JUDGMENT OF THE COURT (Second Chamber)
20 June 1985

In Case 64/84

Queenborough Rolling Mill Company Limited, represented by T. R. Ottervanger, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, 34 Rue Philippe-II,

applicant,

v

Commission of the European Communities, represented by Frank Benyon, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Manfred Beschel, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission's decision of 26 January 1984 imposing a fine on the applicant is void,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, P. Pescatore and K. Bahlmann, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

after hearing the Opinion of the Advocate General at the sitting on 14 February 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 12 March 1984, Queenborough Rolling Mill Company Limited (hereinafter referred to as 'QRM'), having its registered office in Queenborough (United Kingdom) brought an action under the second paragraph of Article 33 of the ECSC Treaty in which it requested the Court to declare void the Commission's decision of 26 January 1984 imposing a fine of 491 988 ECU on the applicant for exceeding its production quotas for the third quarter of 1981 and its production quotas and the parts of such quotas which could be delivered on the common market for the fourth quarter of 1981.

2 It is clear from the documents before the Court that, by letter of 20 August 1981, the Commission notified QRM of its decision fixing the latter's production quota for the third quarter of 1981 at 3 604 tonnes. By letter of 28 October 1981 the Commission allocated to QRM for the fourth quarter of 1981 a production quota of 3 912 tonnes and fixed the part of that quota which could be delivered on the common market at 2 944 tonnes. Those individual decisions were adopted pursuant to a general decision of the Commission, namely Decision No 1831/81/ ECSC of 24 June 1981 establishing for undertakings in the iron and steel industry a monitoring system and a new system of production quotas in respect of certain products (Official Journal 1981, L 180, p.1).

3 It should be borne in mind that Decision No 1831/81, which is based on Articles 47 and 58 of the ECSC Treaty, was applicable during the period from 1 July 1981 to 30 June 1982. The relevant systems were adjusted so as to enable the Commission to fix for the undertakings concerned, on the basis of reference production, the quarterly quotas, the productionquotas and the part of those quotas which could be delivered on the common market. The first paragraph of Article 12 of that decision provides that a fine, generally of 75 ECU for each tonne in excess, is to be imposed on any undertaking exceeding its production quotas or part of such quotas which may be delivered on the common market. The second paragraph of that article states that if an undertaking's production exceeds its quota by 10% or more, or if the undertaking has already exceeded its quota or

quotas during one of the previous quarters, the fine may be up to double that amount per tonne. Finally, according to Article 14 of the decision in question, the Commission is to make suitable adjustments to the reference production if, by virtue of the scale of the abatement rates imposed in respect of a given quarter, the quota system creates exceptional difficulties for an undertaking.

4 It should be noted that the individual decisions fixing the quotas have not been contested by the applicant.

5 On 15 February 1983 the Commission informed QRM that it had established that the latter had exceeded its production quota for Categories V and VI by 2 330 tonnes in the third quarter of 1981 and by 3 263 tonnes in the fourth quarter of 1981, and the part of the quota which could be delivered on the common market by 697 tonnes in the fourth quarter of 1981. After considering QRM's explanation of its conduct, the Commission adopted the decision which forms the subject-matter of this dispute. It should be noted that the applicant does not challenge the Commission's findings relating to the quantities produced in excess of the quotas.

6 In support of its application the applicant puts forward four submissions which may be summarized as follows:

— The late receipt of the letter of 20 August 1981 fixing the quotas for the third quarter of 1981 made it impossible to comply with the quotas allocated;

— Exceptional difficulties encountered during the third and fourth quarters of 1981 seriously jeopardized the undertaking's profitability, a factor which the Commission should have taken into account in fixing the fine;

— In the case of re-rollers, the principle of non-discrimination should have entailed a reduction of the fine of 75 ECU for each tonne of excess, which was fixed by reference to integrated undertakings;

— The imposition of a fine 25% higher than the normal rate for the fourth quarter of 1981 on the ground that QRM had exceeded its quota for the third

quarter was unfair in view of its exceptional situation in that quarter, which the Commission acknowledged.

The alleged impossibility of complying with the quotas allocated

7 The applicant points out in the first place that it received the letter of 20 August 1981 establishing the quota for the third quarter of that year when two-thirds of the quarter had already elapsed. At the time the applicant was no longer able to reduce its production on a temporary basis since a number of very large orders placed before 1 September had compelled it to continue production and the undertaking was closed for two weeks' vacation in August. In view of the orders and the deliveries for regular customers, and taking into account the 1 900 tonnes in stock at the end of August, the applicant had to produce 2 338 tonnes in September 1981. In fact it produced 2 516 tonnes in September. This shows that only in respect of the production of 178 tonnes is there no excuse.

8 The applicant points out, secondly, that in its view the crisis measures had been adopted particularly in order to be applied to the largest undertakings and not to small re-rollers and monoproducers. Finally, it was not possible for the applicant to anticipate the new and complicated quota system imposed by Decision No 1831/81. It was therefore obliged to await receipt of the Commission's letter of 20 August 1981 setting forth the particular conditions imposed on it. When it finally received the letter, there was no longer any possibility whatsoever of complying with it. It was therefore in an exceptional situation, which should have enabled it to escape the imposition of a fine.

9 The Commission replies in the first place that in the contested decision it acknowledged that the fact that the letter was received later than usual may have contributed to the excess production. It had therefore decided to reduce the normal rate of the fine for the third quarter by 50%, which amounted to exempting 1 165 tonnes of excess steel unlawfully produced in September. QRM could therefore have produced in September 1981 the remainder of its quota, namely 186 tonnes (3 604 tonnes less 3 418 tonnes already produced) plus the 1 165 tonnes, making a total of 1 351 tonnes, which does not seem unreasonable to the Commission when compared to the previous monthly average of 1 708 tonnes. Secondly, the Commission contends that the applicant greatly exceeded its

quota for the fourth quarter. This leads to the conclusion that the late receipt of the letter was in no way the cause of the excess. Finally, the deliveries to very regular customers and the very large orders relied upon by QRM to justify the excess cannot, in the Commission's view, constitute a defence to the illegality of the over-production. The quotas imposed constitute measures of public law and take precedence over any contractual obligations.

10 As regards the alleged unforseeability of the new quota system, the Commission points out that any undertaking, even a small undertaking which is a re-roller or a monoproducer, is subject to all the rules of the quota system. In this case QRM had no valid grounds for taking the view that the Commission would not allocate quotas to it for the third quarter because quotas had already been allocated to it in respect of previous quarters. Moreover, QRM could easily have calculated its own reference production and its quotas in accordance with Article 7 a of Commission Decision No 1832/81/ECSC of 3 July 1981 including concrete reinforcing bars and merchant bars in the new system of production quotas established under Decision No 1831/81/ECSC (Official Journal 1981, L 184, p. 1).

11 The applicant's first submission cannot be upheld. As regards its argument to the effect that it had to produce 2 338 tonnes in September 1981 on account of the commitments which it had entered into before 1 September, it is necessary to state that, as the Court has repeatedly emphasized, the purpose of the introduction of the production quota system is to spread in an equitable manner among all undertakings in the Community the inevitable sacrifices entailed by the steel crisis, which is characterized by a reduction in demand and a fall in the level of prices. The consequences of that crisis affect all undertakings, whatever their geographical location, their individual state of development, their structure, their level of development or their rate of utilization of production capacity (see the judgments of the Court of 12 July 1984 in Case 81/83 *Busseni* v *Commission* [1984] ECR 2951, and of 12 December 1983 in Joined Cases 31, 138 and 204/82 *Metallurgiki Halyps* v *Commission* [1983] ECR 4193). That principle of solidarity does not allow the applicant to rely on fixed delivery contracts in order to justify the fact that it exceeded its quotas. By virtue of the same principle, the Commission, once it had decided to establish a general system of quotas, was not entitled to distinguish between integrated undertakings on the one hand and re-rollers and monoproducers on the other (see the judgment of 16 February 1982 in Case

276/80 *Ferriere Padana* v *Commission* [1982] ECR 517) or guarantee for any undertaking a minimum level of production based on its own criteria of profitability or on the orders placed with it.

12 As regards the alleged unforseeability of the new quota system, it must be pointed out that, by reducing the fine for the third quarter by 50% of the amount which would generally have been imposed for excess production amounting to 2 330 tonnes, the Commission thus permitted excess production amounting to 1 165 tonnes to go unpunished. The Commission therefore took account of QRM's exceptional situation. In reducing the fine, the Commission accepted by implication a quantity (1 351 tonnes) higher than that which the applicant could have expected to produce lawfully during September, that is to say approximately 1 202 tonnes (quota for the third quarter, 3 604 tonnes, divided by 3), if its production quota had been notified to it in time. In those circumstances, there is no ground for accusing the Commission of having incorrectly exercised its discretion. The submission challenging the fine imposed on the applicant for exceeding the quota for the third quarter must therefore be rejected.

Exceptional difficulties allegedly encountered during the third and fourth quarters of 1981

13 The applicant claims to have encountered exceptional difficulties within the meaning of Article 14 of Decision No 1831/81 during the last two quarters of 1981 and the first two quarters of 1982. It maintains that its quotas for the first two quarters of 1982 were adjusted by the Commission. However, by individual decision of 22 November 1983, the Commission refused to make an adjustment for 1981 on the ground that the time-limit for the submission of a request for adjustment had not been complied with. The Commission adopted the aforesaid decision although it had promised to examine the applicant's belated request with the greatest care. In QRM's view, the Commission, which does not deny that there were exceptional difficulties, should have taken that factor into account in fixing the amount of the fine.

14 The Commission contends that individual decisions which have not been contested and which refuse to grant quota adjustments may not be challenged in an application requesting the Court to declare void a decision imposing a fine. It maintains, furthermore, that Article 14 of Decision No 1831/81 does not apply to the calculation of fines. In its view, the applicant's arguments cannot therefore justify a reduction in the amount of the fine imposed.

15 This submission must also be rejected. QRM did not challenge either the legality of the decisions fixing the quotas for the third and fourth quarters of 1981 or the individual decision of 22 November 1983 refusing to grant quota adjustments. Consequently, the applicant was still bound by the quotas which were allocated to it and which it exceeded. In those circumstances, the fact that the Commission adjusted the quotas for the first two quarters of 1982 may not be relied upon either as a factor mitigating the infringement which QRM undoubtedly committed during the last two quarters of 1981 or as proof of the existence of an exceptional situation justifying an assessment different from that made by the Commission as regards the gravity of the infringement.

16 Furthermore, it must be borne in mind that it is well established in the case-law of the Court (see the judgments of 13 December 1984 in Case 78/83 *Usinor* v *Commission* [1984] ECR 4177 and of 12 July 1984 in Case 81/83 *Busseni* v *Commission,* cited above), that an applicant may not, in the course of an action for the annulment of an individual decision under Article 33 of the ECSC Treaty, rely on the submission that another decision which was addressed to it, and which has become final, is unlawful.

The alleged breach of the principle of non-discrimination

17 The applicant claims that the consequences of imposing a fine of 75 ECU for each tonne in excess, provided for by Article 12 of Decision No 1831/81 and fixed by reference to a standard integrated undertaking which is thus deprived of the benefit of a decrease in its fixed costs, are proportionally far more severe for a re-roller than for an integrated undertaking. According to QRM, a fine imposed at the rate of 75 ECU leaves integrated undertakings, having regard to the average contribution per tonne (calculated on the basis of the net selling price less production costs varying strictly in accordance with tonnage) with a net benefit of UKL 77 per tonne, whilst the same rate causes re-rollers a loss of UKL 8. Consequently, only infringements by re-rollers are really penalized at the rate of 75 ECU for each tonne in excess. It is therefore not fair, and, moreover, not consistent with the principle of equality, to impose on QRM the same fine as that imposed on integrated undertakings, namely 75 ECU. Moreover, it would have been easy for the Commission, in order to satisfy the requirements of the principle of non-discrimination, to distinguish between the three main types of steel

producers, namely re-rollers, arc-furnace steelmakers and integrated undertakings, and thus to establish a general fine for each of those three types.

18 The Commission emphasizes in the first place that the legality of Article 12 of Decision No 1831/81 has been acknowledged by the Court in its decisions. That provision, as well as Article 58 of the ECSC Treaty, refers to the value of steel production on the market, regardless of the methods of production employed and without reference to the value added by the undertaking concerned or to its profit margin. In the event of an imbalance on the market, the purpose of Article 58 is to restore the balance and that is the reason for which only the value of production on the market is to be taken as a basis for the calculation of the fine. However, the small size, the methods of production, the production of a single category of products or the financial difficulties of an undertaking are taken into account by the Commission when the quota is fixed. The Commission takes the view that the rate of the fine may be reduced only where an undertaking is in a special or an exceptional situation. It adds that QRM's proposal to establish three general rates is impracticable, first of all because the different profit or cost levels vary from one undertaking to another and, secondly, because if its proposal were accepted, there would be no end to claims for further distinctions to be made between the undertakings concerned with a view to reducing fines.

19 In view of that difference of opinion, it must be stated that Article 58 (4) of the ECSC Treaty is based on the notion of the value of the tonnages produced in disregard of the quota, not on that of the average contribution per tonne or on that of the profit realized in respect of such production. The first paragraph of Article 12 of Decision No 1831/81, which provides for the imposition of a fine, generally of 75 ECU for each tonne in excess, is well within the maximum limits prescribed for fines by Article 58.

20 Although it is true that Article 58 does not prevent the Commission, when it imposes a fine, from taking into account the individual situation of the particular undertaking, none the less it is the value of the over-production which brings about an imbalance on the market and which is at the basis of the provisions concerning fines on undertakings which infringe decisions adopted to stabilize the steel market.

21 It is clear from well-established case-law of the Court (see the judgments of 16 November 1983 in Case 188/82 *Thyssen* v *Commission* [1983] ECR 3721, and of 29 February 1984 in Case 270/82 *Estel* v *Commission* [1984] ECR 1195) that the power conferred on the Commission by Article 58 of the ECSC Treaty, in conjunction with the decisions implementing that provision which enable the Commission to impose in all cases in which quotas have been exceeded a fine, generally of 75 ECU per tonne, does not exclude all discretion in the matter of fines. Accordingly, the Commission is indeed obliged, as is apparent from the judgment of 16 November 1983 in Case 188/82 *(Thyssen* v *Commission,* cited above) to vary the amount of the fines where the circumstances of the infringement or the exceptional situation in which an undertaking finds itself justify the application of a rate other than that of 75 ECU which is generally applied. The structure of the undertaking or its small average contribution per tonne of steel produced cannot justify a reduction of that rate unless they serve as evidence establishing the existence of a circumstance mitigating the infringement or of an exceptional situation.

22 The fact that the applicant belongs to a category of undertakings which must bear the consequences of a fine of 75 ECU, which are relatively more severe for it than for undertakings whose production is more diversified or more closely integrated, cannot be regarded as a circumstance mitigating the infringement committed. Nor does it constitute an exceptional situation affecting an undertaking individually. It is not specific either to the applicant or even to other undertakings engaged exclusively in re-rolling, but is a feature inherent in the situation of many other undertakings throughout the Community. The consequences of the fact that its structure is that of a re-roller cannot therefore have the effect of placing the applicant undertaking in an exceptional situation and of distinguishing it, as regards the amount of the fine, from other undertakings whose structure or method of production are different.

23 The Commission rightly relies also on grounds relating to the practicability of the quota system in order to justify the uniform application of a fine which is generally of 75 ECU per tonne, save in exceptional cases. The quota system would be weakened considerably if the Commission were compelled to determine every time the category to which different undertakings belong and the differences which distinguish them. Moreover, the average contributions made by undertakings, even those belonging to the same category, may differ substantially. Finally, it must be stated that if the Commission were to establish different rates of fine by category of undertaking this might give rise to discrimination between undertakings which

place on the market the same volume of over-production of a product and which thus contribute to the same degree to an imbalance on the market.

24 Accordingly, this submission must also be rejected.

The increase by 25% in the fine imposed for the fourth quarter of 1981

25 The applicant claims that the imposition for the fourth quarter of a fine 25% higher than the normal rate on the ground that it had exceeded its quota during the third quarter is unfair because in respect of the third quarter the Commission acknowledged the existence of an exceptional situation by fixing the fine at one half of the normal rate. The applicant takes the view that the Commission should therefore have taken that exceptional situation into consideration when referring to the excess production in question for the purpose of increasing the fine and, for that reason, should have increased the normal fine only by 12.5%, that is to say, one half of the amount by which the fine was actually increased.

26 In reply to that argument, the Commission refers to Article 12 of Decision No 1831/81 which provides for the possibility of increasing the general rate of the fine by up to 100%. Its purpose is to deter offenders from repeating an infringement. Since it is not disputed that the applicant exceeded its quota for the third quarter, the excess production for the fourth quarter constitutes a second infringement notwithstanding the fact that the Commission agreed to treat the infringement committed in the third quarter more leniently. There can be no question of making two concessions, one for the third quarter and one for the fourth quarter, in respect of a single extenuating circumstance, namely the late receipt of the letter fixing the quotas for the third quarter.

27 This submission must also be rejected. The applicant greatly exceeded its quota for the third quarter. It follows, moreover, from the grounds of this judgment concerning the applicant's first submission, that the Commission was right to impose a fine on the applicant for exceeding its production quota for the third quarter by 1 165 tonnes. That excess cannot be regarded as negligible in relation to the quota of 3 604 tonnes allocated to the applicant.

28 The applicant does not deny that in the fourth quarter it again exceeded its production quota (3 912 tonnes) and the part of the quota which could be delivered on the common market (2 944 tonnes), by 3 263 tonnes and 697 tonnes respectively. It follows that it committed an infringement. Accordingly, the Commission was not mistaken in finding that in the fourth quarter the applicant repeated an infringement in the sense contemplated by Article 12 of Decision No 1831/81.

29 Furthermore, it must be borne in mind that Article 12 of Decision No 1831/81 also provides that if an undertaking's production exceeds its quota by 10% or more the fine may be up to double the normal amount of 75 ECU per tonne and that the same rules are to apply to any excess over the quantities which may be delivered on the common market. Accordingly, the increase in the normal rate, in this case of 25% on the ground that the applicant greatly exceeded its quotas during the fourth quarter, does not seem to be unjustified.

30 It is clear from all the foregoing considerations that the applicant has been unable to demonstrate that the Commission's decision of 26 January 1984 is unlawful. The application must therefore be dismissed in its entirety.

Costs

31 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the applicant has been unsuccessful in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the applicant to pay the costs.

Due Pescatore Bahlmann

Delivered in open court in Luxembourg on 20 June 1985.

P. Heim
Registrar

O. Due
President of the Second Chamber