Case 351/85 R

Fabrique de fer de Charleroi
v
Commission of the European Communities

(Steel — Additional production and delivery quotas — Special circumstances)

Summary

1. *Application for interim measures — Conditions of admissibility — Admissibility of main application — Not relevant*
(ECSC Treaty, Art. 39; Rules of Procedure, Art. 83 (1))

2. *Application for interim measures — Suspension of the operation of a measure — Conditions for granting — Grounds establishing a* prima facie *case — Serious and irreparable damage*
(ECSC Treaty, Art. 39; Rules of Procedure, Art. 83 (2))

ORDER OF THE PRESIDENT OF THE COURT
22 April 1986 *

In Case 351/85 R

Fabrique de fer de Charleroi SA, a company incorporated under Belgian law whose registered office is at 266 rue du Châtelet, 6030 Marchienne-au-Pont, represented by M. Waelbroeck and A. Vandencasteele, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, 34 rue Philippe-II,

applicant,

* Language of the Case: French.

Commission of the European Communities, represented by its Legal Adviser, R. Wägenbaur, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

The Kingdom of Denmark, represented by its Agent, L. Mikaelsen, Legal Adviser at the Ministry of Foreign Affairs, with an address for service in Luxembourg at the office of the Danish chargé d'affaires, Ib Bodenhagen, the Embassy of the Kingdom of Denmark, 11 B boulevard Joseph-II,

intervener,

APPLICATION for an order suspending the operation of Commission Decision No 2760/85/ECSC of 30 September 1985 (Official Journal 1985, L 260, p. 7), as confirmed in Article 14 C of Commission Decision No 3485/85/ECSC of 27 November 1985 (Official Journal 1985, L 340, p. 5),

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 18 November 1985, Fabrique de fer de Charleroi SA brought an action in which it requested the Court, pursuant to the second paragraph of Article 33 of the ECSC Treaty, to declare void Commission Decision No 2760/85/ECSC of 30 September 1985 (Official Journal 1985, L 260, p. 7) amending Commission Decision No 234/84/ECSC of 31 January 1984 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (Official Journal 1984,

L 29, p. 1). Article 1 of Decision No 2760/85, which took effect on 1 July 1985, inserted in the aforesaid Decision No 234/84 a new Article 14 D which authorizes the Commission to grant an additional supplementary quota up to a maximum of 25 000 tonnes per quarter to an undertaking provided that it satisfies the following three conditions:

it is the sole undertaking in the country in which it is situated;

it is confronted with exceptional difficulties, even after receiving quota supplement under the provisions of Article 14;

it has not received aid under the provisions of Commission Decision No 1018/85/ECSC (Official Journal 1985, L 110, p. 5).

2 On 27 November 1985 the Commission replaced Decision No 234/84, and the new Article 14 D inserted therein, by Decision No 3485/85/ECSC, cited above, which entered into force on 1 January 1986 for two years. Article 14 C of Decision No 3485/85 confirms the Commission's power to grant an additional quota increase of up to 25 000 tonnes per quarter to an undertaking, but only requires the first two conditions set out in paragraph 1 of this order to be fulfilled.

3 By an application lodged at the Court Registry on 26 February 1986, the applicant requested the Court, pursuant to the second paragraph of Article 39 of the ECSC Treaty and Article 33 of the Statute of the Court of Justice of the ECSC, to suspend the operation of Commission Decision No 2760/85, as confirmed in Article 14 C of Commission Decision No 3485/85, until the Court has given judgment on the main application.

4 By an order dated 14 March 1986 the Kingdom of Denmark was granted leave, under Article 34 of the Statute of the Court of Justice of the ECSC, to intervene in support of the defendant's conclusions.

5 The defendant submitted its written observations on 6 March 1986. The parties presented oral argument on 16 April 1986.

6 At this stage it is necessary to describe briefly the situation which gave rise to the dispute which is the subject of this application for interim measures.

7 Considering that the Danish steel undertaking, Det Danske Stålvalseværk (hereinafter referred to as 'DDS'), satisfied all the conditions laid down in the aforesaid Articles 14 D and 14 C, the Commission granted it under Article 14 D an additional production quota of 25 000 tonnes for each of the last two quarters of 1985 and, under Article 14 C, a quota of the same quantity for the first quarter of 1986. It appears from the documents put before the Court that out of each of those additional quotas the quantity which could be delivered in the common market was 18 698 tonnes, of which 11 460 tonnes were in Category II, which is the category covering the greater part of the applicant's production.

8 It should also be noted that DDS, the undertaking which was granted these additional quotas, is the sole Danish steel undertaking and has for many years been engaged in a restructuring process. Over the same period, as well as the additional quotas under Articles 14 D and 14 C, it was granted additional quotas of 15 000 tonnes per quarter under Article 14 of Decision No 234/84, of which just over 10 000 tonnes related to products in Category II. Its production is chiefly sheet in Category II and is intended for exportation. From the figures contained in the papers put before the Court, which were not challenged at the hearing, it is clear that out of a Category II production of 306 922 tonnes in 1984, it exported 248 483 tonnes, of which 132 483 tonnes went to other Member States of the ECSC. To date DDS is the only undertaking which has been granted additional quotas pursuant to Articles 14 D and 14 C.

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

10 Article 83 (2) of the Rules of Procedure stipulates, as a condition for the grant of an interim measure such as that requested, that the application must state the

circumstances giving rise to urgency and the factual and legal grounds establishing a *prima facie* case for the interim measure applied for.

11 Before considering the arguments put forward by the applicant in order to establish that its application satisfies the conditions for the grant of interim measures, it is appropriate to refer briefly to a question raised by the defendant concerning the admissibility of the main application.

12 The Commission notes that the application for annulment lodged on 18 November 1985 by the applicant referred only to Decision No 2760/85; only in its reply did it consider that it was possible, in the interests of procedural economy, for it to extend the scope of its application to Article 14 C of Decision No 3485/85, on the ground that that article merely confirmed Article 14 D. The defendant states that it cannot accept that interpretation; in particular, it denies that Article 14 C merely confirms Article 14 D. It therefore states that in its view the action cannot at this stage in the proceedings be extended to cover Decision No 3485/85 and considers that the applicant ought to have lodged a fresh application for annulment if it wished to apply for the application of that decision, and Article 14 C thereof, to be suspended.

13 In that connection it should be stressed that the Court has stated in a long line of cases (see in particular Cases 75/72 R, *Perinciolo* v *Council* [1972] ECR 1201, and 186/80 R *Suss* v *Commission* [1980] ECR 3501) that the admissibility of the main application should not be examined in the framework of an application for interim measures. It should be examined when the Court considers the main application. The objection of inadmissibility raised by the Commission therefore will not be examined in connection with this application for interim measures.

14 In order to establish a *prima facie* case for the interim measures which it seeks, the applicant claims first that the contested provision is vitiated by manifest illegality because, by adopting it, the Commission misused the powers conferred upon it by Article 58 of the ECSC Treaty.

15 The applicant considers that the Commission was not entitled to accept a Member State's right to have part of its needs supplied by an undertaking established within its territory as the criterion justifying the grant of additional quotas; the use of that criterion could not in any event be justified by the need to guarantee supplies in

countries in which there is only one steel undertaking. In support of its arguments rejecting the grounds for applying that criterion, it claims that DDS exports most of its Category II production, that there is a large production surplus on the Category II sheet market, which would enable undertakings in other Member States easily to supply the Kingdom of Denmark if that were to prove necessary, and that in addition Article 59 of the ECSC Treaty confers on the Commission all the powers which it would need to deal with any shortage in the Community.

16 It therefore considers that the Commission must, in applying such a criterion, have been motivated by its desire to acknowledge the Member States' right to have part of their needs supplied by an undertaking established within their territory. By basing itself when it adopted the contested provision on the idea that supplies should be available nationally, an idea which is entirely inconsistent with the principle of the common market in steel, the Commission was guilty of a misuse of powers.

17 The Commission considers that Articles 14 D and 14 C are not incompatible with the principles governing the quota system established by Article 58 of the ECSC Treaty and could in any event be justified, if necessary, by overriding considerations relating to the preservation of employment based on the fundamental principle laid down in Article 3 (e) of the ECSC Treaty.

18 In support of its view, it puts forward various submissions. It stresses first that the rule laid down in Articles 14 D and 14 C is abstract and general and does not identify individually the persons to whom it is addressed, who are determined objectively. The mere fact that up to now DDS is the only undertaking which has benefited from those provisions is not sufficient to establish that it is a discriminatory provision or an individual decision which, although adopted in the guise of a general decision, is in reality addressed to DDS. Such undertakings as Hoogovens or Irish Steel, which are themselves the only steel undertakings in the Netherlands or Ireland respectively, may also in the future be granted additional quotas pursuant to Article 14 C if they fulfil the other conditions laid down in that article. Moreover, Articles 14 D and 14 C merely extend Article 14, the legality of

which the Court recognized in its judgment of 3 March 1982 in Case 14/81 (*Alpha Steel* v *Commission* [1982] ECR 749).

19 Secondly, the Commission contends that it does not see on what grounds the criterion adopted in Articles 14 D and 14 C — namely, that the undertaking concerned should be the sole steel undertaking in the country in which it is situated — and the reasons given for the adoption of that criterion — namely, to ensure supplies of steel products in a Member State — are incompatible with the principles of the ECSC Treaty. On that point it refers to the judgment of the Court of 10 July 1984 in Case 72/83 (*Campus Oil* v *Minister for Industry and Energy* [1984] ECR 2727), in which the Court recognized, as regards petroleum products, that the need to guarantee the supplies of a Member State could on grounds of public security justify an exception to the principle of the free movement of goods laid down in Article 30 of the EEC Treaty. Since in its view the guaranteed supply of steel products should be considered just as essential for the economy of a country as the supply of petroleum products, it maintains that that principle should by analogy also apply to steel products in a situation in which there is only one producer in a Member State, because the State is highly dependent on that undertaking to supply its market.

20 The Commission also states that, although it entirely shares the opinion of the Court concerning the principle which it laid down in paragraph 32 of its judgment of 19 September 1985 in Joined Cases 63 and 147/84 (*Finsider* v *Commission* [1985] ECR 2857), to the effect that it is not for the Commission 'to grant adjustments of . . . quotas on the basis of the situation of the undertaking in question on the national market alone and to seek to reserve for that undertaking the production of the steel consumed on that market', it considers that the purpose of Articles 14 D and 14 C does not conflict with that principle. In its view, their purpose is not to reserve an advantage to DDS but to provide for the possibility of granting additional quotas to an undertaking which if such quotas were not granted would be in danger of having to close, provided that it satisfies all the objective conditions laid down in those articles. That purpose is entirely consistent with the objectives laid down in Article 3 (e) of the ECSC Treaty.

21 From the foregoing it appears that the chief ground given by the Commission to justify the rules introduced by Articles 14 D and 14 C is that Article 14 of Decision No 234/84, which authorizes the granting subject to certain strict

conditions of quota supplements to a steel undertaking which experiences exceptional difficulties as a result of the operation of the quota system, does not provide adequate means of dealing with the situation in which an undertaking faces not only exceptional difficulties but also special circumstances such as the fact that it is the sole steel producer in a Member State, whose supplies are therefore highly dependent on that undertaking. In such a case, the Commission considers that it has proved necessary to grant the undertaking an additional quota in order to prevent its having to close. It has stated that that is the sole purpose of Articles 14 D and 14 C.

22 In that regard it should be stated, as the applicant has rightly maintained, that the grounds put forward by the Commission for adopting Articles 14 D and 14 C are *prima facie* erroneous. Indeed, it is difficult to see how the Commission can justify an exception to the principle that the respective market shares should be frozen merely by relying on the need to guarantee supplies on the market of a Member State which has only one steel undertaking, when it is clear from the information known to the Court that DDS exports three-quarters of its Category II production and that there is surplus production capacity in the market in Category II sheet which would enable undertakings in other Member States to supply Denmark without any difficulty if that were to prove necessary.

23 Furthermore, the fact that Danish imports in Category II are almost as high as Danish exports in that category and that Denmark has no difficulty in obtaining supplies of other categories of steel products which DDS does not manufacture constitutes further *prima facie* evidence that the country's supplies would not be jeopardized if the additional quota of 25 000 tonnes per quarter provided for in Articles 14 D and 14 C were not granted to its only steel undertaking.

24 Furthermore, the Commission's reference to the judgment of the Court in *Campus Oil* seems to be totally irrelevant in the present case since the markets in steel and petroleum products seem difficult to compare in view of the wide differences between them. The market in steel products is a market in which there is surplus production capacity and in which the Community has at its disposal means of

action, such as those provided for in Article 59 of the ECSC Treaty, if there is a serious shortage of steel products, whereas those two characteristics are not to be found in the market in petroleum products.

25 In the light of the considerations set out above, it may be accepted that the applicant has succeeded in putting forward pertinent arguments which it will be necessary to examine in greater detail in the proceedings relating to the main application. The grounds relied upon by the applicant may therefore be regarded as establishing a *prima facie* case for granting the interim measure applied for.

26 While the applicant in the present case may be considered to have put forward factual and legal grounds establishing a *prima facie* case for the interim measure applied for, the Court must also assess the circumstances giving rise to urgency.

27 The Court has consistently held that the urgency of an application for interim measures, as stipulated in Article 83 (2) of the Rules of Procedure, must be considered in relation to the need to give an interim decision in order to prevent serious and irreparable damage from being caused to the party requesting the interim measures.

28 In that regard the applicant claims that the granting to DDS of additional quotas of 25 000 tonnes per quarter pursuant to Articles 14 D and 14 C would cause it serious damage in so far as it represents about 38% of its total quotas which may be delivered within the Community; it adds that three fifths of those quotas relate to Category II sheet, whilst the greater part of its production is in the same category.

29 It further stresses that, in order to make a full assessment of the seriousness of the damage which it will suffer, account should be taken of the fact that it is an undertaking experiencing exceptional difficulties within the meaning of Article 14 of Decision No 3485/85 and any redistribution in its favour of part of the quotas which are at present granted to DDS would enable it to reduce its fixed costs and thus to improve its financial position, which is, moreover, jeopardized by the fall in prices resulting from the fact that a quantity (namely the additional quotas granted to DDS) not met by a corresponding increase in demand is placed on a market which has surplus capacity.

30 It further claims that the grant of this additional tonnage also causes damage to all the other producers within the Community. In its submission, there are only two means whereby the Commission can grant such a tonnage: it can either deduct it from the total tonnage for a quarter or increase that tonnage by 25 000 tonnes; this would, in the first case, reduce the total production to be shared among the other Community undertakings by 25 000 tonnes and, in the second case, lead to a fall in prices.

31 The applicant claims that the damage which it will suffer is irreparable in so far as the granting of the additional quotas will adversely affect the economic situation of the steel market and its position in that market in such a way that the annulment of Articles 14 D and 14 C will not make it possible for it to regain the position which it would have held if those articles had not been applied.

32 At the hearing the Commission did not deny that there had been a slight reduction in the price of Category II sheet for the period in which it granted additional quotas to DDS pursuant to Articles 14 D and 14 C, but stressed that the price reduction had applied to all categories of steel products and was not limited to Category II products.

33 It also stated that the additional quotas granted to DDS had been taken into account when the abatement rate applied to the reference quantities of steel undertakings was fixed. According to its calculations, the additional quotas granted to DDS only affected the abatement rate by one percentage point. If those quotas had not been granted, the rate would have been 48% instead of 49%. The applicant would therefore have received 950 additional tonnes per quarter if those additional quotas had not been granted to DDS and if there had been that reduction of one percentage point in the abatement rate.

34 From the circumstances set out above, and in particular those set out in paragraph 33, it must be concluded that, although the applicant has succeeded in establishing that it has suffered financial loss as a result of the granting of additional quotas to DDS, it nevertheless has not succeeded, as the Commission has rightly stressed, in putting forward arguments from which it might be inferred that it has suffered serious and irreparable damage.

35 It has not been able to establish clearly that the reduction in the price of Category II sheet which occurred during the period in which DDS was granted additional quotas was exclusively or largely due to those additional quotas or that they considerably reduced its market share within the Community.

36 It follows from the foregoing that the applicant has not put forward any conclusive argument demonstrating that it would suffer serious and irreparable damage owing to the Commission's granting to DDS, pursuant to Articles 14 D and 14 C, of additional quotas of 25 000 tonnes per quarter.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

(1) The application is dismissed.

(2) Costs are reserved.

Luxembourg, 22 April 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President