Case 340/85

Acciaierie e Ferriere di Porto Nogaro SpA
v
Commission of the European Communities

(Steel production and delivery quotas — Fine)

Report for the Hearing 3575

Opinion of Advocate General Sir Gordon Slynn delivered on 18 June 1987 3581

Judgment of the Court (First Chamber), 24 September 1987 3584

Summary of the Judgment

1. *ECSC — Production — System of steel production and delivery quotas — Excess production or deliveries — Fine — Circumstances justifying a reduction in the fine — None*
(ECSC Treaty, Art. 58; Decision No 1696/82/ECSC, Art. 12)

2. *Objection of illegality — Measures against which an objection of illegality may be raised — Individual decisions — Exclusion*
(ECSC Treaty, Art. 36, third paragraph)

REPORT FOR THE HEARING
delivered in Case 340/85 *

I — Facts

The applicant is an Italian steel undertaking which produces reinforcing bars and merchant bars. Accordingly, it is subject to the Community rules concerning production and delivery quotas for certain iron and steel products (Commission Decision No 1696/82/ECSC of 30 June 1982 on the extension of the system of monitoring and

* Language of the Case: Italian.

production quotas for certain products of undertakings in the steel industry, Official Journal 1982, L 191, p. 1).

In the third quarter of 1981 the applicant brought into operation a new rolling mill, which had the effect of increasing its production capacity as regards both reinforcing bars (Category V under the aforesaid rules) and merchant bars (Category VI). It requested the Commission to assign it production and delivery quotas based on its new production capacity.

The Commission acceded to that request and assigned to the applicant, for the four quarters of 1982 and the first quarter of 1983, production and delivery quotas for reinforcing bars and merchant bars calculated on the basis of the production capacity resulting from the bringing into operation of the new rolling mill.

However, it became apparent that in the second quarter of 1982 the applicant's production capacity had been altered once again by the bringing into service of an additional rolling mill.

In order to take that into account, the Commission adopted on 2 March 1983 a decision retroactively increasing, for the second, third and fourth quarters of 1982 and the first quarter of 1983, the production and delivery quotas assigned to the applicant for Category V (reinforcing bars). At the same time, it reduced, but not to the same extent, the applicant's production and delivery quotas for Category VI (merchant bars).

The Commission's decision ended with these words: 'In view of the date of this decision, you are authorized to carry forward from the second to the following quarters until the first quarter of 1983, after notifying the Commission, the portions of the quotas assigned to you which have not been used up in the quarters in question'.

By telex message of 10 March 1983 the applicant asked the Commission to extend that authorization to carry forward the unused portions of its quotas to the second quarter of 1983. In support of its request, it argued that it did not receive the decision of 2 March 1983 until 9 March 1983, with the result that it found it physically impossible to use up before the end of the current quarter the quantities which it had been authorized to carry forward.

By letter of 22 March 1983 the Commission replied to the applicant that its request was being considered and that it would receive an answer as soon as possible. However, the Commission never informed the applicant of its decision.

At the beginning of 1984, the Commission found that in the second quarter of 1983 the applicant had exceeded its production quota for reinforcing bars and its production and delivery quotas for merchant bars.

In its defence, the applicant contended that it had interpreted the Commission's decision of 2 March 1983 as authorizing it to carry forward not only the additional quotas assigned to it for reinforcing bars but also all the unused portions of its quotas for reinforcing bars and merchant bars.

The applicant also claimed that, since its request of 10 March 1983 had not been expressly refused, it was entitled to consider itself tacitly authorized to carry forward to the second quarter of 1983 all the quantities which the decision of 2 March 1983 had, in its view, authorized it to carry forward to the first quarter of 1983.

However, it did not deny exceeding by 1 765 tonnes its production quota for reinforcing bars even on the assumption that it had been expressly authorized — in accordance with the request it made on 10 March 1983 — to carry forward its unused quotas. In that regard, the applicant contended that the excess was attributable to a clerical error in drawing up its production report. Admittedly, that error had led to an excess of 1 765 tonnes over its production quota for Category V (reinforcing bars), but also to a failure to use up a corresponding proportion of its production quota for Category VI (merchant bars).

On 9 October 1985 the Commission adopted the contested decision which imposed penalties on the applicant for exceeding in the second quarter of 1983 its production quota for reinforcing bars by 1 765 tonnes, and, as regards merchant bars, for exceeding its production quota by 2 484 tonnes and its delivery quota by 522 tonnes.

In the aforesaid decision, the Commission acknowledges that its decision of 2 March 1983 was imprecise and may have led the applicant to interpret it as authorizing the carry-over to the first quarter of 1983 of all the unused portions of its quotas for reinforcing bars and merchant bars.

Furthermore, as regards the question whether the Commission's failure to answer the telex message of 10 March 1983 could be interpreted as tacit authorization to carry forward the quotas to the second quarter of 1983, the contested decision accepts that interpretation only in relation to reinforcing bars, without providing any explanations in that regard. However, in the case of merchant bars, the Commission rejects that argument on the ground that the applicant deliberately interpreted the decision of 2 March 1983 incorrectly so as to be able to transfer to other undertakings substantial portions of its quotas for a category of products which it was no longer manufacturing.

The decision also states that the fine, which normally amounts to 75 ECU per tonne of excess, should in this case be fixed at 50 ECU per tonne of excess in view of the uncertainty which prevailed during the quarter in question regarding the extension of the quota system.

The application was received at the Court Registry on 14 November 1985.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

By order of 17 December 1986, the Court decided, pursuant to Article 95 (1) and (2) of the Rules of Procedure, to assign the case to the First Chamber.

II — Conclusions of the parties

The *applicant* claims that the Court should:

(a) Annul the Commission's decision of 9 October 1985;

(b) In the alternative, reduce *ex aequo et bono* the fine imposed by that decision;

(c) In any event, order the Commission to pay the costs.

The *Commission* contends that the Court should:

(a) Dismiss the application as unfounded;

(b) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — *Primary claim: annulment of the contested decision*

1. *Physical impossibility of using the additional quotas assigned to the applicant*

The *applicant* contends that it received the Commission's decision of 2 March 1983, authorizing it to carry forward to the first quarter of 1983 the unused parts of its quotas from the second quarter of 1982, too late to enable it to produce and deliver during the current quarter the quantities which it had been authorized to carry forward. The applicant was not informed of the decision until 9 March 1983.

The *Commission* points out that, in the case of reinforcing bars, it imposed penalties only in regard to production in excess of the quota which would have been available to the applicant if the latter had been authorized to carry forward its quotas in accordance with the request it made by telex of 10 March 1983. This argument is therefore irrelevant as far as reinforcing bars are concerned.

As regards merchant bars, the Commission emphasizes that the decision of 2 March 1983 reduced the applicant's quotas for that category. Although in the event of a quota increase the belated adoption of the decision increasing the quota may prevent the supplementary quota from actually being used up, this argument is entirely devoid of substance where, as in this case, the quotas have been reduced.

2. *Breach of the principle of the protection of legitimate expectations*

The applicant maintains that by authorizing it on 2 March 1983 to carry forward to the current quarter the unused portions of the quotas for the previous three quarters, the Commission demonstrated its willingness to allow the applicant to use the quotas assigned to it in full. In order to be consistent, the Commission should have allowed the applicant to carry forward its quotas again in accordance with the request which it made to that effect. The applicant was therefore justified in thinking that it would obtain the Commission's authorization to carry forward the quotas. The applicant's belief was strengthened by the fact that certain Commission officials had assured it orally that it would obtain such authorization. In those circumstances, it interpreted in good faith the absence of a refusal to its request of 10 March 1983 as tacit authorization to carry forward its quotas.

In reply, the Commission states that the grant of authorization to carry forward the quotas was a matter for its discretion. It is true that, in the case of reinforcing bars, it imposed penalties only in regard to production in excess of the quota which would have been available to the applicant had the latter been authorized to carry forward its quotas in accordance with the request it made by telex of 10 March 1983. However, the Commission imposed penalties in respect of all overproduction and excess deliveries of merchant bars because the applicant's sole purpose, in asking for its quotas to be carried forward, was to enable it to transfer to other undertakings as much as possible of its quotas for a category of products which it was no longer manufacturing. Moreover, as a matter of principle, silence on the part of the administration is tantamount to refusal. Hence the applicant could not interpret the absence of a reply to its telex message of 10 March 1983 as tacit acceptance of the request contained therein.

B — *Alternative claim: reduction of the fine*

The applicant seeks, in the alternative, a reduction in the fine imposed upon it. In that regard, it relies on its good faith and on the fact that this is the first time that proceedings have been instituted against it for exceeding its quotas. It asks that the fine be calculated at the rate of 12 ECU per

tonne of excess, in accordance with the Court's practice in other cases in which quotas had been exceeded for the first time.

The Commission does not reply to the arguments advanced by the applicant in support of the alternative claim.

IV — Answers to questions put by the Court

A — *Questions put to the applicant*

1. Does the applicant admit that, even on the assumption that it was authorized to carry forward its quotas in accordance with the request it made by telex of 10 March 1983, it still exceeded by 1 765 tonnes its production quota for reinforcing bars (Category V) for the second quarter of 1983?

In its reply, the applicant acknowledges exceeding the quota but maintains that it should not be penalized.

2. The applicant states that it received from certain Commission officials oral assurances to the effect that it would be authorized to carry forward from the first to the second quarter of 1983 the unused parts of its quotas. Did those assurances that authorization would be granted relate to both reinforcing bars (Category V) and merchant bars (Category VI) or only to one of those categories?

In its reply the applicant states that the Commission's officials did not distinguish, in their oral assurances, between reinforcing bars and merchant bars.

3. During the period from the second quarter of 1982 to the second quarter of 1983, did the applicant transfer to other undertakings either wholly or in part its production and delivery quotas for merchant bars (Category VI) and, if so, on what dates and what were the quantities involved?

In reply the applicant states that during the period in question it did transfer part of its quotas for Category VI (merchant bars), comprising the following quantities: in the second, third and fourth quarters of 1982 and the first quarter of 1983, 14 000 tonnes of its production quota and 11 000 tonnes of its delivery quota; in the second quarter of 1983, 10 000 tonnes of its production quota and 5 300 tonnes of its delivery quota. Those quantities were transferred to undertakings belonging to the Porto Nogaro group or linked to the applicant 'by agreements between undertakings'.

4. Is it true that the applicant ceased manufacturing merchant bars (Category VI) altogether as from the end of 1982?

In reply, the applicant states that it did not cease to manufacture merchant bars (Category VI) at the end of 1982. It continued to produce merchant bars until the end of March 1984.

B — *Questions put to the Commission*

1. Are the grounds stated in the decision of 9 October 1985 not contradictory inasmuch as the Commission accepts the applicant's interpretation of the decision of 2 March 1983 as regards the carry-over of its quotas to the first quarter of 1983, whilst rejecting the same interpretation, at least so far as concerns merchant bars (Category VI), with regard to the carry-over of its quotas to the second quarter of 1983?

The Commission maintains that its decision of 9 October 1985 is not contradictory. It in no way accepted the applicant's interpretation of its decision of 2 March 1983 with regard to the carry-over *in toto* of its quotas to the first quarter of 1983 (reinforcing bars and merchant bars). It merely refrained from penalizing the applicant with heavy fines for carrying forward its quotas. However, it did not consider it necessary to show the same degree of forbearance with

regard to the applicant's request to carry forward to the second quarter of 1983 its unused quotas for merchant bars. The decision of 2 March 1983 reduced the quotas for Category VI (merchant bars), so that the communication of that decision at the end of the quarter cannot be the cause of the applicant's failure to use the quotas for that category. On the contrary, the undertaking deliberately chose not to use those quotas.

2. In its decision of 9 October 1985, did the Commission impose penalties in regard to all production in excess of the quota for reinforcing bars (Category V) (second quarter of 1983) or only that production which was in excess of the quota that would have been available to the applicant if the latter had been authorized to carry forward its quotas in accordance with the request it made by telex of 10 March 1983?

In reply, the Commission states that, in the case of reinforcing bars (Category V), it imposed penalties only in regard to that production which was in excess of the quota that would have been available to the applicant if the carry-over requested by telex of 10 March 1983 had been authorized.

3. (a) Is it true that certain Commission officials gave the applicant oral assurances that it would be granted authorization to carry forward to the second quarter of 1983 the unused parts of its quotas?

In reply, the Commission states that one of its officials may have told the applicant that the latter had been authorized to carry forward to the second quarter of 1983 the parts of its quotas which had not been used in the first quarter of 1983.

(b) If such oral assurances were given, did they relate to both reinforcing bars (Category V) and merchant bars (Category VI) or only to one of those categories?

In its reply, the Commission explains that any oral assurances that may have been given could in no circumstances relate to the quotas for Category VI since, by decision of 2 March 1983, it had reduced the quotas previously assigned to the applicant for that category.

R. Joliet
Judge-Rapporteur