Case 360/85 R

Dillinger Hüttenwerke AG
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 — Interim measures — 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 360/85 R

Dillinger Hüttenwerke AG, a company incorporated under German law whose registered office is at Dillingen (Saar), represented by J. Sedemund, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of J. Loesch, 8 rue Zithe,

applicant,

* Language of the Case: German.

V

Commission of the European Communities, represented by R. Wägenbaur, its Legal Adviser, 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 Agents, L. Mikaelsen, Legal Adviser at the Ministry of Foreign Affairs, and H. Meldahl, Administrator in the same Ministry, with an address for service in Luxembourg at the Danish Embassy, 11B boulevard Joseph-II,

intervener,

APPLICATION, primarily, for an interim order restraining the Commission from granting additional quotas for the second quarter of 1986 pursuant to Article 14 C of Commission Decision No 3485/85 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 22 November 1985, Dillinger Hüttenwerke AG 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:

(i) it is the sole undertaking in the country in which it is situated;

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

(iii) 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 10 March 1986, the applicant applied pursuant to the third paragraph of Article 39 of the ECSC Treaty and Article 33 of the Statute of the Court of Justice of the ECSC for an interim order restraining the Commission from granting additional quotas for the second quarter of 1986 pursuant to Article 14 C of Commission Decision No 3485/85 of 27 November 1985 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry.

4 By an order dated 1 April 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 24 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 export. 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 measures 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 22 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 was virtually identical to 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 measure applied for, the applicant relies on various grounds which in its submission clearly show that the special rules from which DDS benefits under Articles 14 D and 14 C are contrary to Community law in several respects.

15 First, the applicant considers that those rules are wholly incompatible with the decisions delivered by the Court on Article 58 of the ECSC Treaty and in particular with the principle which it laid down in its judgment of 3 March 1982 in Case 14/81 (*Alpha Steel* v *Commission* [1982] ECR 749), in which it stated that the quota system cannot in principle alter 'the position of the undertakings on the

market as between each other'. It argues that an exception to that principle that respective market shares may not be altered may be made only on the basis of objective criteria of uniform application, a requirement which was not respected by the Commission when it adopted Articles 14 D and 14 C. The applicant submits that in this case the criterion adopted by way of derogation from that principle, namely that the undertaking concerned should be the sole steel undertaking in a Member State, is not objective since its justification, that is to say the need to guarantee supplies on the national market, is not valid as regards the greater part of the additional quotas granted under Articles 14 D and 14 C, because the undertaking concerned exports more than three-quarters of its production of Category II sheet. Nor is it of uniform application since DDS is the only undertaking capable of benefiting from the grant of such additional quotas.

16 Furthermore, the applicant submits that those articles, as is clear from the Council declaration of 25 July 1985 in which it gave its assent to Decision No 2760/85 pursuant to Article 58 of the ECSC Treaty, are linked to the particular nationality of the undertaking concerned — in this case Danish — and are therefore contrary to the principle of non-discrimination laid down in Article 4 (b) of the ECSC Treaty. That link is also evidence that the contested decisions are in reality individual decisions adopted in the form of general decisions, which is a practice contrary to Community law.

17 The applicant also claims that the fact that the Commission did not extend Article 16 of Decision No 234/84, which lays down special rules for Greece and Ireland, to Denmark proves that exceptional difficulties capable of justifying the application of special national treatment do not exist in the present case.

18 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.

19 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).

20 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.

21 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.

22 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.

23 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.

24 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.

25 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.

26 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.

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

28 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.

29 In that regard the applicant claims that the granting of the contested additional quotas to DDS would cause it serious and irreparable damage aggravated by the fact that its production consists almost exclusively of reversing-mill plate in Category II and that it delivers the greater part of its production which may be

delivered on the common market to the German market, whilst DDS exports half of its production to that same market. It claims that as a result of those additional quotas DDS has succeeded in increasing its production and deliveries of Category II products by 25% and has also been able to increase its exports to the Federal Republic of Germany by the same proportion, and that this has had the effect of altering the market shares in DDS's favour. It estimates that as a result it has lost DM 6 million in turnover.

30 The applicant also complains that the placing of DDS's additional quotas on the market without a corresponding simultaneous increase in demand has reduced the prices of Category II products from DM 830 to DM 800 per tonne, whereas the Commission intended to increase them to DM 860 per tonne. It states that its resulting loss may be assessed at DM 4 million. It considers that the damage which it has suffered since the entry into force of the contested articles as a result of the combination of those two factors may be assessed at DM 10 million, which constitutes half of its profits for the 1984 tax year; moreover, the damage will continue to increase if fresh additional quotas are granted to DDS.

31 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.

32 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 1 350 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.

33 From the circumstances set out above, and in particular those set out in paragraph 32, 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.

34 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.

35 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