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 12 July 1984.

For the Registrar

H. A. Rühl
Principal Administrator

K. Bahlmann
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 30 MAY 1984 [1]

Mr President,
Members of the Court,

1. Introduction

1.1. The basic facts of the case

The basic facts of this case are simple. The Applicant, Ferriera Vasabbia SpA, is challenging a Commission decision of 14 July 1983. By that decision it was fined LIT 284 240 000 for infringements of Article 60 of the ECSC Treaty established almost two years earlier (in the course of an inspection carried out between 14 September and 2 October 1981). Owing to the extension of the

1 — Translated from the Dutch.

time-limit on account of distance, the decision may be regarded as having been received by the applicant on 21 July 1983. The application was not received and registered at the Court Registry until 19 September 1983. Therefore the period prescribed by Article 39 of the Statute of the Court of Justice of the ECSC for instituting proceedings, including the extension on account of distance prescribed by the Rules of Procedure, was exceeded by 18 days. In view of that circumstance the Commission, by a document dated 4 October 1983, raised an objection of inadmissibility.

The main difficulties in assessing the merits of that objection arise directly and indirectly from Italian Law No 742 of 7 October 1969, on the suspension of procedural time-limits during the summer vacation (Gazzetta Ufficiale 281 of 6. 11. 1969). Although as a matter of *law* that law cannot, of course, derogate from Article 80 of the Rules of Procedure of this Court, it appears from the parties' written and oral observations and from statements produced by the applicant at the hearing that *in practice* it has considerably reduced the possibility of challenging Commission decisions such as that contested in this case.

1.2. Main grounds for dismissing the objection

From the documents before the Court and the arguments advanced at the hearing on 5 April 1984, I think that it is clear that the objection of inadmissibility raised by the Commission in its application of 4 October 1983 must be dismissed owing to the practical limitations on the right to a fair hearing. That conclusion is clear to me for the following two reasons.

First, in its answer to a question which I asked at the hearing the Commission admitted that it bore substantial responsibility for the applicant's failure to observe the prescribed time-limit, namely because it sent it the contested decision immediately before a period in which, owing to the above-mentioned 1969 Law on procedural time-limits, virtually all lawyers in Italy and virtually all their staff are on holiday. As regards that fact, the Commission representative freely admitted at the hearing that in its application the Commission had misapprehended the practical effect of the 1969 Law.

Secondly, it became clear at the hearing, following the submission by the applicant of statements by the President of the Italian Bar, the President of the Brescia Bar Association and the applicant's usual lawyer in ECSC cases, that as a result of the 1969 Law:

(1) the law library of the Brescia Bar was closed;

(2) the staff of lawyers' chambers generally had to take their holiday in the period from 1 August to 15 September and

(3) the applicant's lawyer in ECSC cases was also on holiday during the period of the statutory suspension of

time-limits in proceeedings before Italian courts.

(4) It also emerged that even the central law library in Rome was open for only two hours a day during that period.

Finally, in view of the statements made by the applicant at the hearing, which have not been challenged by the Commission, it may be accepted that it did not succeed until the second week of August in finding a lawyer to act in the place of its usual lawyer in ECSC cases who was not available. That other lawyer had no knowledge of the law of the ECSC and did not manage to consult the relevant legal provisions and cases until the local law library in Brescia re-opened at the beginning of September. In view of those established facts it is clear to me that the possibility for the applicant to exercise its right to express its view during the period laid down for bringing an action, which expired on 1 September, was substantially reduced.

1.3. The relevant questions of law

From a comparative legal and factual study it does not appear that comparable legal provisions governing the suspension of procedural time-limits during the summer vacation exist in other Member States. Nor does it appear that the summer vacation in other Member States usually leads to the closure of a comparable proportion of lawyers' chambers. Therefore the question whether this action is admissible, notwithstanding the expiry of the period in which it ought to have been brought, is exceptional in nature and limited to decisions which are addressed to Italian undertakings during or shortly before the statutory suspension of national procedural time-limits.

According to Article 39 of the Statute of the Court of Justice of the ECSC, no right is to be prejudiced in consequence of unforeseeable circumstances or of *force majeure*. From my initial discussion of the question of admissibility, however, it is already apparent that, in my view, two general principles relating to the right to a fair hearing should also be considered. As I have observed, the first question which arises in my view is whether an objection of inadmissibility may be upheld by the Court if it is clear that the Commission was itself largely or entirely responsible for the failure to observe the time-limit owing to the date on which it sent its decision. Secondly, the question arises whether it is necessary to recognize a higher-ranking principle, bestowing a right to have a proper opportunity to defend oneself, which must result in the dismissal of the objection.

Since I have not come upon any decisions directly applicable to those questions, I shall now consider the various legal points before expressing my final opinion.

2. The Commission's arguments

The Commission bases its objection of inadmissibility on Article 39 of the Statute of the Court of Justice of the ECSC read with Article 80 of the Rules of Procedure of this Court. Secondly, it contends that the plea of *force majeure* does not apply in view of the judgment of the Court of 18 March 1980 in Joined Cases 154, 205, 206, 226 to 228, 263 and

264/78 and 31, 39, 83 and 85/79, *Ferriera Valsabbia SpA and Others* v *Commission*, [1980] ECR 907. In paragraph 140 of that judgment the Court stated: "But recognition of circumstances of *force majeure* presupposes that the external cause relied on by individuals has consequences which are inexorable and inevitable to the point of making it objectively impossible for the persons concerned to comply with their obligations and, in this case, leaving them no alternative but to infringe Decision No 962/77."

As is clear from paragraph 141 of the judgment, the Court did not accept that such a case of *force majeure* existed, since it emerged from the documents put in evidence "that of 181 undertakings investigated between June 1977 and September 1979, only 29 infringed the rules on minimum prices".

Owing to the quite different factual and legal background of those grounds of judgment, it is not possible, in my opinion, to draw any clear conclusion in the present case from their application in that judgment.

The factual and legal background against which a plea of *force majeure* was likewise rejected in the Court's judgment of 9 February 1984 in Case 284/82, *Busseni* v *Commission*, [1984] ECR 557, displays rather more similarity with the present case. In that case Busseni pleaded as justification for its failure to comply with the time-limit for instituting proceedings that from 17 March to 13 September 1982 it was completely closed down as an indirect result of a court order. The Court stated, however, in paragraph 12 of the decision in that case, that it was apparent that, despite the court order, the Busseni undertaking had still adopted important managerial measures during that period in the interests of its re-opening and survival. In fact, in paragraph 11 of that decision, the actual definition of *force majeure* was formulated slightly more widely than in the *Valsabbia* case. In particular, the Court amplified the earlier definition by stating that "... even though [the concept of *force majeure]* 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."

As regards the facts of the case now before the Court, it can, in my view, certainly be argued that they were (1) "abnormal" (that is to say, they occur only in Italy), (2) independent of the will of the undertaking concerned (being namely the practical effect of the Italian Law of 1969 and of the time when the contested decision was notified and (3) unavoidable, because it is clear from the facts etablished at the hearing that the applicant did everything in its power to exercise its right to defend itself in due time and to find a specialist lawyer in order to do so. After receiving the decision on 21 July 1983, it gathered together the necessary documents in a short space of time (it was certainly short in comparison with the period of almost two years which the Commission needed in order to prepare its decision)). In spite

of the fact that most lawyers' chambers were closed as a result of the 1969 Law, it also managed to find a lawyer in a little under three weeks, even though that lawyer was not an expert on the law of the ECSC and could not look up the relevant provisions of law and decided cases until after the law library in Brescia had re-opened [1]. Even so, one gains the impression from the application that the applicant's lawyer did not discover even then that the time-limit for bringing proceedings under Article 36 of the ECSC Treaty was laid down in the Statute of the Court of Justice of the ECSC (Article 39) and not in the ECSC Treaty itself.

3. Conclusion

3.1. As I have shown, I consider it quite possible to find satisfactory reasons for dismissing the objection of inadmissibility in view of the definition of *force majeure* contained in paragraph 11 of the Court's judgment in *Bussen*i, cited above. The advantage of such a solution is, of course, that it would not add any essentially new criteria to the existing case-law.

3.2. A new criterion would be added, however, if paragraphs 21 to 24 of the judgment of the Court (Fourth Chamber) of 16 November 1983 in Case 188/82, *Thyssen AG* v *Commission*, [1983] ECR 3721 were applied by analogy. In those paragraphs the Court made it clear that it would not be right to allow Thyssen to be fined for a breach of quota in the first quarter of 1981 which was the result of the Commission's own delay in notifying Thyssen of its definitive quota for the last quarter of 1980. As in the present case, notification was also given shortly before a holiday period during which the statutory rules of the Member State concerned reduced the applicant's ability to avoid the effects of the date of notification of the Commission's decision on the exercise of its rights. Application of the same legal principle (that it would not be right to let undertakings be fined for delays caused by the Commission itself) could lead to the rejection of the Commission's objection of inadmissibility on the ground that the Commission was itself responsible for the failure to bring the action within the time allowed because of the time it chose to notify the applicant of its decision to impose a fine. Moreover, the choice of that date, shortly before the period in which the 1969 Law made a proper exercise of the right of appeal practically impossible, might perhaps also be regarded as an "unforeseeable circumstance" within the meaning of the last paragraph of Article 39.

3.3. On the other hand, a plea based on the principle of the right to a fair hearing, which features so much in the judgments of the Court, could provide both an independent ground for

1 — The suggestion put forward by the Commission at the hearing that, after receiving the decision on 21 July, the applicant ought to have sought out a lawyer at once, without first gathering together the relevant documents on the case, is, in my view, beside the point. Generally, it is pointless to consult a lawyer without producing the relevant documents. Furthermore, it appears that the applicant's lawyer in steel community cases was on holiday on 21 July and was not available during the entire period in question.

dismissing the objection and strengthen the plea of *force majeure*. Clearly, the possibility for the applicant to take appropriate action to challenge the decision imposing the fine was substantially reduced by the fact that the period for lodging an appeal largely coincided with the period in which the aforesaid Italian Law considerably reduced the practical possibility of taking action in the ways I described in my introduction.

An argument for accepting an independent plea based on the right to a fair hearing as a higher-ranking legal principal might be that the courts of a number of Member States tolerate derogations from a time-limit for bringing an action, even if there is no plea of *force majeure*. A comparative legal analysis shows, for example, that in English and Irish courts it is not so much the question of *force majeure* which is important as the question whether the delay caused "would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration" (Supreme Court Act 1981, section 31 (6). In German and Dutch courts *force majeure* is not necessarily a decisive factor either in this regard, but different, wider grounds are adduced to justify the exceeding of time-limits. In the decisions of German courts we find for example the statement that the time-limit for instituting proceedings merely requires "a reasonable effort to be made, that is to say an effort which can in fairness be required of a party who conducts his case properly and conscientiously" (Bundesverwaltungsgericht [Federal Administrative Court] 50 p. 254).

On the other hand, one reason for having sole regard to the right to have a proper opportunity to defend oneself, as a higher-ranking principle of law, to *support* the applicant's plea of *force majeure* is that Article 39 of the Statute of the Court of Justice of the ECSC recognizes only "unforeseeable circumstances" and *"force majeure"* as acceptable reasons for exceeding the time-limit. Therefore, as far as procedural time-limits are concerned, *force majeure* should be interpreted in such a way that, when the definition of that concept contained in paragraph 11 of the Court's judgment in *Busseni* is applied, regard must be had in particular to the question whether the rejection of the plea of *force majeure* would, in view of the exceptional external circumstances relied upon and in spite of the serious efforts made by the applicant, result in a grave infringement of the right to have a proper opportunity to defend oneself.

3.4. *In conclusion* I propose that, for one or more, or for all, of the reasons set out above, the Court should:

1. Dismiss the objection that the application of Ferriera Valsabbia SpA is inadmissible;

2. Make an order as to costs in the decision on the substance of the case.