On those grounds,

THE COURT (Third Chamber)

hereby:

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

2. **Orders the applicant to pay the costs.**

Galmot Everling Kakouris

Delivered in open court in Luxembourg on 30 May 1984.

For the Registrar

D. Louterman

Administrator

Y. Galmot

President of the Third Chamber

## OPINION OF MR ADVOCATE GENERAL DARMON DELIVERED ON 29 MARCH 1984 [1]

*Mr President,*
*Members of the Court,*

1. The common market in coal and steel prohibits discriminatory practices, especially as regards prices (Article 4 (b) and 60 (1) of the ECSC Treaty).

For ensuring that this prohibition is observed the transparency of the market is crucial. Consequently, Article 60 (2) (a) requires the undertakings concerned to publish their price lists and conditions of sale. Only the published prices may be charged and the Commission may impose fines if the rules of the Treaty are infringed (Article 64).

Acting pursuant to Article 47 of the Treaty the Commission carried out

1 — Translated from the French.

investigations at the premises of Ferriera Vittoria. After finding that it had not adhered to the published list prices but granted discounts the Commission fined it approximately 70 million Italian lire by decision dated 14 July 1983. Against that decision Ferriera Vittoria brought an action on 6 October 1983 to which the Commission has raised an objection of inadmissibility in accordance with Article 91 (1) of the Rules of Procedure.

I shall now examine that objection in order to see whether it is well founded.

The examination of the admissibility of the action brought by Vittoria will lead me to consider issues which the Court last dealt with in its judgment in the *Busseni* case [1]. First, I will have to compare the facts of the case with Community rules on time-limits for bringing actions. I will then consider the circumstances which may constitute a defence to the plea that an action is time-barred.

2. In its observations the Commission has provided an excellent summary of the facts relevant to the question of admissibility, as it arises in this case:

The decision of 14 July 1983 was notified on 21 July. This is clear from the acknowledgement of receipt which was signed and returned after the registered letter had been delivered.

The time-limit for bringing an action for a declaration that a Commission decision adopted pursuant to Article 64 of the ECSC Treaty is void is *one month from the notification of the measure* (third paragraph of Article 33 and Article 36 of the ECSC Treaty, supplemented by Article 39 of the Statute of the Court of Justice of the ECSC).

Article 81 (1) of the Rules of Procedure of the Court of Justice of the European Communities provides that the period runs *from the day following the receipt by the person concerned of notification,* that is to say, in this case, from 22 July 1983.

Finally, *the extention on account of distance for Italy is 10 days* (Article 1 of Annex II to the Rules of Procedure adopted pursuant to Article 39 of the said Statute and Article 81 (2) of the Rules of Procedure).

The applicant therefore had a period of *one month and 10 days* in which to initiate proceedings. That period started to run on 22 July and expired *in the evening of 31 August.* [2] Since the application was not lodged at the Court Registry until 6 October, it is time-barred.

3. However, to support the admissibility of its action, the applicant argues that owing to certain circumstances it did not learn of the Commission's letter until later.

As evidence of this it has produced a police report authenticating a sworn statement of its sole director. According to that document, the undertaking was shut down *inter alia* from 6 June to 28 August 1983 for lack of work (under the rules of the *Cassa integrazione)* and the director of the company was absent for personal reasons from 19 July to 26 August 1983 so that he did not acquire

1 — Judgment of 9 February 1984 in Case 284/82, [1984] ECR 557.

2 — Opinion of Mr Advocate General Gand in Joined Cases 25 and 26/75, *Simet and Feram* v *High Authority,* [1967] ECR 33, at pp. 48 and 49.

actual knowledge of the letter until the end of August. According to the director it is difficult to see why the action should have been brought so late if those circumstances did not exist; nor is there any provision of law creating the presumption that the contents of a registered letter automatically become known to its addressee once it is delivered; finally, there was nothing to suggest that a letter imposing a short period in which to appeal would arrive.

The Commission denies the significance which the undertaking attaches to the police report. It maintains that the Italian police officer by no means establishes that the letter was not opened until the end of August. It also points to the lack of concern on the part of the managing director who was absent for nearly 37 days and again points out that the acknowledgement of receipt was signed by someone who was presumably authorized to do so.

As regards the arguments put forward by the applicant, it must be noted that we have been given no indication of the precise date on which the director of Ferriera Vittoria acquired actual knowledge of the letter. In its observations the applicant states that it was at the end of August. The police report is more precise: he acquired knowledge of it "on his return from holiday", that is to say on 27 August 1983, since his holiday ended on 26 August. It will be noted that on that date it was still possible for the applicant to lodge its application. However, if its argument is followed, that is to say if time starts to run from 27 August, the action which was eventually commenced would also have been brought within the prescribed period.

4. Although Ferriera Vittoria has not expressly based its argument on the third paragraph of Article 39 of the Court of Justice of the ECSC in order to justify its delay in bringing its action, it might be considered that the circumstances relied upon by the applicant constitute "unforeseeable circumstances" or "*force majeure*" affording a defence to a plea that the action is time-barred. In my view, however, that defence may not be accepted.

It is an established and undisputed fact that the Commission notified its decision by registered letter with an acknowledgement of receipt and that the acknowledgement, dated 21 July and signed on behalf of the addressee, was returned to it.[1] In this regard the *status of the person who signed the acknowledgement* hardly matters so long as he was — and the applicant does not deny this — "a person authorized for that purpose under the law of the country of destination", which are the words used in the form of acknowledgement of receipt.

Besides, the period for commencing proceedings cannot be made to start from the time when the addressee acquires *actual knowledge* of the Commission's decision. That would conflict with the mandatory nature of time-limits, since the commencement of the period would then depend on a very uncertain subjective factor and the principle of legal certainty, which constitutes the basis of the rules relating to time-limits, would thus be undermined.

A further point which must be made is that the applicant has produced as an annex to its application a number of "credit notes" for refunds and discounts granted to certain customers on account

1 — Joined Cases 32 and 33/58, *SNUPAT* v *High Authority*, [1959] ECR 127 at p. 136; Opinion of Mr Advocate General Lagrange at p. 149.

of the poor quality of the products delivered. The notes dated 29 June and 26 July bear the *stamp and signature of the person in charge of the undertaking (or of a person authorized to bind it financially).* Finally, another credit note, which is unsigned but has also been produced by the applicant, bears the date 22 August 1983. Those documents are significant for two reasons.

In the first place, they demonstrate that, although Ferriera Vittoria was being administered under the *Cassa Integrazione Guadagni* (Italian Law No 675 of 12 August 1977), it had retained its legal structure and personality. Its employees had not been dismissed and the company had not been wound up. It therefore had the legal capacity needed to lodge an appeal against the Commission's decision,[1] which indeed it did not fail to do in this case, whilst it was in an identical situation.

In the second place, the credit notes show that the undertaking was in fact represented by a person who was authorized to sign such documents and who was *a fortiori* in a position to take cognizance of a registered letter sent by the Commission. Indeed, this is quite clear from the signature on the acknowledgement of receipt.

As to the other circumstances to which Vittoria refers — the unexpected delivery of a letter which gave a short time in which to appeal and absence on holiday — neither appears to be independent of the will of the addressee. It must be pointed out in this regard that the Commission's decision concluded a procedure in which the applicant had the opportunity to submit its oral and written observations on the infringement with which it was charged. It must therefore have expected the Commission to impose the contested penalty upon it.

In the result, it seems to me that the situation in which the undertaking finally found itself was directly caused by negligence or at the very least imprudence. Therein lies the explanation not only for its delay in bringing the action but also for a clear lack of diligence, since between 27 and 31 August 1983 it was still possible, by means of telex for example, to send an application to the Court.

Therefore, to borrow the words used by the Court in its decision in the *Busseni* case (paragraph 13), 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."

For those reasons I propose that the Court should declare the application brought by the undertaking Ferriera Vittoria inadmissible and consequently order it to pay the costs.

1 — Case 284/82, *Busseni*, [1984] ECR 557 at paragraph 12; Opinion of Mr Advocate General Reischl at p. 568.