# ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
5 August 2003 *

In Case T-79/03 R,

**Industrie riunite odolesi SpA (IRO)**, established in Odolo (Italy), represented by A. Giardina, lawyer,

applicant,

supported by

**Italian Republic**, represented by I.M. Braguglia, acting as Agent,

intervener,

v

**Commission of the European Communities**, represented by L. Pignataro and A. Whelan, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for suspension of the operation of the Commission's Decision of 17 December 2002 on a proceeding pursuant to Article 65 CS (COMP/37.956 — concrete reinforcing bars), in so far as it imposes a fine of EUR 3.58 million on the applicant,

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

makes the following

## Order

## Facts and procedure

1 On 17 December 2002, the Commission adopted a decision on a proceeding pursuant to Article 65 CS (COMP/37.956 — concrete reinforcing bars, hereinafter 'the Decision'). According to Article 1(1) of the Decision the 11 undertakings and the association of undertakings listed therein, among which is the applicant, infringed Article 65(1) CS by operating a cartel on the Italian market for concrete reinforcing bars in rods or coils, for the purposes of price-fixing and the limitation or concerted control of production and/or sales.

2 Article 2 of the Decision fines the applicant EUR 3.58 million for the infringement found in Article 1. Article 3 of the Decision provides that the fines

thus fixed are to be paid within a period of three months from the date of notification. The Decision was notified to the applicant on 23 December 2002 by letter of 20 December 2002, in which it was stated 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 that Court, provided that interest accrued on the amount due from the date on which the period for payment expired and that an acceptable bank guarantee were provided by that date at the latest.

3 By application lodged at the Court Registry on 27 February 2003, the applicant brought an action pursuant to the fourth paragraph of Article 230 EC for the annulment of the Decision and, in the alternative, the annulment or reduction of the fine which had been imposed on it.

4 By separate document lodged at the Court Registry on 8 May 2003, the applicant made an application for suspension of the operation of the Decision.

5 The Commission submitted its written observations on the application for interim measures on 27 May 2003.

6 By application lodged at the Registry on 6 June 2003, the Italian Republic applied to intervene in support of the form of order sought by the applicant.

7 The hearing before the President of the Court was held on 4 July 2003. At that hearing, the President allowed the intervention of the Italian Republic.

## Law

8 Under the combined provisions of Articles 242 EC and 243 EC and under Article 225(1) EC, the Court of First Instance may, if it considers that the circumstances so require, order the suspension of the contested act or prescribe any necessary interim measures.

9 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that an application for interim measures must state the circumstances giving rise to the urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those requirements are cumulative, so that an application for suspension of operation must be dismissed if any one of them is not met (order of the President of the Court of Justice of 14 October 1996 in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30).

### *Arguments of the parties*

#### Prima facie case

10 The applicant claims, first, that the Commission wrongly adopted the decision on the basis of Article 65 CS even though the ECSC Treaty expired five months beforehand, on 23 July 2002. In the absence of measures intended to extend the

effects of the ECSC Treaty, the decision has no legal basis. According to the applicant, the definition of existing legal relationships and the reallocation of the powers which disappeared following the expiry of the ECSC Treaty should have been the subject of an express legislative measure adopted by the Member States.

11 In support of its argument, the applicant mentions certain acts adopted in various sectors by the Member States, by the representatives of the Governments of the Member States meeting within the framework of the Council and by the Council. Among those acts are, in particular, the Protocol on the financial consequences of the expiry of the ECSC Treaty annexed to the Treaty of Nice, amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts (OJ 2001 C 80, p. 1), the Decision of the Representatives of the Governments of the Member States, meeting within the Council, of 27 February 2002 on the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel (OJ 2002 L 79, p. 42), Council Regulation (EC) No 963/2002 of 3 June 2002 laying down transitional provisions concerning anti-dumping and anti-subsidy measures adopted pursuant to Commission Decisions No 2277/96/ECSC and No 1889/98/ECSC as well as pending anti-dumping and anti-subsidy investigations, complaints and applications pursuant to those Decisions (OJ 2002 L 149, p. 3), and Regulation (EC) No 1840/2002 of the European Parliament and of the Council of 30 September 2002 on the prolongation of the ECSC steel statistics (OJ 2002 L 279, p. 1).

12 The applicant also refers to the position adopted by the Commission in its Proposal for a Council Regulation concerning Community surveillance of imports of hard coal originating in third countries (COM(2002) 482 final), which led to Council Regulation (EC) No 405/2003 of 27 February 2003

concerning Community monitoring of imports of hard coal originating in third countries (OJ 2003 L 62, p. 1).

13 By its second plea in law, the applicant submits, first, that the Commission infringed Council Regulation (EEC) No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), since the fine fixed by the Decision was imposed within the procedural framework of that regulation which is exclusively devoted to the regulation of the procedures for applying Articles 81 EC and 82 EC. Secondly, the applicant accuses the Commission of having sent to the parties, following the expiry of the ECSC Treaty, a statement of additional objections adopted on the basis of Regulation No 17, without that communication containing new complaints. Lastly, the Commission disregarded Article 10 of that regulation, inasmuch as the national authorities were present only at the second hearing, during which the merits of the case were not dealt with.

14 By its third plea in law, the applicant claims that the Decision is invalid because of an inadequate inquiry, which led the Commission to erroneous findings particularly in relation to the relevant market. In addition, the Commission failed to give sufficient reasons for the decision, contrary to Article 253 EC.

15 By its fourth plea in law, the applicant maintains that the Commission fixed the amount of the fine in breach of the principles of equal treatment, proportionality, protection of legitimate expectations and appropriateness.

16 The Commission submits that none of the pleas in law raised by the applicant demonstrates the existence of a prima facie case.

Urgency

17 The applicant submits that the condition relating to urgency is satisfied in this case.

18 It claims, first, that providing the bank guarantee for the entire sum would by itself lead to the cessation of its current business and, therefore, inevitably result in the end of the company. The applicant explains in that regard that the financing of its current activities depends on the grant of bank loans which are financed in the main by bank advances against sales invoices due for payment in the course of the following two months as well as by direct discounts by some customers.

19 At the hearing, in reply to a question put by the President, the applicant stated that the bank loans upon which it depends amount to about EUR 6.5 million per month. By its calculations, the grant of a bank guarantee would result in the blocking of an amount of about EUR two million per month, which would mean that it would have to operate on the market with a bank loan of about EUR 4.5 million. Providing a bank guarantee would therefore entail a large decrease in the bank loans otherwise intended for the company's current business, which would place it in a situation of terminal crisis.

20 As regards its shareholders, the applicant claims that the issued capital is held by 23 shareholders, who are all natural persons of whom none holds more than 15% of the voting rights. There is therefore no 'group of companies' on which the applicant is directly or indirectly dependent and of which account must be taken in order to assess the applicant's ability to provide a bank guarantee or pay the fine.

21 As additional evidence of the serious difficulties which the applicant would encounter by immediate payment or the provision of the bank guarantee, the applicant annexed to its application for interim measures a study of the Decision's impact on the undertaking, which is based on three different forecasts. That study shows that, if the applicant paid the fine or provided the bank guarantee for the amount required, it would cause a cash-flow deficiency, which would be impossible to make good, and would lead to the cessation of the business.

22 The Commission points out that the applicant has not proved that providing the bank guarantee would be objectively impossible for it or that such provision would imperil its existence.

**President's findings**

23 Before ruling on the present application for interim relief, it is appropriate to define precisely the object of the proceeding. By its application, the applicant seeks an order suspending the Decision's operation, in so far as it imposes a fine of EUR 3.58 million on the applicant.

24 It is not in dispute that, in its letter of notification of the Decision of 20 December 2002, the Commission informed the applicant that, if it brought an action before the Court of First Instance, no steps would be taken to recover the fine while the case was pending before that Court, provided that interest accrued on the amount due from the date on which the period for payment of the fine expired and that a bank guarantee acceptable to the Commission and covering both the amount of the principal sum and the interest and accruals becoming due thereon, were

provided at the latest by that date. Accordingly, the object of the application is, in fact, solely to obtain exemption from the obligation to provide a bank guarantee as a condition for the fine, in the amount imposed by the Decision, not being recovered immediately.

25 It is settled case-law that an application for an exemption from the obligation to provide a bank guarantee as a condition for the fine not being recovered immediately will only be granted in exceptional circumstances (orders of the President of the Court of Justice in Case 107/82 R *AEG* v *Commission* [1982] ECR 1549, paragraph 6, and Case C-7/01 P(R) *FEG* v *Commission* [2001] ECR I-2559, paragraph 44). The possibility of requiring the provision of a financial guarantee is expressly provided for with regard to applications for interim relief by the Rules of Procedure of the Court of Justice and of the Court of First Instance and is a general and reasonable way for the Commission to act.

26 The existence of such exceptional circumstances may, in principle, be regarded as established where the party seeking exemption from providing the requisite bank guarantee adduces evidence that it is objectively impossible for it to provide such guarantee (see, to that effect, orders of the President of the Court in Case C-364/99 P(R) *DSR-Senator Lines* v *Commission* [1999] ECR I-8733, and *FEG* v *Commission*, cited above) or where such provision would imperil its existence (see, among others, orders of the President of the Court of First Instance in Case T-295/94 R *Buchmann* v *Commission* [1994] ECR II-1265, paragraph 24, and Case T-191/98 R II *Cho Yang Shipping* v *Commission* [2000] ECR II-2551, paragraph 43).

27 In the present case, the applicant does not claim, as was confirmed at the hearing, that it is impossible for it to provide a bank guarantee. However, it maintains that providing such a guarantee is likely to imperil its existence.

28 In those circumstances, it is necessary to consider whether the applicant has established to the requisite legal standard that the provision of the bank guarantee is likely to imperil its existence.

29 The applicant claims, in that regard, that the provision of a bank guarantee would result in the reduction of the bank loans which it currently receives and which are necessary to finance its current business. In the absence of such loans, its company would be subjected to a terminal crisis, bringing about the cessation of the company.

30 It must be stated, first, that the applicant has produced no document issued by a financial institution showing that it has applied for the provision of a bank guarantee in respect of the fine while, at the same time, being able to continue to receive the bank loans intended for the current business of the company and, secondly, that it has not showed that such an application has been refused because of its financial difficulties.

31 In any event, it must be observed that, as the applicant stated at the hearing, the grant of the bank guarantee at issue would not result in the blocking of all the loans usually granted but merely in the reduction of their amount by about 30%, from EUR 6.5 million to EUR 4.5 million. In that regard, it has not been shown at all that such a reduction of the loans — which has not been supported by any evidence — would result inevitably in the cessation of all the applicant's activities and its disappearance from the market before judgment is delivered in the main proceedings.

32 It follows therefore that the applicant has not proved to the requisite legal standard that the provision of a bank guarantee would imperil its existence.

33 Since the applicant has not established the existence of exceptional circumstances, this application must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

**1. The application for interim relief is dismissed.**

**2. The costs are reserved.**

Luxembourg, 5 August 2003.

| H. Jung | B. Vesterdorf |
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| Registrar | President |