Case 66/84

Ferriere di Borgaro SpA
v
Commission of the European Communities

'Steel production quotas'

Summary

ECSC — Production — Steel production and delivery quota system — Exceeding of a production quota in a given quarter — Reference production incorrectly declared — Request for rectification of the quota — Belated response by the Commission — Excess partly offset in the following quarter — Reduction of the fine

(ECSC Treaty, Art. 58; Decisions No 2794/80 and No 1831/81, Art. 12)

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 31 January 1985 *

Mr President,
Members of the Court,

1. Introduction

1.1. The applicant, Ferriere di Borgaro SpA, which, according to what it told the Court at the hearing, is on the point of becoming insolvent, has appealed to the Court against the Commission's decision of 26 January 1984 by which it was fined 71 857 ECU pursuant to Decision No 1831/81 (Official Journal 1981, L 180, p. 1) for exceeding its production quota for merchant bars in Category VI for the first quarter of 1982 by 1 265 tonnes. It asks the

* Translated from the Dutch.

Court to declare the decision void or in the alternative to reduce the fine.

1.2. The parties are agreed on the amount by which the quota was exceeded. Their opinions differ, however, as to the special circumstances to be taken into account in calculating the amount of the fine which justify a departure from the standard rate of 75 ECU per tonne.

In the decision, which, according to the parties, contains a full and correct summary of the facts, the Commission took account of the uncertainty caused to the applicant by the Commission's granting it an increase in quota only after the first quarter had ended and also of the fact that the exceeding of the first quarter's quota was offset to some extent by the fact that the second quarter's quota was not exhausted. For the quantity offset, namely 788 tonnes, the rate of fine was consequently reduced to 41.25 ECU per tonne — half the rate of 82.5 ECU applied to the remaining portion of 477 tonnes. Article 12 of Decision No 1831/81 provides that as a rule a fine of 75 ECU per tonne must be imposed for each tonne by which a quota is exceeded. If an undertaking exceeds its quota by 10% or more or if the undertaking has previously exceeded its quota, the fine may be doubled. In view of that provision, the fine was increased by 10% to 82.5 ECU per tonne.

As the Commission explained, in fixing the fine it was guided by the Court's judgment of 19 October 1983 in Case 179/82 *Lucchini Siderurgica SpA* v *Commission* [1983] ECR 3083.

The applicant claims that the fine ought to have been further reduced because the Commission shared responsibility for the breach of quota and because it acted in good faith at all times. In this regard it refers to the Court's judgment of 14 February 1984 in Case 2/83, *Alfer*, in which the Court reduced the original fine by about 11%.

In view of what is now established case-law, the unlawful exceeding of a quota cannot be made good by reducing production in a later quarter, since the quota system is based on a three-month period (see *inter alia* the judgments in Case 179/82, *Lucchini*, and 2/83, *Alfer*, cited above). Therefore, the question in the present case is simply whether the fine ought to have been further reduced.

2. The facts

The applicant produces mainly special steel, including ordinary steel billets of less than 50 mm thickness.

Under the system established by Decision No 2794/80 (Official Journal 1980, L 291, p. 1) the applicant had mistakenly entered the billets in question under its quota for crude steel instead of its quota for rolled products (Category IV). As from 1 July 1981, that decision was replaced by Decision No 1831/81 (Official Journal 1981, L 180, p. 1). That decision changed the rules so that the quota system only covered the production of certain categories of rolled products and no longer applied to categories of crude steel. Under that decision it was allocated a quota for merchant bars which proved to be considerably lower than its previous production.

By decision of 21 December 1981, the Commission fixed the applicant's production quota and the proportion of its production which could be delivered on the common

market at respectively 1 185 and 1 169 tonnes for the first quarter of 1982.

By telex messages of 19, 22 and 28 January and 22 and 31 March 1982, the applicant requested an increase in its quota and in the proportion of its production which could be delivered on the common market; it pointed out that it had classified the billets in question incorrectly and asked what it should do by way of adjustment (telex message of 22 January 1982). On 27 February 1982 the undertaking was visited by the Commission's inspectors.

On 19 April 1982 — thus after the end of the first quarter (January, February and March) — the Commission decided to increase the quota to 5 419 tonnes and the proportion of production to be delivered on the common market to 5 646 tonnes. The decision also contained the applicants' quota for the second quarter which was 5 134 tonnes. The applicant thereupon stopped production at some point in the second quarter in order to offset as far as was possible the excess production of the first quarter. It has not in fact been made clear in the proceedings at which precise point the applicant did stop production. The applicant itself has stated that it did so shortly after receiving the decision increasing its quota for the first quarter and fixing its quota for the second quarter, in other words not much later than 19 April. At the hearing, the Commission doubted very much whether the applicant had stopped production so soon after 19 April. That doubt, which in my view is a reasonable one, is based on the fact that the applicant's contention that only 788 tonnes of the quota for the second quarter remained by means of which it offset some of the excess production of the first quarter means that it would already have produced some 4 300 tonnes by the beginning of the second quarter towards the end of April.

Be that as it may, it is clear that the applicant's production in the first quarter was 6 684 tonnes. Consequently, it exceeded its quota by 1 265 tonnes. By restricting its production in the second quarter it produced 788 tonnes less, thereby offsetting some of its excess production, leaving 477 tonnes not offset.

3. The contested decision

In 20 paragraphs the decision sets out the course of events in detail as well as the arguments which the applicant submitted in writing and at the hearing. It states that the original quotas were fixed by the Commission on the basis of incorrect information supplied by the applicant and that in a number of telex messages (five in all) the applicant asked to be advised of the increase in its quota in order not to exceed it; it also states the quantity of the excess production which was actually offset in the second quarter. Finally, it was decided that:

'... in the present case, in view of the undertaking's state of uncertainty in the first quarter of 1982 and its willingness to offset the excess production of the first quarter and therefore to rectify the situation to some extent, the fine imposed for the excess production which was offset, namely 788 tonnes, should be calculated at the rate of 41.25 ECU per tonne, that is at half the rate applicable to the excess production which was not offset, namely 477 tonnes'.

It thus appears that in fixing the fine the Commission rightly took into account the special circumstances in which the infringement was committed, which is in accordance with the decisions of the Court (the most recent being the judgment of 29 February 1984 in Case 270/82 *Estel* v *Commission*, paragraph 12). In doing this the Commission based its decision in particular in Case 179/82 *Lucchini* v *Commission*.

4. The submissions

The applicant's argument consists in fact of two submissions. The *first* submission is that the Commission misused its powers since it is stated in the seventh recital of the preamble to the decision imposing the fine that the incorrect declaration of reference quantities could not be considered separately from the fact that since July 1981 the applicant had ceased declaring its production for the purposes of the levy and had also ceased paying the levy, with regard to which the Commission adopted a decision on 3 June 1983 requiring payment from the applicant. The applicant contends that the decision contested in this case is in fact directed against infringements concerning the ECSC levy and the duty to supply information.

In its *second* submission, the applicant tries to demonstrate to the Court that the special circumstances in which the infringement was committed were such that the Commission was mainly responsible for the infringement so that the fine ought to have been lower. It maintains that it was not clear how billets of less than 50 mm thickness were to be classified under Decision No 2794/80 and that it was not informed by the Commission's inspectors during their inspection visits that the billets had been incorrectly classified in the crude steel category instead of in Category IV, merchant bars. As a result, much of the responsibility for the subsequent excess production lies, in my view, with the Commission. The applicant also informed the Commission in the fourth quarter of 1981 that its production would exceed its annual reference production figure of 6 000 tonnes by a quarter, which would make it subject to the quota system in the following quarter in accordance with Article 4 (4) of Decision No 1831/81 as inserted by Decision No 1832/81 of 3 July 1981 (Official Journal 1981, L 184, p. 1).

Finally, it points out how, despite its urgent requests made in good time in five telex messages, the Commission fixed the increase too late, only after the quarter had ended.

5. Assessment of the submissions

As far as the first submission is concerned, there is nothing to suggest that the decision was adopted for any other reason than the quota excess. The reference to the infringement concerning levies and the duty to supply information forms only a small part of a specific recital, the point of which is indeed not wholly clear, but it did not demonstrably lead to the adoption of the contested decision. Besides, it is clear from the passage in question that those infringements have been the subject of a separate decision. Therefore this submission should in my view be rejected.

In its second submission, the applicant seeks to put most of the blame for the excess production on the Commission. In this regard it relies on the Court's decisions in Case 188/82 *Thyssen* v *Commission* [1983] ECR 3721, in Case 2/83 *Alfer*, and in Case 270/82 *Estel* v *Commission*, in which the Court reduced the fines quite considerably, particularly in the first two cases. As regards the incorrect classification of the billets, it cannot be assumed, for the reasons suggested by the applicant, that the Commission was responsible for it because it did not reprimand the applicant. It is clear from the Commission's statement of defence that, even under Decision No 2794/80, the billets ought to have been classified in Category IV, merchant bars, instead of in the crude steel category. In this regard, the Commission refers to Annex I, which is referred to in Article 2, and to Annex II, which is referred to in Article 10. Those annexes refer in turn to Eurostat Questionnaires Nos 2-13 and 2-11 which clearly refer in turn to Euronorms in which the relevant classification is given. The Commission further points out in this regard that other undertakings had no

difficulty in deciding the correct classification and that Euronorms are distributed to the undertakings concerned. The applicant has not disputed this point any further. It is clear that, after carrying out an inspection under Decision No 2794/80, the Commission did not in fact notify the undertaking of the incorrect classification; perhaps it did not notice it. However, the moment at which the undertaking found out about the incorrect classification was not established in the prooceedings. Questions asked by the Court at the hearing also failed to produce a final answer to this question. At the hearing the Commission, I think, agreed with what the applicant itself stated in its application, namely that the Commission's inspectors informed it of that classification when Decision No 1831/81 entered into force on 1 July 1981. Be that as it may, it is in any case clear from the applicant's conduct that it knew the correct classification in the fourth quarter of 1981 when it notified the Commission that its production was going to exceed 6 000 tonnes (a wrong assumption, in fact) which would bring it under the quota system.

In my view, it cannot be concluded from all those facts that the Commission was responsible for that situation. The applicant cannot later rely on an irregularity which it had itself brought about and which the Commission had not discovered. In any case, it is clear from its own statements, which I have already mentioned, that it knew the product's correct classification under Decision No 1831/81 since it notified the Commission of its production exceeding 6 000 tonnes in the fourth quarter which would make it subject to the quota system. Irrespective of the wrong interpretation of Article 4 (4) of Decision No 1831/81, as amended by Decision No 1832/81, the argument regarding the maximum production limit of 6 000 tonnes for exemption from the quota system is, in my view, closely related to the line of argument taken in this submission. It is not clear to me what it has to do with the classification. On the contrary, as I have already pointed out, it shows that the applicant was aware of the correct classification. In any case, the applicant ought to have been subject to the quota system even in the fourth quarter of 1981 if the limit was 3 000 tonnes per quarter, as the Commission maintains. It is in fact established that in the third quarter of that year the applicant's production was 4 771 tonnes.

In fixing the fine, the Commission rightly took account of the uncertainty which it caused to the applicant through its delay in adopting its decision in the second quarter of 1982 and of the excess production offset by the applicant. In my view, the Commission was right to draw a distinction, when fixing the fine, between the quantity of excess production actually offset and the remaining excess production since in the proceedings it was not possible to establish for certain when the applicant stopped production. If the applicant stopped production shortly after receiving the decision increasing its quota, I would suggest that the Court should apply half the standard rate in view of the acknowledged circumstances of the case and the fact that it was indeed impossible for the excess production, including the 477 tonnes, to be offset any further in that quarter. In view of the doubt whether it did stop production at that stage, which, as I have pointed out is a reasonable doubt, I shall not make such a suggestion to the Court. On the other hand, owing to the acknowledged special circum-

stances of the case, I consider it unfair to apply the increased rate of 82.5 ECU per tonne when fixing this fine. In these circumstances, I therefore suggest that the Court should reduce the fine by applying the standard rate of 75 ECU per tonne. For the 477 tonnes of excess production which was not offset, this gives a figure of 35 775 ECU and, for the 788 tonnes which was offset, a figure of 29 550 ECU, calculated at half the standard rate, resulting in a total fine of 65 325 ECU.

In conclusion, I therefore suggest that the Court should reduce the fine to 65 325 ECU by applying the standard rate of 75 ECU per tonne, that it should dismiss the remainder of the application and that it should order both parties to pay their own costs.