ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

25 August 1994 *

In Case T-156/94 R,

Siderúrgica Aristrain Madrid, SL, a company incorporated under Spanish law, established in Madrid, represented by Antonio Creus and Xavier Ruiz, of the Barcelona Bar, and José Ramón García-Gallardo, of the Burgos Bar, with an address for service in Brussels in the Chambers of Cuatrecasas, 78 Avenue D'Auderghem,

applicant,

v

Commission of the European Communities, represented by Julian Curall and Francisco Enrique González Díaz, of its Legal Service, and by Géraud de Bergues, national expert seconded to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Spanish.

APPLICATION for an order of the Court of First Instance suspending the operation of Articles 3, 4 and 5 of Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ 1994 L 116, p. 1), in so far as it imposes on the applicant a fine in the amount of ECU 10.6 million by reason of its participation in a certain number of anticompetitive practices; release the applicant, until a decision has been taken on the substance of the case, from the obligation to provide a bank guarantee in favour of the Commission for payment of the total amount of the disputed fine or, in the alternative, determine the amount of the said guarantee and, as a conservatory measure, order the Commission not to proceed to the recovery of the fine before the present proceedings for interim measures are concluded,

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

makes the following

Order

Facts

1 The material facts giving rise to the dispute, as set out in the pleadings lodged and the oral explanations given by the parties during the hearing, may be summarized as follows.

2 On 16 February 1994, the Commission adopted, on the basis of Article 65 of the ECSC Treaty, a decision noting the participation of certain European producers of beams in agreements and concerted practices prohibited by that provision of the Treaty (Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams, OJ 1994 L 116, p. 1, hereinafter referred to as 'the Decision').

3 Although the Commission stated in the reasons for the Decision that two companies belonging the Spanish group Aristrain had participated in the infringements in question, the Decision was addressed only to the company Siderúgica Aristrain Madrid, SL ('the applicant') and a fine of ECU 10 600 000 was imposed upon it.

4 In accordance with Article 5 of the Decision, the fine was payable within three months of the date of notification to the recipient. That time-limit expired on 7 July 1994. Since the fine was in excess of ECU 20 000, it could also be paid in five equal annual instalments, the first to be paid within the same time-limit of three months, on condition that a bank guarantee was presented covering the principal and interest. The undertaking concerned was to inform the Commission at the latest on the expiry of the three-month time-limit of its choice of payment method.

5 By letter of 28 February 1994, adhering to a policy adopted in 1981, the Commission informed the applicant that no measure for the recovery of the fine would be adopted in the event that an action against the Decision was brought before the

Court of First Instance, on condition that the undertaking presented a bank guarantee which should cover the whole amount of the fine and the interest payable for the period during which the proceedings were pending.

6 Following consultations between representatives of the Commission and the Aristrain group in May and June 1994, the Member of the Commission responsible for competition policy, Karel Van Miert, informed the applicant by letter of 22 June 1994 that he would propose that the Commission amend the Decision in order to address it also to Siderúrgica Aristrain Olaberría, SL (SAO), a sister company to the applicant. According to that letter, the amendment would impose on each of the two companies of the Aristrain group a fine in proportion to their respective turnover, which together would be equivalent to the fine imposed on the applicant alone. That change was envisaged after the applicant's legal adviser had drawn the attention of the Commission's staff to the fact that, according to Spanish company law, a company is not liable for the obligations of another company belonging to the same group.

Procedure

7 By an application lodged at the Registry of the Court of First Instance on 16 April 1994, the applicant brought an action under Articles 33 and 36 of the ECSC Treaty for the annulment of the Decision in so far as it finds that the applicant has been party to certain agreements and concerted practices involving European beam producers and imposes a fine on it in the amount of ECU 10 600 000.

8 By telex of 7 June 1994, the applicant requested pursuant to Article 39 of the ECSC Treaty a suspension of operation of Articles 3, 4 and 5 of the Decision in so far as

it imposed upon it a fine of ECU 10.6 million. It also requested the President of the Court of First Instance to release it from the obligation to provide a bank guarantee for future payment of the fine or, in the alternative, to determine the amount of that guarantee, and as a conservatory measure to order the Commission not to proceed to recover the fine before the application for interim measures had been decided.

9 The Commission submitted its observations on this application for interim measures on 22 June 1994. The parties presented oral argument on 5 July 1994.

10 At the hearing the applicant requested permission to lodge a number of documents concerning its financial situation which it considered would reinforce the evidence already in the file. The defendant declared that, since it had no prior knowledge of those documents, it wished to have the opportunity to examine them and to submit its observations before the Court of First Instance. Under those circumstances the judge hearing the application for interim measures, considering that it would be helpful to have additional information before settling the dispute, requested the applicant to lodge at the Registry of the Court of First Instance by 8 July 1994 any documents it considered relevant with a view to demonstrating the serious and irreparable harm which it alleged in its application for interim measures. The new information was to be communicated to the Commission by the same date, thus allowing it to inform the Court of First Instance of its observations on the documents in question before 12 July 1994.

11 By telex of 8 July 1994 the applicant added several documents and an explanatory note to the file concerning its financial situation as well as that of the other com-

panies belonging to the Aristrain group. By telex of 12 July 1994 the Commission submitted its observations on the documents lodged by the applicant.

Law

12 Under the second paragraph of Article 39 of the ECSC Treaty, in conjunction with Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance, (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 circumstances so require, order that application of the contested measure be suspended or prescribe any necessary interim measures.

13 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that an application for interim measures made pursuant to the second paragraph of Article 39 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 in Case T-543/93 R *Gestevisión Telecinco* v *Commission* [1993] ECR II-1409, paragraph 16).

The arguments of the parties

14 In order to demonstrate that its claims are *prima facie* well founded, the applicant refers, first of all, to the alleged breach by the Commission of a general principle guaranteeing the right to be heard by an independent and impartial tribunal inas-

much as the infringement was established and the pecuniary sanction imposed by the administrative body which undertook the inquiry and prepared the case and judicial review by the Court of First Instance is not of a nature to remedy that partiality. According to the applicant, the Court of First Instance does not hear and determine all the matters of fact or those falling within the discretion of the Commission. In view of the absence of unlimited power of judicial review by the Court of First Instance, the procedural system of Community competition law infringes Article 6 of the European Convention on Human Rights and a general principle recognized by the constitutional traditions of the Member States.

15 The applicant also relies on several arguments alleging erroneous application of Article 65 of the ECSC Treaty. First, the Commission's reliance on criteria governing the interpretation of Article 85 of the EEC Treaty resulted in failure to observe the specific principles of the ECSC Treaty and in an erroneous assessment of the facts and of the participation of the Aristrain group in the exchanges of information called in question in the Decision. Secondly, the disputed fine was calculated by taking into account the overall turnover of the Aristrain group, contrary to Article 65(5) of the Treaty, according to which only the turnover for the applicant's ECSC products should have been taken into consideration. Thirdly, the fine imposed represents more than 10% of the applicant's annual turnover, which infringes the abovementioned provision of the Treaty. Furthermore, the amount of the fine was calculated on the basis of the ECU/Peseta 1990 exchange rate without account being taken of the fall in the value of the peseta in 1992 and 1993, thus penalizing the applicant by increasing the amount of the fine by 22%.

16 The applicant also claims that the Decision breaches various general principles of law. First, the rights of the defence were disregarded by reason of the lack of clarity in defining the extent of the infringement of which it is accused and of the legal implications of the allegations made against it. Secondly, the Commission breached the principle of equal treatment in so far as it did not take into consideration either certain special circumstances peculiar to the applicant or the penalties imposed in

other comparable cases. Thirdly, the Decision lacks an adequate statement of reasons, regard being had to Article 15 of the ECSC Treaty, and also breaches the principle of proportionality. Finally, the Commission did not act with due diligence as regards the conduct of the procedure and the adoption of its final decision.

17 At the hearing the applicant produced a copy of the abovementioned letter from Mr Van Miert (see paragraph 6), in which Mr Van Miert stated that he would propose an amendment to the Decision in order to make the two companies of the Aristrain group its addressees and liable in proportion to their turnover. Since the Commission had thus acknowledged that there was a restriction on its power to pursue recovery of the disputed fine from the applicant's assets, it should also have taken that restriction into consideration in so far as concerned the requirement of a guarantee.

18 As regards the urgency of the interim measures applied for, the applicant alleges in substance that, by virtue of the special circumstances concerning its financial situation and its status as a private family company and the disproportionate nature of the disputed fine imposed by comparison with the scale of the undertaking, presentation of the bank guarantee, required by the Commission in order to avoid immediate recovery of the fine in the event that a direct action were brought, represents an unbearable financial burden. Such a burden would prevent the applicant from conducting normal business and would severely damage its competitiveness in a sector in crisis. The applicant maintains that the banks with which it has commercial relations are not prepared to grant it the additional credit which it would need in order to provide the aforementioned guarantee. The exhaustion of the credit granted to the applicant likely to result from the provision and maintenance of the security would seriously affect the current programme of investments, which is indispensable in order to ensure its viability on a 'highly competitive and oversaturated' market. According to the applicant, the alleged damage is serious and irreparable because even if its pleas on the substance are upheld by the Court, it will no longer be able to recover the competitive position lost in the meantime. The applicant considers that it fulfils, in that respect, the exceptional conditions referred

to in the Order of the President of the Court of Justice of 15 March 1983 in Case 234/82 R *Ferriere di Roè Volciano* v *Commission* [1983] ECR 725, whereby suspension of the operation of a decision imposing a fine was granted without requiring prior provision of a security.

19 In so far as concerns the balancing of the interests as between the parties, the applicant maintains that the harm which it would suffer following the provision and maintenance of an onerous bank guarantee is disproportionate to the interest the Commission has in such a guarantee. The applicant adds that the Community public interest would be better protected by allowing it to pursue its activities on the market in order to enable it to pay the fine, if and when due, should the Court so decide.

20 The defendant confirmed, in its observations and at the hearing of 5 July 1994, its intention to proceed with the amendment to the Decision. The Commission does not, however, consider it necessary to take any action with regard to the obligation on the Aristrain group to provide, on the basis of the present Decision, security covering the total amount of the fine and the interest payable until the Court has ruled on the substance of the case.

21 As the defendant explained at the hearing, the sole aim of the announced amendment was to ensure that SAO would also be liable for the fine imposed on the applicant should it be necessary to apply for recovery of the fine before a Spanish court. The Commission points out that the provision of the security is a voluntary measure to which the Aristrain group may resort in order to avoid either the immediate payment of the fine in question or enforcement proceedings. In its view, the two companies constitute a single economic entity liable for the whole of the infringements of which the Aristrain group is accused by the Decision. The Decision was addressed to the applicant as a 'representative' company of the group.

According to the Commission, such a practice does not, in general, give rise to any problems, since normally the addressee is the parent company or the subsidiary of the other companies which are liable. The difficulties which have been encountered in the present case result, in the opinion of the Commission, from the fact that the two responsible companies are sister companies.

22 Referring to the charge that the fine is excessive, the Commission points out that the amount of the fine does not exceed the limit of 10% of the annual turnover, laid down in Article 65(5) of the ECSC Treaty, taking into consideration the applicant's turnover in 1990.

23 In so far as concerns urgency, the defendant considers that the applicant has entirely failed to show that provision of the security requested by the Commission will cause it serious and irreparable harm 'beyond the sacrifice necessarily entailed by a fine of ECU 10.6 million'. After examining the documents lodged by the applicant relating to the financial situation of the Aristrain group, the Commission declared itself to have been persuaded that the applicant's viability was not jeopardized by the financial burden resulting from the provision and maintenance of the security.

24 The Commission also considers that the applicant's situation does not correspond to any of the 'exceptional circumstances' referred to in the order in Case 234/82 R, above. The Commission notes that, despite the applicant's argument to the contrary, it is not a small undertaking, since in 1990 its turnover was ECU 129 994 939 and it belongs to a group which is the third largest European producer of beams. The Commission also points out that it is not a subcontractor and the fact that its production is not diversified is irrelevant according to the recent case-law of the Court. The defendant considers, furthermore, that it has not

demonstrated its inability to provide the guarantee in question, either by obtaining credit from other banks or by using the available resources of the Aristrain group. Finally, the Commission emphasizes that the Aristrain group has sufficient resources available to it to pay the whole of the fine, even though that use of funds might affect its planned investments.

25 As regards the balance of the interests of the parties, the defendant claims that the requirement of a security represents the 'minimum required by the Community public interest' and ensures a balance between the public interest and the private interest of undertakings contesting decisions imposing a fine. The Commission considers that to release the defendant from the obligation of providing a guarantee would be particularly unjustified in view of its strong economic and financial situation.

Assessment of the judge hearing the application for interim measures

26 It should be noted *in limine* that, as regards the application for suspension of the operation of Articles 4 and 5 of the Decision in so far as it imposes a fine on the applicant, the Commission has indicated that in accordance with its usual practice it will not take steps to recover the fine if an action has been brought before the Court of First Instance, provided that the undertaking provides a bank guarantee covering the principal and the interests before the expiry of the time-limit prescribed for payment of the fine. Since such an action has been brought, it should be considered that the object of the present proceedings for interim measures is

limited to an application seeking total or partial provisional release from the obligation to provide a bank guarantee for the payment of the whole of the disputed fine until the completion of the proceedings on the substance of the case.

27 As regards the application for suspension of operation of Article 3 of the Decision in so far as it orders the applicant to bring immediately to an end the infringements referred to in the Decision and to refrain from repeating or continuing the acts or behaviour in question, it should be observed that the applicant has adduced no arguments in fact or in law to support such an application. Consequently, it must be rejected.

28 In those circumstances, the judge hearing the application for interim measures must consider whether the conditions for granting the interim measure applied for, that is to say, release from the obligation of providing a guarantee for the whole amount of the fine, are fulfilled in the present case, as required by Article 104(2) of the Rules of Procedure of the Court of First Instance.

29 In this connection and following the observations submitted by Counsel for the applicant on company liability in Spanish law, Mr Van Miert indicated in his letter of 22 June 1994 that he would 'proponer a la Comisión la modificación de la decisión para dirigirla a ambas sociedades, Siderúrgica Aristrain Madrid SL y Siderúrgica Aristrain Olaberría SL, imponiéndoles una multa a cada una de ellas. Cada una de las multas estará en relación con el volúmen de negocios para las vigas de cada una de las dos sociedades en el año 1990 de modo que la suma de las dos multas sea igual a la multa impuesta en la actualidad a Siderúrgica Aristrain Madrid SL' (propose that the Commission amend the Decision in order to address it to both Siderúrgica Aristrain Madrid, SL and Siderúrgica Aristrain Olaberría, SL, imposing

a fine on each of them. Each of the fines would be in proportion to the turnover for beams of each of the two companies for 1990 so that the amount of the two fines would be equivalent to the fine imposed at present on Siderúrgica Aristrain Madrid, SL).

30 In those circumstances, it no longer seems justified, *prima facie*, that the Commission should continue to require from the applicant a security covering the whole of the amount in order to obviate recovery of the fine in question.

31 Moreover, it should be noted that the applicant relies on a number of arguments in support of its application based either on the erroneous application of Article 65 of the Treaty or on the infringement of certain general principles of law which do not appear *prima facie* to be manifestly unfounded.

32 In view of the foregoing, it is appropriate to order the partial suspension of the obligation to provide a security in so far as the fine is excessive in view of the applicant's position within the Aristrain group until the legal issue of the application of the fine is clarified by the Court.

33 The applicant has not included any evidence in the file sufficiently sound to support its allegation of serious and irreparable harm. It should be noted, in that respect, that the applicant belongs to a steel producers' group which is the foremost Spanish producer and the third European producer of beams, that this group has established in recent years a strong investment policy which has greatly strengthened its competitiveness and that the excess liquidity of the group for 1994 appears greater than the estimated cost of the bank guarantee in question. It cannot be denied that the financial burden in question is liable to cause the appli-

cant considerable damage, in particular in the event that the costs of providing and maintaining the security are not reimbursed by the Commission.

34 Although the file does not contain sufficient information to calculate the amount of the fines which might be imposed on each of the two companies of the Aristrain group on the basis of their turnover for 1990, it appears appropriate to order that, in view of the turnover indicated for 1992 and 1993, the applicant should not provide a bank guarantee greater than 50% of the amount of the disputed fine until the Commission makes the amendment to the Decision which it has proposed or, in any event and at the latest, until the Court of First Instance delivers final judgment in the main proceedings.

35 In those circumstances, it is not necessary to order the Commission not to adopt measures to recover the disputed fine before the judge hearing the application has taken a decision in the present proceedings.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The obligation on the applicant to provide the Commission with a bank guarantee is suspended, in so far as the amount to be guaranteed exceeds 50% of the amount of the fine imposed on the applicant by the Decision,

together with the interest on it, until the Commission amends the Decision as regards the application of the aforementioned fine or, in any event and at the latest, until the Court of First Instance delivers final judgment in the main proceedings.

2. The costs are reserved.

Luxembourg, 25 August 1994.

J. Jung

Registrar

J. L. Cruz Vilaça

President