2. Orders the applicant to pay the costs.

Bahlmann Pescatore Due

Delivered in open court in Luxembourg on 9 February 1984.

J. A. Pompe
Deputy Registrar

K. Bahlmann
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 17 NOVEMBER 1983 [1]

Mr President,
Members of the Court,

The subject-matter of the application on which I give my opinion today is a notice of fine which the applicant received pursuant to Article 9 of Decision No 2794/80 ECSC for exceeding the production quotas allocated to it for the first and second quarters of 1981.

The applicant was informed of its production quota for Group IV products for the first six months of 1981 by notice dated 19 December 1980 fixing 12 279 tonnes for the first quarter of 1981 and by notice dated 6 April 1981 for the second quarter of 1981. Later in a letter dated 24 November 1981 the Commission acknowledged that the quota for the first quarter of 1981 should be increased by a further 358 tonnes because the applicant's quota for the last quarter of 1980 was 17 047 tonnes and its actual production only 16 689 tonnes. In a letter dated 1 February 1982 the quota for the first quarter of 1981 was apparently increased by a further 1 178 tonnes.

In fact however the applicant produced more than it was allowed. It referred for the first time in a letter dated 24 April 1981 to a need to do so. Because of heavy debts in 1978 it had made an out-of-court settlement under which the balance was to be paid to banks before the end of 1981. Because its financial situation had further deteriorated it could not observe the production quotas without jeopardizing current business and the repayment under the settlement. In a letter dated 18 May 1981 the applicant further explained that considerable debts had forced it in 1977 to restrict production and reduce staff

1 — Translated from the German.

and therefore it could continue business and comply with the out of court settlement only with a normal production cycle.

The Commission did not inquire further into the situation. In a letter dated 24 November 1981 it pointed out to the applicant that it had improperly exceeded its production quota for the first quarter of 1981 by 4 576 tonnes. Later, after the production quota for the first quarter had been amended in the letter of 1 February 1982 which has already been mentioned, the Commission amended its complaint to the effect that the applicant had exceeded its quota by only 3 398 tonnes. In a further letter dated 4 February 1982 the Commission pointed out that the applicant had produced 3 467 tonnes too much for the second quarter of 1981.

In a telex message of 9 December 1981 the applicant for the first time made its observations, as requested by the Commission, but explained only that it was still waiting for a decision pursuant to Article 14 of Decision No 2794/80. In further observations of 17 December 1981 it pointed out that it had already been in a state of crisis in 1976 and had had to reduce its production in 1977 by 40% because the previous level of production could no longer be financed. Further it referred to its debts in respect of social insurance and to the fact that it was allowed no bank credit and mentioned once again that further restrictions on production would mean the end of the company because they would make normal business, fulfilment of the settlement and the payment of the social insurance debts impossible.

Then on 13 August 1982 a decision was taken on the basis of the penal provisions of Article 9 of Decision No 2794/80 after the applicant had once again made its observations on 19 February 1982 and at a hearing on March 1982. The decision stated that a difficult financial situation was not sufficient to justify exceeding a quota; on the contrary, an undertaking was required to respect the quota allocated to it until a favourable decision was made on an application for adjustment. Since the applicant had exceeded its quota in respect of Group IV products for the first quarter of 1981 by 3 398 tonnes and that for the second quarter of 1981 by 3 467 tonnes it had made itself liable to a fine at the rate of 75 European currency units [ECU] per tonne of excess which amounted to 514 875 ECU or LIT 680 288 891. Under Article 2 of the decision the applicant was required to pay the fine within two months of service of the decision.

The applicant challenged the decision, which was served on it on 26 August 1982, in an application to the Court lodged on 25 October 1982. It claims that the decision of 13 August 1982 should be declared void, alternatively the fine should be reduced and in any event the applicant should be given time for payment.

I must also mention, and this is relevant in determining the admissibility of the application, that the applicant closed its works from 17 March 1982 to 13 September 1982 and that during that period its employees were supported by the Cassa Integrazione Straordinaria. At the same time, namely on 17 April 1982, the applicant also applied to the Tribunale [District Court], Brescia, to be made subject to *Amministrazione controllata.* By a decision of the Tribunale of 23 April 1982 the ap-

plication was granted, an order was made for administration of the company to be subject to supervision for two years and a Commissario Giudiziale was appointed. After negotiations with the trade unions the applicant apparently resumed production on 13 September 1982.

I — for a consideration of the case the major problem is whether the *application is admissible.* The Commission has doubts in view of the time-limit for making an application.

On the basis of the service of the contested decision, which as postmark and signature show took place on 26 August 1982, and regard being had to the extension of the prescribed period for Italian applicants by 10 days under Annex II to the Rules of Procedure on account of distance and to the fact that under Article 81 of the Rules of Procedure the period of time allowed for commencing proceedings against a measure adopted by an institution runs from the day following the receipt by the person concerned of notification of the measure, the Commission takes the view that the prescribed period (one month under Article 33 of the ECSC Treaty) expired on 6 October 1982 and that therefore the application received on 25 October 1982 was out of time.

On the other hand the applicant refers to the fact that its works were closed from March 1982 and re-opened only on 13 September 1982 and in that connection it cites the third paragraph of Article 39 of the Statute of the Court of Justice of the ECSC which reads:

"No right shall be prejudiced in consequence of the expiry of a time-limit if the party concerned proves the existence of unforeseeable circumstances or of *force majeure.*"

First of all the applicant states in the application on this point that it was prevented by the closure of its works from taking cognizance of the contested decision and that became possible only on 13 September 1982. If it is accordingly accepted that the period for making an application began to run only on 14 September 1982, it expired in fact only on 25 October 1982 because 24 October 1982 was a Sunday and in consequence pursuant to Article 80 (2) of the Rules of Procedure must be left out of account. Later the applicant went still further and took the view that because during the period of closure six months' post had accumulated it was not able to take cognizance of the Commission decision immediately on 13 September 1982 but only some days later. On such a calculation the application received on 25 October 1982 must in any event be regarded as having been made within the period as extended pursuant to the third paragraph of Article 39 of the Statute of the Court.

In my opinion the applicant's view cannot be upheld.

It must first of all be observed that it is impossible to accept the view that the time-limit may be regarded as respected if the day on which the applicant's works were re-opened is taken as the relevant day on the ground that it was only then possible to take cognizance of the contested notice. The period would then have started to run on 14 September 1982 and would have expired not on 24 October 1982 but on 23 October 1982, so that it could not have been accepted that it was extended by a day on the ground that 24 October 1982 was a Sunday. If the applicant's original view is accepted, the receipt of the application on Monday, 25 October 1982, would by no means be in time.

Thus the time-limit could be regarded as respected only if the applicant in fact had knowledge of the contested decision only some days after 13 September 1982 and if it were possible to regard that fact as "unforeseeable circumstances" of *"force majeure"* within the meaning of the third paragraph of Article 39 of the Statute of the Court of Justice of the ECSC. In my opinion however that view is hardly tenable.

In justification of that conclusion it is not necessary to attempt to seek a comprehensive definition of what may be regarded as unforeseeable circumstances or *force majeure* within the meaning of the said provision of the Statute. Let me merely mention first that in the judgment in Joined Cases 25 and 26/65 [1] the fact that an application was not received by the Court until four days after it had arrived in Luxembourg was acknowledged to constitute relevant unforeseeable circumstances within the meaning of the said provision of the Statute and that was contrary to the view of the Advocate General who thought the criterion was whether there was an event independent of the will of the person under the obligation, which he could not foresee and the consequences of which he could not avert. In that connection let me cite the case-law on the expression *"force majeure"* in agricultural law, according to which purpose it is important whether all requisite care has been taken, whether there were circumstances outside the influence of the person under the obligation and whether an event is to be regarded as so unusual that its occurrence would have to be considered as improbable by a prudent person acting with the circumspection of a diligent businessman. It thus basically depends on whether there are unusual difficulties independent of the will of the person liable and whether the consequences of such happenings cannot be avoided or can be avoided only at excessive sacrifice (that is the purport of the judgment in Case 4/68 [2] and similarly of the judgments in Cases 11/70 [3] and 25/70 [4] in which there is in addition mention of events for which the persons liable are in no way responsible).

Let me mention further that under legal systems in which, as in the case of Article 39 of the Statute of the Court of Justice of the ECSC, in the event of disregard of time-limits legal disadvantages do not apply if there are unforeseeable circumstances or *force majeure* as in French, Italian, Belgian and Netherlands law, similar considerations are relevant and quite strict criteria apply. The person concerned must in no way be responsible for the relevant event and he must have acted with the requisite care. Finally I should like to mention that under German law (Paragraph 60 of the Verwaltungsgerichtsordnung [rules of the administrative court] in a case corresponding to that to which Article 39 of the Statute of the Court of Justice of the ECSC applies it is relevant whether the person was prevented without any blame on his part from observing a legal time-limit, which according to a decision of the Bundesverwaltungsgericht [Federal Administrative Court] (Volume 43, p. 332) is presumed if everything which may reasonably be expected has been done.

Accordingly, the view appears at least tenable that there can certainly be no

1 — Judgment of 2 March 1967 in Joined Cases 25 and 26/65 *Società Industriale Metallurgica di Napoli and Acciaierie e Ferriere di Roma* v *High Authority of the ECSC* [1967] ECR 33.

2 — Judgment of 11 July 1968 in Case 4/68 *Schwarzwaldmilch GmbH* v *Einfuhr- und Vorratsstelle für Fette* [1968] ECR 377 at p. 386.

3 — Judgment of 17 December 1970 in Case 11/70 *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 at p. 1138.

4 — Judgment of 17 December 1970 in Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* v *Köster, Berodt & Co.* [1970] ECR 1161 at p. 1177.

cause for applying the third paragraph of Article 39 of the Statute of the Court of Justice of the ECSC if in relation to observance of a time-limit there may be said to be blame, negligence and omissions on the part of the person concerned. With the best will in the world, that cannot be excluded from the circumstances on which the applicant relies. When the applicant refers to the temporary closure of its works in 1982 and takes the view that during that period it did need to take cognizance of measures on the part of the authorities and that it could deal only gradually after the reopening of the works with post which had accumulated, that and the view that in such a case there cannot be said to be any negligence, go beyond any reasonable and objective application of the exception provided for in Article 39 of the Statute of the Court of Justice of the ECSC which doubtless must be strictly applied. The Commission rightly points out that closure of the works under the Italian Law of 10 May 1975 does not lead to the disappearance of the relevant undertaking in law, but on the contrary, since the employees are not dismissed and a company so acting is not dissolved, the existing legal structure and capacity to act are unaffected. In such circumstances it is quite reasonable to require and expect that the responsible director of such an undertaking will deal with the important current matters. It may also be observed that during that period an application was made for the administration to be placed under supervision, that is, steps were before the court, and the fact that the application was granted likewise had no influence upon the legal capacity of the company and the normal further conduct of business. Moreover, before the works were re-opened there were also negotiations with the trade unions, that is, legal acts in the interests of the conduct and maintenance of the company.

Since, however, is has not been shown that the applicant's management was prevented by other compelling reasons from taking cognizance of the decision served on it on 26 August 1982 and from reacting thereto, I see no possibility other than to regard the said day as the date from which time began to run and since to take notice of the contested measure only after 13 September 1982 must be regarded as unacceptable negligence, the application which reached the Court only on 25 October 1982 must be treated as made out of time and therefore inadmissible.

II — In view of that conclusion, the soundness of which in my opinion cannot be doubted, I need deal only in the alternative and quite briefly with the question whether the application is well founded.

1. In the first place the applicant relies on the fact that it was in difficulties which prevented it from keeping to the production quota. In addition it referred to a settlement reached by it in 1978, to a previous reduction of its production and to considerable obligations in connection with social insurance. It was therefore, it claims, in "exceptional difficulties" within the meaning of Article 14 of Decision No 2794/80 and that should have led the Commission to carry out an appropriate investigation of the matter and to adjust the production quotas. In the reply the applicant further claimed that its production quota should have been adjusted pursuant to Article

4 (5) of Decision No 2794/80 since it had considerably restricted its production in previous years so that the reference production was below the production for the corresponding months of 1974. Further it had satisfied the conditions of the said provision in so far as it had achieved a profit in 1979.

It follows from that that the applicant is of the view that that the quotas which it is alleged to have disregarded were too low and that the Commission wrongly neglected to increase them. The claim is thus clear but the applicant can no longer be heard to make it. It is true that Article 36 of the ECSC Treaty provides that in support of an action brought against a pecuniary sanction the legality of the decision which is alleged not to have been observed may be contested. The case-law however has already made it clear that that does not come into question in relation to a previous *individual* decision which the undertaking on which a fine is imposed could have challenged and which has become definitive after expiry of the period for bringing an action without any such action being brought (cf. the judgment in Case 36/64 [1] and also the recent judgment in Case 265/82 [2]).

In the present proceedings the applicant, as was apparent when the facts were set forth, emphasized its current difficulties in letters to the Commission dated 24 April and 18 May 1981. In the latter communication and again in one of 17 December 1981 it referred to a previous reduction of its production. It expressly urged in a letter of 9 December 1981 that a decision should be taken under Article 14 of Decision No 2794/80. It is quite clear from the letters of 18 May and 17 December 1981 that it at least tacitly sought also a decision under Article 4 (5) of Decision No 2794/80.

The Commission did not expressly answer and did not specifically give an opinion on the problems referred to by the applicant because, as was explained at the hearing, the Commission took the view that the applicant had not made its applications for adjustment in time and had not sufficiently substantiated them. We know, however, from the first recital in the preamble to the contested decision that on 1 February 1982 an adjustment was made to the quota fixed for the first quarter of 1981. Thus a negative attitude was adopted, also by implication, to the applicant's repeated applications and consequently there were grounds by that date at the latest to bring the question of the correct assessment of the applicant's production quotas before the Court. Since the applicant did not do so its criticism of the assessment of the quota can no longer be heard in the proceedings relating to the pecuniary sanction.

Moreover, and admittedly I say this only with reservations, the impression may be gained that in the applicant's case the conditions necessary for an increase in the quota under Decision No 2794/80 did not obtain.

1 — Judgment of 2 June 1965 in Case 34/64 *Société Rhénane d'Exploitation et de Manutention (Sorema)* v *High Authority of the ECSC* [1965] ECR 341.

2 — Judgment of 19 October 1983 in Case 265/82 *Union Sidérurgique du Nord et de l'Est de la France (Usinor)* v *Commission of the European Communities* [1983] ECR 3105.

The Court has accepted that there are strict criteria for the application of Article 14 of Decision No 2794/80. Exceptional difficulties must have been caused by the quota system itself; financial problems of an undertaking due to other causes were thus not relevant. Moreover, except in the case of deliveries abroad, which the applicant did not allege, application of that provision could basically be contemplated only if the extent to which the capacity of an undertaking was being used was more than 10% below the average of all undertakings in the Community. On the other hand in the case of the applicant it must be accepted that it had serious financial problems long before the introduction of the quota system; moreover it has not given precise particulars of the extent to which its capacity was being used.

As far as concerns Article 4 (5) of Decision No 2794/80 its function was to make it possible to take account of measures of reorganization. It must however likewise be described as very questionable whether there may be any question of such measures in the applicant's case since it emphasized in a letter of 17 December 1981 that for purely *financial* reasons it was compelled to restrict production in 1977, which is relevant for the reference production.

2. The only further matter which the applicant raised in relation to the decision imposing the pecuniary sanction is that if it had to pay the fine it would be forced to shut down its works and announce it was insolvent.

That is an argument which has already been put to the Court in other proceedings, in which everything necessary has been said to show that an annulment or amendment of a pecuniary sanction is not to be achieved on such grounds. On this occasion I should like quite simply to refer to my opinion in Case 234/82 [1] in that respect.

At most it may be added that the Commission has emphasized also in these proceedings that if difficulties are clearly shown it is prepared to allow time for payment of the fines. We do not need now to go into detail on that point, which must rather be considered in special administrative proceedings or if necessary in proceedings relating to enforcement if application is made to the Court for a stay of execution.

III — In view of all that I have said I propose that the application by Busseni should be dismissed as inadmissible and accordingly Busseni should be ordered to pay the costs of the proceedings.

1 — Case 234/82 *Ferriere di Roè Volciano SpA* v *Commission of the European Communities* [1983] ECR 3921.