

Case 213/86 R

Montedipe SpA

v

Commission of the European Communities

(Competition — Suspension of the operation of a decision
imposing a fine)

Order of the President of the Court, 24 September 1986 2623

Summary of the Order

Application for the adoption of interim measures — Suspension of operation — Suspension of the operation of a decision imposing a fine — Conditions for granting — Provision of a guarantee — Absence of exceptional circumstances — Requirement justified
(EEC Treaty, Art. 185; Rules of Procedure, Arts 83 (2) and 86 (2))

ORDER OF THE PRESIDENT OF THE COURT
24 September 1986 *

In Case 213/86 R

Montedipe SpA, a company incorporated under Italian law and having its registered office in Milan, represented by G. Celona, P. M. Ferrari and G. Aghina, Advocates, with an address for service in Luxembourg at the Chambers of Georges Margue, 20, rue Philippe-II,

applicant,

* Language of the Case: Italian.

v

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

defendant,

APPLICATION for an order suspending the operation of the Commission Decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene) (Official Journal 1986, L 230, p. 1) in so far as it concerns the applicant,

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 6 August 1986, Montedipe SpA (hereinafter referred to as 'Montedipe') brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (Official Journal 1986, L 230, p. 1) is void.
- 2 In that decision the Commission imposed fines on a number of undertakings, including a fine of 11 million ECU on the applicant on the ground that the latter had infringed Article 85 (1) of the EEC Treaty by participating from mid-1977 until November 1983 in an agreement and concerted practice involving the principal producers supplying polypropylene in the territory of the common market, the essential purpose of which was to set 'target' or minimum prices for the sale of the product in each Member State of the Community and to share the market by allocating to each producer an annual sales target or quota. The Commission also ordered the applicant to bring the aforesaid infringements to an end forthwith and in future to refrain in relation to its polypropylene operations

from any agreement or concerted practice which might have the same or similar object or effect.

- 3 Article 4 of that decision provided that the fine was to be paid within three months of the date of notification of the decision, and Article 5 provided that the decision was enforceable pursuant to Article 192 of the EEC Treaty.
- 4 In the letter dated 22 May 1986 by which it notified the aforesaid decision of 23 April to the applicant on 30 May 1986, the Commission stated that if the applicant were to bring an action against that decision before the Court of Justice, the Commission would not take any measure to recover the fine whilst the proceedings were pending before the Court, provided that the applicant agreed to pay interest on the fine as from the date of expiry of the period set for payment thereof and supplied the Commission with a bank guarantee, by that date at the latest, covering the amount owed, namely the principal sum plus interest and any increases.
- 5 By another application lodged at the Court Registry on 6 August 1986, the applicant seeks, pursuant to Article 185 of the EEC Treaty, Article 36 of the Statute of the Court of Justice of the EEC and Article 83 of the Rules of Procedure, an order suspending the operation of Commission Decision 86/398 of 23 April 1986 in so far as it concerns the applicant.
- 6 By telex messages of 25 and 26 August 1986 the Court put a number of questions to the applicant and to the Commission. They were requested to reply in writing, the former by 26 August 1986 and the latter by 27 August 1986.
- 7 The defendant submitted its written observations on 25 August 1986. The parties presented oral argument on 22 September 1986.
- 8 Before considering the merits of this application, it is worth briefly setting out the stages which preceded the adoption by the Commission of Decision 86/398.

- 9 In October 1983, the Commission, acting pursuant to Article 14 (3) of Regulation No 17 of 6 February 1962 implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-62, p. 87), carried out investigations at the premises of most of the producers of bulk thermoplastic polypropylene supplying the common market, and in particular at the premises of Montedipe. During those investigations the Commission discovered documentary evidence showing, in its view, that the major polypropylene producers in the Community, including the applicant, had committed the infringements referred to in paragraph 2 of this order. It therefore resolved, by decision of 30 April 1984, to initiate a proceeding of its own motion. That proceeding culminated in the adoption of Decision 86/398, the operation of which the applicant seeks to have suspended to the extent set out in paragraph 5 of this order.
- 10 Article 185 of the EEC Treaty provides that actions brought before the Court of Justice do not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.
- 11 Applications for the adoption of interim measures of the kind requested in this case must, according to Article 83 (2) of the Rules of Procedure, state the factual and legal grounds establishing a *prima facie* case for the interim measures applied for and the circumstances giving rise to urgency.
- 12 The Court has consistently held that the urgency of an application for the adoption of 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 adopt such measures in order to avoid serious and irreparable damage to the party seeking them.
- 13 In that regard, the applicant contends in the first place that the immediate payment of a fine of an amount corresponding to over 60% of its research costs would lead to an intolerable increase in its liabilities and would require it to resort to credit on onerous terms. It further emphasizes that only suspension of the operation of the Commission's decision could remove the shadow which the announcement of a substantial fine has cast on Montedipe's image in the eyes of the public by conveying the impression that the matter is still open and has not been resolved.

- 14 Finally, the applicant emphasizes that even the grant of an order suspending the operation of the decision subject to fulfilment of the conditions laid down by the Commission in its letter of 22 May 1986 is likely to cause it serious and irreparable damage. It points out that merely to require it to provide for three years a bank guarantee corresponding to the amount of the fine would be tantamount to imposing a substantial fine on it in a different guise since, according to its calculations, the cost of providing such a guarantee would be approximately LIT 240 million. At the hearing, it explained that that would be the cost of providing the guarantee for just one year and would cover only the principal sum owed excluding interest. It considers that the total cost of the guarantee, if the Court gives its final judgment in 1988, as seems likely, would be approximately LIT 1 000 million.
- 15 Moreover, the applicant maintains that the provision of such a bank guarantee would serve no purpose since the size of the group to which the applicant belongs is such as to ensure that the Commission will be able to recover the total amount of the fine which the Court may consider to be payable. In that regard, it submitted at the hearing, with the authorization of the Court, a document in which Montedison SpA, the holding company of the group comprising Montedipe SpA, undertakes to guarantee payment to the Commission of any amount which Montedipe may be ordered to pay by the Court when it gives judgment in Case 213/86. The applicant considers Montedison's guarantee to be of greater worth than the bank guarantee required by the Commission since Montedison is the largest company in Italy after Fiat.
- 16 The applicant also emphasizes that no purpose would be served by an undertaking to pay interest on the sum owed as from the date of expiry of the period set for payment of the fine since, in its judgment of 25 October 1983 in Case 107/82 (*AEG-Telefunken v Commission*, [1983] ECR 3151), the Court has laid down the principle that interest is automatically payable on the amount of a fine from the date on which it falls due until the date of actual payment of the fine.
- 17 For its part, the Commission considers that the applicant has failed to show that the implementation of Decision 86/398 is likely to cause it serious and irreparable damage. In accordance with its general practice, the Commission informed the applicant that it would not take steps to recover the fine forthwith if the matter were referred to the Court, on condition that Montedipe provided a bank guarantee, no later than the date of expiry of the period set for payment, as security for the payment of the fine and any interest due. Accordingly, it takes the view that the application for an order suspending the operation of the decision is

devoid of purpose since the Commission has already offered the applicant that which the latter is seeking from the Court. Moreover, it considers that the principle laid down by the President of the Court in his order of 11 November 1982 in Case 263/82 R (*Klöckner-Werke v Commission* [1982] ECR 3995), to the effect that the adverse conclusions which business associates or creditors might draw from the lodging of security about the prospects in the main action cannot in any circumstances cause serious and irreparable damage to the undertaking lodging security, should apply *a fortiori* to public opinion.

- 18 With regard to the applicant's claim that it should also be exempted from the obligation to provide a bank guarantee, the Commission maintains that the disbursement of LIT 240 million clearly could not in any circumstances cause serious and irreparable damage to an undertaking the size of Montedipe. Furthermore, the argument that the size of the group to which the applicant belongs should be a sufficient guarantee that the Commission will be able to recover the total amount of the fine which the Court may consider to be payable should also be regarded as entirely devoid of substance in the light of the attitude consistently taken by the Court in its decisions since the Order of the President of the Court of 11 November 1982 in the *Klöckner-Werke* case. The size of the group cannot in any circumstances be regarded as a special factor justifying an exception to the requirement of a bank guarantee in accordance with the criteria laid down by the Court in its Orders of 15 March 1983 in Case 234/82 R (*Ferriere di Roe Volciano SpA v Commission* [1983] ECR 725) and of 7 March 1986 in Case 392/85 R (*Finsider v Commission* [1986] ECR 959). The Commission also maintains that the only principle which may be inferred from the *AEG-Telefunken* judgment is not that interest is automatically payable, but that the Commission may demand, as a condition for suspending payment of the fine, an undertaking by the company to pay the interest.

- 19 It is clear from the applicant's answer to a written question put to it by the Court that although the application for the adoption of interim measures is couched in general terms, all the applicant is really seeking is an order suspending the obligation to pay the fine without its having to satisfy the conditions laid down for suspension by the Commission. On the other hand, in its application Montedipe clearly does not seek to have the operation of Article 2 of Decision 86/398 suspended. Moreover the applicant has pointed out that it has still not furnished a bank guarantee as security for payment of the fine and that it has no intention of doing so until the Court decides on its application for an order suspending the operation of the Commission's decision.

- 20 In reply to a written question the Commission informed the Court that, even if that bank guarantee were not furnished by 30 August 1986, it had no intention of taking steps to enforce its decision pursuant to Article 192 of the EEC Treaty before the date on which the order was made bringing these interlocutory proceedings to a close.
- 21 Although the Commission contends that the Court should dismiss the application, it is clear from its written submissions that it does not object to the order for suspension being granted, provided that the applicant agrees to pay interest on the fine as from the date of expiry of the period set for the payment thereof and produces a bank guarantee for payment of the fine and any interest due.
- 22 The requiring of such a guarantee reflects a general policy adopted by the Commission in 1981 and has been held to be justified, save in exceptional circumstances, under both the ECSC Treaty as regards steel and the EEC Treaty as regards competition law by the President of the Court, in particular in the orders of 6 May 1982 in Case 107/82 R (*AEG-Telefunken v Commission* [1982] ECR 1549), 7 May 1982 in Case 86/82 R (*Hasselblad Ltd v Commission* [1982] ECR 1557), 11 November 1982 in Case 263/82 R (*Klöckner-Werke v Commission* [1982] ECR 3995) and of 7 March 1986 in Case 392/85 R (*Finsider v Commission* [1986] ECR 959).
- 23 In this case, none of the arguments put forward by the applicant is such as to establish exceptional circumstances of the kind referred to by the President of the Court in his aforesaid order in *AEG-Telefunken* and therefore justify an exception to the conditions to which, in the Commission's submission, suspension of the operation of a decision imposing a fine should be subject. The criteria constituting exceptional circumstances which were set out in the order of 15 March 1983 in Case 234/82 R (*Ferriere di Roe Volciano SpA v Commission* [1983] ECR 725) and enlarged on in the order of 7 March 1986 in the *Finsider* case do not apply in this case. The applicant is not a small undertaking or a subcontractor having difficulties in obtaining a bank guarantee. Moreover, it has not been able to show how the cost of that bank guarantee, amounting to approximately LIT 1 000 million over three years, could jeopardize its activities or its development to such an extent as

to risk causing it serious and irreparable damage. Accordingly, there are no grounds for accepting the substitution of a guarantee furnished by the holding company, Montedison SpA, for the bank guarantee normally required from undertakings in comparable situations.

- 24 It therefore appears that the requirement to lodge a bank guarantee as security for payment of the fine and the interest due is justified. The lodging of that security cannot cause the applicant serious and irreparable damage either as a result of the expense which it involves or as a result of the effects which it may have on the applicant's financial position.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

- (1) **The operation of Article 4 of Commission Decision 86/398/EEC of 23 April 1986 is suspended in relation to the applicant, on condition that the latter provides a bank guarantee acceptable to the Commission as security for the payment of the fine imposed by Article 3 of the contested decision and for any interest due.**
- (2) **The applicant is to provide the Commission with the said guarantee within 15 days from the date of notification of this order. During that period the Commission shall refrain from taking any measures to enforce its decision pursuant to Article 192 of the EEC Treaty.**
- (3) **The costs are reserved.**

Luxembourg, 24 September 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President