JUDGMENT OF THE COURT
3 MARCH 1982 [1]

Alpha Steel Ltd
v Commission of the European Communities

(System of production quotas for steel)

Case 111/81

In Case 111/81

ALPHA STEEL LTD, whose registered office is at 2 Raymond Buildings, Gray's Inn, London, represented by André Elvinger, of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of the said André Elvinger, 15 Côte d'Eich,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Michel van Ackere, assisted by Frank Benyon, a member of its Legal Department, with an address for service at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that an individual decision of the Commission concerning the fixing of production quotas for certain steel products is void (Article 33 of the ECSC Treaty),

1 — Language of the Case: French.

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: G. Reischl
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

The background to the dispute

By Decision No 2794/80/ECSC of 31 October 1980 (Official Journal 1980, L 291, p. 1) the Commission established a system of steel production quotas for undertakings in the iron and steel industry.

Article 2 of that decision provides that the Commission is to fix quarterly production quotas for crude steel and for the four groups of rolled products described in the same article and, in more detail, in Annex 1 to the decision.

Article 3 provides that the Commission is to fix quarterly production quotas "for each undertaking" on the basis of the reference production figures of that undertaking as referred to in Article 4, by application of abatement rates to these reference production figures as referred to in Article 5.

In paragraphs (1) and (2) of Article 4 general rules are laid down for establishing the quarterly reference production figures for both rolled products and crude steel. The provisions read as follows:

"(1) For each month of the relevant quarter, reference shall be 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 will not necessarily be consecutive, shall constitute the reference period.

(2) The reference production figures shall be the same, for crude steel and for each of the other groups of rolled products, as the production of the corresponding items during the reference period."

Paragraphs (3), (4) and (5) of Article 4 describe the special circumstances in which the reference production figures and, hence, the quotas, are to be increased. Article 4 (4) provides that the reference production may be adapted in the case of an undertaking which, further to an investment programme duly reported and not the subject of an unfavourable opinion by the Commission, has activated a new plant after 1 July 1980 which brings the total production capacity for the four groups of products to a level exceeding by at least 15% the total production capacity available for 1979.

Article 4(3) provides as follows:

"... if during the period from July 1977 to June 1980, the average rate of utilization of the production facilities of an undertaking was 10 percentage points or more below the average rate of utilization of the same facilities of the other undertakings of the Community, during the years 1977, 1978 and 1979, the Commission shall increase the reference production figures for this undertaking to a level which corresponds to a rate of utilization which lies five percentage points below that average rate in the other undertakings:

Provided the undertaking undertook to comply from July 1977 to June 1980 with the delivery programme established by the Commission, and

Provided that programme for this enterprise was fixed taking 1974 as a basis, and

Provided that during that year all or part of the undertaking's facilities were not on stream."

Article 6 excludes certain products from the quota system.

By virtue of Article 14 of the decision an undertaking may, if the restrictions imposed entail exceptional difficulties for it, refer the matter to the Commission. The Commission may then adapt the provisions of the decision.

By Decision No 664/81/ECSC of 13 March 1981 (Official Journal 1981, L 69, p. 22) the Commission fixed the rates of abatement for the second quarter of 1981.

The Commission fixed the applicant's production quotas for the second quarter of 1981 by an individual decision dated 6 April 1981 communicated to the applicant in a letter received on 9 April 1981.

The quota for items comprised in Group 1, namely hot-rolled wide and narrow strip, was fixed, after application of the abatement rate of 35.62% to the reference production which was 80 803 tonnes, at 52 021 tonnes and the quota for crude steel was fixed after application of the same abatement rate to a reference production of 53 497 tonnes at 34 441 tonnes.

II — Procedure

The application was lodged on 8 May 1981. The written procedure followed the normal course.

The applicant requested that this case be joined with Case 14/81. The defendant opposed the request.

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

III — Conclusions of the parties

The *applicant* claims that the Court should:

Declare void the decision dated 6 April 1981 whereby the Commission fixed steel production quotas for the applicant for the second quarter of 1981 pursuant to 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; and

Order the Commission of the European Communities to pay the costs.

The *Commission* contends that the Court should:

Dismiss the application as unfounded;

Order the applicant to pay the costs.

IV — Submissions and arguments of the parties

First submission: the alleged unlawfulness of Decision No 2794/80/ECSC

(a) Inadequate statement of reasons and infringement of Article 58 (1) and Article 74 of the ECSC Treaty

The *applicant* claims that the wording of Article 58 (1) and Article 74 of the Treaty is sufficient to show that any application of Article 58 must necessarily be accompanied by a consideration of the "need for the measures provided for in Article 74", and that that consideration must be followed by a decision either to apply or not to apply Article 74 according to the "need" thus established.

Since there is no mention whatsoever to the effect that such an examination was conducted or of the reasons for the conclusions to which it led, the statement of the reasons for applying Article 58 is inadequate.

Since it was undoubtedly "necessary" to adopt the measures provided for in Article 74, the failure to do so constitutes an infringement of those two articles. The Commission's exercise of its discretion is subject to review by the Court.

The *Commission* contends that although in the case of measures adopted under Article 74 (3) the statement of reasons must indicate that the conditions laid down in Article 58 are satisfied, Article 58 contains no such reference to the existence of the conditions provided for in Article 74 and there was therefore no need to refer to Article 74 in the statement of reasons for Decision No 2794/80/ECSC, which was adopted pursuant to Article 58.

The Commission refers to the measures which it has adopted in relation to imports from non-member countries, such as anti-dumping provisions, a system of Community controls and arrangements with a number of non-member countries.

It is anxious to emphasize that the decision as to the extent to which it is necessary to adopt measures under Article 74 is a question of policy. The soundness of the Commission's choice of

policy was demonstrated by a reduction in the level of imports. The complaint directed at the Commission is one which may be raised only in an action for failure to act.

The *applicant* replies that the Commission may not apply Article 58 without considering the need for measures to be adopted under Article 74: if it failed to consider the point it infringed Article 58; if it did not state in its decision that it had considered that point it failed to fulfil its obligation to state reasons. The obligation to state reasons is interpreted strictly by the Court precisely because the assessment of the situation is in part discretionary and thus escapes to some extent judicial review. The obligation exists regardless of whether the decision is to apply the provisions or not to apply them. The explanations supplied by the Commission to the Court ought to have been given as the statement of reasons for the decision.

The *Commission* replies that the applicant has failed to show that measures other than those adopted were necessary. Even if it had, such a matter could only be considered in an action for failure to act on the part of a Community institution.

Consideration of whether the adoption of measures under Article 74 is necessary is not a prerequisite to the taking of action by the Commission under Article 58; nor is it one of the "elements of fact constituting the legal basis" for Decision No 2794/80/ECSC, nor "one of the considerations which led to its adoption 'by the Commission' ". Therefore there was no need to refer to it in the statement of the reasons on which that decision was based.

(b) Infringement of Article 58 (2) of the Treaty

The *applicant* maintains that the quotas were not established "on an equitable basis, taking account of the principles set out in Articles 2, 3 and 4" of the Treaty, as provided for in Article 58 (2): the provisions contained in Article 4 (3) of Decision No 2794/80/ECSC are discriminatory if they do not apply to undertakings whose voluntary production programmes could not be calculated taking 1974 as a basis because their facilities were of more recent date (the so-called "new" undertakings). Similarly Article 14 creates discrimination between viable undertakings and others. Moreover, the fixing of quotas for such undertakings on the basis of actual production during the reference period rather than on the basis of capacity must inevitably lead to discrimination.

The *Commission* contends that the basis on which the quotas were established — the reference production for each undertaking — was an equitable one. To that basic system are added the provisions of Article 4 (3), (4) and (5), the last subparagraph of Article 5 (2) and Article 14.

Article 4 (3), which enables the reference production to be adjusted, was introduced in order to avoid any injustice which might be incurred, owing to the adoption of the three-year period in Article 4 (1), solely by certain undertakings which had participated in the voluntary delivery programmes and which satisfied certain other conditions.

Since the applicant did not satisfy all the conditions which had been laid down (as was stated in the first paragraph of the

preamble to the decision of 24 February 1981), although it had participated in those programmes, there was no reason to allow it an adjustment under Article 4 (3). However, no discrimination was thereby created, either against "new" undertakings or against any other undertaking which did not fulfil the conditions laid down in that paragraph, as there was no different treatment of undertakings which were in similar situations. The treatment differed only inasmuch as the situations of the undertakings differed, and it was therefore wholly justified.

Article 14 enables the disproportionate losses which certain undertakings may have had to suffer as a result of the application of the general provisions of Decision No 2794/80 to be mitigated. The provision is in no way discriminatory since any undertaking experiencing exceptional difficulties may have its quotas adjusted on that ground. If some undertakings do not experience such difficulties but remain "viable" there is no reason to allow them an adjustment under that article; in any case, it must be reiterated that the exclusion of an undertaking from the benefit of that article does not constitute different treatment of similar cases, but different treatment of different cases.

The Commission does not share the view that it is discriminatory to base calculation on actual production rather than production capacity.

Actual production is an objective, precise and measurable criterion, whereas capacity is a less specific concept and its application as the criterion, in preference to actual production, might give rise to injustice.

Furthermore, to calculate the quotas on the basis of the capacity of the undertakings would inevitably penalize those which have a very high rate of utilization as a result of efficient management and would confer an unfair advantage on those with a low rate of utilization.

Article 4 (3) seeks to rectify an injustice whereby a disadvantage would have been suffered by undertakings which, having agreed to take part in voluntary programmes restricting deliveries based on deliveries in 1974, had not yet that year brought their new plant into operation.

"New" undertakings, such as the applicant, which are not covered by Article 4 (3) may however take advantage of other provisions of Decision No 2794/80/ECSC which are also designed to ensure equal treatment, such as Article 14. The applicant's problem was different to that envisaged by Article 4 (3), namely a utilization rate so low that it created exceptional difficulties for it within the meaning of Article 14. The decision of 24 February 1981 recognized that circumstance.

The *applicant* replies that the quota system requires undertakings to sacrifice some of their production capacity. Such a sacrifice must be shared on an equitable basis by using existing production capacity as a reference.

The Commission's argument that capacity is a vague concept which would give rise to considerable difficulty in application does not bear scrutiny.

The Commission itself resorted to that concept for its own programmes, for instance the quarterly estimated programmes, and for the application of the system of voluntary reduction programmes to undertakings which were not producing in 1974. Production capacity should not prove more difficult to ascertain than actual production.

Moreover, it was not the undertakings with modern plant and efficient management which were exploiting their capacity to the full but those with outmoded, labour-intensive plant and the benefit of government subsidies. Those undertakings, held out as good examples by the Commission, were in reality responsible for the deteriorating conditions in the steel industry.

The applicant complains that the reference system creates injustices, the most patent of which is the penalization of undertakings having a very low rate of utilization of their capacity.

Article 4 (3) could have corrected the injustice but three conditions were inserted into it the sole aim of which was to confer an advantage on certain undertakings for which the provision was "tailor-made".

Taken as a whole, the conditions reveal a particularly serious lacuna in the case of undertakings which had progressively introduced new plant after 1974 but before 1 July 1978 and which, moreover, as a result of that, had a smaller period of reference and found themselves deprived of the possibility of choosing the month in which production was highest.

The *Commission* insists that the sacrifice required by the quota system is a reduction in each undertaking's production compared with its previous production so as to adjust Community production to the reduced demand. Actual production, which is represented by tangible objects, is less difficult to ascertain than production capacity.

The Commission explains how it relied on the notion of capacity in limited circumstances in the past. It is preferable to use information on actual production or actual deliveries where it is available.

The applicant's delivery programmes were based on a presumed gradual increase in the utilization of its capacity until full utilization, which was expected to be achieved by the last quarter of 1979. The applicant's deliveries in 1979 and the first half of 1980 amounted to no more than about 50 % of what it could have delivered.

As far as undertakings working at full capacity are concerned, the Commission considers that the more plausible view is that they are doing so because they manufacture a sufficiently wide range of products which are of the quality required by users and were adapted in time to changing market trends.

(c) Infringement of the fourth and fifth paragraphs of Article 14 of the ECSC Treaty and of the general principle of law relating to the misuse of powers

The *applicant* objects to the fact that relief under Article 4 (3) is tied to the undertaking's participation on a voluntary programme to reduce production. The result is to confer *ex post facto* a binding character on measures which were not binding and could not be

so, thus offending against the principle *nulla poena sine lege.*

The Commission replies that confining the benefit of Article 4 (3) to certain undertakings which are the victims of an injustice does not amount to a sanction applied against other undertakings. Since there was no sanction there was no breach of the principle *nulla poena sine lege.* The Commission is unable to see how the provision in question infringes the fourth and fifth paragraphs of Article 14 of the ECSC Treaty.

The *applicant* replies that the breach lies in having conferred a binding character on measures which were not binding. Contrary to the rule that opinions are not binding and that measures involving a legal obligation must be adopted in a particular form, the Commission transformed, *ex post facto,* into binding decisions with obligatory consequences acts which were not binding, namely the unfavourable opinion (Article 4 (4) of Decision No 2794/80) and the delivery programme (Article 4 (3)).

The principle that legitimate expectations must be protected has been breached. Undertakings cannot expect the administration to impose subsequently penalties for failure to comply with a set of rules which were represented as having no binding effect.

The *Commission* considers that the submission concerning breach of the fundamental principle that legitimate expectations must be protected is unfounded. The delivery programmes were not compulsory. If an undertaking chose to ignore an unfavourable opinion of the Commission on an investment it accepted the risks which it might indirectly incur as a result of a situation which it had itself helped to create. The fact that the Commission takes account of that and decides to ignore the resulting increase in capacity in no way amounts to the imposition of a penalty connected to a measure which is without binding force.

Second submission: the contested decision is null and void for infringement of Decision No 2794/80/ECSC, in particular Article 4 (3) and Article 14 thereof

The *applicant* maintains that Article 4 (3) imposes two contradictory and incompatible conditions. If the paragraph is to have any meaning, the delivery programme for the period between July 1977 and June 1980 in the case of undertakings whose plant was not, or was only partially, in operation must be considered to have been fixed on the basis of the general situation in that sector of the industry in 1974. The Commission had no grounds, therefore, for refusing to apply Article 4 (3).

The *Commission* points out that in drawing up the voluntary delivery programmes taking 1974 as a basis it had regard, for all undertakings, to deliveries during that year, and not to the undertakings' capacity or production. In any case the applicant did not participate in the delivery programmes from July 1977 to June 1980, but did so only from the third quarter of 1978. As a result the condition referred to in the first indent of Article 4 (3) was not fulfilled and the paragraph could not in any case apply.

The *applicant* replies that the conditions in question are unlawful and discriminatory and that the Commission must apply paragraph (3) without requiring the conditions to be fulfilled.

As far as Article 14 is concerned, the applicant claims that on the basis of Article 58, which requires the quotas to be established on an equitable basis Article 14 could not be applied, in the case of undertakings with recently installed plant which were not yet established on the market, on the basis of actual production: production capacity must be taken as the sole criterion.

The *Commission* contends that for the applicant and other undertakings it took account of the rates of utilization for the undertaking's capacity in assessing the exceptional difficulties to which it might have been subject. However, the purpose of Decision No 2794/80/ECSC was to restrict production in order to adapt it to the fall in demand, and therefore the adjustments allowed for in Article 14 of the decision could not, as a matter of principle, result in quotas in excess of the undertakings' previous production, and that principle was respected in the decision of 24 February 1981.

The applicant submits that the application of Article 4 (3) may well lead to the fixing of quotas higher than previous actual production.

The same ought to apply in the case of undertakings entitled to relief under Article 14 if it so happens that they experience "exceptional difficulties".

The *Commission* considers that the aim of the applicant's observations is to refute the Commission's submissions in quite another matter. Article 14 is a relief clause and does not lay down detailed rules, as is evident from its application in the case of Alpha Steel, which was allowed an adjustment for the first quarter of 1981 and not for the second quarter.

V — Oral procedure

The applicant, represented by André Elvinger, and the Commission, represented by Michel van Ackere, presented oral argument at the sitting on 15 September 1981.

The Advocate General delivered his opinion at the sitting on 29 October 1981.

Decision

1 By application lodged at the Court Registry on 8 May 1981 Alpha Steel Ltd, a company incorporated under English law, brought an action under the second paragraph of Article 33 of the ECSC Treaty for a declaration that the Commission's individual decision of 6 April 1981 fixing the applicant's production quotas for the second quarter of 1981 pursuant to Commission Decision No 2794/80/ECSC of 31 October 1980 (Official Journal 1980, L 291, p. 1) is void.

2 In support of its inital submission that Decision No 2794/80 is unlawful, the applicant argues that the Commission ought to have considered whether it was necessary to take action in the field of commercial policy under Article 74 of the ECSC Treaty when it was examining the possibility of introducing a quota system. It submits further that the general decision is incompatible with Article 58 (2) of the ECSC Treaty, which requires that quotas be established "on an equitable basis". The applicant also complains of the fact that the reference period used in the general decision runs from July 1977 to June 1980 and criticizes the provisions of Article 4 (3) of that decision; it claims that those provisions were intended to benefit a particular undertaking and that they discriminate against new undertakings. Finally, the applicant takes exception to the fact that the benefit of Article 4 (3) is restricted to undertakings which participated in a voluntary delivery programme; that is said to be in breach of the principle of *nulla poena sine lege* and the principle of the protection of legitimate expectation.

3 In its second submission the applicant maintains, with regard to the individual decision of 6 April 1981, that the Commission ought to have allowed it relief under Article 4 (3) of the general decision, which requires the undertaking to have participated from July 1977 to June 1980 in the Commission's delivery programmes and the programmes for the undertaking to have been fixed with 1974 as a basis. The applicant also considers that the Commission ought to have applied Article 14 of the general decision on the basis of production capacity, rather than actual production, and that it ought to have allowed it a larger quota.

4 The submissions described above are the same in substance as those put forward by the applicant in Case 14/81, which concerns an application for the annulment of the Commission's decision fixing the applicant's quotas for the first quarter of 1981. The points of law considered in Case 14/81 are identical to those which have been raised in these proceedings.

5 In a judgment delivered this day the Court has examined those submissions and rejected them as unfounded. On the same grounds the present application must also be dismissed.

Costs

6 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs.

7 Since the application has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

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

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 3 March 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President