

ORDER OF THE PRESIDENT OF THE GENERAL COURT

13 April 2011 *

In Case T-393/10 R

Westfälische Drahtindustrie GmbH, established in Hamm (Germany),

Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG, established in Hamm,

Pampus Industriebeteiligungen GmbH & Co. KG, established in Iserlohn (Germany),

represented by C. Stadler and N. Tkatchenko, Rechtsanwälte,

applicants,

v

European Commission, represented by V. Bottka, R. Sauer and C. Hödlmayr, acting as Agents, assisted by R. Van der Hout, Rechtsanwalt,

defendant,

* Language of the case: German.

APPLICATION for suspension of operation of Commission Decision C(2010) 4387 final of 30 June 2010 in proceedings under Article 101 TFEU and Article 53 of the European Economic Area Agreement (COMP/38.344 — Prestressing steel) as amended by Commission Decision C(2010) 6676 final of 30 September 2010, in so far as a fine was thereby imposed on the applicants,

THE PRESIDENT OF THE GENERAL COURT

makes the following

Order

Subject-matter and proceedings

- ¹ The applicants belong to the so-called ‘Pampus-Group’ (PIB+-Gruppe), which is active primarily in the industrial steel and cable sector and comprises four holding companies: Pampus Stahlbeteiligungsgesellschaft mbH, Pampus Umformtechnik GmbH, Pampus Logistikbeteiligungsgesellschaft mbH and Pampus Industriebeteiligungen

GmbH & Co. KG ('PIB'). All the shares of those holding companies, for which there is no common holding company, are held by three members of the Pampus family.

- 2 The business of the first applicant, Westfälische Drahtindustrie GmbH ('WDI'), is the manufacture and trading of steel products, and the acquisition and management of undertakings, primarily in the cables sector. WDI is owned as to 98 % by Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG ('WDV'). WDV is owned as to two thirds by PIB and as to one third by ArcelorMittal Hamburg GmbH ('Arcelor-Mittal'). The business of PIB is in particular the acquisition, management and sale of industrial shareholdings and trade in steel products.
- 3 With this application for interim measures, the applicants are essentially seeking suspension of operation of Commission Decision C(2010) 4387 final of 30 June 2010 in proceedings under Article 101 TFEU and Article 53 of the European Economic Area Agreement (COMP/38.344 — Prestressing steel) as amended by Commission Decision C(2010) 6676 final of 30 September 2010 ('the contested decision'), in so far as fines were thereby imposed upon them, without the obligation to constitute a bank guarantee.
- 4 In the contested decision, the Commission essentially accuses a number of prestressing steel manufacturers of, over a number of years, fixing delivery quotas and prices, sharing customers amongst themselves and sharing confidential business information, and by that continuous infringement damaging the entire European building industry. The Commission therefore determined fines of almost EUR 460 million. It fined the applicants a total of EUR 46.55 million: all three jointly and severally EUR 15.485 million, WDI and WDV jointly and severally EUR 23.37 million, and

WDI alone EUR 7.695 million. The Commission also fined four companies in the ArcelorMittal Group EUR 276.48 million initially, subsequently reducing the fine to EUR 230.4 million.

- 5 By an application lodged on 14 September 2010 at the Registry of the General Court, the applicants applied for annulment of the original decision of 30 June 2010 in so far as they were fined thereby, and applied in the alternative for an appropriate reduction in the fines imposed upon them. After notification of the amending decision of 30 September 2010, by letter received at the Court Registry on 16 November 2010, they amended their claims and arguments accordingly.
- 6 By letter received at the Court Registry on 3 December 2010, the applicants made this application for interim measures, seeking essentially:
 - suspension of operation of the contested decision until delivery of the judgment in the main proceedings, without the constitution of a bank guarantee or other financial security, in so far as they were fined EUR 15.485 million (WDI, WDV and PIB jointly and severally), EUR 23.37 million (WDI and WDV jointly and severally) and EUR 7.695 million (WDI);
 - in the alternative, grant them, without the constitution of a bank guarantee or other financial security, easy terms for payment of the fines imposed upon them, in accordance with an appropriate payment schedule determined by experts;

— order the defendant to pay the costs.

- 7 In its written submission on the application for interim measures, received at the Court Registry on 14 February 2011, the Commission contended that the Court should:

— dismiss the applications in their entirety (the main and the alternative application);

— order the applicants to pay the costs.

- 8 By letter of 15 February 2011, the applicants sought leave to reply to the Commission's submission, on the ground that the Commission's administrative procedure investigating their ability of pay ('ITP procedure'), concluded by its letter of 14 February 2011, gave rise to new factors relevant to the urgency of their application for interim measures. That request having been granted, the applicants made their further observations by letter of 25 February 2011. The Commission took a final position thereon by letter of 21 March 2011.

- 9 In its letter of 14 February 2011, the Commission refused a reduction of the fines imposed on the applicants on the ground that WDI was in a position to finance the entire fine of EUR 46.55 million or provide a bank guarantee for that amount.

- 10 This Court is aware of the fact that, in parallel with the ITP procedure pending before the Commission investigating the applicants' ability to pay, the abovementioned companies of the ArcelorMittal Group (see paragraph 4 above) obtained on 4 April 2011 a reduction of their fine from EUR 230.4 million to EUR 45.7 million, the Commission recognising their limited ability to pay. Previously, three of those companies had failed in an application for interim relief on grounds, inter alia, of the considerable financial strength of the ArcelorMittal Group (consolidated overall turnover of over EUR 46 billion in the business year 2009) (Order of the President of the General Court of 7 December 2010 in Case T-385/10 R *ArcelorMittal Wire France and Others v Commission* (not published in the ECR)).

Grounds

- 11 According to Article 278 TFEU and Article 279 TFEU in conjunction with Article 256(1) TFEU, the Court hearing an application for interim relief may, if it considers it necessary in the circumstances, order that application of a contested act be suspended or prescribe any necessary interim measures.
- 12 In accordance with Article 104(2) of the Rules of Procedure of the Court, an application for the adoption of interim measures shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. It is thus open to the judge hearing an application to order the suspension of the operation of an act, or other interim measures, only if it is established that such an order is justified, *prima facie*, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable damage to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action (Order of the President of the Court of Justice in Case C-149/95 P(R) *Commission v Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22). These requirements are cumulative, so that the application for interim measures must be dismissed if one of them is not

met (Order of the President of the Court of Justice in Case C-268/96 P(R) *SCK and FNK v Commission* [1996] ECR I-4971, paragraph 30). In appropriate cases, the Court also weighs up the interests at stake (Order of the President of the Court of Justice in Case C-445/00 R *Austria v Council* [2001] ECR I-1461, paragraph 73, and Order of the President of the Court of First Instance in Case T-198/01 R *Technische Glaswerke Ilmenau v Commission* [2002] ECR II-2153, paragraph 50).

- ¹³ In addition, in the context of that overall examination, the judge hearing the application has a wide discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of EU law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed (*Commission v Atlantic Container Line*, cited in paragraph 12 above, paragraph 23, Order of 3 April 2007 in Case C-459/06 P(R) *Vischim v Commission*, not published in the ECR, paragraph 25).
- ¹⁴ The written submissions of the parties contain all the information necessary for the decision on the application. There is therefore no need for an oral hearing.

Subject-matter of the application for interim measures

- ¹⁵ According to Article 2 of the contested decision, a fined undertaking has the choice, when bringing an action for annulment, between provisionally paying the fine and providing a bank guarantee acceptable to the Commission. The Commission specifically pointed out that choice to the applicants in letters of 5 July and 1 October 2010,

with which the contested decision was notified, stating that the amount of any bank guarantee would carry interest at the rate of 2.5 %.

- ¹⁶ In its statement of its position of 14 February 2011 (paragraphs 52 and 59), the Commission further expressly stated that, on account of the choice aforesaid, the possibility of the application for interim measures being urgent could be excluded at the outset if it was possible for the applicants to provide a bank guarantee — as a less onerous alternative to provisional payment of the fines. The question raised in that application as to whether there was sufficient liquidity for provisional payment of the fines was thus not relevant.
- ¹⁷ It follows, first, that the Commission is itself prepared, under a certain condition (provision of a bank guarantee) to suspend implementation of the contested decision against the applicants. Thus the application for suspension of the implementation of this decision can logically relate only to freeing the applicants from the obligation to provide a bank guarantee as a precondition for not immediately collecting the fines (see Order of the President of the Court of First Instance in Case T-11/06 R *Romana Tabacchi v Commission* [2006] ECR II-2491, paragraphs 23 to 26).
- ¹⁸ Secondly, the Commission itself limits its observations on urgency to the question whether it is actually impossible for the applicants to provide a bank guarantee or, in any event, the claimed damage of insolvency would follow. In the Commission's view, WDI in particular, on the strength of its current and anticipated cash flow, is objectively in a position to provide such a guarantee for the entire fine. In that case, the Commission would not require any additional guarantee from the other two applicants, thereby averting the insolvency danger (Commission's letter of 14 February 2011, paragraph 60).

- 19 From these submissions of the Commission — and also from its determination in the contested decision (paragraphs 1178 and 1179) that, on account of their serious financial difficulties, WDI and PIB cannot pay the fines and are probably not even viable — it can be concluded that, even in the Commission's view, provisional payment of the fines imposed on the applicants is not a realistic option, as the applicants are not currently in a financial position to make such a payment.
- 20 The subject-matter of this application for interim relief — and thus also of the investigation as to urgency — is therefore solely the question whether to free the applicants from the obligation to provide a bank guarantee as a precondition for not immediately collecting the fines imposed upon them.

Urgency

- 21 The urgency of an application for interim relief must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party requesting the interim measure. It is for that party to prove that it cannot await the outcome of the main proceedings without suffering such damage (Order of the President of the Court of First Instance in Case T-151/01 R *Duales System Deutschland v Commission* [2001] ECR II-3295, paragraph 187 and case-law cited; Order of the President of the Court of First Instance in Case T-326/07 R *Cheminova and Others v Commission* [2007] ECR II-4877, paragraph 50).
- 22 As regards the question of a bank guarantee, it is also consistent 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 (Order of the President of the Court of Justice in Case 107/82 R *AEG v Commission* [1982] ECR 1549, paragraph 6; Order of the President of the Court of Justice in Case C-364/99 P(R) *DSR-Senator Lines v Commission* [1999] ECR I-8733, paragraph 48). 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 General Court and is a general and reasonable way for the Commission to act (Order of the President of the Court of First Instance in Case T-79/03 R *IRO v Commission* [2003] ECR II-3027, paragraph 25; Order of the President of the Court of First Instance in Case T-245/03 R *FNSEA and Others v Commission* [2004] ECR II-271, paragraph 77).

- ²³ The existence of such exceptional circumstances may, in principle, be regarded as established where the party seeking dispensation from the obligation to provide the requisite bank guarantee adduces evidence that it is objectively impossible for it to provide such guarantee or that such provision would imperil its existence (*Romana Tabacchi*, cited in paragraph 17 above, paragraph 98; Order of the President of the Court of First Instance in Case T-46/03 R *Leali v Commission* [2003] ECR II-4473, paragraph 33 and case-law cited).
- ²⁴ Both the abovementioned exceptional circumstances concern conditions which the party concerned must meet in the alternative, not cumulatively.
- ²⁵ If, therefore, the applicants succeed in this case in proving that it is objectively impossible for them to constitute a bank guarantee for the fines imposed upon them, the urgency of issuing the interim relief they seek would be established under that case-law.

26 The applicants argue in this respect that constitution of a bank guarantee is objectively impossible for them both on their own account and even after involving associates and the entire PIB+-Group. After notification of the original decision, they had tried intensively, but without success, to assemble a bank guarantee to cover the fine originally determined of EUR 56.05 million by asking of all the approximately [confidential]¹ credit institutions and trade indemnity insurers belonging to the financial circle of the group. After notification of the amending decision, they tried again to assemble a bank guarantee for the reduced fine (EUR 46.55 million), but again without success. All the credit institutions and trade indemnity insurers declined the requests.

27 The Commission counters that the letters of refusal submitted by the applicants appear questionable in a number of respects. The only banks approached were those which were already creditors of the PIB+-Group and therefore had an interest in avoiding a change in the financial status quo by bringing about a reduction in the fine. The correspondence seen by the Commission between WDI and individual banks gave the impression that there was no real interest on either side in a genuine discussion as to whether a bank guarantee could be realised, but that refusal was seen as a necessary condition for a desired reduction in the fine. That would also explain why, apparently without any detailed examination (in particular of the isolated financial position of WDI), banks rejected the requests wholesale. In addition, only nine of the letters submitted were clearly addressed directly to WDI. [confidential] banks justified their refusal by reference to the economic position of the whole Pampus Group. However, WDI was an economically successful, solvent and thus creditworthy undertaking. As there were no convincing indications that any deterioration in the economic situation of the Pampus Group would have an effect on WDI, the actual reason for refusal remained unclear.

¹ Confidential information not disclosed.

28 In the Commission's view, the letters of refusal presented are also unsuitable because the banks merely refuse a guarantee on a wholesale basis and do so overwhelmingly with a general reference to the difficult economic and financial situation of the Pampus Group. The only relevant factor, however, could be the objective financial position of WDI. Given the positive operative cash flow in coming years and the means of security available to the banks, WDI had the possibility of receiving a bank guarantee. It follows from the cash flow forecast submitted by the applicants themselves that WDI could even repay a loan in the amount of the fine by annual instalments over a period of seven years out of free cash flow. The composition of a bank guarantee should therefore be possible.

29 The Court notes in that respect, that, according to the information before it, the applicants first unsuccessfully approached 14 credit institutions for a bank guarantee. On 20 July 2010, WDI, WDV and PIB sent essentially identical letters 'to the credit-giving banks' asking their position on a bank guarantee for all or part of the fines imposed (EUR 56.05 million). By an email the same day, WDI sent a corresponding request to the following banks: *[confidential]*.

30 The letters of refusal refer without exception to the overstretched economic and financial situation of the applicants, making it impossible for the banks to give the desired guarantee. Whereas some letters are very short, others give detailed reasoning. For example, *[confidential]* (letter to WDI of 26 July 2010) refers to the 'size of the undertaking already in existence' and also to the fact that the Pampus Group is 'in the rescue phase'. *[confidential]* (three identical letters to WDI, WDV and PIB of 23 July 2010) refers to 'the recently undertaken exhaustive examination' of the economic situation of the undertaking and its currently overstretched financial position. *[confidential]* (letter to WDI, WDV and PIB of 22 July 2010) states that 'on account of

the current economic circumstances of the whole group of undertakings and of the undertakings individually' it cannot provide a bank guarantee even for part of the desired amount. [*Confidential*] (letter to WDI of 22 July 2010) refers to the 'demanding rescue and restructuring process whereby in the medium term the ability to service capital is to be re-established', and states that 'in the event of a further extension of financial commitments combined with a burdening of financial results' it would regard the rescue possibilities of the group of undertakings as being seriously threatened, and therefore considered that it could not reasonably be expected to assume the relevant share of the guarantee provision. [*confidential*] (letter to WDI, WDV and PIB of 22 July 2010) states that 'after an exhaustive credit examination' it had come to the conclusion that 'the requirements for an extension of its existing credit engagement were not met'.

31 By letter or email of 10 November 2010, the applicants again asked the same banks their position on the provision of a bank guarantee, this time for the now-reduced amount of the fines (EUR 46.55 million). The refusal letters of 11 to 26 November 2010 essentially state that the same grounds for refusal apply also to the reduced fines.

32 In addition, WDI wrote to the abovementioned banks a third time on 19 February 2011 to ask for a bank guarantee specifically in respect of the (reduced) fine imposed on it alone, and at the same time informed the banks of the reasons given by the Commission for the refusal of its ITP application. The banks' replies were again negative. In its letter of 22 February 2011 [*confidential*] justifies refusal of a guarantee by reference to its 'exclusive function as long-term financier of the business and its continued critical assessment of the economic circumstances of the undertaking, contrary to the position of the EU Commission'. In its letter of 23 February 2011, [*confidential*] states that 'after considering all the information and after further internal discussions, [it considered that it had] reached the limit of its willingness to provide credit both to PIB+ as a whole and to WDI in particular', and that it 'must therefore again decline the request for the provision of a bank guarantee in favour of the EU Commission'. It asks understanding for the fact that it cannot reveal all the details of its credit decision,

but states that its internal business processes are designed in such a way that it is not able to make decisions on the granting of credit to undertakings on the basis of a single borrower, but that creditworthiness and processes are assessed by relation to the credit unit, i.e. the group (in this case the PIB+-Group). It further states that its willingness to provide credit is not based solely on current or future cash flow, but also on the amount of credit already granted, security, the arrangement of existing credit agreements and experiences acquired.

33 Finally, the applicants have stated, without being contradicted on the point, that they and the whole group of undertakings to which they belong have been placed under special observation by the financing banks, involving weekly telephone conferences with the coordinating circle of banks ([*confidential*]) and where necessary meetings both with individual banks and with the whole circle of financiers. The Commission concludes therefrom [*confidential*]. It is also apparent from the documents before the court that, since March 2010, the applicants have been providing the banks with detailed monthly reports on their economic situation (current balances, profit and loss calculations, cash flows etc.), which give a comprehensive picture of their economic situation as well as that of the whole PIB+-Group.

34 On the basis of all of the above, the court hearing the application for interim measures cannot avoid the conclusion that the applicants have promptly, repeatedly and seriously sought to obtain a bank guarantee in respect of the fines imposed upon them. The documents before the Court show that the failure of those efforts is based on a searching examination of the applicants' economic and financial position by the banks contacted, as is clear both from their refusal letters and also from the fact that they were fully informed of the position of the applicants within the whole PIB+-Group (including members of the Pampus family) and of the position of the applicant WDI specifically. Against that background, there is nothing to suggest that the

refusals were made to the applicants purely in order to oblige them for the purposes of the present proceedings.

35 As refusals of the requested bank guarantee, justified on the grounds as stated above, were made by a total of 14 banks, the applicants have demonstrated to a sufficient legal standard that it is impossible for them to provide that guarantee, especially when one considers that, in similar cases, the case-law has already accepted two or three refusals as sufficient (Orders of the President of the General Court of 2 March 2011 in Case T-392/09 R *1. garantovaná v Commission*, not published in the ECR, paragraph 56, and *Romana Tabacchi*, cited in paragraph 17 above, paragraphs 102 and 103). It is therefore irrelevant that the applicants have not produced any refusals from its trade indemnity insurers [*confidential*], without there being any need to go into the question as to whether it is in any case the business of a trade indemnity insurer to provide bank guarantees.

36 None of the Commission's counter-arguments are convincing.

37 In so far as the Commission argues in this respect, first, that the financial means of part owner ArcelorMittal, which has long held a one-third holding in WDV, have wrongly been left out of account, it should be noted that, in assessing the financial viability of an undertaking and its ability to provide security, regard may be had not only to the circumstances of the undertaking which must lodge the guarantee but also to the financial possibilities of its shareholders, and to the resources available, as a whole, to the group of undertakings to which it belongs (Order of the President of the Court of Justice in Case C-12/95 P *Transacciones Marítimas and Others v Commission* [1995] ECR I-467, paragraph 12; Order of the President of the Court of First Instance of 11 October 2007 in Case T-120/07 R *MB Immobilien Verwaltungs v Commission*, not published in the ECR, paragraph 36 and case-law cited).

38 That approach is justified in the case-law by the consideration that the objective interests of the undertaking concerned are not to be viewed independently from the interests of the persons who control it, so that in answering the question whether the damage claimed is serious and irreparable, the financial situation of the persons controlling the undertaking must also be taken into account (*MB Immobilien Verwaltungs*, cited in paragraph 37 above, paragraph 37 and case-law cited). That 'case-law on groups of companies' has since been extended to minority holdings (50 %, 40 % and even 30 %), since such substantial holdings, depending on the capital structure of the undertaking concerned, can be relevant to the assessment of its ability to pay, so that an application for interim measures must in any case contain sufficient information about such minority holdings (Order of the President of the General Court of 7 May 2010 in Case T-410/09 R *Almamet v Commission*, not published in the ECR, paragraphs 57 and 58; Order of the President of the General Court of 24 January 2011 in Case T-370/10 R *Rubinetterie Teorema v Commission*, not published in the ECR, paragraphs 39 to 42). That case-law initially provides only for a duty to provide information with regard to the possibility of a concurrence of interests, whereas in both the underlying applications for interim measures there was no occasion to examine whether such a coincidence between the undertaking concerned and the relevant minority shareholder actually existed.

39 In the present case, the applicants have mentioned the minority shareholding of ArcelorMittal in their application for interim measures and stated that, on 26 July and 22 November 2010, they turned — unsuccessfully — to ArcelorMittal for a bank guarantee in respect of the fines imposed upon them. In any event, there is no need for a closer examination of the seriousness of those requests and of Arcelor Mittal's refusal letters of 30 July and 25 November 2010. The abovementioned case-law on groups of companies does not apply to the relationship between the applicants and ArcelorMittal.

40 Whilst ArcelorMittal is active in the steel market, just like each of the applicants, they belong to distinct groups, the ArcelorMittal group on the one hand and the PIB+-Group on the other, which are in competition with each other and pursue different (strategic) business interests. There can therefore be no question of ArcelorMittal and the applicants objectively pursuing the same fundamental interests. It appears in particular to be excluded that ArcelorMittal as a shareholder would support a more

aggressive business policy of the PIB+-Group, designed to take customers and whole markets away from the ArcelorMittal group. The minority shareholding of ArcelorMittal is therefore not capable of bringing the case-law on groups of companies into operation.

- ⁴¹ That is not precluded by the fact that ArcelorMittal and one or other of the applicants may pursue similar pecuniary interests in so far as upholding the value of the ArcelorMittal minority shareholding is concerned. That interest of ArcelorMittal — to which may be added the interest in receiving business data from WDV and WDI, in so far as the position as a minority shareholder so permits — is not equal in intensity to the fundamental strategic interests which a group follows in the orientation of its business policy and which justify the application of the case-law on groups of companies where there is an objective coincidence of interests. That is not affected by the fact, raised by the Commission, that ArcelorMittal is prepared [*confidential*].

- ⁴² Secondly, in the view of the Commission, the refusal letters of the banks do not support the conclusion that it is impossible to provide a bank guarantee because the banks have a substantial interest of their own, in the event of simultaneous suspension of the fines, in covering their own demands as quickly as possible. All creditors of the PIB+ network, including the banks and the Commission, are in competition for the best possible security for, and subsequently the maximum realisation of, their respective demands. [*confidential*] They were objectively interested in the maintenance of the operative business of WDI, on account of the good profit situation and competitiveness of WDI and the cash flow thereby generated. Not to continue the operative business of WDI would for the banks mean abandoning the main income source of the network despite medium- and long-term anticipated growths in cash flow. Therefore it was objectively to be expected that it would in the end finance the provision of a bank guarantee for the fines, as soon as there was no further prospect

of a suspension of operation. Moreover, any sensible bank making rational economic calculations, aware of the positive data of WDI, would be prepared to provide a guarantee for the whole amount of the fines imposed on the applicants.

⁴³ Those arguments cannot be accepted. In so far as the Commission is not prepared to acknowledge the ‘substantial own interest’ of the 14 banks which have refused the applicants a bank guarantee, it should be noted that a bank, when making a positive or negative decision on credit and guarantee questions, always pursues its own interests as a credit institution having regard to its shareholders. In the present situation, those interests must be subordinated to those of the Commission only if the above-mentioned case-law on groups of companies were applicable to the 14 banks. That, however, is not the case.

⁴⁴ First, it is not apparent from the documents before the Court that the banks would become shareholders of the applicants or have in any way become participants in the PIB+-Group through capital contributions. Their business interests in the latter are limited to the area of credit, their interests being directed towards the best possible securing and realisation of their redemption and interest demands. To that extent there is no objective identity between the strategic interests of those credit institutions and those of the applicants primarily operative in the steel sector (see above, paragraphs 1 and 2).

⁴⁵ Moreover, the indication [*confidential*] is not in itself sufficient to demonstrate that there is a sufficiently strong interlinking of personnel between the banks and these companies — such as may exist between the three members of the Pampus family and

make a common holding company unnecessary (see paragraph 1 above) — as to justify application of the case-law on groups of companies.

⁴⁶ In so far as the Commission complains, thirdly, that the applicants did not apply to an external bank, it is sufficient to note that [*confidential*] made it clear from the outset that there was no prospect of obtaining the desired bank guarantee from a bank not belonging to that circle of financiers, after that circle had manifested its total rejection. It is, moreover, recognised in the case-law that the refusal of a bank guarantee by the applicant's usual banks, with which it is an established customer, demonstrates the objective impossibility of obtaining the guarantee demanded (*Romana Tabacchi*, cited in paragraph 17 above, paragraphs 105, 109 and 110).

⁴⁷ Since the multiple refusal letters of the abovementioned [*confidential*] banks are sufficient for the finding that it is impossible for the applicants to provide a bank guarantee for their fines, the Commission's claim, based on numerous financial documents and economic data of the applicants, that those banks would in the end nevertheless provide the bank guarantee in question, since any sensible bank aware of the positive data of WDI in particular would be prepared to do that, is irrelevant.

⁴⁸ That claim of the Commission stands in contrast to its own [*confidential*] assessment in the contested decision (paragraph 1179), '[*confidential*]'. It is further noteworthy that the Commission claims in this case to be able to judge the behaviour of a 'sensible bank making rational economic calculations', even though it has always hitherto stated — and been followed by the Court in that respect (Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission* [2004] ECR II-1181, paragraph 479) —, that it is not a bank and does not have either the infrastructure or the specialist departments of a bank.

49 The Commission's claim also appears to be irreconcilable with the case-law whereby the urgency of an interim application is to be assessed according to the circumstances at the time when it was lodged, and at the latest at the time of its determination by the competent court (Order of the President of the Court of First Instance of 23 January 2009 in Case T-352/09 R *Pannon Hőerőmű v Commission*, not published in the ECR, paragraphs 29 and 30; Order of the President of the Court of First Instance of 8 June 2009 in Case T-173/09 R *Z v Commission*, not published in the ECR, paragraph 22). Whereas the applicants have demonstrated in this case to a sufficient legal standard that it was objectively impossible for them, before the issuing of the decision in question, to provide a bank guarantee, the Commission is attempting with its claim — that the banks could be expected 'in the end' to finance the provision of a bank guarantee 'as soon as there was no further prospect of a suspension of enforcement' — to take as the relevant time a time after the decision in question and thereby 'let it depend' on the applicants at that later time, in the event of no bank guarantee being provided despite all efforts, on the applicants having to declare insolvency on account of inability to pay or over-indebtedness (Paragraphs 17 and 15a of the German Insolvency Code in conjunction with Paragraphs 177a and 130a of the German Commercial Code).

50 Finally, the Commission cannot successfully accuse the applicants of themselves improperly helping to cause their precarious financial situation, by WDI making large capital transfers to other companies in the group after service of the statement of objections, while at the same time making only a minimal reserve of EUR [*confidential*] million in respect of an 18-year participation in the prestressing steel cartel.

51 In so far as the Commission is here arguing that such capital transfers must not be used to render its fines policy ineffective, it is sufficient to note that the capital transfers in question here were indisputably designed to prevent the insolvency of individual companies in the PIB+-Group and consequent job losses. It is also undisputed that the shareholders did not withdraw any assets either from the fined companies or from the recipients of the intra-group capital transfers, save for a distribution of EUR [*confidential*] million in favour of the minority shareholder ArcelorMittal, which was

not part of the group, in 2008. In those circumstances, neither PIB-Holding nor the PIB+-Group as a whole can be blamed for using WDI as a source of finance for other, ailing, companies in the group in order to support their business.

- 52 As regards the reserve of EUR [confidential] million, the accusation of insufficient coverage appears to be irrelevant, inasmuch as the Commission itself referred in the contested decision (paragraphs 1178 and 1179) to a number of factors which indicated *a priori* that [confidential]. In view of that, the amount of a reserve as shown by the books is hardly relevant. Moreover, the amount of EUR [confidential] in the context of the prestressing steel cartel does not appear to be in any way irrational. The Commission has already twice had occasion to correct fines imposed on individual cartel participants downwards. In the case of the world's largest steel concern, ArcelorMittal, it reduced the fine by as much as 80 % on account of the inability of individual undertakings in the group to pay (see above, paragraph 10).

- 53 After all of the above, the applicants have demonstrated the urgency of the interim relief which they seek to a sufficient legal standard.

Prima facie case

- 54 According to the case-law, a prima facie case is present where at least one of the applicant's pleas appears at first sight to be too weighty to be discounted, or cannot be discounted without a detailed examination, which is reserved for the decision on

the merits (see, to that effect, Order of the President of the Court of First Instance of 28 April 2009 in Case T-95/09 R *United Phosphorus v Commission*, not published in the ECR, paragraph 21 and the case-law there cited, and Order of the President of the Court of First Instance in Case T-395/94 R *Atlantic Container Line and Others v Commission* [1995] ECR II-595, paragraph 49, confirmed by the Order of the President of the Court of Justice in *Commission v Atlantic Container Line and Others*, cited in paragraph 12 above, paragraphs 26 and 27).

55 In this case, the applicants make seven pleas, on which they base their principal claim for annulment of the contested decision and their claim in the alternative for an appropriate reduction of their fines.

56 As the Commission has rightly observed, the presentation of most of the pleas is too short and not in itself comprehensible. It does not therefore satisfy the requirements of the case-law, according to which the essential elements of fact and law on which an application for interim relief is founded must be set out coherently and comprehensibly in the text of the application itself, so that the defendant is enabled to submit its observations and the judge hearing the application is able to rule on that application with the necessary dispatch, where necessary without other supporting information (Order of the President of the Court of First Instance Case T-236/00 R *Stauner and Others v Parliament and Commission* [2001] ECR II-15, paragraph 34; Order of the President of the Court of First Instance in Case T-306/01 R *Aden and Others v Council and Commission* [2002] ECR II-2387, paragraph 52; Order of the President of the Court of First Instance in Case T-85/05 R *Dimos Ano Liosion and Others v Commission* [2005] ECR II-1721, paragraph 37)

57 That does not, however, apply to the plea arguing that there was an erroneous assumption of a single continuous infringement. In that respect, the application for interim relief states essentially that the Commission holds WDI responsible for an infringement from 1 January 1984 until 19 September 2002 and WDV for an infringement from 3 September 1987 until 19 September 2002. The applicants argue by contrast that WDI and WDV could be accused of an infringement only in respect of a

much shorter period, namely from 12 May 1997 until 19 September 2002. They argue that, in respect of infringements before 12 May 1997, a time limitation on prosecution has come into effect. The Commission thus ignored the fact that, in the course of the agreements, a break of almost one and a half years took place. It took no account of the fact that the agreements before and after that break, on account of their differing nature and organisation, could not be regarded as a single continuous infringement. The applicants further argue that, at a meeting on 9 January 1996, in a manner visible to all other undertakings, they distanced themselves from the cartel agreements, as has been unequivocally proved by written notes. On account of that distancing also, the applicants could not be accused of participating in a single continuous infringement.

58 That submission of the applicants, which if successful could result in a significant reduction in the fines on WDI and WDV, is so precise that it has placed the Commission in a position to adopt a wide-ranging and detailed position. It also enables the Court hearing the application for interim measures to determine that the plea in question does not appear at first sight to be totally without foundation and cannot be dismissed without a detailed examination, which is reserved for the Court making the decision on the merits.

59 The plea in which the applicants complain that account was not taken of their inability to pay is also in itself comprehensible, and likewise enabled the Commission to take a wide-ranging and detailed position.

60 It must be noted in this respect that the Court, in accordance with Article 261 TFEU and Article 31 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the

implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) has unlimited jurisdiction to review the disputed fine determinations by the Commission. In the present case, the possibility cannot be excluded that the Court may make use of that jurisdiction in the main proceedings and reduce the fines imposed on the applicants. The Commission itself submits in that respect that, in so far as the applicants are complaining of the assessment in the contested decision of the ability to pay, the Court itself determines the fines in the event of an error of law being established, taking as a basis the facts as presented on the strength of the information provided in the meantime; in so far, therefore, as urgency in this case is not accepted, the same applies to the chances of success in the main proceedings. Those arguments of the Commission also apply to the case — like the present — where urgency is confirmed.

- ⁶¹ Under those circumstances, it must be held that, at first sight, there is a *prima facie* case at least for a reduction of the fines imposed on the applicants, in accordance with their application for interim relief.

Balancing of the interests

- ⁶² According to consistent case-law, in interim relief proceedings the risks of each of the possible solutions must be balanced against each other. In practice, that means in particular that it must be examined whether the interest of the applicant in suspension of operation of the contested decision weighs more heavily than the interest in immediate implementation of that decision (Order of the President of the Court of Justice in

Commission v Atlantic Container Line and Others, cited in paragraph 12 above, paragraph 50; Order of the President of the Court of Justice in Case C-180/96 R *United Kingdom v Commission* [1996] ECR I-3903, paragraph 89; Order of the President of the Court of Justice in Joined Cases C-182/03 R and C-217/03 R *Belgium and Forum 187 v Commission* [2003 ECR I-6887, paragraph 142).

⁶³ In the present case, the applicants have demonstrated both the urgency of their application for interim measures, as it was objectively impossible for them to provide a bank guarantee for their fines, and a *prima facie* case for the fine reductions sought in their application. It must therefore be acknowledged that they have an interest worthy of protection in the suspension of the obligation to provide a bank guarantee for those fines. If their application were not allowed, the Commission would be authorised to enforce the fines immediately, which would very likely result in the insolvency of the applicants on account of inability to pay or over-indebtedness (see paragraph 49 above).

⁶⁴ The Commission argues against that that it is necessary to protect the public interest in maintaining the effectiveness of the competition rules of the European Union, the deterrent effect of fines, and the financial interest of the Union. It points out in particular that, after confirmation at the highest judicial level, a fine becomes part of the public budget of the Union.

⁶⁵ On the subject of the financial interests of the Union, the fundamental importance of which cannot be disputed, it should be noted that, in this case, the applicants do not have the necessary liquidity to pay the fines imposed upon them (see paragraphs 16 and 19 above), and that it is impossible for them to provide the required bank guarantee. It is therefore very likely that, if the Commission were to enforce these fines

by compulsion, it would not receive the determined amount. The applicants have also stated without contradiction that, in the event of their — likely — insolvency, the Commission's claim would, in accordance with German insolvency law, not have any priority, and the Commission would therefore have to be content with the bankruptcy dividend. In those circumstances, the financial interests of the Commission would not be better protected, if immediate compulsory enforcement were commenced, than it would be if the applicants were enabled to continue their business and pay their fines out of the proceeds therefrom (*Romana Tabacchi*, cited in paragraph 17 above, paragraph 136).

⁶⁶ Moreover, the Commission appears in the present case itself to have estimated at the outset that implementation of the financial interests of the Union was unlikely. At the time when it issued the contested decision, it took the view that several factors indicated that PIB and WDI could not pay the fines and very probably were not capable of surviving (paragraphs 1178 and 1179 of the contested decision). That suggests that the Commission reconciled itself at the outset to the irrecoverability of the fines. Moreover, after the issuing of the contested decision the Commission carried out numerous ITP procedures to investigate the ability of fined undertakings to pay. That implies that the Commission is fully prepared (partially) to waive fines, even after they have become part of the public budget of the Union. The Commission most recently manifested such a waiver, of around 80 %, in favour of the ArcelorMittal group. Against that background, the Commission's attempts to 'revive' the Union's financial interests specifically against the applicants, does not appear particularly deserving of protection.

⁶⁷ On the strength of the whole of the above, the interests of the applicants must be given priority over the financial interests of the Commission.

68 It should be noted, however, that, in this case, a *prima facie* case has been confirmed only in relation to the interim application for fine reduction, and that the applicants themselves have indicated willingness to make instalment payments from July 2011 in accordance with an appropriate payment plan (see paragraph 6 above). By letter of 7 February 2011 in the context of the ITP procedure, the applicants submitted an updated payment plan to the Commission and stated that, if their fines were reduced by 75 %, i.e. to around EUR 12 million, they would be in a position, from July 2011, to make payments in 39 instalments. It should also be noted that WDI has, over a period, built up a reserve of EUR [*confidential*] million for the payment of its fine.

69 The financial interests of the Union can therefore currently be met by granting the applicants the interim relief they seek — without there being any need at this stage to decide upon the 75 % fine reduction referred to — only on the condition that they pay the Commission the sum of EUR [*confidential*] million by 30 June 2011 and from 15 July 2011 onwards pay monthly instalments of EUR 300 000 (on the 15th of each month) until further notice, but not beyond delivery of judgment in the main proceedings.

70 It should further be noted that, under Article 108 of the Rules of Procedure, the court hearing an application for interim measures may at any time vary or cancel such measures on account of a change in circumstances, such ‘change in circumstances’ being, in particular, facts which are capable of changing the assessment of the criterion of urgency in the particular case (Order of the Court of Justice in Case C-440/01 P(R) *Commission v Artegoda* [2002] ECR I-1489, paragraphs 62 to 64). It is thus for the parties, in appropriate cases, to turn to the Court if, in their opinion, circumstances have changed in a way that may lead to variation of this order.

On those grounds

THE PRESIDENT OF THE GENERAL COURT

hereby orders:

1. **The obligation of Westfälische Drahtindustrie GmbH, Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG and Pampus Industriebeteiligungen GmbH & Co. KG to provide the Commission with a bank guarantee in order to avoid immediate collection of the fines imposed on them under Article 2(1) of Commission Decision C(2010) 4387 final of 30 June 2010 in a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (COMP/38.344 — Prestressing steel) as amended by Commission Decision C(2010) 6676 final of 30 September 2010, is suspended under the following conditions:**
 - (a) by 30 June 2011, Westfälische Drahtindustrie GmbH, Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG and Pampus Industriebeteiligungen GmbH & Co. KG shall pay the Commission the sum of EUR [*confidential*] million;

- **(b) from 15 July 2011 until further notice they shall pay to the Commission monthly instalments of EUR 300 000 (on the 15th of each month), but not beyond delivery of judgment in the main proceedings.**

2. Costs are reserved.

Luxemburg, 13 April 2011.

E. Coulon

Registrar

M. Jaeger

President