Case 268/84

Ferriera Valsabbia SpA

v

Commission of the European Communities

(Common market in steel — Fine for exceeding production and delivery quotas)

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Summary of the Judgment

ECSC — Production — Steel production and delivery quotas — Exceeding of quotas — Calculation — Taking account of stocks

(ECSC Treaty, Art. 58; Decision No 1831/81)

REPORT FOR THE HEARING

delivered in Case 268/84 *

I — Facts and written procedure

By Decision No 1831/81/ECSC of 24 June 1981 (Official Journal 1981, L 180, p. 1), as amended first 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), the Commission, acting under Article 58 of the ECSC Treaty, renewed for undertakings in the steel industry the monitoring system and the system of production quotas in respect of certain products and extended it as from 1 July 1981 to other steel products, including those in Category V. Article 12 of that decision provided for a fine, generally of 75 ECU for each tonne in

* Language of the Case: Italian.

excess, to be imposed on an undertaking exceeding its production quotas.

Under that decision, the Commission, by letter of 4 December 1981, informed Ferriera Valsabbia (hereinafter referred to as 'the applicant') of its production quotas for the first quarter of 1982 and of the part of such quotas which could be delivered on the common market. By letters of 11 June and 24 October 1982, the company was informed of its quotas in respect of the second quarter of 1982.

On the basis of the declarations and information supplied by the applicant in accordance with the aforementioned decision, the Commission came to the conclusion that the applicant had exceeded the part of its production quota in respect of products in Category V which could be delivered on the common market during the first and second quarters of 1982.

By letter of 11 October 1982, the Commission complained that the applicant had exceeded by 979 tonnes the part of its production quota in respect of products in Category V which could be delivered on the common market during the first quarter of 1982 and in a further letter, dated 11 November 1982, it complained that the applicant had exceeded by 1 239 tonnes the part of its production quota in respect of products in Category V which could be delivered on the common market during the second quarter of 1982. At the same time, it invited the applicant to submit its comments on the matter in accordance with Article 36 of the ECSC Treaty.

By letter of 28 October 1982, the applicant submitted its comments on the letter of 11 October 1982. In reply to the letter of 11 November 1982, it submitted comments in letters dated 24 November 1982, 17 February and 18 April 1983 and orally on 11 October 1983. Finally, it submitted further comments in a letter of 17 October 1983.

Since the applicant claimed that the Commission's inspectors had counted certain deliveries twice because they had based their calculations on mere *pro forma* invoices, the Commission carried out further checks.

The Commission considered that the comments which the applicant made in its own defence were without foundation and that it had in fact admitted that the complaints were factually correct; by the decision at issue, adopted on 27 September 1984, it therefore imposed a fine on the applicant of 70 875 ECU, equal to LIT 98 461 676 for exceeding by 945 tonnes the part of its production quota in respect of products in Category V which could be delivered on the common market during the second quarter of 1982.

That decision was sent by registered letter and reached the applicant on 5 October 1984. By an application dated 6 November 1984, which was received at the Court Registry on 12 November 1984, the applicant commenced the present proceedings.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocte General, the Court decided to open the oral procedure without any preparatory inquiry. It did however invite the parties to furnish to the Court copies of the provisions of national law to which they referred in their pleadings, namely, in the case of the Commission, Circulars Nos 52/5373 and 52/8348 and, in the case of the applicant, Decree No 627 of the President of the Italian Republic of 6 October 1978 and Decree No 24 of the President of the Italian Republic of 29 January 1979. The parties complied with the Court's request within the prescribed time-limit.

By order dated 21 November 1985 the Court assigned the case to the Second Chamber.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Suspend the operation of the contested decision;

2. Declare void Commission Decision No C (84) 1409/3 final of 27 September 1984;

3. In the alternative, reduce the fine imposed by the contested decision to such sum as the Court may consider fair;

4. In the further alternative, order a substantial extension of the period for payment of the fine, issuing such directions as may be consequent thereon;

5. Order the defendant to pay the costs.

The *Commission* contends that the Court should:

1. Dismiss the application;

2. Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The applicant puts forward two submissions in support of its action, namely breach of an essential procedural requirement and application of a different criterion for fixing the amount of the fine.

1. *Breach of an essential procedural requirement*

In its first submission, the *applicant* complains that the Commission did not provide a sufficient statement of the reasons on which its decision was based. In the seventh paragraph of the preliminary comments to the decision, it merely stated that the various checks carried out by its inspectors showed that the invoices produced by the applicant were properly issued and registered and were not therefore such as to cast doubt on the delivery figures arrived at. It thus based its decision on a mere assertion without any reference to the reasons put forward by the applicant to explain the course of events and the lawfulness of its position.

The applicant is particularly critical of the fact that the Commission has produced no facts to explain why it saw fit to treat the issue of *pro forma* invoices as equivalent to actual subsequent deliveries. The explanation for the presence of the goods as a result of the imperative need to defer delivery should be accepted as valid. The *pro forma* invoices were issued only in order to use credit from the bank and it was not possible to make the deliveries since the economic conditions necessary to permit goods to leave the undertaking did not exist.

According to the applicant, a telex of 5 March 1981 (annexed to the application) shows that in April 1981, a *pro forma* invoice was issued in the name of Philipp Brothers, an undertaking based in Zug (Switzerland), purely for the purpose of using credit and the undertaking continued to have the goods at its disposal until the deferred delivery date. In reality, the goods were not delivered to Philipp Brothers until July, August and September 1981.

Those circumstances, inherent in the way a system of sale closely linked to credit arrangements actually works, explained the facts which emerge from the delivery dockets, namely that a larger quantity of goods was delivered in August 1981 than had been delivered in July and that there was an obvious excess over what had been invoiced. That also explains how it came about that the Commission's inspectors

found stock which did not correspond to reality inasmuch as it was based on the calculation of turnover and not on the actual delivery dockets and the dispatch of the goods subsequent to the issue of *pro forma* invoices.

The Commission thus did not take account of the effect of delivery being deferred until a date much later than that on which the *pro forma* invoice was issued. That invoice, which was issued purely for essential banking reasons, had necessarily to be cancelled and, because of accounting requirements which could also not be departed from, the new definitive invoice had to bear the same number as the *pro forma* document.

By not taking account of those circumstances, the Commission based its decision on an abstract and formalistic assessment of the running of the undertaking which is in contradiction with the actual requirements of commercial dealing.

The applicant also claims that it is impossible to check the method of assessment used by the Commission in the light of the summary nature of the contested measure. With regard to the practice of distinguishing between *pro forma* invoices and definitive invoices, the applicant observes that that practice was regarded as firmly established by the national administrations and is endorsed by Italian tax law. Moreover, Articles 5, 8, 11 and 12 of Decision No 1831/81 refer only to *delivery* of the goods and never to mere invoicing.

According to the applicant, the defendant has established neither the existence of sufficient reasons to justify the contested measure nor that its assessment of the findings of fact is correct. Before adopting a measure of such a serious nature, likely to compromise economic stability and employment, both of which are intended to be fostered by the Community, the Commission should have examined more closely the way in which the applicant undertaking actually functioned and, most importantly, it should have provided an adequate explanation for all measures imposing sanctions.

With regard to the alleged infringement of production quotas, the applicant points out, on the one hand, that the difference alleged to exist by the Commission's inspectors does not in fact exist and, on the other hand, that the goods supplied to Philipp Brothers, even though delivered on the basis of an invoice established in advance, were sent to a non-member country (Algeria) and for that reason had no effect on the market in the Community. According to the documents produced on 17 October 1983, the actual stock on 30 June 1981 was 6 009 tonnes and not 1 273 tonnes as the Commission claimed by including the Philipp Brothers invoices, since the decisive factor in regard to the obligations under Decision No 1831/81 is the actual movement of the goods; it is thus sufficient for the purposes of carrying out a 'physical' check of the deliveries made that the inspectors take note of the information contained in the delivery dockets, on the basis of which they can establish the exact situation of the goods actually present.

On the other hand, the results of the inquiries carried out by the Commission's inspectors are unacceptable because they refer exclusively to the invoices. Consequently, the applicant considers that it is essential that the Court order a new definitive examination of its accounts in order to determine the exact quantity of goods 'delivered' during the first quarter of 1981.

The *Commission* observes first that the applicant has also included in its submission alleging breach of an essential procedural requirement complaints dealing with the substance of the case. In reality therefore,

and without saying so expressly, it has put forward a further, unspecified submission. However, the Commission supposes that it is perhaps possible to discern an allegation of misuse of powers in the applicant's arguments. The Commission points out that Article 38 (1) (e) of the Rules of Procedure of the Court requires the applicant to state summarily in the initiating application the submissions on which it relies, otherwise its submissions are inadmissible.

With regard to the first submission put forward by the applicant, namely the insufficient statement of the reasons on which the decision was based, the Commission contends that the obligation to state the reasons for a decision which is individual in character, laid down in Article 15 of the ECSC Treaty, cannot extend to an examination of the substance of the contested decision. There can therefore be no question of verifying whether the statement of the reasons on which the decision is based corresponds in all its details with the reality; all that can be judged is whether it is sufficiently explicit and complete.

The Commission contests the applicant's claim and contends that it has substantially complied with the obligation to state the reasons on which the decision is based contained in Article 15 of the ECSC Treaty. According to the Court's case-law, a statement of the reasons for a decision is sufficient if it sets out, in a concise but clear and relevant manner, the principal issues of law and of fact upon which it is based and which are necessary in order that the reasoning which has led the Commission to its decision may be understood, that the applicant may determine its rights and that the Court may exercise its power of review. It is not therefore required to discuss all the possible objections which might be raised against the contested decision.

In the Commission's view, the invoices in question are not *pro forma* invoices but genuine definitive invoices. They contain all the elements required by the national rules concerning the invoicing of transactions for the purposes of value-added tax, namely Decree No 633 of the President of the Italian Republic of 26 October 1972 and in particular Article 21 thereof. That conclusion is reinforced by the fact that the applicant has never been able to produce definitive invoices corresponding to those it describes as *pro forma* even though it was asked to do so on several occasions both by the Commission's inspectors and by the Commission itself.

The Commission states that its inspectors carried out several checks at the applicant's premises in order to verify, on the basis of the latter's statements, the accounting position on 30 June 1981, on which date, according to the applicant, it and the Commission arrived at different conclusions as to the quantity of goods in stock. Those checks were necessarily based on an examination of the accounting documents produced by the undertaking and could not have been carried out on the basis of physical checks alone.

Furthermore, during the first and second quarters of 1981, the applicant itself chose to make the declarations required by the rules in force at the time on the basis of the invoices for its sales and not on the basis of the delivery dockets, as can be seen from the reports drawn up by the inspectors. It was only with effect from the third quarter of 1981 that it decided to change its method of control.

In any event, the Commission does not consider that it was possible that the same quantity was counted twice. It was therefore correct in finding that the applicant's stock amounted to 1 273 tonnes on 30 June 1981, as is shown by the inspectors' report.

Finally, independently of the actual amount of goods in stock on 30 June 1981, the Commission considers that the applicant cannot claim to deduct from that stock such

quantities as were in any event intended for export to non-member countries. If that was to be done, the distinction between deliveries on the common market and exports to countries outside the ECSC would be distorted.

The Commission emphasizes that, however it is designated, the document containing the information required by Article 21 of Decree No 633 of the President of the Italian Republic constitutes an invoice for the purposes of value-added tax and that that provision has remained unaltered since its entry into force except for the obligation added later to indicate the VAT number of the person issuing the invoice.

The Commission accepts that it is permitted under Italian adminstrative practice to issue simple *pro forma* invoices which are of no effect for the purposes of value-added tax. However, such invoices must be numbered in a distinct series making it possible to clearly identify their nature and must indicate that an invoice for the purposes of value-added tax will be issued later. That was the view expressed by the Minister for Finance in Circular No 52/5373 of 15 January 1973 and Circular No 52/8348 of 5 March 1973. If that information is not provided, it is not possible to distinguish them from definitive invoices. The Commission considers that it was therefore entitled to regard the invoices in question as definitive.

On the other hand, the Commission denies that it claimed that the issue of an invoice corresponds to the actual transfer of the goods. It is in fact the applicant who has always used that system as a basis for its declarations as to its deliveries and who asked the inspectors to calculate its sales on the basis of the sales invoices and not on the basis of actual deliveries. Since the Commission found right at the beginning of its inspections that the documents which the applicant was required to produce had been kept in a most improper manner, it agreed, at the request of the applicant, to carry out its check of deliveries, provisionally, on the basis of the invoices and not on the basis of the delivery dockets in order to facilitate progress towards a proper accounting system.

It was only with effect from the third quarter of 1981, in particular because of the continuing irregularities and notwithstanding the repeated reminders addressed to the applicant, that the inspectors decided to change their method of checking and to base their assessments exclusively on the delivery dockets. They were thus obliged to establish the quantity of stocks held on 30 June 1981 by applying the verification system based on the invoices. They proceeded in that manner, verifying each of the sale invoices *and* the corresponding delivery dockets referring to the same quantities of goods, and thereby arrived at the result contained in the inspection report of 17 January 1983, namely that the quantity of goods in stock amounted to 1 273 tonnes and not 6 009 tonnes (as the applicant claimed). Finally, in the light of the numerous checks already carried out at the applicant's premises, the Commission considers that a further inspection on the basis of the applicant's accounting documents is not necessary.

2. *Application of a different criterion for the fixing of the amount of the fine*

The *applicant* seeks, in the alternative, to have the amount of the fine reduced to such sum as the Court may consider fair having regard to the particular facts of the case and the general principles of law, such as, *inter alia*, the personal nature of liability and the conditions concerning fraudulent intention and fault, that is to say, equitable criteria. That those criteria are applicable can be seen from the very terms of the rule providing for the sanction, namely Article 12 of Decision No 1831/81 which provides

that the fine to be imposed is 'generally' of 75 ECU for each tonne in excess. Since the sanction is of a 'penal character' that sum must be understood not as a fixed amount but merely as a point of reference. In this case, the applicant refers particularly to the special circumstances of fact and its good faith in view of the 'complete novelty' of this particular type of complaint concerning the special *pro forma* invoice procedure.

The *Commission*, while accepting in theory the principle of interpretation proposed by the applicant in regard to Article 12 of Decision No 1831/81, none the less objects that there are no special circumstances or factors in this case capable of justifying a reduction of the fine. Moreover, the sanctions provided for in Article 12 must be regarded as more administrative than penal. That is also the view of the majority of legal writers.

3. *Extension of the period for payment*

The *applicant* seeks, in the further alternative, a substantial extension of the period for payment of the fine.

The *Commission* merely refers to the Court's findings in the judgment of 12 July 1984 (Case 81/83 *Busseni* v *Commission* [1984] ECR 2951) to the effect that such an application is manifestly inadmissible.

4. *Application for suspension of operation of the decision*

Finally, with regard to the applicant's application for the suspension of the operation of the contested decision, the Commission observes that according to Article 39 of the ECSC Treaty and Article 83 of the Rules of Procedure of the Court, such an application must be made by a separate document and must contain a sufficient statement of the grounds on which it is based. Since those conditions have not been fulfilled, the application should be dismissed as inadmissible.

IV — Oral procedure

The applicant, represented by Francesco Masperi, Avvocato, and the Commission, represented by M. Ferrari, presented oral argument, replied to questions put by the Court and produced certain documents at the sitting on 13 March 1986. Pursuant to a request made by the Court at the hearing, the parties, by letters of 26 March 1986 and 24 April 1986, submitted a number of other documents including the minutes, invoices and delivery dockets concerning the quantities of steel at issue. After examining those documents, the Court decided to order a further hearing devoted solely to the problem raised by the determination of the stocks actually held by the applicant on 30 June 1981, immediately before the entry into force of Decision No 1831/81/ECSC.

To that end, the Court called upon the Commission to clarify during the hearing the method of calculation by which it arrived at the figure of 1 273 tonnes and to indicate in particular:

(i) whether the 'reconstitution' of stocks at the abovementioned date had been carried out independently of their future destination (within the common market or outside it);

(ii) whether the goods delivered to Philipp Brothers, the precise tonnage of which should be stated, were taken into account

  (a) in respect of the first half of 1981 or the second half;

  (b) on the basis of invoices or delivery dockets or both, specifying which of the documents produced had been taken into consideration.

By a letter of the same date, the Court also called upon the applicant's representative to submit his observations on the abovementioned points.

The Commission, represented by Oreste Montalto and F. Ferrari, acting as Agents, assisted by M. Mazza, as expert, and the applicant, represented by Francesco Masperi, Avvocato, replied to the abovementioned questions and to further questions put by the Court at the sitting on 23 September 1986.

The Advocate General delivered his Opinion at the sitting on 21 October 1986.

K. Bahlmann
Judge-Rapporteur