ORDER OF THE PRESIDENT OF THE COURT
OF 16 DECEMBER 1980 [1]

S.p.A. Metallurgica Rumi
v Commission of the European Communities

"System of production quotas for steel"

Case 258/80 R

Interlocutory proceedings — Powers of judge responsible for granting interim relief — Jurisdiction to suspend or derogate from a general decision — Limits

Interlocutory proceedings — Interim measures — Conditions for grant — Direct link with the decision at issue in the main action

(ECSC Treaty, Art. 39; Rules of Procedure, Art. 83 (2))

In Case 258/80 R

S.P.A. METALLURGICA RUMI, whose registered office is in Bergamo (Italy), represented by Giacomo Fustinoni and Giuseppe Marchesini, Advocates at the Italian Corte di Cassazione, with an address for service in Luxembourg at the chambers of Jean Hoss, 84 Grand'Rue,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Alberto Prozillo, with an address for service in Luxembourg at the office of Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

1 — Language of the Case: Italian.

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

Facts and Issues

I — The background to the dispute

1. By Decision No 2794/80/ECSC of 31 October 1980 (Official Journal 1980, L 291, p. 1), the Commission, considering that by reason of the decline in demand for steel the Community was confronted with a period of manifest crisis within the meaning of Article 58 of the ECSC Treaty and that the means of action provided for in Article 57 were not sufficient to deal with that situation, established a system of production quotas for crude steel (Article 1) and for four groups of rolled products (Article 2).

Group IV covers light sections, which include coiled wire rod, concrete reinforcement bars and other merchant bars, coming under lines 132, 133 and 134 respectively of the Eurostat questionnaire.

2. Article 1 (4) of Decision No 2794/80 provides for the quota system to be managed by the Commission. It also provides that the Commission may obtain assistance from independent agencies or from experts and that the business secrecy of the undertakings must be maintained.

3. By virtue of Articles 3, 4 and 5 of that general decision, the quotas for Group IV for the fourth quarter of 1980 were to be fixed by application of an abatement rate of 17.39% on the basis of the *reference production figures* referred to in Article 4. By virtue of Article 5 (2) of the decision, the rate of abatement in the case of crude steel is to correspond to the average abatement rates of the four groups of rolled products weighted according to the *reference production* of each of those groups of products.

4. Article 4 provides that the quarterly reference production figures for each undertaking shall be calculated as follows:

"(1) For each month of the relevant quarter, reference shall be made to the same month during the period from July 1977 to June 1980 during which the total production of the four groups of rolled products was the highest. The three months thus chosen, which will not necessarily be consecutive, shall constitute the reference period.

(2) The reference production figures shall be the same, for crude steel and for each of the other groups of rolled products, as the production of the corresponding items during the reference period."

5. Article 7 (2) of the decision provides:

"With regard to the delivery of products subject to the quota system, undertakings may not exceed, by group of products, for deliveries within the Common Market, the ratio of Community deliveries to total deliveries in those twelve months of the period from July 1977 to June 1980 in which the total production of the four groups of rolled products was the highest."

6. Articles 10, 11 and 12 require undertakings to supply the information stipulated therein, whilst Article 13 provides:

"(1) The Commission shall verify the accuracy of the reports and information provided by undertakings. Undertakings must allow such verification work, and no individual decision shall be required for this purpose. The instruction given to the verifying official must refer to this provision and state what reports or information provided by the undertaking he has been asked to verify.

(2) Any undertakings evading the obligations incumbent upon them under Articles 10, 11, 12 and 13 (1) or giving false information shall be liable to the fines and penalties provided for in Article 47 of the Treaty."

7. By an individual decision dated 1 November 1980 the Commission fixed the applicant's production quotas for the period between 1 October and 31 December 1980 as follows:

	Reference figures				Reduction	Quota 4th quarter 1980
	October 1978	November 1979	December 1977	Total		
	tonnes	tonnes	tonnes	tonnes	%	tonnes
Rolled products						
Group I					20.78	
Group II					18.93	
Group III					21.53	
Group IV	36 390	40 466	35 833	112 689	17.39	93 092
Total I—IV	36 390	40 466	35 833	112 689		93 092
Steel	46 500	47 392	42 010	135 902	17.39	112 269

8. By letter of 3 November 1980 the Commission informed the applicant that the information needed to check that its production quotas were being observed

would be gathered by auditors assisted by engineers. It requested the applicant to supply the names of the persons whom it had made responsible for maintaining contact with the said agents for the Comission. On 10 November 1980 the applicant wrote to the Commission giving the name of its general manager, who was to be responsible for relations with the Commission's inspectors.

On 11 November 1980 an inspector belonging to a private firm of auditors and an engineer, acting as agents for the Commission, went to the applicant's premises in order to check that the production quotas which had been imposed on it by telex on 1 November 1980 were being observed.

9. The applicant refused to agree to the checking of its production quotas on the ground that the engineer engaged by the Commission was an employee of a competing steel producer. By engaging that engineer as an expert for the purpose of executing the inspections which had to be carried out at the applicant's premises the Commission was failing to maintain the applicant's business secrecy and that was contrary to Article 1 (4) of the decision of 31 October 1980.

A report dealing with that refusal was drawn up and signed by the Commission's agents and by the representative of the applicant.

10. In a telex message sent to the applicant on 26 November 1980 the Commission confirmed that since it was responsible for carrying out inspections it must inevitably have recourse to the services of experts on the steel industry. The message further stated:

"In principle the team instructed to carry out the inspection is directed, under the responsibility of the Commission, by an employee of the firm of auditors. The experts are technical assistants to the Commission who act in accordance with the instructions given by the firm of auditors, which alone organizes and directs the inspection *in loco.*

If the undertaking which is being inspected finds that certain requests made by the technical consultant relate to a secret concerning the structure of the plant or the production and marketing cycle, it may request the Commission, through the head of the inspection team, to take the necessary measures to eliminate the difficulty created by the technical consultant's request."

Taking note of these explanations, the applicant informed the Commission by a telex message dated 28 November 1980 that:

"Having regard to the fact that the technical experts will not have any power of initiative and may be removed or excluded from the inspection in the event of the company's having reason to apprehend damage to its interests protected by the Treaty, we raise no further objections in view of those specific assurances."

II — Written procedure

1. By an application dated 20 November 1980, which was received at the Court Registry on 24 December 1980, the applicant brought an action in which it seeks a declaration that the individual decision of 1 November 1980 is void and in which it pleads, in substance, the illegality of the general

decision, Decision No 2794/80, which the contested decision implemented.

The general decision is alleged to be unlawful because of:

— The *retroactive effect* given to it;

— The method for *determining the production quotas;*

— The freezing of the *volume of deliveries* within the Community;

— The absence of protection against imports from *non-member countries;*

— The inadequate protection of the *business secrets* of the undertakings concerned with regard to the persons engaged to carry out inspections and verifications.

2. On 28 November 1980 the applicant submitted an application for the adoption of interim measures pursuant to Article 29 of the ECSC Treaty and Article 83 of the Rules of Procedure of the Court. That application seeks an order:

(a) Suspending the operation of the individual decision complained of, at least in so far as production (and sales) for the month of October 1980 are included in the quota system established by Decision No 2794/80/ECSC replacing that system if appropriate by a two-month quota for November and December of the current year;

(b) Requiring the Commission to make immediate use of the remedies which Article 74 of the ECSC Treaty places at its disposal, all the conditions for the application thereof being satisfied in the present instance;

(c) Restraining the Commission from using, at least for the purpose of carrying out inspections and verifications in relation to the applicant, technical experts in the employ of competing or similar steel producers.

In its observations on the application for interim measures the Commission contends that the Court should:

(a) Dismiss Rumi's application for the adoption of interim measures;

(b) Order the said company to pay the costs.

III — Submissions and arguments of the parties

A — Suspension of the operation of the individual decision of 1 November 1980

The *applicant* considers that the fixing of the quotas for steel and concrete reinforcement bars which were allocated to it for the fourth quarter of 1980 retroactively takes into account its production in the month of October. It disputes the legality of this method of selecting the *dies a quo,* arguing that it calls in question legal situations which had become final prior to the entry into force of the system and adversely affects expectations on the part of the producers, which deserve protection. The "declaration of intent" contained in the communication from the Commission which was published in the Official Journal of 11 October 1980 does not invalidate that conclusion because it makes no reference to restrictions applicable to *sales* within the ECSC.

As regards urgency, there is no doubt that to await the outcome of the main action would entail delay extending beyond the date on which the general decision would cease to be applicable (30 June 1981). Hence the applicant would suffer serious and irreversible loss, since the interruption of production and sales

on the Community market cannot subsequently be made good.

In those circumstances the deterioration in an undertaking's financial position as a result of the retroactive nature of the decision imposes a not insignificant additional burden of the kind of which the Court had considered, for example in the Order of the President of 20 October 1977 in Case 119/77 R *Nippon Seiko K.K.* v *Council and Commission* [1977] ECR 1867, that the undertakings which had applied for a suspensory measure must be relieved.

The *Commission* stresses at the outset that the object of the interlocutory application is clearly the same as the object of the main action and that that fact alone is sufficient to justify its refusal.

In reality the application does not seek the suspension of the contested decision but its annulment. Such an application is inadmissible because the procedure for obtaining the suspension of the operation of a measure cannot be transformed into a procedure for obtaining its annulment, as that would confront the Court with an irreversible situation when it came to try the case on its merits. The Court had given a ruling to that effect in the Order of the President of 28 March 1975 in Case 44/75 R *Könecke* [1975] ECR 637.

The Commission considers that it has taken into account the problems which the general decision might create in particular cases. In fact Article 14 of that decision provides for a procedure whereby an undertaking suffering exceptional difficulties may refer the matter to the Commission. The fact that the applicant has not made use of that option suffices to show that one of the conditions necessary for the adoption of an urgent interim measure, namely the risk that the applicant may suffer irreparable damage, is not satisfied.

Further, the Commission considers that the individual decision under challenge is not based on any discretionary power vested in the Commission because the method prescribed for the calculation of the quotas is governed by detailed rules contained in the general decision and consequently the irreparable damage results from the general decision and concerns all steel producers.

In order to disprove the existence of the damage relied upon the Commission produces a table showing both the applicant's production in the fourth quarter of recent years and the production quotas fixed for the fourth quarter of 1980:

(tonnes)

	1977	1978	1979	Quotas
Steel	134 565	129 331	137 540	112 269
Rolled products	101 379	103 865	99 397	93 092

It concludes from this table that reductions on such a scale cannot cause damage such as to justify suspending the operation of a Community measure.

B — The implementation of Article 74 of the ECSC Treaty.

The *applicant* considers itself particularly exposed to the risk of damage as a result of imports of steel and rolled products from non-member countries. It therefore requests the Court to order the Commission to make immediate use of the remedies which Article 74 of the ECSC Treaty places at its disposal, all the conditions for their application being satisfied in the present instance.

In reply, the *Commission* states that that request is inadmissible because there is settled case-law to the effect that in proceedings for urgent interim relief the Court cannot grant more than could be obtained in the main action. Even if the Court upheld the submission, the only result to which it could lead would be the annulment of the general decision and not the introduction of the measures provided for in Article 74.

The *Commission* considers this claim to be inadmissible. Under Article 83 (1) of the Rules of Procedure an application to suspend the operation of a measure is admissible only if the applicant has challenged that measure in proceedings before the Court. That relationship implies that if a part of measure is contested it is possible to apply for suspension of operation only in respect of that part of the general decision on which the individual decision is based. In this case the part of the general decision which is being contested provides for the introduction of a system of quotas on the basis of Artcle 58 of the ECSC Treaty. The other part of the general decision, which is legally distinct, is based on Article 47 of the ECSC Treaty and contains provisions relating to inspections. According to the Commission, the declaration of inapplicability sought as a preliminary step in the annulment of the individual decision can relate only to that part of the general decision on which the contested individual decision is based. Consequently, that part of the action which relates to inspections is inadmissible, as is the corresponding part of the application for suspension.

C — Protection of business secrets

According to the *applicant company,* the presence of employees of competing or similar undertakings amongst the technical experts engaged to carry out the inspections on the premises of undertakings does not ensure the maintenance of business secrecy proclaimed on several occasions in Decision No 2794/80.

Analysing Article 1 (4) of that decision, the applicant submits that persons belonging to a similar or competing undertaking cannot be regarded as "third parties" or as "independent".

As regards the choice of persons engaged to carry out the inspections, the Commission considers that undertakings are not entitled to reject an inspector. For their part, before each inspection the inspectors undertake not to divulge information constituting a business secret. Further, the possibility of having recourse to independent experts to carry out inspections was recognized by the Court in the judgment of 16 December 1963 in Case 18/62 *Barge* v *High Authority* [1963] ECR 259.

Finally, the Commission construes Rumi's telex message of 28 November

1980 as meaning that following the explanations supplied by the Commission the applicants accepted that the inspections in question might also be carried out by independent agents. The applicant has thus shown that it has no reason to apprehend serious and irreparable damage and it has by implication withdrawn the application for suspension.

IV — Oral procedure

Having deen duly invited to do so, the parties presented oral argument at the hearing on 15 December 1980.

Decision

1 Article 39 of the Treaty establishing the European Coal and Steel Community provides that actions brought before the Court do not have suspensory effect. However, the Court may, if it considers that circumstances so require, order that application of the contested decision to be suspended. It may also prescribe any other necessary interim measures.

2 Under Article 83 (2) of the Rules of Procedure of the Court, the grant of an application to suspend the operation of a measure and a decision ordering interim measures are subject to the existence of circumstances giving rise to urgency and grounds establishing a *prima facie* case for such measures.

3 As the application for the adoption of interim measures contains three distinct claims, it is necessary to consider them separately in the light of the criteria set out above.

A — The application for suspension

4 The decision of 1 November 1980, whose operation it is sought to have suspendend, informed the applicant of the reference production figures and production quotas for the fourth quarter of 1980 which result from the application of the general decision, Decision No 2794/80/ECSC, and it accordingly fixed those quotas at 93 092 tonnes for rolled products in Group IV and at 112 269 tonnes for steel.

5 The applicant complains that, although General Decision No 2794/80, which was implemented by the contested decision, did not come into force until 31 October 1980, October's production was included in the volume of the quotas, whereas no restriction on production existed during that month. It submits that if production and sales achieved in October 1980 were to continue to be included in the quotas allocated to it for the fourth quarter, it would be compelled — if it wished to avoid the risk of incurring the severe penalties applicable — to break off production and, as regards sales, not to honour orders which it is under an obligation to fulfil.

6 This first claim concerns, with regard to the fourth quarter of 1980, the fixing of quotas (Articles 3, 4 and 5 of Decision No 2794/80) on the one hand and the restrictions on deliveries within the common market (Article 7) on the other. It is therefore necessary to deal with those two aspects separately.

I — Fixing of the applicant's quotas

7 It is clear from the application for interim measures and from the explanations given at the hearing that, although expressed in general terms, the claim seeks in substance a decision that by way of derogation from General Decision No 2794/80/ECSC the quotas allocated to the applicant should be calculated without including October's production, that is to say, they should be fixed for two months (November and December) instead of three and the production reference figures should likewise be calculated on the basis of the two most favourable corresponding months during the period from July 1977 to June 1980. Thus this claim constitutes both a claim for suspension of operation of the decision and a claim for "necessary interim measures" within the meaning of Article 39 of the ECSC Treaty and Article 83 (2) of the Rules of Procedure.

8 It is not disputed that in so far as it states the reference figures and the figures which constitute the undertaking's quotas for the fourth quarter of 1980, the decision of 1 November 1980 does not in any respect involve the exercise of a discretionary power conferred upon the Commission. On the contrary, it involves the automatic application of the precise and detailed criteria laid down by Articles 3, 4 and 5 of General Decision No 2794/80/ECSC. It is thus clear that the real purpose of the claim is to obtain from the

judge responsible for granting interim relief an individual dispensation from the terms of General Decision No 2794/80/ECSC by substituting, in favour of the undertaking concerned, criteria for the determination of the quotas different from those applicable to steel undertakings in general.

9 Such jurisdiction to suspend or derogate from a general decision, where it is by no means certain whether the applicant is entitled to seek to have that decision declared void by means of a main action under Article 33 of the Treaty, may be exercised by the judge responsible for granting interim relief only in exceptional circumstances and where it is apparent that failure to take the measures requested would cause the applicant to suffer damage so serious and irreparable that it could not be redressed even if the measure contested in the main action were annulled.

10 That is particularly true in this case since by virtue of the short period for which the disputed quotas were fixed, namely the fourth quarter of 1980, the measures requested would themselves be irreversible in nature, prejudging the outcome of the main action and destroying the equality in the terms of competition between the applicant and undertakings which produce and market products identical to its own use.

11 It should also be emphasized that in order to deal with exceptional situations Article 14 of Decision No 2794/80/ECSC provides that "where the production or delivery restrictions imposed by this decision or its implementing measures entail exceptional difficulties for an undertaking, it may refer the matter to the Commission, providing all appropriate supporting documentation. The Commission shall examine the case without delay, in the light of the objectives of this decision. Where appropriate, the Commission shall adapt the provisions of this decision".

12 Although prior recourse to Article 14 does not in itself constitute a condition precedent for the admissibility of the application for interim measures, the fact that the applicant has not thought it necessary to refer the matter to the Commission with a view to obtaining an increase in its quotas, together with

the fact that in the present proceedings it has not adduced evidence showing a real danger of serious and irreversible damage if the disputed quotas continue to be applied to it, lead to the conclusion that the urgency and necessity of a suspensory order or of the measures requested have not been proved to the standard required by law.

13 The applicant stated, without however supplying any details in this regard, that its quotas would be exhausted by 19 December 1980 and that it would have to cease production on that date. The Commission, for its part, stated without being contradicted that the total production of steel and concrete reinforcement bars in October and November 1980 amounted to 157 359 tonnes. It thus appears that for the month of December the applicant had a reserve of 205 361 tonnes less 157 359 tonnes, that is to say, 48 002 tonnes.

(tonnes)

	Production			Quotas
	October 1980	November 1980	October and November 1980	4th quarter 1980
Concrete reinforcement bars	43 812	30 128	73 940	93 092
Steel	44 604	38 815	83 419	112 269
Total	88 416	68 943	157 359	205 361

Moreover, it also appears that the production of concrete reinforcement bars in October 1980 attained an exceptionally high level compared to the corresponding production for the same period in the previous five years and this makes it appear probable that, in anticipation of the decision which was about to be taken, the applicant deliberately pushed its production beyond its usual limits.

14 In those circumstances spreading out production over the months of November and December 1980 so as to remain within the limits of the quotas did not present the applicant with problems such as would justify the dispensation which it seeks and which would place it in a more favourable competitive position than its competitors. Further, it must be noted that it is apparent from statements made both by the Commission and by the applicant

that the latter can fulfil any obligations which it may have towards its customers by drawing on the considerable stocks which, on its own admission, it possesses.

II — Restrictions on deliveries within the common market

15 The application for suspension of the operation of General Decision No 2794/80/ECSC also relates to the restrictions on deliveries within the Community resulting from the application of Article 7 (2) thereof.

16 That claim must be rejected. An application for interlocutory relief may relate only to interim measures having a direct link with the decision which is at issue in the main action. That is not so in this case since the decision of 1 November 1980 does not relate to the implementation of Article 7 (2) of Decision No 2794/80/ECSC. From what was stated by the Commission at the hearing it appears that the restrictions on deliveries within the common market do not apply to products which, as in the applicant's case, were manufactured before 1 October 1980 and are held by an undertaking in stock.

17 Thus it is clear that the suspension sought and the measure requested in that regard are neither urgent nor necessary, the more so as they seek to amend General Decision No 2794/80/ECSC for the sole benefit of the applicant.

B — The claim for an order relating to Article 74 of the ECSC Treaty

18 The second claim seeks, by way of interim measure, an order requiring the Commission "to make immediate use of the remedies which Article 74 of the ECSC Treaty places at its disposal".

19 It is immediately apparent that such a claim does not satisfy any of the conditions which Article 39 of the Treaty and Article 83 (2) of the Rules of Procedure place on the jurisdiction of the judge responsible for interlocutory

applications to prescribe "necessary interim measures" pending the Court's decision in the main action to which the application for interim relief relates.

C — The protection of business secrets

20 The third claim seeks, by way of interim relief, an order restraining the Commission from using experts who are in the employ of competing or similar steel producers for the purpose of carrying out the verifications and inspections provided for by General Decision No 2794/80/ECSC in relation to the applicant.

21 As the Commission has rightly observed, a claim for interim relief must have a direct link with the subject-matter of the main action. Such is not the case, since the decision of 1 November 1980 makes no provision whatsoever with regard to the verifications and inspections which the Commission may order in relation to the applicant undertaking.

22 It is clear from all the considerations set out above that, both as regards the suspension of operation and as regards the other measures applied for, the application must be dismissed.

Costs

23 It is appropriate, at this stage, to reserve the costs.

On those grounds,

THE PRESIDENT OF THE COURT,

by way of interlocutory decision,

hereby orders as follows:

1. **The application for interim relief is refused;**

2. The costs are reserved.

Luxembourg, 16 December 1980.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President