manifest illegality of the decision.

19 Furthermore, the applicant claims that, whether or not Article 14 confers on the Commission a right of search, the contested decision would in addition be manifestly unconstitutional if it were permissible thereunder to carry out a search without the prior issue of a warrant by a judge. Such unconstitutionality results from the breach of the fundamental right of legal persons to the inviolability of their commercial premises, a right which forms part of the constitutional traditions of the Member States and the general principles of law which Community law protects and the observance of which is ensured by the Court of Justice.

20 In order to establish a *prima facie* case justifying the suspension of the operation of the Commission decision of 3 February 1987 imposing periodic penalty payments pursuant to Article 16 of Regulation No 17, the applicant claims that the decision bears the mark of manifest illegality on account of infringement of essential procedural requirements, failure to comply with which renders the measure void. Such illegality arises from the fact that the decision was adopted in manifest infringement:

(i) of Article 16 (3) and paragraphs (3) to (6) of Article 10 of Regulation No 17, since the Advisory Committee on Restrictive Practices and Monopolies was not consulted prior to its adoption, in spite of the fact that such consultation is expressly required by the reference contained in Article 16 (3);

(ii) of Article 19 (1) of Regulation No 17, and of Articles 2 (3) and 7 (1) of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17

(Official Journal, English Special Edition 1963-64, p. 47) since, contrary to those provisions, the Commission did not supply the statement of objections required by Article 2 (3) nor did it afford to Hoechst the opportunity to put forward its arguments orally, as required by Article 7 (1), even though Hoechst had expressly so requested.

21 The Commission contends that there are two stages in the procedure for fixing a periodic penalty payment. First, the penalty payment is provisionally fixed, by way of warning, and it is then fixed definitively. In the first stage, a decision such as the one in point in this case is taken in order to compel an undertaking to take certain measures or pay a periodic penalty payment the amount of which is fixed in that decision. If the undertaking does not take the measures, notwithstanding the threat of such a periodic penalty payment, a second decision is adopted fixing the definitive amount of the periodic penalty payment to be imposed. It is only in the second stage that the Commission is bound to satisfy the aforesaid essential procedural requirements prescribed, failure to comply with which renders the decision void.

22 The applicant claims that the breach of the fundamental right of legal persons to the inviolability of their commercial premises, upon which it relies as regards the decision ordering an investigation, also affects the decision imposing periodic penalty payments, since the purpose of those payments is to impose by force a search which is unlawful and unconstitutional. Consequently, the Commission decision of 3 February 1987 imposing periodic penalty payments is also manifestly unconstitutional.

23 In order to establish the urgency of its application within the meaning of Article 83 (2) of the Rules of Procedure, the applicant refers primarily to the order made by the Court in Joined Cases 60 and 190/81 R *IBM* v *Commission* [1981] ECR 1857. On the basis of that decision, the applicant considers that where a measure of Community law, the suspension of the operation of which is requested, appears on a *prima facie* appraisal to be manifestly illegal, it is not even necessary to examine the material or non-material damage which may result from its application. In its submission, a manifestly unlawful measure always gives rise to the danger of serious and irreparable damage, if only because its implementation undermines confidence in the legal system. The suspension of the operation of such a measure is therefore justified purely in the interests of the correct application of the law. If it is clear from the judgments of the Court that the manifest illegality of a measure of Community law is a sufficient basis for granting a request for the suspension of its operation, *a fortiori* the same should apply where such a measure is also manifestly unconstitutional.

24 The applicant also stresses that the non-material damage which it will suffer as a result of the unconstitutionality of the two contested decisions constitutes damage which could not be repaired because the integrity of the protection afforded to the fundamental right in question would be breached and could not be restored, after the event, even if the Commission were later forced to forgo the advantage obtained from such breach. The decision imposing periodic penalty payments further causes it material damage which is increasing by DM 2 000 per day.

25 In substance, therefore, the applicant's arguments amount to claiming that the decisions whose operation it requests the Court to suspend are marred by such serious and obvious defects that it is evident, even at first sight, that they lack any legal basis and are manifestly illegal. In its submission, by reason simply of the nature and gravity of these illegalities it is necessary and a matter of urgency that the situation resulting from their application should be terminated forthwith. That submission acquires even greater force where the decisions in question are not only illegal but also manifestly unconstitutional, because a fundamental right forming an integral part of the general principles of law the observance of which is ensured by the Court of Justice has been breached.

26 It must therefore be considered whether in this case the arguments put forward by the applicant are capable of providing *prima facie* evidence of such illegality or unconstitutionality.

27 As regards the first submission raised concerning the decision of 15 January 1987, it must be considered whether the content of the decision *prima facie* appears to satisfy the requirements laid down in Article 14 (3) of Regulation No 17, which provides as follows:

'Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject-matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 15 (1) (c) and Article 16 (1) (d) and the right to have the decision reviewed by the Court of Justice.'

28 In the context of such an appraisal, it must be stated that the contested decision ordering an investigation *prima facie* seems to satisfy those procedural requirements:

Article 1 and the recitals in the preamble state the subject-matter and purpose of the investigation: namely, to investigate whether or not Hoechst was or is still a party to agreements or concerted practices between certain producers and suppliers of PVC and polyethylene, including LDPE, in the EEC, fixing the selling prices and quotas or sales objectives of those products, which might constitute a serious infringement of Article 85 (1) of the EEC Treaty.

Articles 2 and 3 and the final recital in the preamble respectively state the date on which the investigation is to begin, the right to have the decision reviewed by the Court of Justice and the penalties provided for in Article 15 (1) (c) and Article 16 (1) (d) in the event of a refusal to submit to such an investigation.

29 As regards the second submission challenging the decision to order an investigation and the submission, contesting the decision imposing periodic penalty payments, of infringement of essential procedural requirements, which raises a problem concerning the interpretation of Article 16 of Regulation No 17, it must be stated that consideration in interim proceedings of the problems raised by those submissions would amount to prejudging the substance of the case, which would be contrary to a consistent line of decisions of the Court in which it has held that interim measures may be granted only if they do not prejudge the decision on the substance of the case (see in particular, most recently, the order of the President of the Court of 30 April 1986 in Case 62/86 R *AKZO* v *Commission* [1986] ECR 1503). The President of the Court therefore considers that these questions may not be resolved in the context of interim proceedings. Such submissions therefore cannot be regarded as disclosing the existence of a manifest illegality.

30 The President of the Court considers that the appraisal in paragraph 29 of this order also applies to the complaint based on the breach of the fundamental right of legal persons to the inviolability of their commercial premises and relied upon by the applicant to establish the manifest unconstitutionality both of the decision ordering the investigation and of the decision imposing periodic penalty payments.

31 On the grounds set out above it must be found, without prejudging the substance of the main application, that the contested decisions do not appear, in the light of the complaints made against them, to be measures which lack even the appearance of legality or constitutionality, as maintained by the applicant, and whose operation must for that reason alone be suspended forthwith.

32 It was therefore for the applicant to put forward arguments capable of demonstrating that there is an urgent need for the requested measure to be granted in order to prevent it from suffering serious and irreparable damage.

33 The only submissions which the applicant has made and which are set out in paragraph 24 of this order are not, however, capable of establishing that such is the case.

34 Indeed, if the investigation were carried out on the basis of the decision of 15 January 1987 and that decision were subsequently annulled by the Court of Justice in the exercise of its powers of judicial review, the Commission would in that event be prevented from using, for the purposes of a proceeding in the matter of an infringement of Article 85 of the EEC Treaty, any documentary evidence which it might have obtained in the course of that investigation, as otherwise the decision on the infringement might be annulled in so far as it was based on such evidence.

35 Furthermore, the material damage of DM 2 000 per day which would result from the implementation of the decision imposing a periodic penalty payment does not seem likely to cause the applicant serious and irreparable damage. Apart from the grave doubts which may be entertained as to the seriousness of such damage in the light of what is, after all, the trifling amount which that penalty payment represents when compared with the size and turnover of a company such as Hoechst, it must also be accepted that even assuming the decision of 3 February 1987 to be an enforceable measure, the Commission would be bound, should that decision be declared void by the Court in the main proceedings, to repay the amount received by way of penalty payments. In those circumstances it therefore seems scarcely possible to establish that such damage would be irreparable.

36 It follows from all the considerations set out above that the application for interim measures must be dismissed.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

(1) The application is dismissed;

(2) Costs are reserved.

Luxembourg, 26 March 1987.

P. Heim
Registrar

A. J. Mackenzie Stuart
President