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

Metalgoi SpA
v Commission of the European Communities

(Steel production quotas — Fines)

Case 10/83

ECSC — Production — Steel production quotas — Determination of the basis on which quotas are fixed — Application of the system to quantities intended for export to non-member countries — Fine for exceeding quotas — Economic difficulties endangering the very existence of the undertaking if the fine is levied — No effect
(ECSC Treaty, Art. 58; Decision No 2794/80, Arts 2 and 9)

In Case 10/83

METALGOI SPA, a steel undertaking whose registered office is at Brescia, represented by Gino Alberto Bergmann of the Milan Bar, Fabrizio Massoni of the Brussels Bar and Gerolamo Pellicano of the Milan Bar, 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, a member of its Legal Department, with an address for service in Luxembourg at the office of Oreste Montalto, also a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION requesting the Court to declare void a Commission decision of 24 November 1982, by which the applicant was fined 101 850 European Currency Units for exceeding its production quota for rolled products in Group IV for the second quarter of 1981,

1 — Language of the Case: Italian.

THE COURT (Second Chamber)

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

Advocate General: P. VerLoren van Themaat
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 — Summary of the facts

After reaching the view in the third quarter of 1980 that the European steel industry was in a manifest crisis for the purposes of Article 58 of the ECSC Treaty and that the indirect courses of action available to it had proved ineffective or insufficient to cope with the crisis, the Commission decided that in order to restore a balance between supply and demand it had to intervene directly by means of binding measures relating to production. Consequently, by Decision No 2794/80/ECSC of 31 October 1980 (Official Journal 1980, L 291, p. 1), it established a system of steel production quotas for undertakings in the Community steel industry applicable until 30 June 1981.

Article 2 of Decision No 2794/80 provides that the Commission is to fix quarterly production quotas for crude steel and for four groups of rolled products one of which, Group IV, includes light sections (coiled wire-rod, concrete-reinforcing bars and other merchant bars).

According to Article 3 (1) of Decision No 2794/80, the quarterly production quotas are to be fixed for each undertaking on the basis of individual reference production figures and by the application of abatement rates to those reference production figures.

Article 3 (2) provides that the Commission is to inform each undertaking of its reference production figures and of the production quotas resulting from the application of the abatement rates.

Article 7 (1) provides that, subject to a tolerance margin and the possibility of carrying over or exchanging quotas, undertakings must comply with the production quotas notified to them by the Commission. As regards the delivery within the common market of products covered by the quota system, undertakings may not exceed a ratio laid down in Article 7 (2).

Article 9 of Decision No 2794/80 provides that undertakings exceeding their production quota or that part of the quota which may be delivered within the common market are to be fined. Generally the amount of the fine is to be 75 ECU per tonne of excess for ordinary steels and 150 ECU per tonne of excess for special steels. Where the production of an undertaking exceeds the quota by 10% or more or where the undertaking has already exceeded its quota or quotas during one of the previous quarters, the fine may be up to double those amounts per tonne. The amount of the fine is to be increased by 1% for each month of delay in payment, from the date fixed in the decision by which the undertaking is fined.

By a letter dated 6 April 1981 the Commission notified Metalgoi SpA, a steel undertaking established in Brescia, of its reference production figures and production quota for Group IV products for the second quarter of 1981. The production quota was later adjusted slightly and Metalgoi was informed of the adjustment by a letter from the Commission dated 9 June 1981.

By a letter dated 1 February 1982, the Commission, acting pursuant to Article 36 of the ECSC Treaty, accused Metalgoi of having exceeded by 1 428 tonnes the production quota allocated to it for products in Group IV for the second quarter of 1981.

By a letter dated 22 February 1982 Metalgoi pleaded the following facts in its defence:

(a) By a telex message dated 17 July 1981, to which it received no reply, it requested the Commission to adjust its quota pursuant to Article 14 of Decision No 1831/81/ECSC of 24 June 1981 establishing for undertakings in the iron and steel industry a monitoring system and a new system of production quotas in respect of certain products (Official Journal 1981, L 180, p. 1).

(b) In the same telex message it notified the Commission that it had exceeded the relevant quota and stated that it was justified in doing so for financial reasons.

(c) The entire quantity produced in excess of the quota was for delivery to non-member countries and did not therefore entail any disturbance of the common market.

Following a hearing held on 28 May 1982 the amount by which the Commission alleged that the quota had been exceeded was reduced from 1 428 to 1 358 tonnes after it was found that there was a difference between the applicant's actual production and its declared production.

After Metalgoi had submitted further observations on 13 July 1982, the Commission, by Decision No C (82) 1631/6 of 24 November 1982 (Official Journal 1982, C 324, p. 2, point 2), found that Metalgoi had exceeded by 1 358 tonnes the production quota for Group IV products allocated to it for the

second quarter of 1981 and for that infringement fined it the sum of 101 850 ECU or LIT 136 533 999. By the terms of the decision the fine was to be paid within two months of the date of notification of the decision and was subject to a surcharge of 1% per month or part thereof in the event of delay in payment.

II — Written procedure and conclusions of the parties

On 18 January 1983 Metalgoi brought an action under Article 33 of the ECSC Treaty against the Commission's decision of 24 November 1982.

It claims that the Court should:

After making all necessary declarations and suspending the contested decision, declare the Commission's decision of 24 November 1982 void;

In the alternative, reduce the fine imposed by that decision;

In the further alternative, grant a long period for payment of the fine, with all necessary declarations; and

Order the defendant to pay the costs.

By an application lodged on 15 March 1983 Metalgoi applied, under the second paragraph of Article 39 of the ECSC Treaty and Article 83 (1) of the Rules of Procedure, for an order suspending the operation of the decision contested in the main action.

The President of the Court made the following order pursuant to the first paragraph of Article 33 of the Protocol on the Statute of the Court of Justice of the ECSC and Articles 85 and 86 of the Rules of Procedure:

"1. The operation of Article 2 of Commission Decision No C (82) 1631/6 of 24 November 1982 shall be suspended on condition that the applicant first produces a bank guarantee acceptable to the Commission guaranteeing payment of the fine imposed by the contested decision and default interest calculated at 1% above the discount rate fixed by the Bank of Italy.

2. The costs are reserved."

The written procedure in the main proceedings followed a normal course.

In its written submissions the Commission claimed that the Court should dismiss the application and order the applicant to pay the costs.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, the parties were each requested to reply in writing to a question. The applicant was requested to confine its oral observations at the hearing to arguments concerning the legality of the decision of 24 November 1982 imposing the fine, since the decisions of 6 April and 9 June 1981 fixing the quota are not the subject of these proceedings.

By an order of 5 October 1983 the Court assigned the case to the Second Chamber, pursuant to Article 95 (1) and (2) of the Rules of Procedure.

III — Submissions and arguments of the parties

The *applicant* takes the view that the Commission's decision of 24 November 1982 must be declared void or that at the very least the fine should be reduced and the period for payment extended.

(a) In the production found to exceed the quota the contested decision worngly includes products not belonging to Group IV as defined in Article 2 of Decision No 2794/80. Those products should not have been included in the quota allocated to the applicant.

The products in question consisted of a certain type of section (T-bars and angle bars) to be made into plastic-covered fencing posts. Such products are classified under tariff heading 73.40.980, whereas rolled products fall under heading 73.11.190. Nor do they belong, owing to their dimensions, quality, processing distribution and specific nature, to Category VI provided for by Decision No 1831/81, which replaced Decision No 2794/80.

It must also be taken into consideration that, although Metalgoi ha the products in qeustion turned into plastic-covered fencing posts and there are delivery notes to that effect, they are not disposed of or invoiced but remain the property of Metalgoi and are stocked in its warehouse pending their sale as finished products. They do not comes under the control of the ECSC.

The level of production of those sections is such that it cancels out the applicant's excessive deliveries on the ECSC market.

(b) By a telex message of 17 July 1981 the applicant applied to the Commission for an adjustment of its production quota. That application should have been granted pursuant to Article 14 of Decision No 2794/80, which provides that where the production or delivery restrictions imposed by the quota system entail exceptional difficulties for an undertaking the Commission must examine the case without delay in the light of the objectives of that decision. The Commission made no response to Metalgoi's application regarding the second quarter of 1981. However, Article 14 of Decision No 2794/80 should have been applied because the applicant was experiencing particularly serious difficulties owing to the small size of the entirely self-financing undertaking, producing one type of product only and having a rigid structure. A reduction in production imposed unilaterally would entail the closure and liquidation of the undertaking.

Moreover, the applicant undertaking, which exports a large proportion of its products to non-member countries, was penalized as regards the calculation of its reference period compared to undertakings which dispose of their product within the common market.

(c) As most of the applicant's products are exported to non-member countries, all the production considered excessive by the Commission was intended for

export and cannot therefore have affected the common market.

The *Commission* considers that none of the applicant's submissions are well founded.

(a) During the second quarter of 1981 Decision No 2794/80 was in force. Article 2 of that decision provided for four groups of rolled products; Group IV comprised light sections, which included merchant bars. The products in question belong to that category. Under the system introduced by Decision No 1831/81, which entered into force on 1 July 1981 and was therefore not applicable to the quotas for the second quarter of 1981, merchant bars are classified in Category VI.

The products in question are unquestionably merchant bars. Although intended by the applicant undertaking to be put to particular uses after further processing, the basic product remains a merchant bar in respect of which production quotas were allocated to the applicant. The fact that several processing stages eventually lead to the manufacture of a product not covered by the ECSC makes no difference in the present case, since that final product is obtained from a product whose production is controlled by the ECSC.

Furthermore the applicant itself admits that it uses only part of its steel to produce fencing posts.

(b) The telex message of 17 July 1981 was never received by the Commission. In any case, it contained an application for an adjustment of quotas under Article 14 of Decision No 1831/81, which was not applicable to the second quarter of 1981; and moreover, the application concerned the production quota for the third quarter of 1981, whereas the quota alleged to have been exceeded was for the second quarter.

(c) The argumentswhich the applicant bases on its difficult financial situation cannot be accepted. They are not supported by any evidence and in any case the very purpose of intervention by the Commission in order to regulate the market is to prevent an even more difficult situation for undertakings.

(d) The sale of goods in non-member countries is a commercial decision adopted without constraint by the undertaking concerned. Exporting undertakings cannot be exempt from the quota system on that ground.

(e) As far as the amount of the fine is concerned, the applicant does not offer any specific arguments. Since the submissions advanced in support of the application for a declaration that the contested decision is void are unfounded, there is nothing to justify a reduction of the fine.

(f) The Commission has always granted undertakings which prove that they are in a difficult economic situation an extension of time for payment. The applicant has never requested an extension.

IV — Oral procedure

The applicant undertaking, Metalgoi, represented by F. Massoni, and the Commission, represented by S. Fabro, presented oral argument and answered questions put to them by the Court at the sitting on 17 November 1983.

The Advocate General delivered his opinion at the sitting on 15 December 1983.

Decision

1 By an application lodged at the Court Registry on 18 January 1983 Metalgoi SpA brought an action under the second paragrapoh of Article 33 of the ECSC Treaty whereby it sought to have declared void Commission Decision No C (82) 1631/6 of 24 November 1982 (Official Journal 1982, C 324, p. 2, point 2). That decision, which imposed a fine on the applicant for exceeding its production quota for Group IV products for the second quarter of 1981, was adopted 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 (Oficial Journal 1980, L 291, p. 1). In the alternative, the applicant seeks a reduction of the fine.

2 On the basis of declarations made by the applicant, the Commission, by decision of 6 April 1981, fixed the applicant's reference production and production quota for Group IV products, which include merchant bars. The quota was slightly increased by an amending decision of 9 June 1981. Those decisions were not contested by the applicant.

3 Having found that the production quota thus fixed had been exceeded, the Comission gave the applicant an opportunity to submit ovservations before fining it 101 850 ECU or LIT 136 533 999 in the decision at issue in these proceedings.

4 By an order dated 20 April 1983 the President of the Court suspended the operation of the contested decision subject to certain conditions.

5 The applicant advances various submissions in support of its application. It contends, first, that the Commission did not make use in its case of the hardship clause in Article 14 of Decision No 2794/80, thereby refusing to take account of the difficulties which it had to contend with as an undertaking of modest dimensions which contentrates on the manufacture of a

single product and which is required to operate at a rate approaching its maximum capaciy in order to remain profitable; secondly, the excess production was mainly used for the manufacture of plastic-covered fencing posts, which do not fall within any of the categories defined in Decision No 2794/80; thirdly, all the excess production was exported out of the Community. In the alternative, it contends that enforcement of the penalty would lead to its closure and liquidation and requests a reduction of the fine.

6 Those arguments call for a number of preliminary observations.

7 In the first place, the argument concerning the failure to aply Article 14 of Decision No 2794/80 is directed not against the decision imposing the fine but against the decision fixing the production quota. Since the latter decision is no longer open to challenge, that submission is inadmissible. It is therefore unnecessary to consider the defence arguments put forward by the Commission in this regard.

8 Secondly, the main submissions put forward by the applicant are partly contradictory. It claims that nearly all the excess production was used for the manufacture of plastic-covered fencing posts which were sold, according to the applicant, partly within the common market and partly outside it. At the same time it states that its excess production was "entirely for export". A comparison of those two statements shows that they cannot both relate to the same quantities of steel.

9 In so far as those two submissions are consistent, they call for the following observations.

10 The argument that the quota system does not apply to the excess production because it was used for the manufacture of plastic-covered fencing posts, which, as finished products, do not fall within the categories defined by

Decision No 2794/80, fails to take account of the scheme of that decision, under which production quotas are fixed not on the basis of finished products made from steel but on the basis of the intermediate products described in detail in Article 2 and Annex 1.

11 It is not disputed that the applicant declared production of merchant bars falling within Category IV and that its quota was fixed for that product on the basis of that declaration. The fact that an undertaking carries out further processing on a product subject to quotas before disposing of it to third parties does not exempt the product from the production restrictions provided for by Decision No 2794/80. The submission must therefore be dismissed.

12 As regards the submission that the applicant exported its production outside the Community, it need only be pointed out, as the Court has already had occasion to do, that the production restrictions provided for by Decision No 2794/80 are not confined to steel disposed of within the common market but also apply to quantities destined for export, partly because of the need to ensure that the international agreements entered into by the Community are complied with and partly because of the danger that exported steel might find its way back on to the common market (for the Court's most recent judgment, see that of 11 May 1983 in Case 24/81, *Klöckner,* [1983] ECR 1451, para. 4). This submission must therefore also be dismissed.

13 In the alternative, the applicant submits that the levying of the fine could endanger its very existence, since it has neither the reserves nor the size to cope with the fine imposed. It requests its reduction on that ground. In answer to that submission it may be pointed out, as the Court has repeatedly held, most recently in its judgment of 14 December 1983 in Case 263/82 *(Klöckner,* [1983] ECR 4143), that an undertaking may not rely upon the economic difficulties which it must contend with in order to exempt itself from the restrictions imposed on account of the crisis and exceed at will the production quota allocated to it. Such conduct would create increased difficulties for all the other undertakings and would eventually bring about

the collapse of the entire quota system. The applicant must therefore bear the consequences, which it was perfectly able to foresee, of its failure to submit to a discipline imposed in the general interest. The alternative submission must therefore be dismissed.

Costs

14 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs.

As 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;**

2. **Orders the applicant to pay the costs, including the costs of the application for interim measures.**

Bahlmann Pescatore Due

Delivered in open court in Luxembourg on 1 March 1984.

For the Registrar

H. A. Rühl

Principal Administrator

K. Bahlmann

President of the Second Chamber