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

In Case T-295/94 R,

Buchmann GmbH, a company established under German law, having its registered office at Rinnthal (Germany), represented by Helmut Braun, Rechtsanwalt, Dresden,

applicant,

v

Commission of the European Communities, represented by Bernd Langeheine and Richard Lyal, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, also of the Commission's 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 (IV/C/33.833 — Cartonboard, OJ 1994 L 243, p. 1), without the applicant's being

* Language of the case: German.

obliged to provide a bank guarantee, in so far as that decision requires the applicant to pay a fine,

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, which include the applicant, 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', in 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, in which all European manufacturers of cartonboard were represented, was to give effect to the price increases agreed on by the PWG.

3 Article 3 of the Decision imposes on the applicant a fine of ECU 2 200 000 in respect of the infringements established 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.

4 The Commission notified the Decision to the applicant 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 accrues 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.

5 By application lodged at the Registry of the Court of First Instance on 28 September 1994 the applicant brought an action under Article 173 of the EC Treaty for annulment of the Decision.

6 By a separate document lodged at the Registry of the Court of First Instance on 14 October 1994, the applicant made this application under Article 185 of the EC

Treaty for suspension of operation of the Decision, without its being obliged to provide a bank guarantee, in so far as the Decision requires it to pay a fine.

7 The Commission submitted its observations on the present application for interim measures on 2 November 1994. The parties presented oral argument on 25 November 1994.

Law

8 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 establishing 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 act be suspended or prescribe any necessary interim measures.

9 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

10 In order to establish a prima facie case, the applicant relies on four of the grounds of challenge put forward in its main application: (i) error as to the duration of its involvement in the infringement established by the Commission; (ii) error as to its involvement in an exchange of commercial information designed to support the application of the restrictions on competition in question; (iii) error as to its involvement in the 'President Conferences' of the PG Paperboard; and, finally (iv) unlawful acquisition of certain items of evidence.

11 In support of its first ground of challenge, the applicant points out that, in point (2) of the Decision as well as in the operative part, the Commission accuses it of having participated since mid-1986 in the agreement complained of. As is clear from Table 4 annexed to the Decision, recording the meetings of the JMC and the exchange of correspondence preceding the Decision and the individual notification of the complaints on 21 December 1992, it is not possible to date the beginning of the applicant's involvement in the alleged infringement to a time earlier than 1988.

12 The second ground of challenge is that, in stating in the Decision that all the undertakings addressed, including the small producers, took part, through exchanges of information, in monitoring the level of orders on the books, the Commission made, so far as the applicant is concerned, an inaccurate appraisal of the facts, as is made clear by a letter which the applicant sent to the Commission on 13 August 1991 and by the statistics to which the Commission has access.

13 By its third ground of challenge, the applicant claims that, contrary to the statement in point (42) of the Decision, it never attended a 'President Conference', a fact which the Commission itself recognized in Tables 3 and 7 annexed to the Decision as well as in a letter of 1 March 1994 addressed to the applicant.

14 In its fourth ground of challenge, the applicant refers to a hearing on 20 December 1993 which was held by the Commission and at which the applicant was not represented. The applicant submits that, according to the minutes sent to it by a third party, the Commission's representative stated during that hearing that 'the producers which have more or less admitted practically all the allegations (and, moreover, I shall willingly admit to being mistaken if such is the case) are, I think, Buchmann ... They have basically accepted the allegations made against them.' So far as the applicant is concerned, that statement is incorrect and it was able to refute it only by a letter of 2 February 1994. It follows, according to the applicant, that all the evidence obtained during and after the hearing was unlawfully acquired on the ground that the Commission deliberately misled the accused undertakings.

15 So far as the issue of urgency is concerned, the applicant submits that provision of a bank guarantee, demanded by the Commission if no fine is paid, would seriously compromise its existence and place in grave jeopardy the jobs of its 450 employees. Since its own capital is now inadequate in view of the losses which it has accumulated and the provision needed to cover payment of the fine, provision of a guarantee for the amount envisaged would make it impossible for it to acquire fresh capital. In the months to come, the applicant will need additional credit in order to meet its operating requirements. Following prior notification by letter of 11 August 1994, annexed to the application for interim measures, its bank informed it, in the interim, that it was withdrawing discount credit granted previously. The applicant adds that even subsequent reimbursement or payment of damages following annulment of the Decision could not compensate for the extremely severe consequences that would follow from provision of the guarantee.

16 The Commission observes first of all that it is only in quite exceptional circumstances that a judge hearing an application for interim measures can uphold an application which, like the applicant's, seeks suspension of operation of a decision in so far as it requires the applicant to provide a bank guarantee for an amount equal to the fine imposed on it. Such exceptional circumstances, it submits, are not present in this case as the applicant has not stated the circumstances giving rise to

urgency or the pleas of fact and law establishing a case for the interim measures applied for.

17 In reply to the objection that the Commission made an error in assessing the duration of the applicant's involvement in the infringement found by the Commission, the latter refers to point (162) of the Decision and to Article 1 thereof, which states that 'in the case of Buchmann and Rena [the infringement lasted] from about March 1988 until at least the end of 1990'. The Decision is therefore not based on an incorrect assessment of the facts regarding the duration of the infringement.

18 So far as the applicant's arguments on the exchanges of commercial information to support application of restrictions on competition are concerned, the Commission considers that these are irrelevant. In view of the manner in which the infringement established came about, it was not necessary in this case to set out exhaustively how each undertaking was involved in each action.

19 So far as concerns the applicant's involvement in the 'President Conferences', the Commission points out that, as is clear from Table 3 annexed to the Decision, it has not assumed such involvement. The arguments put forward by the Commission with regard to the second ground of challenge also apply in equal measure to the third. In any event, the applicant was informed by other undertakings within the sector of the results of the meetings of the PWG and was consequently in a position to plan its competitive behaviour accordingly.

20 With regard to the ground of challenge alleging unlawful acquisition of certain evidence, the Commission begins by pointing out that, in its view, it does not appear from the main application that the applicant is denying its involvement in the agreement, but rather that the applicant is quite simply arguing that, since it did not take

part in certain meetings, a number of its actions have been incorrectly construed. It is therefore not entirely wrong to say that the applicant admits the matters of which it stands accused. Moreover, the Commission's rapporteur reserved the right to correct his statements. The applicant also fails to explain why the very fact of mentioning that it admitted the matters of which it stands accused should have had such a significant influence on the other undertakings. This is at odds with the impression which the applicant wishes to create, namely, that it played only a secondary role in the collusive arrangements. Furthermore, it is difficult to see how any influencing of other undertakings could affect the legality of the Decision *vis-à-vis* the applicant.

21 So far as the question of urgency is concerned, the Commission takes the view that no urgency has been established. The letter of 11 August 1994, referred to above, does not justify the conclusion that the applicant's very existence, together with 450 jobs, is threatened, since that letter does not refuse any request for provision of a bank guarantee and even makes proposals on continuing cooperation between the applicant and its bank. The applicant has not even said that it has sought unsuccessfully to obtain a guarantee from another bank. Apart from the applicant's claims regarding the alleged withdrawal of its discount credit, for which it has not in any case provided sufficient evidence, the application contains no other indication as to its real economic and financial position.

Appraisal of the President of the Court of First Instance

22 By its interim application, the applicant seeks to be relieved from the obligation, imposed in the letter referred to in paragraph 4 of this order, to provide a bank guarantee for an amount equal to that which it has been fined, as a condition for allowing it to avoid immediate payment of that fine.

23 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 not provided any evidence justifying an immediate conclusion 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, according to which the provision of a bank guarantee would jeopardize its existence, and with regard to the prima facie merits of its main application.

24 With regard to the applicant's objection that it cannot provide a bank guarantee without placing its existence in jeopardy, the only document produced by the applicant in support of its arguments is the abovementioned letter of 11 August 1994 from its bank. Although that letter makes clear that the applicant is in a precarious position, it does not justify the immediate conclusion that the obligation to provide a bank guarantee in order to avoid immediate payment of the fine, pending delivery of the judgment in the main proceedings, would jeopardize its existence. In that regard, the analysis of the applicant's financial position, which constitutes the basis of the letter in question, already takes account of the disadvantage of making provision for a liability in the amount of the fine imposed, and the letter does not refuse a request for provision of the guarantee in question. Neither the letter from the bank nor the explanations given by the applicant itself make it possible to examine precisely whether and to what extent the applicant's situation might deteriorate if, instead of simply making or maintaining the provision, it had to provide a bank guarantee in the corresponding amount. More generally, it follows from the bank's letter that the bank continues to regard itself as 'the reliable partner' of the applicant, that it is prepared to 'stay with [the applicant] through a difficult period' and to help it to 'recover its past strength', subject to certain conditions, in particular that its members should support it unreservedly. None of the

documents before the Court justifies any immediate conclusion that those conditions cannot possibly be met.

25 With regard more particularly to the applicant's argument that in the coming months it will need additional credit in order to meet its operating requirements, which the provision of a bank guarantee would prevent it from obtaining, there is nothing in the documents before the Court to enable the President of the Court to assess the validity of that argument. It should be added that the applicant admitted during the hearing that another local financial institution has expressed its willingness to grant a bank guarantee to the applicant on condition that its members pledge their personal assets.

26 In view of the public interest in seeing Commission decisions implemented and the Community's financial interests safeguarded, and in view of the potential advantages which might accrue for a company's members from its anti-competitive conduct, it seems appropriate, as is recognized by case-law, to take account of any possibilities which members may have to assist the undertaking in providing a bank guarantee such as that required by the Commission in the present case (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, and the order in *Transacciones Maritimas and Others*, cited above).

27 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
Registrar

J. L. Cruz Vilaça
President