JUDGMENT OF THE COURT (SECOND CHAMBER)
9 FEBRUARY 1984 [1]

Acciaierie e Ferriere Busseni SpA v Commission of the European Communities

(ECSC — Quota system for steel production — *Force majeure)*

Case 284/82

1. *Community law — General principles — Force majeure — Concept*

2. *Procedure — Time-limit for instituting proceedings — Barring — Cases of force majeure — Concept — Limits*
(Statute of the Court of Justice of the ECSC, Art. 39, first and third paras)

1. Apart from special cases in specific areas in which it is used, the concept of *force majeure* requires basically unusual circumstances making accomplishment of the matter in hand impossible. Even though it does not presuppose absolute impossibility it nevertheless requires abnormal difficulties, independent of the will of the person concerned and apparently inevitable even if all due care is taken.

2. The temporary closure of an undertaking, which does not mean either its winding-up or the termination of the responsibility of its management for the normal conduct of business, cannot be regarded as a case of *force majeure* within the meaning of the third paragraph of Article 39 of the Statute of the Court of Justice of the ECSC justifying disregard of the time-limit for instituting proceedings laid down in the first paragraph thereof.

In Case 284/82

ACCIAIERIE E FERRIERE BUSSENI SPA, at present subject to court-controlled management procedure, having its registered office at Nave (Brescia, Italy), in the person of its sole administrator, Maurizio Busseni, represented by

1 — Language of the Case: Italian.

Fabrizio Massoni, Gino Alberto Bergmann and Gerolamo Pellicano, with an address for service in Luxembourg at the Chambers of André Elvinger, 15 Côte d'Eich,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Sergio Fabro, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, both members of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the individual decision of the Commission of 13 August 1982 imposing a fine on the applicant is void,

THE COURT (Second Chamber)

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

Advocate General: G. Reischl
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts

Confronted with a situation of manifest crisis in the iron and steel market within

the meaning of Article 58 of the ECSC Treaty the Commission adopted general Decision No 2794/80/ECSC of 31 October 1980 (Official Journal, L 291, p. 1) as amended by Decision No 3333/80/ECSC (Official Journal, L 349, p. 21) establishing a system of steel production quotas for undertakings in the iron and steel industry.

Under Articles 2 to 4 of the general decision the Commission fixes quarterly production quotas for each undertaking in respect of crude steel and for each of the four groups of rolled products, the fourth of which concerns the products in question in this case. The calculation of those quotas is based on the quarterly reference productions of each undertaking. For that purpose for each month of the relevant quarter, reference is made to the same month during the period from July 1977 to June 1980 during which the total production of the four groups of rolled products was the highest. The three months thus chosen, which are not necessarily consecutive, constitute the reference period. The reference production figures are the same, for crude steel and for each of the four groups of rolled products, as the production of the corresponding items during the reference period. However, in the cases provided for by Article 4 (3), (4) and (5) of the general decision the Commission may within certain limits increase the reference production and consequently the quotas allocated to the undertakings in question.

Further, Article 14 of the decision provides that where the production or delivery restrictions imposed by the decision and its implementing measures entail exceptional difficulties for an undertaking, it may refer the matter to the Commission, providing all appropriate documentation. The Commission examines the case without delay in the light of the objectives of the decision and, where appropriate, adapts the provisions of the decision to the particular case.

Article 9 of the decision provides that the Commission is to fine firms exceeding their production quota or that part thereof which under Article 7 (2) and (3) may be delivered within the common market. The fine is generally to be 75 European currency units [ECU] per tonne of excess for ordinary steels and 150 ECU per tonne of excess for special steels.

By letters dated 19 December 1980 and 6 April 1981 the Commission informed Busseni of its reference production and production quota for the first and second quarters of 1981 as a result of the application of the abatement rates provided for in Article 5 of the general decision and amended the figures by a letter dated 1 February 1982. The decision allocating the production quota has never been challenged by Busseni before the Court.

On 24 April and 18 May 1981 Busseni asked for its quota for the first quarter of 1981 to be adjusted but never received a reply from the Commission.

By letters dated 24 November 1981 and 4 February 1982 the Commission complained that Busseni had exceeded its quota for Group IV products by 4 576 tonnes and 3 476 tonnes and asked it to submit its comments pursuant to Article 36 of the ECSC Treaty. In its observations by telex message of 9 December 1981, letters of 17 December 1981 and 19 February 1982 and during the course

of a hearing granted to its representatives on 26 March 1982 Busseni did not deny exceeding the quota but disputed the extent. Following that correspondence the excess for the fourth quarter of 1981 was reduced from 4 576 tonnes to 3 398 tonnes. Nevertheless as justification for the excess Busseni cited the heavy financial and social burdens which forced it to maintain a production higher than that allocated by the Commission. The Commission took the view that Busseni's arguments were inadequate and by decision dated 13 August 1982 imposed on it a fine of 514 875 ECU, that is, LIT 680 289 981, pursuant to Article 9 of the general decision. The decision of 13 August 1982 was sent to Busseni from Brussels on 19 August 1982 by letter dated 17 August 1982 and the acknowledgment of receipt was signed by Busseni on 26 August 1982 in Nave (Italy).

Meanwhile Busseni had been under the Cassa Integrazione Guadagni [income supplement fund] pursuant to the Italian Law No 675 of 12 August 1977 and subjected to the system of *concordato stragiudiziale* [out-of-court settlement]. By order of the Tribunale [District Court], Brescia, dated 23 April 1982, the court-controlled management procedure was started against Busseni.

Pursuant to Article 33 of the ECSC Treaty Busseni instituted proceedings by application sent from Milan on 22 October 1982 and received at the Court Registry on 25 October 1982 for a declaration that the individual decision of the Commission of 13 August 1982 imposing on it a fine for exceeding the said quota was void or in the alternative for a reduction of the amount of the fine and in the further alternative time for payment of the fine.

II — Written procedure and conclusions

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court invited the applicant and the Commission to supply certain information which was given to the Court by letters of 13 July 1983 from the applicant and of 11 July 1983 from the Commission and which is reproduced below.

The Court thereupon decided to open the oral procedure without any preparatory inquiry.

By order dated 22 June 1983 the Court assigned the case to the Second Chamber.

The *applicant* claims in its application that the Court should:

1. "Declare void the Commission decision of 13 August 1982 and as a preliminary suspend the operation thereof;

2. In the alternative, reduce the fine;

3. In the further alternative defer payment of the fine whatever the outcome of the proceedings."

The *Commission* contends in its defence that the Court should

1. "Declare the application inadmissible for disregard of Article 39 of the Statute of the Court of Justice of the ECSC;

2. Alternatively, if the above contention that the claim is barred is dismissed, declare the applicant's claims inadmissible;

3. In any event order the applicant to pay the costs."

The *applicant* claims in its reply that the application is admissible.

III — Submissions and arguments of the parties

The *applicant*'s first submission is that it was impossible for it to observe the quotas allocated by the Commission. The undertaking encountered exceptional difficulties which should have led the Commission to consider its case as soon as possible pursuant to Article 14 of general Decision No 2794/80. The undertaking experienced an extremely serious crisis, leading in 1977 to heavy debts of approximately 19 000 million lire, massive recourse to the Cassa Integrazione Guadagni, a staff reorganization, the signature of an out-of-court settlement in 1978 and finally the commencement of the court-controlled management procedure under the Tribunale, Brescia. During that period Busseni reduced its steel production from 121 804 tonnes in 1976 to 74 446 tonnes in 1981 which represents a catastrophic reduction in the quantity of steel produced, a situation which is corroborated by the reduction in its consumption of energy. The reduction in production made it impossible to meet the normal commitments of production management or the commitments arising from the out-of-court settlement and impossible to discharge the special obligations.

The applicant's second submission is that it cannot be held to be at fault in exceeding the quotas since it was not able to observe them without irreparably and still more precipitously aggravating its economic and financial situation. It was thus absolutely impossible for it to act differently.

The applicant's third submission is that payment of such a fine would have made the company insolvent and prevented it from properly concluding the court-controlled management procedure.

The *Commission* in the first place raises an objection that the action is inadmissible. It is of the opinion that the applicant has not observed the period of one month for bringing an action commencing with the date of notification of the individual decision in question as laid down in Article 39 of the Statute of the Court of Justice of the ECSC and extended by 10 days in this present case pursuant to Article 81 of the Rules of Procedure of the Court and Article 1 of Annex II thereto. Thus although the application should have been lodged at the Registry before 6 October 1982 it did not arrive at the Court until 25 October 1982. The Commission denies that the applicant may rely on the fact that the undertaking was closed from 17 March to 13 September 1982 after being put under the Cassa Integrazione Guadagni pursuant to Italian Law No 675/77 and that such closure constitutes a case of *force majeure* within the meaning of Article 39 of the Statute of the Court of Justice of the ECSC. The Italian Law does not provide either for the dissolution of the company or the dismissal of its staff. On the contrary, the undertaking retains its organization intact and maintains its legal personality so that it is able to take all the legal

measures which are necessary, as is proved by the declaration of the Prefettura di Brescia from which it appears that the undertaking's management negotiated with the trade unions to fix the date for resuming work while the company was still under the Cassa Integrazione Guadagni.

Even if the validity of the applicant's arguments were accepted the application would nevertheless have been out of time since if it were agreed that the period commenced to run on 13 September 1982 when the undertaking re-opened, the application should have been lodged at the latest on 23 October 1982 whereas it was not lodged until 25 October 1982.

On the substance the Commission confines itself to observing that the applicant's argument as to the existence of exceptional difficulties cannot exclude its liability for exceeding the production quotas. If the Commission had authorized Busseni to exceed its quotas in the event of long-standing difficulties it would have had had to do likewise with a large number of other undertakings which would have made the system of production quotas ineffective as a whole. The criterion of the exceptional nature of the economic difficulties must have a solid basis to be applicable in an exceptional period.

Further, the Commission maintains that every undertaking is bound to observe the quota system so long as the Commission has not considered it necessary to bring into operation the derogations provided for in Article 15 of the general decision. Otherwise the system would lose all effectiveness since no one would observe it.

As for payment of the fine the Commission observes that its officers were authorized to grant considerable time for payment to undertakings which proved that they were experiencing economic difficulties. It follows that the Court cannot in any event agree to the applicant's claims.

The *applicant* contends in its reply that the objection of inadmissibility put forward by the Commission is completely unfounded. Busseni was completely closed as a result of a very serious company crisis from 17 March to 13 September 1982 so that there were "unforeseeable circumstances" of *"force majeure"* within the meaning of Article 39 of the Statute of the Court of Justice of the ECSC, which provided sufficient reason for not observing the time-limits. The article cited requires neither the dissolution of the company nor the dismissal of its staff to satisfy the aforesaid conditions. In this case the closure of the undertaking led to the accumulation of six months' post, which prevented the management from taking cognizance of the notification of the Commission's decision for 18 days at least after the re-opening of the company on 13 September 1982.

Even on the assumption that only the date of the re-opening is relevant the action was brought in time since according to Article 80 of the Rules of Procedure of the Court the period of one month provided for bringing an action began to run on 14 September 1982 and expired, in view of the 10

additional days provided for by Article 1 of Annex II to the Rules of Procedure, on 24 October 1982. Since that day was a Sunday the period in fact expired on 25 October 1982 when the application was lodged at the Court Registry. The action is therefore fully admissible from the point of view of the time-limit.

As to the substance, the applicant reasserts its argument that the exceptional difficulties which it encountered and in particular its insolvency justified the application by the Commission of Article 14 of the general decision. If when the matter was duly put to it the Commission did not consider it needed to act thereunder, that constitutes an additional defect in the contested decision.

Further the applicant alleges that the fine should be quashed along with the decision at issue pursuant to Article 4 (5) of the general decision since, on the basis of the applicant's economic situation the Commission, it claims, ought to have increased its reference production so as to reach the total equivalent to the production for the corresponding quarter of 1974. The production for that year on which the ECSC levies were calculated amounted to some 180 000 tonnes whereas the average for the three reference years was less than 120 000 tonnes. There is in consequence a reduction in production of 60 000 tonnes as against 1974. Thus the 6 800 tonnes excess of which complaint is made against Busseni is amply compensated for and absorbed by that difference in the reference production.

In its rejoinder the *Commission* challenges the facts as presented by the applicant, namely that the closure of the undertaking might be regarded as justification on the basis of *force majeure* or unforeseeable circumstances, concepts which are defined in the case-law of the Court as external events independent of the will of the person owing the obligation and therefore unforeseeable as regards both their occurrence and their consequences. Although that definition covers a natural catastrophe or a strike, it cannot apply in this case since on the one hand the event was not only foreseeable but requested by the applicant and moreover since it is clear that all the company responsibilities were fully performed, the administrators had a duty to carry on at least current management. The Commission considers that the fact that the administrators did not even take the trouble to open correspondence amounts to blatant negligence on the part of the management.

Finally the Commission reasserts its view that the Cassa Integrazione Guadagni organization does not affect the legal capacity of the undertaking. That is easily apparent from consideration of the rules governing the system which go back to Legislative Decree No 788 of the Lieutenant General of the Kingdom of 9 November 1945 and conclude after various amendments with Law No 675 of 12 August 1977 cited by the applicant.

On the substance the Commission refers to the observations set out in its defence.

IV — Answers to the questions put by the Court

The Court asked the applicant to provide it with the relevant documents governing the closure of its establishment and the documents in relation of the out-of-court settlement and the court-controlled management procedure referred to in the application and any decisions of the national court following application of that procedure and relating to the management of the undertaking. The applicant placed before the Court its application of 17 April 1982 to the Tribunale Civile e Penale, Sezione Fallimentare [Civil and Criminal District Court, Insolvency Division], Brescia, pursuant to Article 187 of Royal Decree No 267 of 16 March 1942.

The Court also asked the Commission to explain the amount of the fine. The Commission answered that in this case it applied Article 9 of Decision No 2794/80 under which the fine is to be 75 ECU per tonne of excess. It added however that in fact it ought to have applied the second paragraph of Article 9 since it was not a first offence since the excess arose in two quarters, that is to say the first and second quarters of 1981, so that according to its practice in the exercise of its discretion the amount of the fine in relation to the excess for the second quarter ought to have been increased by 10% since the case involves an undertaking with a negative balance.

V — Oral procedure

At the sitting on 22 September 1983 the Commission of the European Communities, represented by S. Fabro, acting as Agent, presented oral argument.

The Advocate General delivered his opinion at the sitting on 17 November 1983.

Decision

1 By application lodged at the Court Registry on 25 October 1982 Acciaierie e Ferriere Busseni SpA (hereinafter referred to as "Busseni"), whose registered office is at Nave (Italy), brought an application under the second paragraph of Article 36 of the ECSC Treaty claiming on the one hand that the Court should declare void Commission Decision C (82) 1191/3 of 13 August 1982 fining it 514 875 ECU, that is LIT 680 289 981, pursuant to Article 58 (4) of the ECSC Treaty and Article 9 of the general Commission Decision No 2794/80/ECSC of 31 October 1980 establishing a system of steel production quotas for undertakings in the iron and steel industry (Official Journal, L 291, p. 1) and on the other hand, in the alternative, the reduction of the amount of the fine and the grant of time for payment.

2 The statement of the reasons on which the contested decision is based refers to the fact that for the first and second quarters of 1981 Busseni exceeded by

3 398 and 3 467 tonnes respectively the production quotas allocated to it for Group IV products under the steel production quota system established by Decision No 2794/80. The Commission ordered Busseni to pay the fine within a period of two months from notification of the decision.

3 The decision was forwarded to Busseni by letter dated 17 August 1982 and received by Busseni on 26 August 1982 at its registered office in Nave.

Admissibility

4 The Commission raises an objection that the application is inadmissible. It alleges in that respect that Busseni has not observed the period of one month from notification of the disputed decision, laid down by Article 39 of the Statute of the Court of the ECSC and extended by 10 days in the present case pursuant to Article 81 of the Rules of Procedure of the Court and Article 1 of Annex II thereto. The application which ought thus to have been made before 6 October 1982 did not in fact reach the Court until 25 October 1982.

5 Busseni on the contrary maintains that the application is fully admissible with regard to the time-limit. It was not able to make application within the prescribed period because the undertaking was under the Cassa Integrazione Guadagni because, by order of the Tribunale, Brescia, of 23 April 1982 it had been placed under court-controlled management for two years with the appointment of a Commissario Giudiziale and because it had been completely closed from 17 March to 13 September 1982. In those circumstances the management of the company had been prevented from taking cognizance of the service of the decision at issue before a date which Busseni puts at 18 days at least after the re-opening on 13 September 1982 by reason of the accumulation of six months' post.

6 In the applicant's view the closure represented a very serious crisis constituting unforeseeable circumstances or *force majeure* within the meaning of the third paragraph of Article 39 of the Statute of the Court of Justice of the ECSC and thus interrupted the running of the prescribed period.

7 Alternatively Busseni maintains that even on the assumption that only the date of the re-opening is to be taken into account the application ought to be treated as made in time since according to Article 80 of the Rules of Procedure of the Court the period of one month prescribed for bringing an action would have started to run on 14 September 1982 and would have expired, in view of the 10 additional days provided by Article 1 of Annex II to the Rules of Procedure, on 24 October 1982. Since that day was a Sunday the period in fact expired on 25 October 1982 when the application was registered at the Court.

8 It must be stated that the period for bringing an action must be strictly observed and cannot be extended save on grounds of distance as provided in the second paragraph of Article 39 of the Statute of the Court of Justice of the ECSC. Nevertheless the third paragraph thereof provides that 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.*

9 In the present case pursuant to Article 33 of the ECSC Treaty the period prescribed for bringing an action was one month extended on account of distance by a period of 10 days granted to Italian applicants pursuant to Annex II to the Rules of Procedure. In view of the fact that the decision at issue was notified to the applicant on 26 August 1982 and that according to Article 81 of the Rules of Procedure the period of time allowed for commencing proceedings against a measure adopted by an institution is to run from the day following the receipt by the person concerned of notification of the measure, the period for commencing proceedings expired on 6 October 1982 so that the application, registered at the Court on 25 October 1982, was out of time.

10 The admissibility of the application thus depends solely on the question of the existence in this case of *force majeure* within the meaning of the third paragraph of Article 39 of the Statute of the Court of Justice of the ECSC.

11 It is apparent from the established case-law of the Court that apart from special cases in specific areas in which it is used, the concept of *force majeure* essentially covers unusual circumstances which make it impossible for the relevant action to be carried out. Even though it does not presuppose absolute impossibility it nevertheless requires abnormal difficulties, independent of the will of the person concerned and apparently inevitable even if all due care is taken.

12 It must be observed that it is apparent from the file that the closure of the Busseni undertaking did not mean either the winding-up of the undertaking or the termination of the responsibility of its management for the normal conduct of business. The fact that it received the support of the Cassa Integrazione Guadagni, that it was placed by order of 23 April 1982 of the Tribunale, Brescia, under court-controlled management for two years, that a Commissario Giudiziale was appointed and that it adopted managerial measures in the interest of its re-opening sufficiently shows a considerable activity intended to secure its survival and preservation.

13 In consequence it must be stated that in this case there are no abnormal and inevitable difficulties or external events independent of the will of the management of the undertaking which might have justified a failure to open correspondence relating to the business of the undertaking.

14 It follows that the institution of proceedings out of time is not due to *force majeure* and that the action is inadmissible.

Costs

15 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

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.