Neutral Citation Number [2006] IEHC 213

THE HIGH COURT

[2005 No. 998 S]

BETWEEN

KINGDOM OF BELGIUM

PLAINTIFF

AND
RYANAIR LIMITED

DEFENDANT

Judgment of O'Neill J. delivered the 30th June, 2006.

1. The defendants by their Notice of Motion on 28th day of October, 2005, seek an order staying these proceedings pending the determination of case TT196/04 *Ryanair Ltd. v. the Commission of the European Communities*, which is currently before the Court of First Instance of the European Communities (hereinafter referred to as the "CFI").

2. The background to this matter is as follows.

3. By its decision published on 12th February, 2004, the Commission of the European Communities (hereinafter referred to as the "Commission"), decided that certain arrangements or transactions which had been concluded between the Walloon region and the defendants and implemented by the plaintiff were determined to be illegal state aids and incompatible with Article 87(1) of the Treaty.

4. The conclusion of the Commission was expressed at paragraph 6 of the decision in the following terms:-

> *"6. Conclusions.*
>
> *The Commission notes that Belgium has unlawfully provided aid for the benefit of the airline Ryanair in violation of Article 88(3) of the Treaty. However, for the contribution that this aid can make to the launching of new air transport services and the sustainable development to a regional airport, a portion of this aid may be declared compatible with the common market, subject to the conditions set out in ss. 338 to 334.*
>
> *Has Adopted this Decision:*
>
> *Article 1*
>
> *The aid measures implemented by Belgium in the contract of the 6th November, 2001, concluded between the Walloon Region and Ryanair in the form of a reduction in airport landing charges that goes beyond the official tariff set in Article 3 of the Walloon Government decree of 16th July 1998 laying down charges to be levied for the use of airports in the Walloon Region, and the general discounts provided for in Article 7(1) and (2) of the said Decree, are incompatible with the common market within the meaning of Article 87(1) of the Treaty.*
>
> *Article 2*
>
> *The aid measures implemented by Belgium through the contract of 2nd November, 2001 concluded between Brussels South Charleroi Airport (BSCA) and Ryanair, in the form of discounts on ground handling services in comparison with the official airport tariff, are incompatible with the common market within the meaning of Article 87 (1) of the Treaty.*
>
> *Belgium shall determine the total aid recoverable by calculating the difference between the operating costs borne by BCSA and linked to the ground handling services provided to Ryanair and the price invoiced to the airline. So long as the two-million passenger threshold provided for in Directive 96/67/EC remains unattained, Belgium may deduct from this total any profits realised by BCSA or other strictly commercial activities.*
>
> *Article 3*
>
> *Belgium shall ensure that the compensation guarantees granted in the contract of 6th November, 2001 by the Walloon Region in the event of losses suffered by Ryanair through the exercise by the Walloon of its regulator powers are void. The Walloon Region shall have with Ryanair, as with other airline companies all the necessary freedom and fixing airport charges, airport opening hours, or other provisions of regulatory nature.*
>
> *Article 4*
>
> *The other types of aid granted by BSCA, including marketing contributions, one-shot incentives and provision of office space, are declared compatible with the common market as start-up aid for new routes, subject to the following conditions:*
>
> *(1) The contributions must relate to the opening of a new route and be limited in time. In view of the intra-European destinations covered, the time period must not exceed five years following the opening of a route. The contributions may not be paid for a route opened as a replacement for another route closed by Ryanair in the preceding five years. In future, aid may not be granted for a route that Ryanair has provided in replacement for another route that served previously from another airport located in the same economic or population catchment area.*
>
> *(2) The marketing contributions, currently set at EUR 4 per passenger, must be justified in a development plan compiled by Ryanair and validated by BSCA for each route concerned. The plan shall specify the costs incurred and eligible, which must relate directly to the promotion of the route with the aim of making it viable without aid after an initial period of five years. At the end of the five year*

period BSCA shall a posteriori validate the start-up costs incurred by each airline, and BSCA shall where necessary enlist an independent auditor in the task.

(3) With regard to the portion of contributions already paid by BSCA, a similar exercise must be carried out to validate this aid on the same principles.

(4) The one shot contributions paid in a lump sum when Ryanair set up at Charleroi, or whenever a route was opened, must be recovered, except for any portion that Belgium can justify being directly linked to the costs that were incurred by Ryanair at the Charleroi airport hub and are proportional and incentive in nature.

(5) The sum total of aid for which a new route benefits must never exceed 50% of start-up marketing and one shot costs aggregated for the two destinations in question, including Charleroi. In the same way, the contributions granted for the destination must not exceed 50% of the actual costs for that destination. Specific attention shall be paid in these evaluations to routes that link Charleroi to a major airport, such as those included in Categories A and B as defined in the Committee of the Regions outlook opinion of 2nd July 2003 on the capacity of regional airports and identified in the present decision, and/or to co-ordinated or fully coordinated airports within the meaning of Regulation EEC No. 95/93.

(6) The contributions paid by BSCA that at the end of the five year start-up period exceed the criteria laid down must be repaid by Ryanair.

(7) The contributions paid where applicable for the Dublin-Charleroi route under the November 2001 contracts examined herein shall be recovered.

(8) Belgium shall set up a non-discriminatory aid scheme intended to ensure equality of treatment for airlines wishing to develop new air services departing from Charleroi airport in accordance with the objective criteria laid down in the present Decision.

Article 5

(1) Belgium shall take all the necessary measures to recover from the beneficiary the aid mentioned in Articles 2 and 2 and unlawfully made available to it. The aid mentioned in Article 1 may however remain partly unrecovered, for the portion that does not exceed the ceiling, in compliance with the conditions laid down in Article 4. The recovery shall be effected immediately in accordance with the procedures of national law, insofar as they allow immediate and effective enforcement of the present decision. The aid to be recovered shall include interest running from the date at which it was made available to the beneficiary to the date of recovery. The interest shall be calculated on the basis of the reference rate used for calculating the subsidy equivalent for regional aid. It shall be calculated on a compound basis.

(2) If the conditions laid down in Article 4 are not complied with a portion of the aid, whether that portion corresponds to a category of aid or an aided route, or if the terms for balancing the agreements concluded between Ryanair and BSCA are substantially altered, Belgium shall be required to recover all the corresponding aid referred to in the said article

Article 6

Belgium shall inform the Commission within two months of the date of notification of this decision of the measures taken to comply with it".

5. Following on this decision there ensued correspondence between the plaintiff and defendant herein with a view to the recovery of the shortfall in the airport landing charges, the discounts on ground handling services, and the marketing contributions, one shot incentives and other payments made to the defendants.

6. This correspondence led to an agreement whereby 4 million euro was placed in a joint escrow account pending the determination of the case taken by the defendants against the Commission in which the defendants seek the annulment of the Commission decision. This sum represented recovery of the reductions in airport landing charges condemned in Article 1 and the discounts on ground handling charges condemned in Article 2 of the decision.

7. Insofar as the payments to Ryanair are concerned the correspondence failed to resolve the issue of their recovery, the defendants terminating correspondence in that regard by indicating an unwillingness to engage in any further clarification or exploration of the issue pending the outcome of the case before the CFI.

8. As a result of failure to achieve agreement on this, the plaintiffs issued these proceedings seeking the recovery of the sum of €2,288,000.00 together with interest which as of the 1st November, 2005, was claimed in the sum of €333,606.00.

9. In the meantime as already indicated the defendants have brought a case to the CFI in which they seek the annulment of the decision of 12th February, 2004. It is common case that if the defendants are successful in that case there will be no legal basis for the recovery of the sums sought as liquidated sums in these proceedings.

10. In seeking a stay on these proceedings Mr A. Collins S.C. for the defendants makes the following submissions.

1. The defendants will *inter alia* as part of their defence to these proceedings claim that the decision of the 12th February, 2004, of the Commission is invalid and if necessary will seek a reference to the European Court of Justice (hereinafter referred to as the "E.C.J.") on that point under Article 234 of the Treaty.

2. The defendants have initiated proceedings in the C.F.I. seeking an annulment of the decision. These proceedings were initiated within time and raise issues of the utmost importance to the defendants and to the airline industry in general. The defendants case is *bona fide* and weighty, the salient elements of which are set out in paragraph 8 of the affidavit of

Jim Callaghan for the defendants and summarised in the official journal of the European Union on 11th September, 2004.

3. The courts of this jurisdiction have no jurisdiction to question or determine the validity of the decision of the 12th February, 2004, that jurisdiction being reserved to the courts of the European Union either C.F.I. or E.C.J. as appropriate as per the decision of the E.C.J. in case 314/85 *Foto-Frost v. Hauptzollamt Lubeck – Ost* [1987] E.C.R. 4199.

4. As the plaintiffs right to make the claim that is made in these proceedings depends wholly upon the validity of the decision of the 12th February, 2004, and as Irish courts cannot do otherwise than proceed upon the basis of the validity of this decision, if these proceedings are permitted to continue to final judgment, there is a risk of an injustice to the defendant insofar as a judgment may be obtained on the basis of an E.U. decision which may ultimately be annulled by the C.F.I. and/or the E.C.J.

5. At best there is a risk, having regard to the fact that the trial of these proceedings would take four to five days, that there would be a waste of judicial resources in this jurisdiction, by permitting these proceedings to continue in advance of a determination on the validity of the aforesaid decision by the C.F.I.

7. In any event when the matter would come on for trial the defendants intend to apply to the court for a reference to the E.C.J. pursuant to Article 234 of the Treaty on the question of the validity of the said decision and in the event of the court granting to that request the proceeding would be automatically stayed.

8. Irish case law and in particular the cases of *Merck and Co. Ink v. G.D. Searle and Co. and Monsanto and Co.* [2002] 3 I.R. 614 and the case of *Friends of the Irish Environment v. the Minister of the Environment*, judgment delivered the 15th April, 2005 by Murphy J, favour the granting of a stay in circumstances similar to those in this case. Similarly the case of the *Department of Trade v. British Aerospace* [1991] C.L.M.R. 165 demonstrates a similar approach in the Courts of England and Wales.

9. The judgment of the ECJ in the case of *Masterfoods Limited v. HB Ice-Cream Limited* [2000] E.C.R. 1-11 369 establishes a binding jurisprudence throughout the community which governs issues such as arise on this motion. The following passage from that judgment illustrates the pith of the defendant's case on this motion.

> *"When the outcome of the dispute before the national court depends upon the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the community courts, unless it considers that in the circumstances of the case a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted."*

In this motion the defendant is not seeking to stay the operation of a national measure based on a community regulation, but was merely seeking to stay a court proceeding which relates only to a specific claim by the plaintiff against the defendant herein and hence a stay has no wider effect and accordingly it was submitted that the jurisprudence of the E.C.J. in regard to the suspension of national measures based on community regulation as set out in the joined cases of C – 413/88 and C – 92/89 *Zuckerfabrik Suederdithmarschen A.G. Hauptzllamt Itzehoe and Ors* [1991] E.C.R. 415, does not apply.

10. The governing principle of European law relevant to the issues arising on this appliation are set out in the case of *Masterfoods Limited v. HB Ice-Cream limited* and not in the *Zuckerfabrik* case.

11. The plaintiffs will not suffer any prejudice as a result of the stay being granted, it being clear that the defendants have ample resources ultimately to meet a judgment and any delay is compensatable in favour of the plaintiff by the application of interest pursuant to Article 5 of the decision which involves, compound interest.

12. Having regard to the fact that the plaintiffs had initiated these proceedings and pursued them with vigour, if a stay were to be granted it could not reasonably or realistically be said, as was apprehended by the plaintiffs that there was a risk to the plaintiffs of infringement proceedings pursuant to Article 226 of the Treaty, being taken against the plaintiffs by the Commission.

10. For the plaintiffs it was submitted by a Mr. Donal O'Donnell S.C. as follows:

1. Article 87(1) of the Treaty prohibits the granting of aid by a Member State in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings and insofar as such aid effects trade between Member States it is declared to be incompatible with the common market.

2. Articles 1 and 2 of the decision of the Commission of the 12th February, 2004, found that the reduction in landing charges and discounts on ground handling charges which were conceded to the defendants by the plaintiffs through the Walloon region at the BSCA were illegal State aids. Article 4 of the decision listed the type of start up aid considered to be compatible with the common market provided that certain conditions were met. As the defendant in correspondence eventually declined to provide information which would have enabled a decision to be made as to whether or not these conditions were met, the plaintiffs were left with no option but to proceed immediately to recover the aid given as it was required to do by Article 5 of the decision. Insofar as the aid which was condemned in Articles 1 and 2 of the decision was concerned, recovery in respect of that was satisfied by the placing in escrow of the sum of four million euro. The failure to reach any agreement on the amount due in respect of the aids dealt with in Article 4 has led to these proceedings.

3. The plaintiffs are obliged by virtue of Article 5 of the said decision to recover the illegal aid provided. This obligation arises by virtue of Article 5 of the said decision and also by virtue of Article 14 of Council Regulation (E.C.) No. 659/1999.

4. The reason or philosophy which underpins the policy of the speedy recovery of illegal aids is to restore the equilibrium of the market distorted by the provision of illegal state aid to an undertaking. If this is not done speedily, in sensitive markets undertakings which profit from illegally granted aid, may well distort the conditions of competition in such a way as the competitive structure is permanently altered. Thus the policy of speedy recovery of a illegal State aids is integrally bound up with the underlying policy, fundamental to the common market, of protecting competition from distortion by the

provision of illegal State aids.

5. Article 242 of the Treaty provides that actions before the Court of Justice do not have a suspensory effect. Accordingly the initiation of its proceedings before the CFI did not have the effect of staying the decision of the 12th February, 2004.

6. See in this respect Case-137/92P, *Commission v. BASF* [1994] E.C.R. 1/2555, para. 48. National Courts do not have a power to annul a Commission decision that jurisdiction being reserved to the community courts, either the E.C.J or C.F.I. (see Case 314/85 *Foto-Frost* [1987] E.C.R. 4199).

7. A national court may stay proceedings where those proceedings involve the validity of a community measure until a decision has been given in any action for annulment in respect of that decision by the C.F.I. or E.C.J. In this regard reference was made to Case C-344/98, *Masterfoods Limited v. HB Ice-Cream Limited* [2000] E.C.R. 1-11369.

8. Any decision to stay these proceedings is a decision to suspend the enforcement of the decision of the Commission made the 12th February, 2004. Whilst this court has a jurisdiction to do that, it must exercise its discretion in that regard in accordance with the principles laid out by the E.C.J in the joint cases C-413/88 and C-92/89, *Zuckerfabrik* [1991] E.C.R 415 which governs the staying or suspension of the enforcement of an administrative measure based upon a community regulation. In this case it was held that national courts could grant relief only on the same basis as the community courts, applying the same principles.

9. Pursuant to the judgment in the *Zuckerfabrik* case, the defendants in order to obtain a stay or suspension must satisfy a three part test. Firstly, they must persuade this court that serious doubts exist as to the validity of the community measure, i.e. the decision of the 12th February, 2004. Secondly, they must show that a stay is necessary in order to avoid serious and irreparable damage to the defendant and that such harm is likely to materialise before the decision of the community courts. In this regard financial loss simpliciter will not be regarded in principle as irreparable. It must be established that immediate enforcement of the community decision is likely to result in irreversible damage to the defendant which could not be made good if the Community Act were declared to be invalid. Thirdly, the court must take account of the community's interest and must consider whether the community measure in question would be deprived of effectiveness if not immediately implemented.

10. The defendants in a letter of 25th October, 2005, have accepted, in explaining why they did not apply to the C.F.I. for a suspension that "*the Court of First Instance would not be likely to grant such a stay because our client's exposure was financial and was at a level within its capacity to meet*". On the basis that this court should approach the application for a stay on the same basis as would the C.F.I., the acknowledgment by the defendant that it would not be successful in getting a suspension from the C.F.I., of itself is sufficient to persuade this court to refuse the application for a stay.

11. Without prejudice to the foregoing, it is submitted that the defendants have failed to place before this court sufficient material to enable this court to determine whether or not there exists serious doubts as to the validity of the decision of the 12th February, 2004, and hence this court is not in a position to ascertain whether there is a real possibility of the invalidity of that decision. The defendant has wholly failed to put forward any evidence to demonstrate that in the absence of a stay they will suffer irreparable harm and have contented themselves with merely contending that the plaintiffs will suffer no prejudice by the grant of a stay. The aforesaid acknowledgment in the letter of the 25th October, 2005, demonstrates that the only potential consequence for the defendants of enforcement of the decision is purely financial and well within its capacity to bear and hence demonstrates that no irreparable loss is apprehended.

12. Insofar as the third condition is concerned the interest of the community in the restoration of competition in the market in question requires that the defendants repay immediately the aids received so that they are not continuing to trade with the benefit of those financial advantages. Insofar as the illegal aids which were condemned in Articles 1 and 2 of the decision are concerned recovery has already been achieved by the placing of the €4 million in escrow. There remain outstanding sums sought in these proceedings and so long as the defendants continue to retain those funds they continue to trade with that advantage over other competitors in that market. Hence any delay in the enforcement of the decision of the 12th February, 2004, injures a fundamental community interest, i.e. the protection of competition from distortion by illegal State aids.

13. The judgment of the E.C.J. in the *Masterfoods* case is distinguishable because in that case there was a real risk that without a stay the judgments of the Supreme Court might have been in conflict with the judgment of the community courts so, that the parties would have found themselves subject to conflicting judgments which would have been inimical to the principle of legal certainty. In this case it was submitted no such risk exists and this court in refusing a stay honours the status of the current decision of the 12th February, 2004, as a valid act without suspensory effect.

14. Insofar as the defendants contend that they would in due course seek a reference under Article 234 to the E.C.J. in this case, it was submitted that the circumstances which might give rise to such a reference should not be anticipated at this stage nor could this court at this stage on this application proceed upon the basis that such a reference would be sought and/or if it was sought that the circumstances would exist which would warrant such a reference.

15. The plaintiffs in this case, if a stay is granted, are at risk of infringement proceedings being taken against them by the Commission pursuant to Article 226 of the Treaty. In this regard reference is made to case no. C-232/05 *Commission v. France* and the decision of the E.C.J., in case C-224/01, *Kobler* where the judgment of the court was delivered on the 30th September, 2003, and held that in certain circumstances Member States may be liable in damages for breach of E.U. law where the infringement is attributable to a national court.

Decision

11. The first issue to be confronted is to determine what is the correct approach to be adopted to ascertain whether or not a stay should be granted. This comes down to whether or not the rulings of the E.C.J. in the *Zuckerfabrik* case applies or not. Mr. Collins submitted that it did not because the *Zuckerfabrik* case was to be distinguished as applying only where a stay or suspension was sought in relation to a national measure based on community regulation and also he drew attention to the absence of any linkage in the judgment of the E.C.J. in the *Masterfoods* case to the three part test for a suspension set out in the *Zuckerfabrik* case.

12. In my view the *Zuckerfabrik* case and the *Masterfoods* case form part of a cohesive jurisprudence. In circumstances such as existed in the *Masterfoods* case where there was a real risk of two courts of competent jurisdiction i.e. community court and a national court producing judgments which conflicted with each other, there would be an overriding imperative to avoid the parties being subject to conflicting judgments, and hence it would seem to follow that notwithstanding non-compliance with the three part test set out in the *Zuckerfabrik* case that a stay or suspension should be granted by the national court. That is the approach that was taken by McCracken J. in the *Monsanto* case.

13. There is of course perhaps the more fundamental question raised by Mr. Collins and that is whether the *Zuckerfabrik* judgment is to be distinguished, as confined to applications to suspend or stay the national measures based upon community regulation.

14. If Mr. Collins is correct in his submission it would have the strange effect of excluding from the *Zuckerfabrik* test decisions of the Commission generally on the grant of illegal aids to particular parties and also decisions of the Commission condemning anti competitive practices on the part of particular parties. Given that the provisions of Article 87 of the Treaty can only be given effect through the decisions of the Commission in regard to particular alleged illegal state aids, and having regard to the fact that pursuant to Article 249 of the treaty decisions of the Commission are binding on those to whom they are addressed, I am of opinion, having regard to the fundamental importance of decisions of this type in achieving one of the most important policy objectives of the Treaty namely the establishment of a common market free from distortion, inter alia by illegal state aids or anti competitive practices, that it would necessarily follow that where a suspension of a decision was sought or a stay sought on enforcement proceeding pending the outcome of annulment proceedings in the community courts, that the three part test set as out in the *Zuckerfabrik* case applies, notwithstanding the absence of an express reference in the *Zuckerfabrik* case to decisions of the Commission such as is in issue in this case.

15. The obligation of sincere co-operation enjoined on Member States by Article 10 of the Treaty, in my view implies that National Courts, in an application for a stay on enforcement of a decision of the Commission, must apply the general jurisprudence of the Community Courts on such issues as set out in the *Zuckerfabrik* case.

16. In my view therefore the correct approach to this application for a stay is to apply the three part test as set out in the *Zuckerfabrik* case.

17. The first requirement here is that this court should have serious doubts as to the validity of the decision of the 12th February, 2004. In that regard the plaintiff submitted that the defendants had not placed sufficient material before the court to enable it to form any view on the validity of the decision.

18. Clearly what is required here is not that this court should be required to form any kind of a decisive or conclusive opinion on the question of validity. I do not think that a national court could be expected to go any further than to do as is done in the judicial review jurisdiction here on the ex parte application for leave, namely, simply to ascertain that there are arguable grounds for contending that the decision is invalid. If more were required of the national court it would necessitate a much deeper inquiry as to the nature of or merit of the challenge to the decision, than I think is envisaged on an application such as this.

19. The material which is available to this court setting out the nature of the defendants challenge to the validity of the decision is set out in the affidavit of Jim O'Callaghan sworn for the purposes of this application and particular paragraph 8 thereof. In addition there is set out in the Official Journal of the E.U. Union of the 11/9/2004, pleas in law and main arguments of the defendants. There is sufficient material between these two sources to persuade me that the defendants have arguable grounds for contending that the decision is invalid or to put it another way to establish serious doubts as to the validity of the decision.

20. The second requirement is that the defendants demonstrate that they will suffer irreparable harm if a stay is not granted. It is quite clear that the defendants have put forward no evidence which can come close to satisfying this test. The letter of the 25th October, 2005, candidly acknowledges that the only harm apprehended is pure financial loss which is well within their capacity to bear.

21. This brings me to the third aspect of the test namely the interest of the community. The interests asserted here is, as mentioned earlier, the necessity to restore the equilibrium of the market by the recovery of the sums paid to the defendants as claimed in these proceedings. Specifically what has to be looked at here is whether or not the measure in question will be deprived of all effectiveness if not immediately implemented.

22. In this regard no evidence has been put forward by the plaintiffs or the defendants which would enable the court to form a view as to the affect (if any) of the non-recovery of the sum claimed in these proceedings on the state of competition in the market in question. Thus the court is left in a position where it can easily conclude as a matter of theory that the competitive equilibrium of the market was disturbed by the payment of these aids and may continue to be so distorted by their non-recovery. But as to the actual affect of the non-recovery of these payments on the market in question, the court would have to speculate to reach a conclusion in that regard. I am therefore unable to conclude on the basis of the evidence before me that the non-recovery of the sums claimed in this case has any significant impact on competition in the relevant market.

23. In regard to the failure of the defendants to demonstrate irreparable harm, it follows that the defendants are not entitled to a stay of these proceedings, applying the test as set out in the *Zuckerfabrik* case.

24. Notwithstanding the non-compliance with the requirements of the three part test in *Zuckerfabrik* as discussed, it remains to be considered whether or not the rule formulated in the *Masterfoods* case by the E.C.J. is to be applied on the basis of the risk of a conflict of judgment.

25. In this case the decision of the 12th February, 2004, has to be regarded by the Irish courts as having the force of law unless and until it is annulled by the C.F.I. or ultimately the E.C.J., and its validity cannot be questioned in these proceedings. It has been intimated that it is the intention of the defendant to seek a reference under Article 234 to the E.C.J. for the purpose of a preliminary ruling on the question of validity of the decision. Having regard to the fact that the validity of that decision is the subject matter of the annulment proceedings currently pending before the C.F.I., it being the appropriate community court with jurisdiction to hear that challenge, I am of opinion that this court would be unlikely to accede to an application for a reference in respect of the same question under Article 234 to the E.C.J. Thus should that situation arise the question which the trial court will ultimately be faced with is the same issue as arises on this application namely whether to stay its proceedings to await the judgment of the C.F.I. on the validity of the decision.

26. In my view there does not appear to be any risk of these proceedings leading to a judgment which could conflict with the

judgments of the C.F.I. or of the E.C.J., if there was an appeal, given that this court cannot question the validity of the decision.

27. It could be said that if these proceedings continued to the ultimate stage of judgment for the plaintiff and all of this is accomplished before the community courts reach a final judgment and if the final judgment of the community courts is that the decision is to be annulled, that there is a risk of the defendants being exposed to a judgment which would be legally enforceable but in respect of which the legal basis ultimately is found to be wanting.

28. Should that situation emerge I will be inclined to the view that the risk of any loss to the defendants by the enforcement of that judgment is so remote as to be negligible.

29. I have been urged by Mr. Collins to follow the judgment of Ognall J. in the case of the *Department of Trade and Industry v. British Aerospace Plc. and Anor.* [1991] 1 C.L.M.R. 165. As this case was decided before the judgment of the E.C.J. in the *Zuckerfabrik* case was delivered and also before the coming into force of Counsel Regulation (E.C.) No. 659/1999, I am of the view that I ought not to adopt the reasoning of Ognall J. in that case.

30. For all the reasons I have set out above I have come to the conclusion that I must refuse this application for a stay of these proceedings.