JUDGMENT OF THE COURT (Second Chamber)
21 January 1987 *

In Case 268/84

Ferriera Valsabbia SpA, whose registered office is at Odolo (Brescia), appearing in the person of its managing director, Giovanbattista Brunori, represented and assisted by Francesco Masperi, of the Brescia Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 rue Philippe-II,

applicant,

v

Commission of the European Communities, represented by Oreste Montalto, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, also a member of the Commission's Legal Department, Jean Monnet Building,

defendant,

APPLICATION for a declaration that Decision No C (84) 1409/3 of the Commission of the European Communities of 27 September 1984 imposing a fine on the applicant for exceeding the production quota in respect of products in Category V which could be sold on the common market during the second quarter of 1982 is void,

THE COURT (Second Chamber)

composed of: T. F. O'Higgins, President of the Chamber, O. Due and K. Bahlmann, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

* Language of the Case: Italian.

having regard to the Report for the Hearing as supplemented following the hearings on 13 March and 23 September 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 21 October 1986,

gives the following

Judgment

1 By an application lodged at the Court Registry on 12 November 1984, Ferriera Valsabbia SpA (hereinafter referred to as 'Valsabbia'), whose registered office is at Odolo (Brescia), brought an action under the second paragraph of Article 36 of the ECSC Treaty for a declaration that the Commission decision of 27 September 1984 imposing a fine of 70 875 ECU on the applicant for exceeding the steel production quota in respect of products in Category V (concrete reinforcing bars) which could be delivered on the common market during the second quarter of 1982 was void.

2 That decision was adopted on the basis of Commission Decision No 1831/81/ECSC of 24 June 1981 (Official Journal 1981, L 180, p. 1) (hereinafter referred to as 'the general decision'), as amended by Decision No 1832/81/ECSC of 3 July 1981 (Official Journal 1981, L 184, p. 1), and most recently by Decision No 533/82/ECSC of 3 March 1982 (Official Journal 1982, L 65, p. 6), a general decision which renewed the quota system and extended it, with effect from 1 July 1981, to other steel products, including products in Category V.

3 It can be seen from the contested decision that the Commission complains that Valsabbia exceeded that part of its quotas in respect of products in Category V which could be delivered on the common market by 979 tonnes for the first quarter of 1982 and 1 239 tonnes for the second quarter of 1982, that is to say, a total of 2 218 tonnes. The contested decision points out that the stock of products in Category V to be found on the undertaking's premises on 30 June 1981 was equal to 1 273 tonnes which, when deducted from the 2 218, tonnes left an excess of 945 tonnes.

4 On the other hand, Valsabbia claimed that in addition to the 1 273 tonnes referred to in the decision, it had in stock on the abovementioned date 4 749 tonnes which were delivered outside the common market, to a Swiss company, Philipp Brothers, Zug, only after 30 June 1981.

5 Reference is made to the Report for the Hearing for the background to the dispute and the submissions and arguments of the parties which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 It should first be noted that formally Valsabbia puts forward only two submissions, namely, breach of an essential procedural requirement and, in the alternative, breach of the principle of proportionality and equity in fixing the amount of the fine. However, in certain of the facts and arguments put forward in the context of the first submission, the applicant is in fact claiming that the Commission departed from its general practice when calculating the stock at the time at which the quota system came into effect.

7 It must also be observed at the outset that it can be seen from the explanations given during the oral procedure and from the documents submitted to the Court that the experts responsible for determining stocks at the time that the general decision entered into force did so on the basis of definitive invoices. Subsequently, Valsabbia no longer maintained its claim that the Commission had miscalculated by counting twice certain deliveries intended for Philipp Brothers, namely once on the basis of *pro forma* invoices drawn up during the first quarter of 1981 for the sole purpose of obtaining credit from a bank and for the second time on the basis of the delivery dockets concerning the deliveries carried out during the second half of 1981.

8 The subject-matter of this case is therefore limited to the determination of the stocks held at the time that the general decision entered into force for products in Category V and is concerned more precisely with whether the quantities delivered during the second half of 1981 to Philipp Brothers, a total of 4 749 tonnes, should or should not have been taken into account in making that calculation.

9 Valsabbia claims that those deliveries should have been taken into account by virtue of the fact that they did not actually take place until the second half of

1981, as can be seen clearly from the documents submitted to the Court and not contested by the Commission.

10 In order to justify the omission of those quantities from the calculation of the stock, the Commission puts forward three considerations:

(i) It was because of the inadequate nature of Valsabbia's accounts and at that undertaking's request that it has generally calculated the stock in the past on the basis of invoices rather than delivery dockets;

(ii) The goods delivered to Philipp Brothers after 30 June 1981 were no longer part of the stock at the time that the general decision entered into force but had already been separated from the stock and placed at the disposal of the undertaking to which they were to be delivered;

(iii) Those deliveries were intended for a non-member country and are therefore irrelevant to the exceeding of that part of the production quota which could be delivered on the common market.

11 With regard to the Commission's first argument, it must be observed that the Commission was not entitled to omit deliveries carried out after the entry into force of the general decision merely because the invoices issued by Valsabbia carried a date before the said entry into force, all the more so because there were available to the Commission at that time not merely the definitive invoices but also the delivery dockets, which showed that the deliveries to Philipp Brothers had actually taken place during the second half of 1981.

12 With regard to the second objection, it should be noted that Valsabbia had undertaken a contractual obligation towards Philipp Brothers to hold at its disposal, separate from the general stock, the deliveries intended for it. However, during the oral procedure, the Commission's representative admitted that the goods involved were fungible goods, that is to say, interchangeable. He also admitted that no specific check as to whether the goods intended for Philipp Brothers had been separated from the stock was carried out and it is not contested that the products in question had not yet been individually identified at Valsabbia's storage facilities.

13 Consequently, the mere existence of a contract of sale with Philipp Brothers without the goods to be delivered being kept separately does not exclude the possibility that quantities corresponding to that order might still be in stock, contrary to Valsabbia's contractual obligations, and that the deliveries made to Philipp Brothers during the second half of 1981 came not from that stock but from the goods produced during the second half of that year. Consequently, the Commission's objection in that regard cannot be accepted.

14 Finally, with regard to the objection to the effect that the deliveries at issue were intended for a non-member country, it must first be observed that the general decision does not deal with the point whether stocks in existence at the time that the general decision entered into effect are or are not to be added to the calculation of that part of the production quotas which may be delivered on the common market. As it explained during the oral procedure, however, the Commission's general practice is to apply a concession when the quota system is implemented to permit an undertaking to deliver, over and above its delivery quota, the quantities held in stock at the time when the system enters into force either to non-member countries or on the common market.

15 It follows that in order to avoid any inequality of treatment, the Commission is required to apply that general practice in each individual case unless different treatment is justified on objective grounds.

16 It also follows that Valsabbia was entitled to deliver on the common market the quantities held in stock at the time when the general decision entered into force in addition to that part of the production quotas which could be delivered on the common market and that it was not prevented from drawing the quantities delivered to Philipp Brothers during the second half of 1981 from its production during those six months.

17 The contested decision must therefore be declared void without there being any need to consider Valsabbia's other submissions.

Costs

18 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

(1) Declares void the Commission decision of 27 September 1984 concerning a fine imposed on Ferriera Valsabbia SpA under Article 58 of the ECSC Treaty;

(2) Orders the Commission to pay the costs.

O'Higgins Due Bahlmann

Delivered in open court in Luxembourg on 21 January 1987.

P. Heim
Registrar

T. F. O'Higgins
President of the Second Chamber